

EMBRACE THE COMING CHANGES IN CORPORATE GOVERNANCE: LESSONS FROM DEVELOPMENTS IN CORPORATE LAW – A COMPARATIVE VIEW

IVAN TCHOTOURIAN*

ABSTRACT

The worldwide financial crisis that was unleashed in 2007-2008 occurred at a time of many challenges in the transformation of the economic and social system. As this protean crisis showed, new reflection in the field of corporate governance is necessary. This paper aims to explore a new conception of corporate governance based on the existing legal literature and case law. Shareholder primacy and the focus on shareholders alone in the traditional view of companies' corporate governance lead to a difficult situation. In order to identify an innovative way to design corporate governance, the paper studies current positions on the conception of the latter. Then it considers in detail the consequences of corporate law and its definition of the company. In this regard, a strong trend in the regulatory approach is clearly pro-shareholder, but the paper relies heavily on writings and cases that address the matter with originality to change the dominant point of view. It is relevant to raise awareness of traditional and more recent writings and cases from the legal traditions of different countries. These sources of law demonstrate that the economic system could better take into account the ethical ideals of the future that human communities demand we respect. In its research, the paper suggests that an alternative conception of corporate governance could be chosen as a positive reaction to the crisis. This is a political choice with a strong basis in part of "forgotten" corporate law. The findings point out the possibility that corporate governance can be designed in more than one way.

KEYWORDS: *Crisis. International position. Corporate governance. Corporate law. Comparison. Agency theory. Shareholder primacy. Critics. Solution.*

1 INTRODUCTION: PLAYING WITH FIRE?

Simply explained, corporate governance could be understood as [...] the system by which companies are directed and controlled. (Cadbury, 2000) Failed corporate governance is of course only one of many interconnected and reinforcing contributing factors to the crisis. Other candidates include greed, wishful thinking and linear extrapolation, an addiction to efficient capital markets,

* Professor, Faculty of Law, University of Laval (Canada). Codirector of the *Centre d'Études en Droit Économique* (CÉDÉ). Further comments and discussions can be found at the following address: ivan.tchotourian@fd.ulaval.ca.

belief in mathematical models replacing judgment, and, in general, regulatory capacity and appetite lagging the developments of global financial markets. (e.g. Haspeslagh, 2010) Persistent shortcomings in corporate governance do certainly belong on the list. Over emphasis on profit maximization and on share price performance, however, has been identified as a root cause of the latest governance crises (Zandstra, 2002; Currall and Epstein, 2003) as well as the current financial crisis of 2007-2008. (Bruner, 2011; Stiglitz, 2009; Adams, 2009) Finally, [T]he financial crisis can be to an important extent attributed to failures and weaknesses in corporate governance arrangements. (Kirkpatrick, 2009)

One of the most discussed solutions by organisations and numerous academics is currently to reinforce the power of directors and shareholders in the corporate governance of their corporations. The reality of the contemporary legal reforms and recent cases increasingly mirrors a shareholder primacy view and further agency theory. This proposition has, without any doubt, positive aspects. Nevertheless, this article demonstrates that limiting reflection to managers and shareholders alone is inadequate and risky. From our point of view, the time is ripe to study the foundations of corporate governance in detail. The paper contributes to corporate governance literature by describing another way of analyzing companies. How can a responsible approach be established through the law when the currently accepted corporate governance model seems to reject any notion of social good? Are the intellectual foundations of contemporary corporate governance relevant?

A considerable amount of literature in finance, management, law and economics has been published on companies' corporate governance. These studies have attempted to assess the potential convergence of two systems of corporate governance: the American shareholder-focused approach and the European approach, which includes a broader social class of stakeholders within the ambit of managerial concern. (For an overview of the convergence discussion in multiple disciplines, *see* generally Thomsen, 2004) But our aim is original. It is to question the relevancy of the convergence that has occurred in economically developed countries.

This article proceeds as follows: in the first part, it appears that European thinking and European company practice have been moving toward the Anglo-American pattern for a number of years. Agency theory has been preeminent in corporation law and become a real fascination based on assumptions about economics. The second part suggests that the widespread diffusion of agency theory as an ideology has reached corporate law, which used to favor a shareholder view and was traditionally seen as a hurdle for managers to overcome when making decisions that might even appear to run counter to profit maximization. However, this article recommends strong reflection on the legitimacy of agency theory and on how to build corporate governance differently. Since a capitalist model centred on a free-market perspective that gives law only a residual role to play is unable to ensure social development, the legal point of view is relevant to expose. Reframing our understanding of corporate governance may pave the way to new solutions and shed light on the notion of “company”, the emergence of the corporate social responsibility (CSR) movement and the stakeholder-based relationship view. The final part provides some concluding remarks.

2 STATEMENT ON CURRENT CORPORATE GOVERNANCE: SHAREHOLDER-CENTRED APPROACH

2.1 POSITION OF INTERNATIONAL ORGANIZATIONS: PRIORITY GIVEN TO THE MANAGER-SHAREHOLDER RELATION

In most contemporary debates about corporate governance, the agency problem and conflicts of interest between shareholders and management seem to be the only thing to which international organizations pay attention. To illustrate this, we will focus on two examples.

At the international level, the conclusions of the Steering Group’s analysis of corporate governance are interesting and reveal a specific view of the corporation (OECD, 2009). The final report addresses four areas of corporate governance that the

Group considered closely linked to recent failures: remuneration/incentive systems, risk management practices, the performance of boards, and the exercise of shareholder rights. While only two areas concern *a priori* the management-shareholder conflict, we must bear in mind that the remuneration process and implementation of risk management are linked to an “agency theory view” of the stakeholder relationships that underlie an existing company. The remuneration in question is notably that of the managers, and risk management implies the board’s role.

At the EU level, one of the latest regulatory initiatives from the European Commission demonstrates the concentration of the corporate governance debate on the shareholder-management conflict.¹ Among the three subjects which are expressly “at the heart of good corporate governance” according to the Green Paper entitled “The EU corporate governance framework” published on 5 April 2011, two concern the board of directors (composition, availability and time commitment, evaluation, remuneration, risk management)² and shareholders (involvement, short-termism, identification, agency relationship between institutional investors and their asset managers, proxy advisors, minority protection, employee share ownership).³

1 Nevertheless, in 2012, the European Commission launched a public consultation on the future of European company law from 2012 onwards. Two questions about the objectives of EU company law allow an opening beyond shareholders because citizens and organisations can reply that they think there should be better protection for employees, creditors, shareholders and members.

2 “The board of directors – high performing, effective boards are needed to challenge executive management. This means that boards need non-executive members with diverse views, skills and appropriate professional experience. Such members must also be willing to invest sufficient time in the work of the board. The role of chairman of the board is particularly important, as are the board’s responsibilities for risk management.”

3 “Shareholders – the corporate governance framework is built on the assumption that shareholders engage with companies and hold the management to account for its performance. However, there is evidence that the majority of shareholders are passive and are often only focused on short-term profits. It therefore seems useful to consider whether more shareholders can be encouraged to take an interest in sustainable returns and long-term performance, and how to encourage them to be more active on corporate governance issues. Moreover, in different shareholding structures there are other issues, such as minority protection.”

In fine, these international positions show a clear addiction to principal agent model thinking.

2.2 INTELLECTUAL BASIS: AGENCY THEORY

Writings in economics (Coase, 1937), management and finance (for a history of contemporary financial theories, *see* Bernstein, 1992) have constructed the notion of the enterprise on a model that has been rooted, since the 1960s, on a contract-based approach: the theory of agency. Milton Friedman, a noted free-market economist, has been the chief spokesman for this view, which he articulated most prominently in an article entitled “The Social Responsibility of Business Is to Increase Its Profits”, which initially appeared in the *New York Times Magazine* on September 13, 1970. He noted, for example:

What does it mean to say that “business” has responsibilities? Only people can have responsibilities. A corporation is an artificial person and in this sense may have artificial responsibilities but “business” as a whole cannot be said to have responsibilities [...]. [The] criterion of performance is straightforward, and the persons among whom a voluntary contractual arrangement exists are clearly defined [...]. The whole justification for permitting the corporate executive to be selected by the stockholders is that the executive is an agent serving the interests of his principal. This justification disappears when the corporation executive imposes taxes and spends the proceeds for “social” purposes. He becomes in effect an public employee, a civil servant, even though he remains in name an employee of a private enterprise. [Corporate executives] can do good but only at their own expense [...]. The situation of the individual proprietor is somewhat different. If he acts to reduce the returns of his enterprise in order to exercise his “social responsibility”, he is spending is own money, not someone else’s.

Developed by Alchian and Demsetz concerning the production function of companies (Alchian and Demsetz, 1972), this theory was taken up by Jensen and Meckling, and used in a broader manner. (Jensen and Meckling, 1976) Since companies are defined by contractual relations, it has been necessary to take cooperation

into account in order to determine the spreading of risk and the amount to be borne by each economic agent. In this cooperative environment, distribution of risk becomes the fundamental issue at stake in company management, in particular because parties to the contract are likely to be pursuing different, possibly clashing, objectives. (Eisenhardt, 1985) The fact that individuals' interests diverge means that cooperative relationships are accompanied by conflicts that generate costs and reduce the potential advantages of cooperation. The principal thus has to employ control processes and instruments.

In this framework, shareholders have a special role. (Hansmann and Kraakman, 2004; Smith, 1998) As capitalist property owners, they are the best enforcers of good management of the company and are the residual creditors who bear the entrepreneurial risk (Easterbrook and Fischel, 1993) since the company contract does not specify any remuneration *ex ante*. (Klein and Coffee, 2006) In this respect, shareholders have to be able to influence the company and force it to maximize profit. (Hansmann and Kraakman, 2002) The classical, "common sense" approach is to consider that the firm is owned and that the shareholders are the owners. Those managing the firm are therefore their "agents"; i.e., basically, specific kinds of employees subject to their command. These agents are paid by the shareholders to manage the firm's property with the sole goal of promoting the shareholders' interest. The shareholders' interest is equated with maximization of the present value of the shares, and because of asymmetry in the information available to managers and shareholders about the business of the firm, transaction costs, shirking issues, etc., the interest of the agents are supposed to be aligned with those of the shareholders via an allocation of stock-options giving managers a direct incentive to maximize the present value of the shares. Company management (the board of directors elected by the shareholders) is then considered to be the body responsible for ensuring that the managerial team (the agent) acts in the shareholders' (the principal's) interests. Since they pursue their own interests, executive officers are inclined toward strategic behaviour and opportunism (Williamson, 1985), which are sources of inefficiency for companies, inefficiency that is made worse by the

asymmetry of information that executives know how to exploit to evade controls that weigh on them.

3 SHAREHOLDER PRIMACY IN CORPORATE LAW: CAN IT SURVIVE? SHOULD IT SURVIVE?⁴

3.1 THE EFFECTS OF CURRENT STRUCTURES: CONCENTRATION ON MANAGERS AND SHAREHOLDERS

Historically, a corporation has been viewed as serving one primary function: maximizing shareholder value. The dominant theory in Anglo-American jurisdictions, as far as determining the objective of large public corporations, has been, certainly since the 1970s, the shareholder primacy theory, also known as “shareholder value” or “shareholder wealth maximization”. Whichever point we identify as the time from which the shareholder primacy dogma became more accepted (Keay, 2009), it is clear that it is now the essential theory in corporation law in Anglo-American jurisdictions. (See Macey, 2008; Romano, 2001; Coffee, 1999; Romano, 1996; Bainbridge, 1993; Kraakman, 1984; Hessen, 1979) The Anglo-American approach is clearly understood to place great stock in “shareholder value”, as noted by Professor Bainbridge, who asserts that “[m]ost modern academic commentary on corporate law [...] rests [...] on the principle of shareholder primacy.” (Bainbridge(a), 2002)

Many lawyers have embraced this view including Yale and Harvard law professors, who, defending what they blatantly present as an ideology, state:

The triumph of the shareholder oriented model of the corporation [...] is now assured. [...] the ideological and competitive attraction of the standard model will become indisputable, even among legal academics. And as the goal of shareholder primacy becomes second nature to politicians, convergence in most aspects of the law and practice of corporate governance is sure to follow. [...]

4 This title is borrowed from Keay, 2009.

Moreover, the new activist shareholder-oriented institutions are today acting increasingly on an international scale. As a consequence, their influence now reaches well beyond their home jurisdictions. We now have not only a common ideology supporting shareholder-oriented corporate law, but also an organized interest group to press that ideology. (Hansmann and Kraakman, 2000)

Mark Roe confirms this analysis and provides a classical example in the fact that underlying [...] norms in American business circles, starting with business school education, emphasize the value, appropriateness, and indeed the justice of maximizing shareholder wealth. (Roe, 2001)

In sum, this Anglo-American orientation has been due to such things as the “globalization of capital markets, the rise of institutional investors, greater shareholder activism and the increasing importance of corporate governance issues.” (Omran et al., 2002; Mills, 1998; Fera, 1997)

This view seems accepted in the famous Dodge decision, where the court held that a corporation’s primary purpose is profit maximization for shareholders. Almost every law student who takes a basic course on corporations encounters *Dodge v. Ford* (*Dodge v. Ford Motor Co.*, 1919). In this case, the Dodge brothers, minority shareholders of Ford Motor Company, sued for an injunction to stop Ford from expanding operations and asked the court for a decree commanding Ford to pay dividends. The Dodge brothers argued, and the Supreme Court of Michigan agreed, that Ford’s actions perverted the corporation’s purpose. The court famously wrote:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among its stockholders in order to devote them to other purposes.

Although the court ultimately deferred to much of Ford’s business judgment, it ordered the company to declare a special dividend. According to Professor Bainbridge, Dodge’s [...] theory

of shareholder wealth maximization has been widely accepted by courts over an extended period of time. (Bainbridge(b), 2002)

So, the currently dominant paradigm of corporate governance was built around the shareholder value or shareholder primacy approach. Legal mechanisms are required in order to keep managers' actions aligned with the interests of shareholders. Much energy has been devoted over the past twenty years to facilitating governance mechanisms of this type. These include the law relating to directors' duties, supervision *via* non-executive directors, executive compensation agreements, managerial labour markets that respond to past performance, the market for corporate control, discipline exercised by creditors and competitive product markets.

The problem has been the "contamination"⁵ of agency theory and the shareholder primacy model. By looking beyond United States, the focus on shareholders has affected most developed countries and State Members of the EU, no matter what their legal tradition (common law or civil law). One of the main features of the general thrust in regulation in recent years, both before and after the crisis, has been to increase shareholder influence, particularly that of institutional investors.

In Canada, the legal system has followed the American position: The company means the shareholders, no external interest outside of that of the shareholders can be considered legitimate by (the) directors and managers. (Palmer, 1967)

Contradicting the principles expressed in previous judgments (*Salomon v. A. Salomon & Co.*, 1897), Judge Evershed clearly identified the interest of the commercial corporation as that of its

5 Influences and cross influences are familiar to legal historians and comparatists alike. They have been visited and addressed under a variety of names that include reception, legal transplants, migration or circulation of legal ideas, diffusion or transposition. Contamination is not one of those, though a useful term to indicate the permeability of legal systems and the sometimes less visible influences they may have on one another. But, the word contamination adds to the more conventional language. As Professor Moréteau (Moréteau, 2010) said: "Contamination refers to the less visible. Its effects, good or bad, may appear later on. A transplant may take place with all its visible effects, yet generating some invisible or less visible changes in the system of the recipient."

shareholders and foreshadowed the future Canadian approach. (*Greenhalgh v. Ardenne Cinemas*, 1951) In this case, the magistrate pointed out that: [T]he phrase “the company as a commercial entity, distinct from the corporators”: it means that the corporators as a general body.

Duty of loyalty is one area in which Canadian courts have interpreted corporation interest as shareholder interest. (*Palmer v. Carling O’Keefe Breweries of Canada Ltd.*, 1989; *Parke v. Daily News Ltd.*, 1972)

In the UK, for instance, Professor Deakin has summarized the situation as follows:

Core institutions of UK corporate governance, in particular those relating to takeovers, board structure and directors’ duties, are strongly orientated towards a norm of shareholder primacy. [...] The Company Law Review, while making some concessions to stakeholder concerns in the form of new reporting requirements for companies, rejected calls for changes to the law governing directors’ duties. The reaction to the corporate scandals of 2001-2 was telling. (Deakin, 2003)

In France, some scholars focus on the interests of shareholders, who hope for the creation of wealth and optimization of bond value. (Martin, 2005; Bissara, 2003; Viandier, 2003) Basing his arguments on Articles 1832 and 1833 of the Civil Code, Professor Schmidt considers that a corporation is not created for any interest other than that of its shareholders, who have the sole purpose of sharing in the corporate earnings. (Schmidt, 2000; Schmidt, 1995) French case law sheds little light on the issue. Indeed, French case law is characterized by absence of delimitation of the concept and a constant swing between shareholder and company interests. (Merle, 2011; Cozian, Viandier and Deboissy, 2010)⁶

Lastly, recent German reforms in the field of corporate law have implemented new rules for remuneration of managers to encourage supervisory boards to improve their decision-making

6 There have been debates about this and we will not restate our position here. See Tchotourian, 2011.

processes and to introduce a “say on pay” by the general assembly of shareholders. In Germany, it appears that the legal debate has indirectly reflected the so-called principle-agent conflict and the assumption that a separation between ownership and control leads to conflict between the interests of managers and owners.

3.2 TIME TO CHANGE: THE FUTURE OF CORPORATE GOVERNANCE

The general trend towards shareholder value since the 1980s was implicated in a wider, systemic failure of the corporate governance system, of which the global crisis was simply the most visible manifestation. Under these circumstances, a reassessment of the shareholder value-based approach to governance and management of large corporations is required. (Deakin, 2010) So, is there an alternative to corporate governance? What about the lessons from corporate law?

In the United States, both the constituency statutes adopted by numerous states during 1990s, and the recent evolution in forms of for-profit corporations (benefit corporation, flexible purpose corporation, socially responsible corporation),⁷ seem to illustrate a profound (but invisible?) change in the American legal view of the company. (Tchotourian, 2012)

In Australia, despite the rejection of a proposal to change Article 181(1) of the *Corporations Act* to include explicit obligations for directors to take into account the interests of stakeholders, the government committee took the view that:

[...] The current common law and statutory requirements on directors and others to act in the interests of their companies are sufficiently broad to enable corporate decision-makers to take into account the environmental and other social impacts of their decisions, including changes in societal expectations about the role

7 We could add the famous Dodd vs. Berle debate during the 1930s to the controversy between shareholders and stakeholders; it was conducted in a series of articles published in the *Harvard Law Review*.

of companies and how they should conduct their affairs. (CAMAC, 2006)

Furthermore, in one recent Australian judgment, a judge emphasized that non-shareholder interests should not be ignored by directors:

It is, in my view, incorrect to read the phrases ‘acting in the best interests of the company’ and ‘acting in the best interests of the shareholders’ as if they meant exactly the same thing...it is almost axiomatic to say that the content of the duty may (and usually will) include a consideration of the interests of shareholders. But it does not follow that in determining the content of the duty to act in the interests of the company, the concerns of shareholders are the only ones to which attention need be directed or that the legitimate interests of other groups can safely be ignored. (*The Bell Group Ltd (in liq) v. Westpac Banking Corporation [No 9]*, 2008. See also Ramsay and Marshall, forthcoming)

Courts in Canada have grappled with the question of the interests that may be considered by directors in compliance with their duties. The most recent important judgment is that of the Supreme Court of Canada in *BCE Inc v. 1976 Debentureholders*.⁸ The Court made the following observations:

The fiduciary duty of directors is a duty to act in the best interests of the corporation; often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation but if they conflict, the directors’ duty is to the corporation; and the duty is not confined to short-term profit or share value. Where the corporation is an ongoing concern, the duty looks to the long-term interests of the corporation.

8 The 2004 decision of the Supreme Court of Canada, *Peoples Department Stores Inc. (Trustee of) v. Wise*, also changed the traditional solution in corporate law. Pursuant to section 122 of the *Canadian Business Corporation Act*, directors have the duty to act honestly and in good faith in regards to the “best interests of the corporation.” In this case, the Supreme Court had to decide whether directors of financially distressed corporations are accountable to creditors or not. With respect to fiduciary duties, the Supreme Court set aside the traditional interpretation of the interest of the corporation, which gave primacy to shareholders’ interests. (Rousseau, 2006) The Court held that the “best interests of the corporation” refers to maximization of the corporation’s value.

The Court also stated:

In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decision. [...] The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

Although the traditional position in commercial law in Canada prioritized shareholder interest, director's responsibility for stakeholders' interests is not a new issue. (Rousseau and Tchotourian, 2012; Rousseau and Tchotourian, 2008)

In brief, Professor Williams and Conley noted for the UK that "shareholder capitalism in the UK is beginning to diverge from its American counterpart and develop its third way: a long-term enlightened shareholder value perspective with strong elements of European stakeholder thinking." (Williams and Conley, 2005)

Take, as an illustration, the UK enactment of the *Companies Act, 2006*. Section 172(1) imposes a duty upon a director to act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly with respect to members of the company. According to a member of the UK Company Law Review Steering Group, which drafted the changes, the laws reflect an "enlightened

shareholder value” approach. (Harper Ho, 2010; Keay(a), 2010) Section 172(1)(b)-(e) seeks to make clear that although shareholder interests are predominant, the promotion of these interests does not require “riding roughshod” over the interests of other groups on whose activities the business of the company depends for success. (Davies, 2005)

Professors Armour, Deakin and Konzelmann wrote in their study:

Corporate governance in the UK has not reached the “end of history”. The shareholder value model is less deeply rooted than is generally supposed. The institutions which support it – above all, the City Code on Takeovers and Mergers and the corporate governance codes – are of recent origin. From an historical perspective, the extent of shareholder preeminence achieved in the 1980s and 1990s, far from being a normal state of affairs, is an anomaly. (Armour, Deakin and Konzelmann, 2003)

Finally, Professor Gelter has said that the UK is an intermediate case, in a position somewhere between the approaches pervasive in the United States, on one hand, and Continental Europe, on the other. (Gelter, 2010)

While French institutional theory can trace its roots to the 1930s (Ripert, 1951; Gaillard, 1932), it rose to prominence in France in the 1960s. The School of Rennes, which was later described by one of its main representatives, Professor Champaud, as a “realist” movement (Champaud, 2003), similarly emphasized the entity character of the corporation as a focal point of various interests and sociological locus of entrepreneurial decision-making (e.g., Paillusseau, 1967; Champaud, 1965). The movement began to exert a strong influence on the interpretation of corporate law and the courts. The *Fruehauf* decision of the Paris Appeal Court issued in 1965 is probably the most well-known example. (Court of Appeals Paris, 22 May 1965)⁹ The theory of independent *intérêt social* (social interest) remained influential. Only in the 1990s did criticism begin to pile up.¹⁰

9 See also Reims Appeal Court, 24 April 1989; Paris Appeal Court, 26 March 1966.

10 In Belgium, the rescue and dismantling of the Fortis group also provides many lessons

In Germany, Rathenau espoused the idea that large corporations should be seen as entities independent from shareholders. This institutionalist view carried the day in 1937, but in a distorted form infused with authoritarian ideology. The post-war decades saw increased labour influence through mandatory employee representation on boards of directors, which culminated in the 1976 co-determination law, which requires corporations with more than 2000 employees to assign half of the seats to employees. (See Gelter, forthcoming)

4 CONCLUSION: GOING BEYOND

This is not the place to propose a clear prescription of what needs to be done if there is indeed a problem, but the analysis in this article should underscore the fact that too much attention has probably been paid to agency theory and conflicts of interest between shareholders and management, and how they should be prevented. The lesson of the crisis is perhaps that if we indeed consider that there are problems with the predominance of shareholder wealth maximization as corporate governance policy, a good company is not one that only turns a profit. (O’Boyle, Solari and Marangoni, 2011)

This article suggests that – sooner or later – policymakers may well be forced to grapple with the challenge of re-thinking corporate governance (toward a “responsible corporate governance”: Sjøfjell, 2010) where shareholder-centrism has produced some decidedly negative consequences.¹¹

concerning the debate over corporate interest. The *Cour de cassation* quashed the decision of the Court of Appeal (which sanctioned a kind of welfare state for finance, Brussels Appeal Court (18th Ch.), 12 December 2008) on February 19, 2010. (*Cour de cassation*, 19 February 2010) The *Cour de cassation* very rightly reduced its doctrinal value but on a point that is essential. However, the decision’s defect indirectly concerns the failure to take into account, as part of corporate interest, the general interest that a listed company (and in consequence its shareholders, even if they are purely financial) cannot ignore. (De Cordt and Gollier, forthcoming)

11 For an overview of the strong points of shareholder primacy, see Keay, 2009.

To answer our initial questions, corporate law (a “progressive corporate law”: Mitchell, 1995) through a few reforms, cases and doctrinal opinions, proposes an innovative view of the company¹² and its governance.¹³ This view is not dependent on the differences between legal traditions (Siems, forthcoming; Corbisier, 2011), yet has been ignored for more than thirty years. (Robé, 2012; Robé, 2010) It would be a crucial step to focus on this point of view, which shapes the OECD’s definition of corporate governance as a set of relationships between a company’s management, its board, its shareholders and its other stakeholders. (OECD, 2004)

Nevertheless, it is important to keep in mind that “if there is to be a move, or perhaps we should say a greater move, to stakeholderism it must involve more than just legislative directives and it will certainly take time.” (Keay(b), 2010)

REFERENCES

ADAMS, R., “Governance and the Financial Crisis”, **ECGI, Finance Working Paper**, Brussels, Belgium, No. 284/2009, 2009, available at: <<http://ssrn.com/abstract=1398583>> accessed (18/12/2013).

ALCHIAN, A.A. and DEMSETZ, H., “Production. Information Costs, and Economic Organization”, **Economic Review**, Pittsburgh, PA, 1972, Vol. 62, Iss. 5, pp. 777-795.

ARMOUR, J., DEAKIN, S. and KONZELMANN, S.J., “Shareholder Primacy and the Trajectory of UK Corporate Governance”, **ESRC Centre for Business Research, University of Cambridge, Working Paper**, Cambridge, UK, 2003, No. 266, available at: <<http://www.cbr.cam.ac.uk/pdf/WP266.pdf>> accessed (18/12/2013).

12 Moreover, in lawyer thinking, the corporation is often associated with a “legal” person used to structure the firm when there is an incorporation process.

13 In addition, the CSR movement and the emergence of the stakeholder theory paradigm in the juridical landscape largely look to balance shareholder goals with the need to reduce externalities that impact stakeholders. In other words, shareholders are not the only constituency whose financial well-being is correlated with a corporation’s success.

BAINBRIDGE(b), S.M., **Corporation Law and Economics**, Foundation Press, New York, , 884 pages, 2002.

BAINBRIDGE(a), S.M. , “Director Primacy in Corporate Takeovers: Preliminary Reflections”, **Stanford Law Review**, Stanford, CA, 2002, Vol. 55, pp. 791-818.

BAINBRIDGE, S.M., “In defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green”, **Washington and Lee Law Review**, Lexington, VA, 1993, Vol. 50, Iss. 4, pp. 1423-1447.

BERNSTEIN, P.L., **Capital Ideas: The Improbable Origins of Modern Wall Street**, Free Press, New York, 360 pages, 1992.

BISSARA, P., « Le gouvernement d’entreprise en France : faut-il légiférer encore et de quelle manière? », **Revue des sociétés**, Paris, 2003, Vol. 1, pp. 51-70.

BRANSON, D.M., “Corporate Governance “Reform” and the New Corporate Social Responsibility”, **University of Pittsburgh Law Review**, Pittsburgh, PA, 2001, Vol. 62, Iss. 4, pp. 605-647.

BRUNER, C.M., “Corporate Governance Reform in a Time of Crisis”, **The Journal of Corporation Law**, Iowa City, IA, 2011, Vol. 36, Iss. 2, pp. 309-341.

CADBURY, A., “The Corporate Governance Agenda”, **Corporate Governance**, Bingley, UK, 2000, Vol. 8, Iss. 1, pp. 7-15.

CHAMPAUD, C., “Les fondements sociétaux de la “doctrine de l’entreprise””, in **Aspects organisationnels du droit des affaires – Mélanges en l’honneur de Jean Paillusseau**, éditions Dalloz, Paris, Dalloz, 2003, 474 pages, pp. 117-164.

CHAMPAUD, C., **Le pouvoir de concentration de la société par actions**, éditions Sirey, Paris, Sirey, 349 pages, 1962.

COASE, R.H., “The Nature of the Firm”, **Economica**, Malden, MA, 1937, Vol. 4, Iss. 16, pp. 386-405.

COFFEE, J.C., “The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications”, **Northwestern University Law Review**, Chicago, IL, 1999, Vol. 93, Iss. 3, pp. 641-708.

CORBISIER, I., **La société : contrat ou institution?**, Édition Larcier, Brussels, 742 pages, 2011.

THE CORPORATIONS AND MARKETS ADVISORY COMMITTEE (CAMAC), **The Social Responsibility of Corporations**, Australian Government, Sydney, 183 pages, 2006, available at: <[http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/CSR_Report.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf)> accessed (12/12/2013).

DE CORDT, Y. and GOLLIER, J.-M. (forthcoming), “**Corporate Social Responsibility through the Prism of Company Law**”, in Tchotourian, I. (Ed.), **Company Law and CSR: New Legal and Economic Challenges (analysed from a Comparative Perspective)**, éditions Bruylant, Brussels, Bruylant.

COZIAN, P., VIANDIER, A. and DEBOISSY, F., **Droit des sociétés**, éditions Litec, Paris, 856 pages, 2010.

CURRALL, S.C. and EPSTEIN, M.J., “The Fragility of Organizational Trust – Lessons from the Rise and Fall of Enron“, **Organizational Dynamics**, Philadelphia, PA, 2003, Vol. 32, Iss. 2, pp. 193-206.

DAVIES, P., “Enlightened Shareholder Value and the New Responsibilities of Directors”, **W.E. Hearn Lecture**, University of Melbourne Law School, 2 October, 2005.

DEAKIN, S., “Corporate Governance and Financial Crisis in the Long Run”, **Centre for Business Research, University of Cambridge, Working Paper**, Cambridge, UK, No. 417, 2010, available at: <<http://www.cbr.cam.ac.uk/pdf/WP417.pdf>> accessed (18/12/2013).

EASTERBROOK, F. and FISCHER, D.R., **The Economic Structure of Corporate Law**, Harvard University Press, Cambridge and London, 384 pages, 1993.

EISENHARDT, K.M., “Control: Organizational and Economic Approaches”, **Management Science**, Catonsville, MD, 1985, Vol. 31, Iss. 2, pp. 134-149.

FERA, N., “Using Shareholder Value to Estimate Strategic Choice”, **Management Accounting**, Iowa City, IA, 1997, Vol. 79, pp. 47-51.

GAILLARD, E., **La société anonyme de demain : la théorie institutionnelle et le fonctionnement de la société anonyme**, thèse Paris II, Paris, 1932.

GELTER, M. (forthcoming), “Shareholder-Stakeholder Debates: From Institutional Theories to Private Pensions”, in Tchotourian, I. (Ed.), **Company Law and CSR: New Legal and Economic Challenges (analysed from a Comparative Perspective)**, Bruylant, Brussels.

GELTER, M., “The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance”, **Harvard International Law Journal**, 2009, Vol. 50, Iss. 1, pp. 129-194.

HANSMANN, H. and KRAAKMAN, R., “Agency Problems and Legal Strategies”, in Kraakman, R. *et al.* (Eds.), **The Anatomy of Corporate Law: A comparative and Functional Approach**, Oxford University Press, Oxford, New York, Auckland etc., 2004, pp. 21-31.

HANSMANN, H. and KRAAKMAN, R., “Toward a Single Model of Corporate Law?”, in Mc Cahery, J. *et al.* (Eds.), **Corporate Governance Regimes. Convergence and Diversity**, Oxford University Press, Oxford, 2002, pp. 56-82, 2002.

HANSMANN, H. and KRAAKMAN, R. (2000), “The End of History for Corporate Law”, **Law and Economics Working Paper**, No. 235, 2000, available at: <<http://papers.ssrn.com/abstract=204528>> accessed (18/12/2013).

HARPER HO, V., “Enlightened Shareholder Value: Corporate Governance - Beyond the Shareholder-Stakeholder Divide”, **The Journal of Corporation Law**, Iowa City, IA, 2010, Vol. 36, Iss. 1, pp. 59-112.

HASPESLAGH, P., “Corporate Governance and the Current Crisis”, **Corporate Governance**, Bingley, UK, 2010, Vol. 10, Iss. 4, pp. 375-377.

HESSSEN, R., **In Defense of the Corporations**, Hoover Institution Press, Stanford, CA, 134 pages, 1979.

JENSEN, M.C. and MECKLING, W.H., “Theory of the Firm: Managerial Behaviour. Agency Costs and Ownership Structure”, **Journal of Financial Economics**, Rochester, NY, 1976, Vol. 3, Iss. 4, pp. 305-360.

KEAY(b), A.R., “Stakeholder Theory in Corporate Law: Has it got What it Takes?”, **Working Paper**, 4 January, 2010, available at: <<http://ssrn.com/abstract=1531065>> accessed (18/12/2013).

KEAY(a), A.R., “Moving towards Stakeholderism? Constituency

Statutes, Enlightened Shareholder Value, and All That: Much ado about Little?”, **Working Paper**, 4 January, 2010, available at: <<http://ssrn.com/abstract=1530990>> accessed (18/12/2013).

KEAY, A.R., “Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?”, 1 November, 2009, available at: <<http://ssrn.com/abstract=1498065>> accessed (18/12/2013).

KIRKPATRICK, G., “The Corporate Governance Lessons from the Financial Crisis”, **Financial Market Trends**, OECD Publishing, Paris, 2009, Vol. 2009/1, available at: <<http://www.oecd.org/finance/financialmarkets/42229620.pdf>> accessed (18/12/2013).

KLEIN, W.A. and COFFEE, J.C., **Business Organization and Finance: Legal and Economic Principles**, Foundation Press, New York, 476 pages, 2006.

KRAAKMAN, R., “Corporate Liabilities Strategies and the Cost of Legal Controls”, **Yale Law Journal**, New Haven, CT, 1984, Vol. 93, pp. 857-898.

MACEY, J.R., “A Close Read of an Excellent Commentary on *Dodge v. Ford*”, **Virginia Law & Business Review**, Charlottesville, VA, 2008, Vol. 3, pp. 177-190.

MARSHALL, S. and RAMSAY, I. (forthcoming), “Directors’ Duties and Corporate Social Responsibility”, in Tchotourian, I. (Ed.), **Company Law and CSR: New Legal and Economic Challenges (analysed from a Comparative Perspective)**, Bruylant, Brussels.

MARTIN, D., “L’intérêt des actionnaires se confond-t-il avec l’intérêt social?”, in Mélanges D. Schmidt – *Liber amicorum*, éditions Joly, Paris, 544 pages, 2005, pp. 359-370.

MERLE, P., **Droit commercial – Sociétés commerciales**, éditions Dalloz, Paris, 958 pages, 2011.

MILLS, R., **The Dynamics of Shareholder Value**, Mars Business Association, Gloucester, Lechlade, 1998.

MITCHELL, L.E. (Ed.), **Progressive Corporate Law**, Westview Press, Boulder, CO, 313 pages, 1995.

MORÉTEAU, O., “An Introduction to Contamination”, **Journal of Civil**

Law Studies, 2010, Vol. 3, pp. 9-15, 2010, available at: <<http://www.law.lsu.edu/globals/sitelibraries/jcls/home/4%20Moreteau%20Final.pdf>> accessed (18/12/2013).

OECD, **Principles of Corporate Governance**, OECD Publishing, Paris, 2004, available at: <<http://www.oecd.org/dataoecd/32/18/31557724.pdf>> accessed (18/12/2013).

O'BOYLE, E.J., SOLARI, S. and MARANGONI, G.D., "The Good Company", **Corporate Governance**, Bingley, UK, 2011, Vol. 11, Iss. 1, pp. 64-76.

OMRAN, M., ATRILL, P. and POINTON, J., "Shareholders versus Stakeholders: Corporate Mission Statements and Investor Returns", **Business Ethics: a European Review**, Malden, MA, 2002, Vol. 11, Iss. 4, pp. 318-326.

PALMER, E.E., "Directors' Powers and Duties", in Ziegel, J.S. (Ed.), *Études sur le droit canadien des compagnies*, Butterworths, Toronto, 1967, Vol. 1, 670 pages, pp. 365-395.

RIPERT, G., "Les aspects juridiques du capitalisme moderne", rééd., LGDJ, Paris, 354 pages, 1951.

ROBÉ, J.-P., "Being Done with Milton Friedman", **Accounting, Economics, and Law**, 2012, Vol. 2, Iss. 2, Article 3, pp. 1-31, available at: <[http://www.degruyter.com/dg/viewarticle.fullcontentlink:pdfeventlink/contentUri?format=INT&t:ac=j\\$002fael.2012.2.issue-2\\$002f2152-2820.1047\\$002f2152-2820.1047.xml](http://www.degruyter.com/dg/viewarticle.fullcontentlink:pdfeventlink/contentUri?format=INT&t:ac=j$002fael.2012.2.issue-2$002f2152-2820.1047$002f2152-2820.1047.xml)> accessed (18/12/2013).

ROBÉ, J.-P., "The Legal Structure of the Firm", **Accounting, Economics, and Law**, 2011, Vol. 1, Iss. 1, Article 5, pp. 1-86, available at: <<http://www.degruyter.com/view/j/ael.2011.1.1/ael.2011.1.1.1001/ael.2011.1.1.1001.xml?format=INT>> accessed (18/12/2013).

ROE, M.J., "The Shareholder Wealth Maximization Norm and Industrial Organization", **University of Pennsylvania Law Review**, 2001, Vol. 149, Iss. 6, pp. 2063-2081.

ROMANO, R., "Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance", **Yale Journal on Regulation**, 2001, Vol. 18, Iss. 2, pp. 174-252.

ROMANO, R., “Corporate Law and Corporate Governance”, **Industrial and Corporate Change**, 1996, Vol. 5, Iss. 2, pp. 277-339.

ROUSSEAU, S. and TCHOTOURIAN, I., “Pouvoirs, institution et gouvernance de la société par actions : lorsque le Canada remet en questions le dogme de la primauté actionnariale”, **Les cahiers de la CRSDD**, collection recherche, UQAM, No. 05-2012, 2012, available at: <<http://www.crsdd.uqam.ca/Pages/docs/05-2012.pdf>> accessed (18/12/2013).

ROUSSEAU, S. and TCHOTOURIAN, I., “L’“intérêt social” en droit des sociétés : Regards canadiens”, **Revue des Sociétés**, 2009, pp. 735-760.

ROUSSEAU, S., “Sans frontières ? Les devoirs des administrateurs de sociétés par actions à la lumière de la jurisprudence récente”, **Cours de perfectionnement du notariat**, 2006, Vol. 1, pp. 101-157.

SCHMIDT, D., “Les conflits d’intérêts dans la société anonyme”, éditions Joly, Paris, 565 pages, 2000.

SCHMIDT, D., “De l’intérêt social”, **Revue de droit bancaire**, 2000, Vol. 50, pp. 130-134.

Siems, M. M. (forthcoming), “The Ranking of Shareholder and Stakeholder Interests in Common and Civil Law Countries”, in Tchotourian, I. (Ed.), **Company Law and CSR: New Legal and Economic Challenges (analysed from a Comparative Perspective)**, Bruylant, Brussels.

SJÅFJELL, B. “Responsible Corporate Governance”, **Nordic & European Company Law, LSN Research Paper Series No. 10-13**, 2010, available at: <<http://ssrn.com/abstract=1512591>> accessed (18/12/2013).

SMITH, D.G., “The Shareholder Primacy Norm”, **Journal of Corporate Law**, 1998, Vol. 23, Iss. 2, pp. 277-323.

STIGLITZ, J., **The Financial Crisis of 2007/2008 and its Macroeconomic Consequences**, Columbia University, New York, 2009, available at: <<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan033508.pdf>> accessed (18/12/2013).

TCHOTOURIAN, I., “RSE, Développement durable et gouvernance

d'entreprise – Un jeu d'acteurs et de structures... *ad hominem* ou *ad libitum* du marché ?”, *Journal des sociétés*, July 2012, Iss. 100, Special Issue Desbarats, I. (Ed.), pp. 36-40.

TCHOTOURIAN, I., “CSR and “best interests of the corporation”: New Purpose for Corporations and Managers? A Comparative View from north American and European Corporate Law”, in Sun, W., Louche, C. and Pérez, R. (Eds.), *Finance and Sustainability: Towards a New Paradigm? A Post-crisis Agenda – Critical Studies on Corporate Responsibility, Governance and Sustainability*, Vol. 2, Emerald Books, Bingley, 325 pages, 2011, pp. 63-81.

THOMSEN, S., “Convergence of Corporate Governance during the Stock Market Bubble: Towards Anglo-American or European Standards?”, in Grandori, A. (Ed.), *Corporate Governance and Firm Organization: Microfoundations and Structural Forms*, Oxford University Press, New York, 416 pages, 2004, pp. 297-317.

VIANDIER, A., *OPA-OPE et autres offres publiques*, éditions Francis Lefebvre, Paris, 550 pages, 2003.

WILLIAMSON, O. E., *The Economic Institutions of Capitalism*, Free Press, New York, 468 pages, 1985.

ZANDSTRA, G., “Enron, Board Governance and Moral Failing”, *Corporate Governance*, 2002, Vol. 2, Iss. 2, pp. 16-19.

Case Law

Australia:

The Bell Group Ltd (in liq) v. Westpac Banking Corporation [No 9], [2008] WASC 239.

Canada:

BCE Inc v. 1976 Debentureholders, [2008] SCC 69, date of judgment: 20 June 2008; reasons delivered: 19 December 2008.

Magasins à rayons Peoples Inc. (Syndic de) v. Wise, 2004 CSB 68.

Palmer v. Carling O’Keefe Breweries of Canada Ltd., (1989) 67 O.R. (2d) 161 (Ont. H.C.J.).

Parke v. Daily News Ltd., [1972] 2 All. E.R. 929 (Ch.).

Greenhalgh v. Ardenne Cinemas (1950), [1951] 1 Ch. 286, p.291 (C.A.).

Belgium:

Cour de cassation, 19 February 2010, *J.T.*, 2010, p. 140.

Brussels Appeal Court (18th Ch.), 12 December 2008, *J.T.*, 2009, p. 62.

France:

Reims Appeal Court, 24 April 1989, *J.C.P.*, 1990, éd. E., 15677, commentary Viandier and Caussain.

Paris Appeal Court, 26 March 1966, *R.T.D.Com.*, 1966, p. 349, commentary Houin.

Paris Appeal Court, 22 May 1965, *J.C.P.*, 1965, II, 14274bis; *D.*, 1968, *Jur.*, p. 147.

UK:

Salomon v. A. Salomon & Co., [1897] A.C. 22 (H.L.).

United-States:

Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (Mich. 1919).

Acknowledgment

I am grateful to the inspiration provided by the authors of Company Law and CSR: New Legal and Economic Challenges (analysed from a Comparative Perspective), which I edited. Special thanks go to my doctoral student Dominique Mannella to review this paper and for having performed its layout.