

Familiar places or liminal spaces? Examining the codification process in corporate governance

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Abstract: For a quarter of a century, corporate governance in many countries has been viewed as a process of institutionalising codes of good conduct by institutionalising their periodic and partial deinstitutionalisation. Episodic shocks, induced by spectacular corporate failures, have created opportunities for more radical change, but such codes have proved resilient. But has this been process firmed up a thickening core? With each revision, is the corporate governance community living in increasingly familiar places or opening itself to liminal spaces? This paper deals with a story that is even now unfolding. The UK Corporate Governance Code is undergoing a major revision, with submissions to a consultation closing on February 28. As we wait for a new code to emerge, let us explore the practical background and its philosophical underpinnings, drawing on concepts from the writings of de Certeau (1984) and Turner (1977), to reflect on places, spaces, rituals, and explorations, to understand what creates and constitutes resilience and allows for change.

Keywords: Corporate failure, codes of conduct, consultation, routines, process, corporate governance, place, space, liminality

Introduction

In announcing plans in December 2017 to revise the UK Corporate Governance Code, the Financial Reporting Council said it planned to undertake “a comprehensive review to ensure that the Code remains fit for purpose” (FRC, 2017, p. 1). It is the latest of a string of what have become biennial reviews, but this one would do more than make the incremental changes. The negative version of that expression – “not fit for purpose” – has special significance in the discourse of British policymaking. Politicians use it often when politicians to condemn an agency or policy for inducing a crisis. The FRC’s choice of expression suggests it wanted to avoid such a thing. A few weeks later, while the consultation was underway, a listed company that concentrated on construction and outsourcing contracts for central and local government collapsed. It had nearly one billion pounds sterling of debt and a very large pension deficit. Its many public- and private-sector contracts were brought to a sudden halt. The company, Carillion plc, had complied fully with the UK Corporate Governance Code.

The changes that arise from the review will potentially have an impact not just in Britain, but for many organisations in many countries. Key aspects of the code have been copied throughout the world (Aguilera & Cuervo-Cazurra, 2009). The code has informed practice in both civil- and common-law jurisdictions, in emerging markets and developed economies. It has provided core concepts of good corporate governance to multilateral organisations (OECD, 2015a), unlisted as well as listed companies (IoD, 2010), state-owned

enterprises (OECD, 2015b), public- as well as private-sector organisations, and even organs of national governance (Nordberg, 2014; UK Parliament, 2013).

This project explores the processes of consultation that leads to the formulation of what could be substantial rather than incremental change in a set of institutional arrangements that has guided corporate practice for the past 25 years. Revising the code has become a tried-and-tested affair, refined regularly into what has become a two-year cycle of renewal and reform. That process has led to substantial agreement about what constitutes good corporate governance. That it has become institutionalised is evidence in both the high levels of compliance and the frequent affirmation among practitioners that the UK code represents the “gold standard”. If so, its virtues may have become taken for granted (Green, 2004), and thus come to be viewed uncritically.¹ If so, then the question arises: How has the *process* of consultation itself affected the ability of consultation to effect change?

In this developmental paper, let us explore the institutional context in the UK and discuss how the code has developed a sedimented logic (Cooper, Hinings, Greenwood, & Brown, 1996; Soin & Huber, 2013) that has achieved and sustained broad adherence through the institutional work of actors central to the field (Nordberg, 2017a). We then reflect those institutional observations, first, against a theoretical perspective taken from the sociology of de Certeau (1984) and translated into entrepreneurship by Hjorth (2004), in which the concepts of *place* and *space* play a large role, and then against the anthropological concept of liminality (Turner, 1977). Both these perspectives point towards greater chances for creativity to emerge in social setting where control is less apparent and traditional hierarchies do not apply. These conditions give voice to the less powerful, allowing opportunities for entrepreneurial actions to succeed.

It then outlines plans for analysing the contributions to the 2018 consultation to look for signs of the emergence of *space* and liminality during the process and assess those against the outcome of the changes in the new version of the code, which is due to be published in the middle of the year. Doing so provides an opportunity to re-examine the extent to which the process permits new ideas to come to the fore, marginal actors to gain influences. We intend to conclude by posing questions about how such changes might affect the likelihood of the new code to a) retain and gain adherents and institutionalise the new arrangements, or b) lose them and disrupt the consensus on what constitutes good corporate governance.

Corporate governance in context

From its inception as the Cadbury Code (1992), through a major, post-Enron revision (FRC, 2003), and the challenge to its integrity after the existential crisis of the global financial crisis (FRC, 2010), the code has proved resilient. Nordberg and McNulty (2013) show how, in response to these crises in the corporate world, the code has bent to embrace shifting understandings of what constitutes good governance but remained true to its core. Other revisions, recently at intervals of roughly two years, have made relatively minor modifications.

In many ways the UK code had created a template for the mitigation of the principal-agent problem identified in agency theory (Fama, 1980), in which managers’ interests are misaligned with those of shareholders. First Cadbury (1992) and then the Higgs Review (2003) placed emphasis on board structures and director independence as central to increasing accountability to shareholders. Alternatively, stewardship theory (Davis, Schoorman, & Donaldson, 1997) holds that, rather than being self-interested schemers or lazy skivers, managers generally seek to do a good job. Its remedies to the ills of corporate governance and directly opposed those of agency theory.

This practice of periodic revision has institutionalised a process of deinstitutionalisation, creating a ritual of consultation and revision, which at once facilitates change and reinforces its legitimacy. Resilience implies both flexibility and rigidity, a balance between a solid centre and a surface to absorb shocks. But scholars have long argued that institutionalisation hardens the process, and that the rules it embodies become decoupled from the changing world around them (Fiss & Zajac, 2006; Meyer & Rowan, 1977).

That raises uncomfortable questions for a code now a quarter of a century old. When does a core ossify or the surface become brittle? How does change proceed when the crisis isn't one in the core constituencies of corporate management and investment practice? How does change proceed when the motivation for it come from a crisis in national governance, the shock of Brexit and the questions of legitimacy of government itself through an ill-timed election and the ill-run campaign? These questions we raise here require a type of analysis that goes beyond the theoretical thinking familiar to scholars of corporate governance, using different and less familiar theoretical perspectives.

Perspectives of resilience and change

Two perspectives offering philosophical insights on resilience and change can provide new ways of thinking about the old conundrums of corporate governance: the age-old question of who will guard the guardians? How can firms explore new approaches if their boards always seek to control? These perspectives, drawn from sociology and anthropology, appear in more practical literatures as diffuse as architecture and town planning, to management consultancy and remote and temporary working. They are, however, little used in corporate governance literature but have much to say about resilience and innovation in the face of change. First is work drawing on ideas of the French sociologist, Michel de Certeau (1984), who distinguishes between the concepts of *place* and *space*. Second is a stream of thinking that developed from the writings of the British anthropologist Victor Turner (1977) concerning rituals and rites of passage and the creation of liminal spaces where hierarchy is suspended, temporarily, to encourage creativity.

Place vs. space

These concepts, derived from the work of Lefebvre (1974/1991) and Bachelard (1957/1994), take on a subtle meaning in the work of de Certeau (1984; de Certeau, Giard, & Mayol, 1998). He divides the world into categories of being. Place refers to an abstraction of physical or psychological dimensions, the parts of a field with definition, boundaries and rules, a signification ownership or control;² place is a “configuration of positions” implying an “indication of stability” (de Certeau, 1984, p. 117). Space, by contrast, is the location of movement, the “intersections of mobile elements ... term dependent upon many different conventions” (de Certeau, 1984, p. 117). Spaces may be seen therefore as open territories between places, where rules are in the process of becoming, a continuing unfolding that resonates with Heidegger (1927/2010) and Gadamer (1975/2013). These concepts find elaboration into the world of management and entrepreneurship through Hjorth (2004, 2005), and within the corporate governance literature in a partial way in a recent study of company secretaries (McNulty & Stewart, 2015).

Ritual, and liminal spaces

The concept of space also resonates with the liminality discussed in anthropology and associated with rituals and rites of passage. As developed by van Gennep (1909/2013) and

Turner (1977), liminality implies a condition on the threshold between one state and another. The elders of a tribe temporarily dispense with hierarchy, play with the young males, instil them with the culture of adulthood, before inducting them into the society of men. The state of being between states, with its ambiguities and uncertainties allows for playfulness and learning, while the rules become embedded through experience rather than coercion. In management studies, the concept has been employed to illuminate the work of management consultants (Czarniawska & Mazza, 2003), expatriate managers of multinational businesses (Guimarães-Costa & Pina e Cunha, 2009), creative people working from remote locations (Vesala & Tuomivaara, 2018), and boards of directors (Concannon & Nordberg, 2018).

Issues of place, space, and liminality in the UK code debate

Early attempts to solve the agency problem suggested market mechanisms, like share options and other incentives, to limit agency risk (Fama & Jensen, 1983). The Cadbury Code and others that it inspired took a different approach, where rules created structure, encouraged director independence, and later emphasised the interpersonal relationships on the board (Nordberg & McNulty, 2013), which highlights the institutional side of governance.

Many writers have analysed the codification of corporate governance in institutional terms (Aguilera & Yip, 2004; Capron & Guillén, 2009; Estrin & Prevezer, 2011; Haxhi & Aguilera, 2017; Judge, Douglas, & Kutan, 2008). Codes set the formal and semi-formal rules of how boards work and how they interact with investors. Institutional theory has puzzled over how to account for change, either radical (Greenwood & Hinings, 1996) or even gradual (Mahoney & Thelen, 2010). Greenwood, Suddaby, and Hinings (2002) theorised that an exogenous, precipitating jolt might dislodge the taken-for-granted assumption in a field to instigate a process of de-institutionalisation. DiMaggio (1988) proposed the concept of institutional entrepreneurship, in which social actors at the periphery of the field tapped into sources of legitimacy in adjacent fields. Other writers extended the concept to include efforts to disrupt, alter, or maintain an institution during times of doubt, called the phenomenon institutional work (Zietsma & Lawrence, 2010). Those routines and rituals and their often tacit explanations of legitimacy spawned interest in the concept of institutional logics (Friedland & Alford, 1991; Thornton & Ocasio, 1999).

Many scholars have considered the effects of adoption of such institutional arrangements, and especially the UK code (e.g. Doble, 1997; Elsayed, 2007; Koutoupis, 2012; MacNeil & Li, 2006), but comparatively little attention has been paid to the processes involved in creating and revising them. Spira and Slinn (2013) take a historical perspective on the development of the Cadbury Code, using the Cadbury archive at the University of Cambridge to trace the interplay of social, political, and economic actors, the issues they highlighted, and how they resolved into the language of the first code. Two recent studies (Nordberg, 2017a, 2017b) analyse themes in governance, tracing them through the code's origins and its development during the crises of confidence in the early 2000s and then through the 2007-09 financial crisis. Those three works indicate how the company directors, and especially their chairmen and associations, jostled with representatives of asset management firms, insurance companies and pension funds for power over the language of the code. They point us towards an interpretation of corporate governance as a field with twin focal points, mediated by professional actors, most notably the large accountancy firms and their professional organisations. Other actors are heard in the debates, but their voices are then marginalised as the codes pass from ideas, to drafts, to the final language that then shapes and controls behaviour.

Those studies provide a narrative of events and the beginnings of a conceptualisation of the process. But they stop short of theorising how these forces interact. They provide tantalising if preliminary insights into why marginalised voices participate and continue to engage in a process where their power is limited. They point, therefore, to a value in examining those processes themselves as a social phenomenon. And because a) the UK code and its processes have informed corporate governance debate in many countries, and b) the process of codification has echoes in many fields (e.g. the fabled Lamfalussy process in the European Union), undertaking such a study will have policy as well as theoretical and practical benefits.

This study intends to address that challenge by comparing the process of the 2018 major revision with what took place in other periods, analysing those differences through the lenses of liminality and de Certeau's place-space distinction. From this preliminary view, the Cadbury code ventured into unclaimed territory, with echoes of unorganised space. Subsequent revisions look more like orchestrated uses of liminality, designed to bring dissenting voice into the fold, albeit through the appropriation or accommodation of some of their concerns. The institution would thus be modified through the excursion into liminality, while remaining noticeably the same. Whether the 2018 revision follows that pattern, or takes a less settled route, remains to be seen.

Next steps

The plan, between the close of the consultation on February 28 (the date also of the close of submission to BAM), is to harvest contributions to the code from the FRC website, interview key actors guiding the process, and then compare these with the processes used in early consultations and with the formal model that structured development of financial regulation in the European Union from the late 1990s to major reforms in 2005 and surrounding years, named after Baron Alexandre Lamfalussy, who led the process. This analysis will lead to comparative models of the process and a discussion of how differences in the steps they involve may influence the legitimacy of the code and the extent to which compliance may be embedded or symbolic.

¹ That the UK code sets a "gold standard" is evidenced in many conversations I have had, over many years, among governance specialists, in the UK and elsewhere. It was repeated, with a twist, at a symposium organised by the corporate governance special interest group of the British Academy of Management at Cass Business School in London in February 2018. David Styles, head of corporate governance at the Financial Reporting Council, told the gathering he was somewhat sceptical of the claim, which suggested complacency had set in and that he meant to counteract that through the code revision.

² *Place* in French is "lieu", and in de Certeau "lieu propre", a phrase his translators have struggled to portray. The word "propre" connotes something clean or orderly but also something owned; its usage thus suggests places are ordered and possessed, where rules exist and are generally followed.

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