Book Review: After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US, by John Armour and Joseph A. McCahery

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GLOBAL FORCES OF CORPORATE CHANGE AND EUROPEAN PATH-DEPENDENCIES

I.

Edited academic collections on topics that have entered the public consciousness, well beyond scholarly circles, constitute a risk for the editors, the authors and the publishers. In the fast-evolving world of academic publishing, with its constant increase in paper-based and online venues for disseminating expert knowledge, the status of a carefully edited volume of substantial content and length remains ambiguous. This explains why many pieces included in a volume like the one here under review will have previously appeared in academic journals or, often, as working papers on the omnipresent Social Science Research Network. Why then take on in such a volume the task-as editor or, indeed, as publisher of assembling previously published articles and of soliciting further original work from some of the most renowned experts in the field?

While such general observations might be prompted by the appearance of a 700 page volume that convenes some of the leading scholars in U.S. and European corporate law to assess the 2000 crash of "Wall Street's darling," the Enron corporation, any doubts over the need for this publication are quickly brushed aside once the volume is opened.
After Enron presents an excellent and timely collection of analyses of the Enron debacle, provided by some of the most astute and informed corporate law scholars, and masterfully integrated by two of the finest academics in this field. The editors, John Armour and Joseph McCahery, have succeeded in collecting, conceptualizing and organizing a most comprehensive and intriguing collection of excellent writings on Enron and its aftermath. Their book can aptly serve as either a first-blush or a more in-depth analysis of the problems, for those conducting research as well as those teaching in the area of corporate and securities law. Yet, beyond this achievement, the editors also contribute importantly to a literature which has for some time now emphasized the need to take a deliberately comparative viewpoint when analyzing the trajectories of corporate law development around the world. This work has only more recently begun to explore the existing differences in greater depth and with a view to the historical, political and socio-economical context of company law regulation. This move to a "deeper reading" of the contextual conditions of the regulatory framework of companies' activities in advanced and developing nations is unlikely to be reversed in the near future, given the growing awareness that corporate governance is irrevocably developing into a multi-layered body of transnational law. Corporate and securities law rules form part of a complex regulatory environment, which is historically grown and continues to develop along co-evolutionary lines of official/unofficial, hard/soft law legislation, and which involves modes of public and private
ordering with direct and indirect regulatory effects.5

II.

What was Enron? Emerging in the 1990s as an overwhelmingly successful corporate actor with a keen sense for the transforming political climate, marked by a forceful embrace of large-scale deregulation and privatization policies, Enron emerged as arguably the smoothest player in a fast unfolding energy trading game—until, in late 2001, its name became a signifier worldwide for a plethora of regulatory failings, personal misconduct and largest-scale financial and existential losses.6 Enron's fall from the global capital market's grace was brought about by its management's outrageous collaboration in reducing corporate assets and misstating the company's financial status. Enron's dealings, which led to wide-reaching criminal prosecution, have been among the prime homework-providers for corporate law regulators in just about every jurisdiction worldwide.7

Within the last few years, the U.S. Congress' 2002 SarbanesOxley legislation (a.k.a. SOX) has become a formula for similarly-minded corporate governance law reform worldwide.8 Today, as SOX attracts criticism for allegedly unreasonably raising compliance costs,9 the Act's Section 404 and other countries' similar regulations10 are under heightened scrutiny. Section 404 requires the creation of extensive policies and controls within public companies to secure, document,
process, and verify material information dealing with financial results. Essentially, it requires that each annual report filed with the Securities and Exchange Commission-overseeing "reporting companies" with at least 300 shareholders and minimum assets of U.S. $500 million-contain an internal control report. That report must detail management's responsibility for establishing and implementing adequate procedures for financial reporting, including an assessment of internal control structures and procedures and disclosure of adopted codes of ethics. One of the clearest signs of the Act's retaliatory nature is its requirement that a company's Chief Executive Officer (CEO) and Chief Financial Officer (CFO) personally certify the report's accuracy.

Interestingly enough, the Act's emphasis on individual, personal misconduct is not precisely the focus of SOX's critics. Instead, they target the law's creation of a compliance regime that is perceived as burdensome, counterproductive and ineffective. To be sure, the degree to which the issue of personal guilt of CEOs and CFOs remains within the purview of ongoing corporate law reform, both professionally and in popular discourse, is reflected for example in the attention given to aspects of management remuneration, which alone has prompted a long worldwide debate. And it is here where the contributions in Armour and McCahery's volume constitute a much-needed and welcome advance in the current debates over corporate governance. The authors of their collection provide excellent insights into the much more complex
regulatory framework that constitutes corporate governance.

III.

The contributions to the volume are divided into four sections. They are preceded by an introductory essay by the two editors, who take on the ever more rarely assumed task of actually "editing" the work of their contributors. Armour and McCahery provide a roadmap through the volume by engaging with each of the chapters and placing them in the context of the larger debates to which they contribute. This will help particularly those readers who have no firm prior knowledge of the Enron debacle or of the various regulatory responses, and those who are particularly interested in corporate law reform from a distinctly comparative perspective. Given the predominantly Anglo-Saxon focus of much of the volume, it succeeds in mapping and further facilitating a dialogue, a dialogue no longer merely between scholars of different jurisdictions, but also between differently conceived and evolved regulatory cultures.

The first of the four sections of the book, "Stock Markets and Information," contains two articles, the first by Ronald Gilson and Reinier Kraakman and the second by Donald Langevoort, which inquire into the emergence and reliability of traditional instruments evaluating a firm's worth as the decisive signal to stock market investors. In light of the inevitable rise of stock market capitalism in the United States and the
United Kingdom, and the pressure on stakeholder capitalist regimes such as France, Germany and Japan, the editors are correct in asking how Enron could for so long hide its destructive dealings from the capital market's "eye that sees all." Inviting two of the field's leading scholars to build on their previous work on the role of stock market institutions in soliciting, interpreting and disseminating information, and to pursue this focus within the contemporary capital market environment, provides for an intriguing overture to the book's inquiry. It is particularly helpful because Gilson and Kraakman's article provides a sober view of how much irrationality still exists in our attempts to read stock prices. Langevoort's article, discussing various patterns of investor behavior, adds to this picture of the uncertainty and irrationality that remain even where in fact more information is available to investors. Both sections put in context some of the basis for the regulatory retaliation, emphasizing the need for better disclosure that took place after Enron.

The second section is dedicated to the exploration of "Corporate Scandals in Historical and Comparative Context" and collects papers on the United States (by David Skeel, Jr.), the United Kingdom (by Simon Deakin and Suzanne Konzelmann), and Italy (by Guido Ferrarini and Paolo Giudici). These are followed by a summarizing evaluation of "Why the US and Europe Differ" (by John Coffee). This section's contributions underscore the importance of seeing beyond the demands of the day when responding to crisis.
In tracing the different aspects of various corporate scandals in the investigated countries' history, the authors in this section illuminate key connections in the way in which scandals were and are being perceived and responded to. They succeed in raising some doubt as to the adequacy of certain of the regulatory responses. This discussion becomes particularly interesting when the responses are reviewed in the context of the specific corporate governance regime in which they unfold. It is here where the differences between shareholder and stakeholder-oriented corporate governance regimes are apparently put to the test. If scandals do indeed take place in either kind of regime, the analysis of their scope and of the subsequent regulatory response speaks not only to the concrete scandal but well beyond it, to the nature of the respective corporate governance regimes. The authors' inquiry into the reasons why measures to prevent corporate fraud often fail-taking the case of Italy, for example, where rules even more stringent than SOX failed to prevent fraud-ultimately reveals the great need for deeper comparative work.

The chapters provide a powerful illustration of why discussions over convergence versus divergence of corporate governance regimes will eventually fail in the face of the particular dynamics of regulatory change that we can observe in the various jurisdictions. While a first-cut distinction between "outsider" and "insider" corporate governance regimes is helpful in identifying some of the base variances in regulatory
design,

we need to direct our attention to the environment in which corporate law regulation is unfolding. This environment involves a transnational proliferation of norm authors and norm-setting sites, changing political coalitions and an intricate mix of regulatory approaches. It is from such a reformed investigative agenda that we can hope to find more helpful answers to the conundra of Enron, WorldCom, Parmalat, and other scandals.

The third section, entitled "Evaluating Regulatory Responses: The US and UK," brings together papers by luminaries including Lucian Bebchuk and William Bratton, among others. It focuses on the SOX, particularly on its regulatory aspirations as well as its blind spots and omissions. Given its thematic orientation, this section might be taken as the most short-lived in light of its concrete engagement with specific elements of an evolving regulatory regime. Yet the individual papers reach beyond their contemporary confines, either by building on existing research agendas and discussions or by unfolding forward-looking ones. To take an example, Lucian Bebchuk's paper forms part of his recent proposals to strengthen shareholder rights within the corporation. Likewise, the paper by William Bratton contributes to an ongoing discussion over the rules versus principle-based approach in designing accounting rules.

The final, fourth section of the volume, which takes up more than a third of the book's space, is entitled "Reforming EU Company Law and Securities Regulation." It constitutes a perfect orchestration of the most interesting voices in the current discussion in Europe. It is this part of
the book that arguably carries the greatest weight in deepening the transatlantic dialogue on corporate regulation. The chapters-authored by Paul Davies, Klaus Hopt, John Armour, Gerard Hertig and Joseph McCahery, Eilis Ferran and Luca Enriquesbring to the table the leading voices in the current European Community (EC) company law reform debate. What these authors shareand, again, this testifies to the editors' conscious design of their book and to their commitment to telling a coherent story—is a particular perspective on corporate law reform, which is ultimately a perspective on the corporation itself.

All of the authors in this section have in various ways been personally involved in advisory or even law proposal commissions within the EC in recent years, and are thus the last to be accused of being na\'ive of the challenges of corporate law reform. Yet their astute understanding of the European intricacies of multilevel lawmakering and negotiation might also explain their reluctance to expose more clearly the challenges that face a more fundamental inquiry into the greater political goals of corporate law reform. Such an inquiry would inevitably have to reconsider the broader role of business corporations in society if one accepts the premise that corporate governance regulation encompasses a dynamic set of rules and standards in different, yet intertwined areas of law. The book's editors and their authors are well aware of this connection, clearly expressed for example in Simon Deakin and Suzanne Konzelmann's chapter (pp. 155-58). Yet their brief presence (that paper is a pithy four pages) paradoxically also underlines the absence of another set of issues and
approaches, which the volume could profitably have alluded to and which the editors could have sought to integrate in their collection.

Clive Schmitthoff, writing in 1973, provided a succinct and highly sensitive account of the challenges facing corporate law reform in Europe. He already then pointed to the particular intricacies arising for law reform from the complex political economy of an integrating Europe. Europe-like Enron-is an enigma, a conundrum, a formula, which always stands for more than a given observer can perceive. If one thing is certain about European corporate governance reform, however, it is its inseparability from the greater process of European integration and the relation of Europe to its global environment. The coming years will show to which degree the participants in the debate are able to reflect on the correlation between policy choices and theoretical models to explain the business corporation. It is certain, and the reviewed book is a much needed illustration of this insight, that Europe is still in evolution and that the study of corporate law reform is taking place in a vibrant, 24-7, open conceptual and experimental laboratory.

Notes

1. See CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004).
2. See, e.g., CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATES, AND MARKETS IN EUROPE, JAPAN, AND THE US (Klaus J. Hopt et al. eds., 2006). A good example of the merit of such an approach is provided by Stephanie Ben-Ishai, A Team Production Theory of Canadian Corporate Law, 44 ALBERTA L. REV. 2 (2006).
4. Katharina Pistor, The Standardization of Law and Its Effect on Developing
5. This is elaborated in GRALF-PETER CALLIESS & PEER ZUMBANSEN, RouGH CoNSEnSuS AND RUNNING CouE: A THEORY OF TRANSNATIONAL PRIVATE LAW (forthcoming; manuscript on file with author).


16. The other contributions in this section are by James Cox; Bernard Black, Brian Cheffins and Michael Klausner; and Richard Nolan.


18. See for instance the contribution by Hopt (pp. 445-96).
