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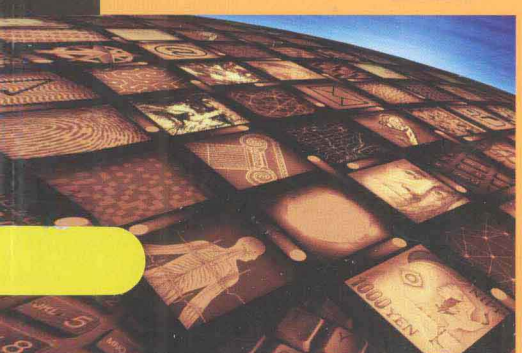

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本卷主题：经济全球化中的公司法一体化走向

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王保树·主编
朱慈蕴　汤　欣·副主编

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卷首语

全球经济一体化已经成为一种潮流。面对这一潮流，公司法的一体化趋势不容忽视。应该说，欧洲率先认识到了这一点，并走到了前面。欧洲的经验值得研究，甚至值得学习。

公司的规则需要健全的区域组织，在没有健全的区域组织之前，制定统一的公司法规则是没有组织基础的。亚洲与欧洲相比，远没有强有力的统一的政治意识，甚至这种统一意识形成的愿景也还没有，存在着巨大的地区内差异。虽然，上个世纪八十年代人们就开始研究亚洲经济一体化和东亚经济一体化，甚至官方也提出亚洲经济一体化和东亚经济一体化，但至今没有区域组织的雏形，近期不可能将指令和条例作为实现公司法一体化的选项。

商法学界在立法上对亚洲经济一体化或东亚经济一体化中的公司法一体化研究甚少，没有给亚洲或者东亚公司法一体化提供理论支撑，诸如东亚诸国或地区公司法有何共同性、差异性，那些问题需要统一，那些问题容易统一，那些问题受制于政治因素或经济体制的差异，那些问题将较长时间不能一体化，以及公司法一体化的入径与实现方式，都远没有提上研究日程。为适应东亚公司法一体化的要求，很需要加强公司法区域化的研究，包括多国的合作研究。

考虑到东亚经济一体化大多停留在一个愿景的状态，一体化并无实质性进程。商法学界特别是有关国或地区的公司法专家、学者应以特有的智慧加快东亚公司法一体化的进程。我们已经注意到立法专家建议稿对立法机关的影响是不能忽视的，也注意到全美律師協會公司法委员会编纂的美国示范公司法对美国各州公司立法的实质性影响，相关国家或地区的公司法专家、学者可以组成研究会（非组织形式）拟定规划，共同调研，定期探讨，在充分讨论的基础上草拟《东亚示范公司法》，以促进公司法一体化。在这方面，中、日、韩三国民法学者已走在我们前面，他们草拟《东亚示范合同法》已经取得进展，值得我们学习。

COMMERCIAL LAW REVIEW

商事法论集

公司法一体化的可行性探讨

欧盟公司法一体化的经验与教训

东亚公司法一体化之探讨

公司法一体化下的公司治理

公司法一体化下的董事制度

其　他

公司法一体化的可行性探讨

Feasibility and Hindrances of Corporate Governance and Corporate Law Convergence

John H. Farrar*

In this paper I will first make some general remarks about globalisation and convergence, secondly discuss some methodological issues, thirdly consider attempts by law-and-economics scholars in the West to engage in empirical surveys, fourthly briefly look at some case studies, fifthly consider significant variables and lastly the impact of the Global Financial Crisis.

General Remarks

Globalisation is a loose concept capable of a number of meanings. Globalisation is a word which has been in circulation since about 1962[①] and is used to describe complex processes of economic and social change making things global in nature or scope. The emphasis is usually on internationalisation although sometimes distinctions are drawn between globalised localism and localised globalism.[②] Another theme is standardisation, particularly manifest in the ubiquity of US fast-food outlets, which is an example of globalised localism.[③] Localised globalism on the other hand is the impact of transnational practices on local conditions.[④] Some of the processes involved in globalisation such as international trade are not new.[⑤] The Silk Road dates back nearly 3,000 years as a trade route and linked East, South and West Asia with the European World. Other processes are, particularly modern communication technology[⑥], and the overall result is sometimes paradoxical and difficult to pin down. Indeed it can be argued that there is not one globalisation, but many.[⑦] There has been a tendency in the last 20 years to think mainly of economic globalisation but social and political globalisation are also important and have deep cultural

* Bond University and the University of Auckland.

① R. W. Burchfield (ed.), *A Supplement for the Oxford English Dictionary* (Clarendon Press, 1972) vol. 1-A-G, 1240.

② Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (LexisNexis Butterworths, 2nd ed., 2002) 179.

③ Ibid.

④ Ibid.

⑤ Robert J. Holton, *Globalisation and the Nation State* (Palgrave Macmillan, 2nd ed., 2011) 57 et seq.

⑥ Peter Dicken, *Global Shift-Reshaping the Global Economic Map in the 21st Century* (Sage, 4th ed., 2003) ch 4.

⑦ De Sousa Santos, above n 2, 178.

consequences. [8]

Globalisation has been linked with capitalism and imperialism in the past but the Global Financial Crisis (GFC) has thrown that into question. Early views of globalisation in the first decade after 1990 saw globalisation as reducing the significance of the nation state. [9] Again, the GFC has cast doubt on that and we have seen the resurgence of the nation state as regulator, investor and sometimes economic saviour. [10] At the same time there has been a need for greater international cooperation. [11] Here then are many paradoxes.

Globalisation basically connotes internationalisation of some sort. Its emphasis is primarily economic although it is often cultural. It has been dominated since 1990 by the idea of American hegemony since the disintegration of theUSSR. [12] It was characterised by the Washington Consensus which emphasised the role of markets, favoured deregulation and down played the state. [13] It strongly influenced the IMF, World Bank and the OECD. Essentially the gospel preached was that the world should be made safe for markets. In doing so it transferred power to the private sector in a way that proved dangerous in the absence of global regulation to safeguard the integrity of capital markets and guard against excessive risk taking. [14] Confidence in this model was seriously damaged by the Global Financial Crisis. In fact this approach transferred power to multinationals and global finance who were able to operate with less restraints.

Convergence is a term originally used to describe a joining of separate currents or streams of water. [15] Oceans come from different directions but join together at some point e. g. the Equator, Arctic and Antarctic.

Before the crisis, convergence of legal systems in a deregulatory model was thought to be the goal. At the same time "Law matters" was another possibly contradictory theory [16] and excessive claims were made by US scholars about the "End of History" [17] and the triumph of the US model. [18] Corporate collapses like Enron and World Com cast doubt on these claims which were later refuted by the Global Financial Crisis. The West had been distracted by this kind of rhetoric and then by the War on Terror. Excessive debt was built up by the USA which now finds its dollar downgraded.

Convergence of corporate laws and corporate governance, however, was always an illusory goal for reasons which I will explore later. Some convergence may happen but not much and this may be a good thing.

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[8] Ibid., 165 - 6; Holton, above n 5, 23 et cetera.

[9] Holton, above n 5, ch 4.

[10] Ibid., 67.

[11] Ibid., ch 5.

[12] Joseph Quinlan, *The Last Economic Super Power* (McGraw Hill, 2011), 53.

[13] Michael Spence, *The Next Convergence* (UWA Publishing 2011), ch 14.

[14] Ibid., ch 23.

[15] *Oxford English Dictionary*.

[16] For a useful summary see B. Cheffins, *Corporate Ownership and Control: British Business Transformed* (Oxford University Press, 2008), 33 et seq.

[17] Henry Hansmann and Renier Kraakman, "The End of History for Corporate Law", in J. N. Gordon and M. J. Roe (eds.), *Convergence and Persistence in Corporate Governance* (Cambridge University Press, 2004), 33.

[18] Ibid., 67.

Methodological Issues

Discussion of convergence necessarily involves comparative law. Comparative law is a subject in search of an adequate methodology. [19]Hard questions have been asked about traditional approaches such as the functional method. More attention has been paid to interdisciplinary discourse with history, sociology, economics and anthropology and other related disciplines. [20] Comparative corporate governance is even more complex because it transcends law and includes self regulation and ethics which raise complex cultural questions. [21]

With globalisation the focus is shifting from nation states to traditions or epistemic communities. [22]At the same time these are in flux and the change is caused by economic and technological factors. The old divisions between private and public law and domestic and international law are breaking down. Likewise, the difference between legal and self regulation. The major legal traditions still exert influence on legal development although there is an increasing tendency to convergence of method on precedent and interpretation of statutes. [23]

Legal transplants have taken place first because of imperialism and secondly because of the need ofThird World countries to adopt a convenient Western model. [24] The transplants have been superimposed on local culture and there is a tension between these two factors. [25] Opinions differ amongst comparative law scholars as to the efficacy of legal transplants. [26]Some systems such as the Peoples Republic of China represent a mixture of elements-some communist, some influenced by the West and some by Japan.

Added to this are questions of local legal culture regarding sources of law and in particular the relationship between law, administration and self regulation. Matters such as corporate governance which in the West are dealt with by self regulation, have been dealt with inChina by administrative regulation.

Another complication is the distinction between form and substance. Laws or self regulation may be adopted in form but not carried out in substance. [27] A particular example is the difficulties which arise with adopting the practice of independent directors.

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⑲ See generally Mathias Reimann and Reinhard Zimmermann (eds.) *The Oxford Handbook of Comparative Law*(Oxford University Press, 2006), and material cited in Part II.

⑳ Ibid., Preface vii.

㉑ See John H. Farrar, "In Pursuit of an Appropriate Theoretical Perspective and Methodology for Comparative Governance." (2001) 13 *Journal of Corporate Law* 1.

㉒ See Horatia Muir Watt, "Globalisation and Comparative Law", in Reimann and Zimmermann (op cit) ch 17, 584 et seq.

㉓ Ibid., 606.

㉔ See Michele Graziadei, "Comparative Law as the Study of Transplants and Receptions", in Reimann and Zimmermann (op cit) ch 13, 456 et seq.

㉕ Ibid., 470 et seq.

㉖ Ibid.

㉗ See Ronald Gilson, "Globalizing Corporate Governance: Convergence of Form or Function", in Gordon and Roe, op cit, ch 4.

Law-and-Economics Attempts at Empiricism

Although there was early work by Berle and Means[28] and later English scholars[29] on ownership and control of listed companies the modern work has been done by groups of Harvard economists _ La Porta, Lopez-de-Silanes, Schleifer and Vishny (LLSV),[30] some Cambridge and Oxford law and business scholars (CBR)[31] and some EU legal Scholars.[32]The first group sometimes referred to as representing the Legal Origins Thesis argued that the evidence shows that company law is a determinant of ownership structures in large companies. They used a six factor "anti director rights" index to measure the extent to which company laws in different countries protected minority shareholders. They also found that there was a correlation between the lack of a block of shares and the quality of protection. In 2008 they restated their theories in four propositions:[33]

First, legal rules and regulations differ systematically across countries, and these differences can be measured and quantified. Second, these differences in legal rules and regulations are accounted for to a significant extent by legal origins. Third, the basic historical divergence in the styles of legal traditions—the policy-implementing focus of civil law versus the market-supporting focus of common law—explain well why legal rules differ. Fourth, the measured differences in legal rules matter for economic and social outcomes.

Their overall conclusion was in favour of continued liberalisation and against "the more state-centred capitalism of Continental Europe and perhaps Asia" based on a "surprising calm" world and was badly timed as it was published in June 2008 the beginning of the Global Financial Crisis.

Their methodology was criticized and they did further work to correct it and then work on self dealing.[34]Later work has been on securities regulation.[35]Brian Cheffins in his interesting study, Corporate Ownership and Control-British Business Transformed[36]has made some telling criticisms of their work in connection with the United Kingdom.

Secondly, work was done by the Centre for Business Research at Cambridge by Simon Deakin and other scholars. Simon Deakin summarized their approach as follows:[37]

There are problems with the legal origins hypothesis which the project set out to address. The most serious is that evidence for the claims it makes rests on quantitative indicators of legal systems which offer a purely cross-sectional view of the law (mostly of the content of laws as they were in the late 1990 s).

㉘ Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (Harcourt, Brace and World Inc., Revised Edition, 1968).

㉙ See Cheffins, above n 16, 13 - 15.

㉚ Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny, "Corporate Ownership around the World" (1999), 54 *Journal of Finance* 471; "Investor Protection and Corporate Governance" (2000), 58 *Journal of Financial Economics* 3.

㉛ Centre for Business Research, University of Cambridge Website.

㉜ Cheffins, above n 16, 16.

㉝ "The Economic Consequences of Legal Origins" (2008) XLVI, *Journal of Economic Literature* 285, 326.

㉞ "The Law and Economics of Self-Dealing" NBER Working Paper Series No. 11883; (2006) *Journal of Financial Economics.*

㉟ "What Works in Securities Laws" (2005), 61 *Journal of Finance* 1.

㊱ See Cheffins above n 16.

㊲ Centre for Business Research, above n 31.

This is to assume that laws change relatively little and that the rank order of countries, in terms of the impact of regulation on business, does not alter much. In this context, CBR project addressed a need for longitudinal data on legal change and for case studies which could provide a more in-depth and nuanced view of the forces driving the law reform process at country level, and its effects...

We produced new datasets charting legal change over time in the areas of shareholder protection, creditor protection and labour regulation. We used indices with up to 60 *indicators to code for the law of five significant countries (France, Germany, India, the UK and the US) for* 36 *years* (1970 – 2005), *and reduced-form indices of* 10 – 12 *indicators to code for a wider sample* (25 *countries*) *for the period* 1995 – 2005. *The coding methods used marked an advance on previous studies, by incorporating a wider range of legal and regulatory variable and taking into account the different ways in which regulatory rules can be expressed (as mandatory rules or as 'defaults' applying in the absence of contrary agreement). We then used time-series and panel data econometric analysis to test for correlations between the scores in the indices and economic performance variables.*

This methodology is complex and it is difficult to weigh the variables and their interaction. Deakin continued:[38]

The data we collected give a somewhat different picture of the state of the law than that provided by the early legal origins papers. We see considerable change in the area of shareholder protection and corporate governance, with civil law systems 'catching up' with their common law counterparts, in particular over the decade to 2005. *This suggests that lock-in through legal origin has not been much of an obstacle to the formal convergence of systems. For creditor protection, we do not find such a clear common law/civil law divide, and a less clear convergence trend. In labour regulation, there is a more distinct common law/civil law divide but not much evidence of convergence of systems.*

Our econometric findings call into question aspects of the legal origin hypothesis and its use by policymakers. We find that increases in shareholder protection have not led, on the whole, to greater stock market development. This suggests that a 'one size fits all' approach to corporate governance reforms, stressing elements of British and American practice-the role of independent boards and the market for corporate control-may not be working as intended, in particular in civilian systems.

On the other hand, we have some evidence that a strengthening of shareholder rights has a positive impact on stock market growth, and changes to the law of secured credit may be assisting banking development in emerging markets.

He expresses the important conclusion that:[39]

Our case studies confirm the view that there is no single best model for the laws governing the business enterprise. We show how the reception of Anglo-American norms in civilian and developing systems has often been incomplete and with unanticipated effects. There has been convergence of form, but not of function. Political structures have greater explanatory power than legal origin in accounting for the nature of legal change, but there is also a need to understand the role that institutional forces play in

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[38] Centre for Business Research, above n 31.
[39] Ibid.

shaping and changing the preferences of interest groups.

Further work has been done by European Scholars notably Goergen and Renneboog and Van der Elst[40] on the ownership and control of European companies.

What this research shows is that opinions differ on the appropriate methodology to use. There is a need to measure legal change over time and the relationship between this and the development of capital markets. There is also a need to distinguish reforms of form and reforms of function. Politics and local culture matter as much as law in terms of function. There is increased scepticism as to whether one size fits all.

Some Brief Case Studies

The purpose of this part of the paper is to make some brief comparisons.

Historically the United Kingdom was a significant developer of the corporate form and corporate governance. [41] The imperial model was directly applied to the British Commonwealth, often to the exact letter until the 1960s. It stalled in 1973 when the United Kingdom joined the European Economic Community as it then was and became subject to the harmonisation program. The UK was conscientious in its implementation of the directives although this often had a stultifying effect on domestic legal development. In the 1990s it commenced its own reform of the Companies Act which bore an uneasy relationship to its EU obligations. The result was the Companies Act 2006 which was influenced as much by Commonwealth reforms as EU ideas. This stimulated fresh interest in the EU in reform. The UK was prominent in the development of self regulation of Corporate Governance through reports such as Cadbury, Greenbury, Hampel and their sequels. [42] This again stimulated interest in the EU.

In the USA each state is a separate corporate law jurisdiction and there is no federal corporate law. Securities regulation on the other hand is now mainly federal. In practice the dominant sources are the Delaware Business Corporations Act and the Model Business Corporations Act. The USA does not have a single self regulatory code of corporate governance although the federal Sarbanes-Oxley Act of 2002 deals in a heavy handed manner with a number of aspects of corporate governance. [43]

Australia and New Zealand followed the imperial model until 1973. Australia started departing from it by criminalising breach of the main directors' duties. It struggled in the 1980s and 1990s to develop a national model which was difficult for constitutional reasons. It has been influenced by US laws to some extent. [44] New Zealand decided to follow the Australian model because of the Closer Economic Relations Agreement and then changed its mind and followed the Canadian version of the North American model. [45]

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[40] See Cheffins above n 16.

[41] See John H. Farrar, *Corporate Governance: Theories, Principles and Practice* (Oxford University Press, 3rd ed., 2008) ch 2.

[42] Ibid., ch 27.

[43] See Justin O'Brien, "The Politics of Symbolism: Sarbanes-Oxley in Context" in Paul Ali and Greg Gregoriou, *International Corporate Governance After Sarbanes-Oxley* (Wiley Finance, 2006), ch 2.

[44] Farrar above n 41, ch 2.

[45] See John Farrar, "Introduction" in John H Farrar (ed.), *Company and Securities Law in New Zealand* (Thomson Reuters, 2008), ch 1.2.

Recently however, New Zealand has moved to adopt some aspects of Australian securities regulation.

Although European members of the EU share a common civil law tradition and EU background they tend to differ in the details of their corporate laws and systems of self regulation. [46]

The EU treaties provide for harmonisation of company and securities laws and this has been done through directives which leave to the member state the method and form of implementation. Other changes come through regulations which take direct effect, treaties and decisions of the European Court of Justice.

The program has met with mixed success although there is now renewed effort and even a proposal for a Model Companies Act as an alternative to harmonisation. [47]The European Company (SE) and the proposed EU private company are using the method of regulation. However the latter has been abandoned recently because of German opposition.

India inherited the imperial model but has made limited domestic reforms and is developing a system of corporate governance through the Securities Exchange Board and the listing rules. [48] Major industries are still controlled by families. Shareholder activism is limited and there is inadequate control of self dealing by directors. Pyramiding and tunnelling are common. The Satyam Computer Services scandal was India's Enron.

Japanese corporate law and corporate governance historically has had some very distinctive features-the Keiretsu system, a galaxy of companies revolving around a main bank, cross shareholdings and interlocking boards, life time employment, weak shareholders whose rights tended to come last and so on. This is the post war picture for complex reasons and it preceded the "lost decade' of economic stagnation inJapan, after which followed regulatory and international reforms. The question is how we explain these events and how deeply the reforms have gone. [49]

There are different schools of thought-some think that eventually there has been little or no change. Others think that there has been change and thatJapan is moving closer to the Anglo American model. Others think that there has been a gradual transformation which continues. [50]

China originally adopted companies legislation based on German laws but this lapsed with the communist takeover. It has adopted company laws which are now an amalgam of European, Japanese and local ideas. Corporate governance is administrative regulation promulgated by the Securities Commission. The securities law is influenced by Anglo American law. Recent research emphasises the sinonisation of Chinese Corporate Governance. [51] State owned enterprise is the norm. Experience with independent

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[46] See Mads Andenas and Frank Wooldridge, *European Comparative Company Law* (Cambridge University Press, 2009), ch 1.

[47] See Theodor Baums and Kruger Andersen, "The European Model Company Law Act Project", *Working Paper Series* No. 78, Institute for Law and Finance, Goethe University, Frankfurt.

[48] John Armour and Prya Lele, "Law, Finance and Politics: The Case of India". CBR, University of Cambridge Working Paper No. 361.

[49] See L. Nottage, L. Wolff and Ken Anderson (eds.), *Corporate Governance in the 21st Century-Japan's Gradual Transformation* (Edward Elgar, 2008).

[50] John H. Farrar Book review (2009) 15 NZBLQ 149.

[51] Wei Yuwa, *Comparative Corporate Governance: A Chinese Perspective* (Kluwer, 2003).

directors, *institutional investment and shareholder activism are taking place with limited success.*[52] Changes are made to form but not necessarily to substance. There have been a number of frauds in connection with Chinese companies listed in Hong Kong and the USA which have recently received bad press in the US business media.[53]

Significant Variables

What we have seen so far in this paper is the strong influence that local culture plays in legal development. Some US scholars have argued the path dependence thesis and this is a useful, if over simple metaphor to describe a process of development which is often complex. Bebchuk and Roe state:[54]

There are significant sources of path dependence in a country's pattern of corporate ownership structure. Because of this path dependence, a country's pattern of ownership structures at any point in time depends partly on the patterns it had earlier. Consequently, when countries had different ownership structures at earlier points in time-because of their different circumstances at the time, or even because of historical accidents-these differences might persist at later points in time even if their economies have otherwise become quite similar.

Key variables which also play a part are the local conception of the state and its role in relation of markets, in particular, whether it is a system which is primarily based on state capitalism. The Western concept of the state developed over a long history and it was only in the Nineteenth and Twentieth Centuries that the modern state arose and became the Welfare State. The Washington Consensus in the last thirty years favoured a shrinking of the state but this has now been undermined by the Global Financial Crisis which has led to a resurgence of the powers of the state.

Linked with this is the role of markets and in particular capital markets and the extent to which they are open. The US and UK have historically had the most open markets. China has a relatively closed securities market. The top companies are still state owned enterprises.

Another significant variable is the role of institutional investment and the form it takes in a particular jurisdiction. China set up the State-Owned Asset Supervision and Administration Commission in 2000. It is directly under the State Council and is responsible for managing SOEs. There is a policy of reducing the number of these by mergers. It is still a very centrally controlled structure.

Then there is the question of investor activism. Western institutional investors have been relatively passive. The new phenomenon of hedge funds is more activist. Hedge funds are mainly a Western phenomenon. China has reformed the provisions on shareholder rights in 2005 and in the Regulations on

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[52] See On Kit Tom and Celina Ping Yu, "China's Corporate Governance Development" in C. Mallin (ed.), *Handbook of International Corporate Governance* (Edward Elgar, 2011), ch 10.

[53] "US Listed Chinese Companies Under Probe for Fraud" (30 September 2011), http://www.English.news.cn, "Over 20 China Firms Listed in US Accused of Fraud" *China Daily*, 13 December 2010.

[54] Lucian Bebchuk and Mark Roe, "A Theory of Path Dependence in Corporate Ownership and Governance", in Gordon and Roe (above n 17). ch 2.