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The UK corporate governance code principle of ‘gompily or explain’: Understanding code compliance as ‘subjection’

Roberts, John ; Sanderson, Paul ; Seidl, David ; Krivokapic, Antonije

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The UK Corporate Governance Code Principle of ‘Comply or Explain: Understanding Code compliance as ‘subjection’

John Roberts, University of Sydney
Paul Sanderson, University of Cambridge
David Seidl, University of Zurich
Antonije Krivokapic, University of Sydney

Corresponding Author Professor John Roberts, University of Sydney Business School
john.roberts

Abstract

The UK Corporate Governance Code Principle of ‘Comply or Explain’: understanding Code compliance as ‘subjection’

The focus of this paper is on UK Code compliance and the contests and confusions that have surrounded its principle of ‘comply or explain’. In contrast to many agency theory informed studies, the paper suggests that visible compliance with the Code cannot itself be taken as a reliable proxy for board effectiveness. Instead, drawing upon Foucault’s account of governance as subjection, we argue that, as a form of board accountability, visible compliance can only support the Code’s primary objective of establishing norms which shape the conduct of director’s conduct within boards. The contests and confusions as to the meaning of comply or explain are then explored in terms of the challenge regulators have faced, throughout the subsequent life of the Code, in respecting the freedom of action of directors, whilst nevertheless seeking to influence how this is exercised. The paper first explores three key moments in the evolution of the UK Code; the initial Cadbury committee two-page ‘Code of Best Practice’ in 1992, the more prescriptive 2003 post-Enron changes to the UK Combined Code following the Higgs review, and the retreat from such prescription in the 2010 changes to the Code. This is then complemented by drawing on qualitative empirical research to describe three very different ‘subject positions’ – refusal, cynical distance, and whole-hearted embrace - which directors have come to adopt in response to the Code. The paper concludes by pointing to the very different consequences for actual board effectiveness implied by these different, but largely invisible, responses to the Code.

Key words: Board effectiveness, Corporate Governance, Comply or Explain, Compliance, Foucault, subjection.

The UK Corporate Governance Code Principle of Comply or Explain: understanding Code compliance as ‘subjection’

We believe that our approach, based on compliance with a voluntary code coupled with disclosure, will prove more effective than a statutory code. It is directed at establishing best practice, at encouraging pressure from shareholders to hasten its widespread adoption, and at allowing some flexibility in implementation. .. Statutory measures would impose a minimum standard and there would be a greater risk of boards complying with the letter, rather than with the spirit, of their requirements. (Cadbury, 1992, 1.10)

The focus of this paper is on UK Code compliance and, in particular, the contests and confusions that have surrounded its principle of ‘comply or explain’. The above quote from the founding *Report of the Committee on the Financial Aspects of Corporate Governance* (1992) suggests that, in proposing the adoption of a voluntary code, its authors were pursuing two related but different objectives. Their first objective was to promote actual board effectiveness through setting norms of best practice for directors to follow. In this respect they argued for the superiority of a voluntary code over statutory measures, since the latter might encourage compliance only with ‘letter’ of requirements, whilst the former preserves the ‘spirit of enterprise’. Their second objective was to provide investors with a means to enhance their own confidence as to a board’s effectiveness, through new financial and corporate governance disclosures. These dual normative and accountability objectives then found expression in what, at the time, was the innovative disclosure requirement of ‘comply or explain’.

This paper argues that both investors and academics have typically ignored or failed to understand the dual nature of the Code’s objectives, and, as a consequence, have been prone to equate visible Code compliance with actual board effectiveness. From within the still dominant perspective of agency theory ‘corporate governance is about the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment’ (Shleifer and Vishny, 1997, p.737). Given the agency theory assumption that agents are, by nature, self-interested and opportunistic, only compliance with the Code is seen to secure the principal’s interests. Data on Code compliance has subsequently provided academics with infinite opportunities for testing the relationship between different governance variables and aspects of company performance, whilst explanations, if considered at all, have been explored

only in relation to whether they too comply (Brown *et al.*, 2011). Similarly, for investors, compliance with the Code is typically taken as a reliable proxy for good corporate governance, whilst explanations are ignored or viewed with suspicion. This paper challenges this too easy elision of visible Code compliance and effective corporate governance. The weak version of this argument insists that compliance with Code provisions, at best serves as a very crude and imprecise proxy for corporate governance effectiveness, and, at worst, can be positively misleading. Of necessity the focus of corporate governance disclosures is on structures and processes that are visible from a distance, but actual effectiveness depends on the mostly invisible conduct and relationships within a board (Owen, 2003; Walker, 2009). The stronger version of this argument, as developed here, suggests that the focus on formal compliance by practitioners and academics is itself misplaced. The primary focus and target of the Code is boards, and how directors exercise their own agency within these. In this respect, the ‘comply or explain’ disclosures should be seen merely as a form of board accountability, whilst the primary objective of the Code itself is normative, as it seeks to establish and promote a set of norms or ideals which will shape the conduct of directors’ conduct.

Surprisingly, the normative objectives of the Code, and the limits and constraints that these create for the use of codes as a mode of regulation, have received little attention in the corporate governance literature. Yet in what follows, through an exploration of the co-evolution of the Code since its inception in 1992, and its target and correlate – the conduct of directors within UK boards - we suggest that, in practice, it has been very difficult to maintain a balance between the Code’s normative and accountability objectives. The paper builds on the work of similar reviews (Nordberg and McNulty, 2013; Stewart and McNulty, 2015; Price *et al.*, 2018) which have sought to explore the evolution of the language of the UK Code. Our specific focus here, however, is on how the Code itself, and directors understanding of and response to it, have changed and adapted in relation to each other over time, as regulators have experimented with the potentials of the Code as a mode of regulation, and directors have experimented with what it means to be subject to the Code. Our analysis suggests that, in its now 28 year history, those who are charged with the maintenance of the UK Code have come to recognize that they must respect the freedom of action of directors, whilst nevertheless seeking to influence how such agency is exercised. Similarly, some

directors at least have come to understand the Code, not as a threat to their autonomy, but simply as an unavoidable condition of its exercise.

The paper begins with a brief review of the contests and confusions that have arisen amongst practitioners around the meaning of the Code principle of ‘comply or explain’, and how these have been largely mirrored in academic research on visible compliance. The paper then contrasts dominant agency theory perspectives of the ‘problem’ of corporate governance, with the Foucauldian view of governance as ‘subjection’ that we draw upon to inform our own inquiry into the Code’s operation. This inquiry is then pursued in two empirical sections. The first explores three key moments in the evolution of the Code – the recommendations of the Cadbury Committee’s Code of Best Practice, the changes to the Code following the UK Higgs review in 2003, and the 2010 revisions to the Code following the global financial crisis. The second, drawing lightly on qualitative empirical research in UK boards, describes three very different ‘subject positions’ directors have adopted in response to the Code; these we characterize as directors’ ‘refusal’, ‘cynical distance’, and ‘whole-hearted embrace’ of the Code. The paper concludes by pointing to the very different consequences for actual board effectiveness implied by these different, but largely invisible, responses to the Code.

THE CODE PRINCIPLE OF ‘COMPLY OR EXPLAIN’

_ CONTESTS AND CONFUSIONS

Although the Code was given force when compliance was made a listing requirement by the London Stock Exchange, the normative objectives of the original Code were reflected in its presentation to directors as a voluntary *Code of Best Practice*. Here the Cadbury Committee placed responsibility for ‘putting the Code into practice’ with the board of directors. It suggested that the Code should be followed by individuals and companies ‘in the light of their own particular circumstances’, and that, in doing so, boards should ‘give precedence to substance over form’. At the same time, the Committee asserted that compliance itself was a ‘matter for everyone concerned with corporate governance’ and, in particular, recommended that institutional investors ‘should use their influence as owners to ensure that the companies in which they have invested comply with the Code’ (1992, 6.16). To inform investors, whilst respecting the need for board discretion and flexibility, the Committee recommended that listed

companies should state in their report and accounts ‘whether they comply with the Code and identify and give reasons for any areas of non-compliance’ (1992, 3.7). Despite the clarity of this requirement, in practice, it leaves the meaning of compliance open to multiple interpretations. For directors, whilst the Code is voluntary, and leaves them free to explain rather than comply, it nevertheless requires them to explain any areas of non-compliance. For investors, does compliance mean that companies should be encouraged to comply with the Code *rather than* explain, or instead, that both compliance and explanations should be counted as compliance. These ambiguities in the principle of ‘comply or explain’ have remained a point of contention and confusion throughout the subsequent life of the UK Code.

The Hampel Committee – set up to review the early years of the Code’s operation – echoed Cadbury in asserting that good corporate governance is ‘not just a matter of prescribing particular corporate structures and complying with a number of hard and fast rules’ (1998, 1.11). However, its own consultations suggested that investors were seen by boards to have treated the Code as ‘sets of prescriptive rules’ and were only interested in whether ‘the letter of the rule had been complied with’. Such a ‘box ticking’ approach to compliance, it suggested, failed to take account of ‘the diversity of circumstances and experiences among companies, and with the same company over time’. The Committee also suggested that this ‘box ticking’ approach might encourage boards to ‘arrange matters so that the letter of every governance rule was complied with but not the substance’ (1998, 1.14). Its own attempt at clarifying the meaning of the principle of ‘comply or explain’ took the following form:-

‘We believe, as did the Cadbury Committee, that there can be guidelines which will be appropriate in most cases; but there will be valid reasons for exceptions. Where practices are approved by the board after due consideration, it is not conducive to good corporate governance for the company’s explanations to be rejected out of hand and for its reputation to suffer as a result’ (1998, 1.13).

This defence of a company’s right not to comply with the Code in all circumstances, and insistence that investors should listen to the explanations for such non-compliance, was echoed in subsequent reviews of the Code by the FRC.

A new challenge to the principle of ‘comply or explain’ arose in the wake of the 2007/2008 financial crisis when a European Commission Green Paper (2011) questioned the quality of company explanations, raising the possibility of regulatory, rather than investor oversight of such explanations (see also Keay, 2014). The UK responded with a series of discussions, sponsored by the Financial Reporting Council (FRC, 2012), from which emerged a change to the wording of the UK Code. This now specified that a board’s explanations of non-compliance ‘should set out the background, provide a clear rationale for the action it is taking, and describe any mitigating actions taken to address any additional risk and maintain conformity with the relevant principle.’ In the very latest iteration of the UK Code (FRC, 2018a) a number of new emphases have appeared with the inclusion of an explicit requirement to consider the interests of stakeholders, particularly employees. However, the principle of ‘comply or explain’ has retained its central role.

Alongside these regulatory reviews of the principle of ‘comply or explain’, have been numerous academic studies of UK compliance. Many early studies merely replicated the ‘box ticking’ approach of investors by focusing only on levels of compliance with the Code (Conyon, 1994; Conyon and Mallin, 1997; Weir and Lang, 2000). A study of ‘comply or explain’ by MacNeil and Li (2006) then echoed the concerns of some directors in arguing that, in practice, the principle was being enacted in the form of ‘perform or explain’; investors seemed only to take a strong interest in governance when financial performance waned (see also Roberts *et al.*, 2006). Only more recently have studies begun to explore the nature of the explanations that accompany non-compliance. In their 2010 study of the operation of the principle, Arcot *et al.* questioned the adequacy of both company explanations and investor attitudes to compliance. In the context of high overall levels of compliance, their study pointed both to the substantial number of companies providing no explanations for areas of non-compliance, as well as to the widespread inadequacy of the explanations that were offered. On the other side of the relationship, they also observed that investors seemingly continued to attach significance only to whether a company complied. Here they suggested that there may be ‘too much compliance’, and that investors should give greater attention to value-relevant differences in the quality of company explanations.

The Arcot *et al.* (2010) study became the stimulus for a series of more recent studies of the explanations offered for non-compliance. An initial study by Seidl *et al.* (2013) of the construction of legitimacy through different forms of explanations for non-compliance, has been further developed in studies by Shrives and Brennan (2015: 2017) of the ‘rhetorical strategies’ used in company explanations. From a legal perspective Keay (2014, p. 292) takes the inadequacy of some company explanations as a sign that their boards ‘regard shareholders with some contempt’, and on this basis advocates greater regulatory monitoring. Against this Luo and Salterio (2014) find the use of ‘explain’ in Canadian companies to be ‘strongly and positively associated with higher firm value’.

However, while valuable, these studies focus on *formal* compliance with the principle of ‘comply or explain’. This focus on the external accountability of boards to investors largely ignores the primarily normative objectives of the Code, and in this way has the potential to misunderstand or misrepresent both the purpose *and* limitations of the Code as a mode of regulating corporate governance. Given the centrality of the principle of ‘comply and explain’, not just to the UK Code but to the proliferation of governance codes globally (Aguilera and Cuervo-Cazurra, 2009; Zattoni and Cuomo, 2008), it is surprising that so little attention has been given within the academic literature to this principle and, in particular, to its primarily normative objective of influencing the exercise of director agency. Instead, much accounting research continues to seek merely to test the relationship between code compliance and company performance, despite early meta analyses that suggested that no reliable correlations could be found (Dalton, *et al.*, 1998, 1999, 2003; Masli *et al.*, 2018).

In contrast, this paper argues that it is the *freedom of choice* embodied in the principle of ‘comply or explain’ that is a decisive, if constraining, feature of codes as a form of regulation. The principle implies that the target of codes is not compliance as mechanistic rule following, but rather the agency of directors, and how they choose to exercise this. As the Cadbury Committee expressed this in the opening paragraph of its report:-

‘The country’s economy depends on the drive and efficiency of its companies. Thus the effectiveness with which their boards discharge their responsibilities determines Britain’s competitive position. They must be free to drive their companies forward, but exercise that freedom within a framework of effective accountability. This is the essence of any system of good corporate governance’ (Cadbury, 1992, 1.1).

In the remainder of the paper we develop a schematic review of the history of the UK Code, as well as of directors’ responses to the Code, to suggest that, for both regulators and directors, finding the ‘right balance’ between director ‘freedom’ and board ‘accountability’ has, in practice, proved very difficult. To inform our analysis of this two-sided history we draw on a theory of governance that has been largely ignored within the corporate governance literature – Foucault’s account of governance as subjection. In the next section, we contrast agency theory views of the ‘problem’ of corporate governance with some of the core elements of Foucault’s own attempts to understand governance as ‘subjection’ or ‘subjectification’.

FROM SELF-INTERESTED OPPORTUNISM TO SUBJECTION

The dominant conceptualization of the corporate governance ‘problem’ in the academic literature is derived from agency theory (Jensen and Meckling, 1976; Fama, 1980; Shleifer and Vishny, 1997). Following neo-classical economics, the root assumption of agency theory is of a self-interested and opportunistic individual and the problems that this poses for owners (principals) who employ executive (agents) to manage companies on their behalf. The problem of corporate governance, thus defined, is to find ways in which executives can be made to serve, not their own self-interest, but the interests of shareholders. Agency theory proposes a number of solutions to this problem. In part these solutions rely on the market, in particular, the so called ‘market for corporate control’ in the form of takeovers, and the executive labour market. The operation of both are argued to encourage executives to take account of owner interests as a part of the calculation of their own self-interest. There is also a more intimate set of solutions which involve the operation of boards of directors. The first involves the use of ‘independent’ non-executive directors who can monitor, and, if necessary, replace executives as a direct protection against their opportunism (Walsh and Seward, 1990). The second seeks to align the calculation of

executive self-interest with the interests of shareholder/owners through the use of incentives; notably share options and performance related pay (Jensen and Murphy, 1990; Shan and Walter, 2016).

At first sight the original Cadbury Code can be seen merely to echo the assumptions of agency theory, in particular in the emphasis it gave to what it termed the ‘control function’ of the independent non-executive directors in areas where there is a potential for the interests of executives to depart from the interests of the company and its shareholders. However, an agency perspective of the need for external monitoring of executive conduct, sees only compliance as important, therefore, it is difficult to understand both the Code’s voluntary status and the discretion it allows boards to comply *or explain*. In reality, the Cadbury Committee was concerned to go beyond such a narrow view of the role of non-executive directors. It suggested that their focus on non-executive director’s control function was the result of the Committee’s remit, and should not be allowed to detract from non-executive directors ‘primary and positive role’ in giving leadership to a business. In what follows, drawing upon the work of Foucault, we suggest that the target of the Code was not external control but rather the conduct and relationships of executive directors, non-executive directors and investors, in relation to whom it was seeking to establish a set of normative ideals or ‘guidelines’.

Agency theory embodies what Foucault terms a ‘sovereign’ view of power; in the case of corporate governance, how the sovereign property rights of owner/shareholders can be protected from the opportunism of the agents they employ to run their firms. Foucault offers an alternative view of power as ‘self-discipline’ or ‘subjection’. The way in which such self-discipline works is captured in the following (Foucault, 1977, pp. 202-3):-

‘He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection’

In relation to corporate governance, the field of visibility is created through the Code principle of ‘openness’ or transparency and, in particular, the disclosure requirements of the principle of ‘comply or explain’. Foucault’s suggestion is that those whose conduct is subject to such transparency, and who know it, come to internalize the power relation. It is this internalization of powerful external expectations within the self as a set of norms that distinguishes Foucault’s account of governance as subjection, from the traditional agency view. As subjection, governance has the form of a set of internalised norms against which directors monitor and judge both their own and each other’s conduct. Here governance takes the form of ‘self’-discipline by both executive and non-executive directors, occasioned by the knowledge that their own conduct is now visible to others. In this way the power of the Code is realised largely in anticipation of its exercise, and is something that directors come to practice upon themselves and each other. The agency view of governance, on the other hand, conceives of power solely as *external* monitoring of executive agents by shareholders and non-executive directors.

Such a Foucauldian perspective on governance has been highly influential within accounting research, but with a few exceptions, its focus has been on those subject to the discipline of accounting processes rather than the organizationally ‘powerful’ (Hoskin and Mave, 1987; Miller and O’Leary, 1987). Nevertheless, Foucault himself, in explaining the historical shift from sovereign to disciplinary modes of power makes use of Pinel’s account of the ‘treatment’ of George III early in the 19th century (Foucault, 2006). When King George develops a mania, a cure is effected through the King’s isolation in a padded room, and his being informed that ‘he is no longer sovereign, but that he must henceforth be obedient and submissive’. The King repeatedly protests against this treatment and, on some occasions, ‘in a fiery delirium’, ‘daubs the doctor with filth and excrement’. Foucault reads this conduct as an indication of the King’s impotence and subjection; despite such outbursts, after some months, this treatment produces ‘a sound cure without relapse’. Foucault describes these processes as a form of ‘reverse coronation in which it is quite clearly shown that it involves placing the king in a situation of complete subordination’, with the doctor as the ‘effective agent of this dethronement’ in telling him that ‘he is no longer sovereign’.

‘In place of this beheaded and dethroned power, an anonymous, multiple, pale and colorless power is installed which is basically what I will call disciplinary power’, in which the body and very person of the dethroned king, ... must be rendered “docile and submissive” by this new power’ (2006, p.22).

Analogously, the development of corporate governance can be understood as a process of the subordination of powerful senior executives and investors to a new form of normative self-regulation or subjection (Stein, 2008)

Whilst in *Discipline and Punish* Foucault developed a view of what he termed the ‘micro-physics’ of power, in later comments in *The Subject and Power* (1982) Foucault insists that it was not power but rather the subject that has been the general theme of his research. He defines subjection as follows:-

‘There are two meanings of the word subject: subject to someone else by control and dependence, and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to’ (1982, p. 212).

Compliance with the Code can be seen to contain these two related meanings. The Code seeks to control by making directors subject to it. It does so, however, not only through external disclosures, but also in the way that it frames an ideal or ethic for director conduct. Thus whilst agency theory relies solely on external monitoring and incentives to control what are assumed to be self-interested and opportunistic agents, what Foucault terms the ‘government of individualization’ concerns the more subtle goal of shaping the ‘identity’ of directors through promoting a set of norms against which they will come to judge their own and each other’s conduct. As he puts it (1982, p.220) :-

‘The exercise of power is not violence; nor is it consent which, implicitly, is renewable. It is a total structure of actions brought to bear upon possible actions; it incites, it induces, it seduces, it makes easier or more difficult; in the extreme it constrains or forbids absolutely; it is nevertheless always a way of acting upon an acting subject or acting subjects by virtue of their acting or being capable of action. A set of actions upon other actions’ .

This serves as an almost perfect description of corporate governance as a project. Its focus is primarily the actions of directors within boards; how they act upon

themselves, and upon the conduct of their fellow directors. But it also seeks to touch upon the conduct of investors, auditors, remuneration consultants, company secretaries as these in turn act upon the actions of directors.

Importantly, Foucault (1982, p. 221) insists that power always depends upon the *freedom* of the subject; 'Power is exercised only over free subjects, and only in so far as they are free'. Since it is the agency of the subject that is the target of power, he suggests that it cannot be exercised 'without knowing the inside of people's minds, without exploring their souls, without making them reveal their innermost secrets' (1982, p.214). The UK Code is 'voluntary', a form of self-regulation that was presented as more desirable and flexible than hard law. In this sense it is indeed concerned to influence how directors exercise their freedom of action, and it is this that the '*explain*' part of the principle enshrines. The authority and effectiveness of the Code lies in, and continues to depend on, its ability to respect and recognize the freedom of action of directors, whilst nevertheless seeking to direct their conduct towards what Cadbury seductively termed 'best practice'.

Although after 28 years the Code has become an established fact of corporate life, following Foucault it is important to see this as an ongoing process of *experimentation* that is constantly being elaborated and adjusted. As Foucault puts it (1982, p.224) :-

'The exercise of power is not a naked fact, an institutional right, nor is it a structure which holds out or is smashed: it is elaborated, transformed, organized; it endows itself with processes which are more or less adjusted to the situation'

In what follows we explore this evolution of the UK Code in relation to how it has sought to maintain an ambiguous and precarious balance between director freedom and accountability. We begin by exploring the evolution of the Code itself through tracing its changing form and content, and how this has been refined and constantly rebalanced in the light both of new crises and the knowledge of its own effects. We focus here on three key moments in the evolution of the Code which illustrate how it first established, then began to lose, and then sought to regain a balance between director freedom and accountability. We then explore the Code in terms of different

modes of compliance by directors as they have come to experience and learn about what it is to be subject to the Code.

EXPERIMENTING WITH SUBJECTION: THE EVOLUTION OF THE UK CODE

The Cadbury Committee

The genesis of the UK Code in 1991 was a series of unexpected corporate collapses – PollyPeck and Coloroll – in which companies that had been signed off as ‘going concerns’ by their board and auditor suddenly collapsed. The Cadbury Committee was initially sponsored by the Financial Reporting Council, the accounting profession, and the London Stock Exchange to look at ‘the financial aspects of corporate governance’. The primary concern of these bodies was with investor confidence in equity markets, and the quality of financial reporting upon which such markets were seen to depend. Shortly after the Committee began its work, the Maxwell scandal broke –the Mirror Group pension funds had been raided by the company’s Chairman, Robert Maxwell, possibly with the support or knowledge of directors who included his two sons – and a bank, BICC, collapsed. The Committee extended its considerations beyond financial reporting to the operation of the board itself.

Viewed from a Foucauldian perspective, the original version of the Code can be seen to have sought to introduce a series of ‘differentiations’ or ‘dividing practices’ into boards. The Code itself initiated a normative differentiation between ‘best’ and other practices, but it also made a recommendation to separate the roles of chairman and chief executive such that ‘no one individual has unfettered powers of decision’. A further key differentiation was between ‘independent’ and non-independent non-executive directors, with a majority of ‘independent’ non-executive directors being proposed in areas where there was the potential for the interests of executives to conflict with the company interest. The Committee recommended that boards should have formally constituted audit, remuneration and nominations committees in which such ‘independent’ non-executive directors were to be in the majority. The other prominent feature, discussed above, was the principle of ‘comply or explain’.

As part of its own review process the Cadbury Committee sought to consult very widely amongst interested parties, and so was able to forge a broad consensus around

what became the original Code of Best Practice. This form of review, based on wide consultation, has become a hallmark of subsequent UK corporate governance reform, and demonstrates a clear awareness in the FRC that the authority of the Code ultimately depends on director and investor support.

From the very beginning the Code was conceived as something to be further refined and, as part of this, Cadbury recommended that it be reviewed in the light of the early years of its operation. The review was conducted in 1998 and chaired by Sir Ronnie Hampel, then Chairman of ICI plc. As described above, the Hampel Committee criticised investors in relation to their 'box ticking' approach to company compliance, but otherwise left the content of the Code largely untouched save for a strengthening of the recommendation that companies should have a senior independent director as a check against the potential for the chairman to fail in the exercise of their role. Hampel also incorporated the findings of the 1995 Greenbury report on executive remuneration into what was now to be called the Combined Code on Corporate Governance. Greenbury had followed the Cadbury Committee in seeking to influence director' conduct by requiring greater disclosure of the details of executive pay; a requirement that subsequently had the unintended effect of greatly increasing executive awareness of pay relativities between companies (Ezzamel and Watson, 1998; Shan and Walter, 2016).

A significant way in which the Combined Code differed from the original Code of Best Practice, however, was in its structure. The Cadbury Code was just two pages in length with items presented under four headings; 'Board of Directors', 'Non-executive Directors', 'Executive Directors', and 'Reporting and Controls'. The twelve-page Combined Code consisted of two sections; the first on 'Companies' with subsections related to 'Directors', 'Director's Remuneration', 'Accountability and Audit', and 'Relations with Shareholders', and the second on 'Institutional Investors' with three sections on 'Shareholder Voting', 'Dialogue with Companies', and 'Evaluation of Governance Disclosures'. However, the content of each of these sections was now differentiated between a statement of 'Code Principles' and a more detailed statement of 'Code Provisions'. Arguably, this new division between 'Principles' and 'Provisions' was the Hampel Committee's attempt to differentiate between the 'spirit' and 'letter' of the Code.

The Higgs Review

The second moment in the life of the UK Code that we explore is the reforms, introduced in 2003, as a result of the *Higgs Review of the role and effectiveness of non-executive directors*. Unusually, this review was sponsored by the UK government (the DTI and Treasury) in the wake of the scandals of Enron and Worldcom in the United States. In contrast to the legal remedies of the Sarbanes Oxley Act in the United States (Bratton, 2003), this review suggested continued faith in the effectiveness of Codes as an instrument of board (self) governance. As with the original Cadbury Committee review, the core objective of the Higgs review was to restore investor confidence in the quality and reliability of financial reporting, upon which the entire UK equity market was felt to depend. Arguably, it was important in this respect for the UK Government to be seen to be doing something, and such concerns possibly shaped the subsequent FRC reforms to the UK Code in 2003. For the first time such reform was in part informed by qualitative academic research for the Higgs review (Roberts *et al.*, 2005) which sought to draw upon the experience of directors in relation to non-executive director effectiveness in their role.

The Higgs-inspired reforms were numerous and involved a substantial strengthening of existing Code provisions. The separation of the roles of chair and chief executive was made absolute, and chief executives were for the first time precluded from becoming chairman in the same company. Chairmen were also restricted from acting as Chair of more than one FTSE 100 company. The ‘independence’ of non-executive directors was more fully specified, and these were now required to constitute 50% of any board, excluding the chairman. New Code provisions were also introduced in relation to the recruitment and induction of non-executive directors, along with a recommendation that non-executive directors should normally serve in the role for no more than three, three-year terms. New disclosure requirements in relation to the frequency and attendance at board and board sub-committee meetings also became Code provisions.

All these changes seemed only to further extend the focus of the original Code on the ‘control function’ of independent non-executive directors, and suggested a faith in further prescription via the provisions of the Code. However, one change in the 2003

Code was of a qualitatively different form; a new requirement for the members of a board to conduct an annual appraisal of their own performance. This took the Code much closer to the ‘minds’ and ‘souls’ of directors in seeking to promote both reflexivity amongst directors in relation to the Code’s norms of effectiveness, and discussions within a board as to the effects of individual conduct upon colleagues and the overall effectiveness of the board as a group (Cankar *et al.*, 2010).

The academic research commissioned by Higgs had suggested that the traditional focus of the Code on board structure and composition could at best ‘condition rather than determine board effectiveness’ (Roberts *et al.*, 2005), which the study argued depended upon individual conduct and the functioning of the board as a group. Whilst this was re-iterated in Higgs’ report to the UK government in 2003, with perhaps the exception of the board appraisal provision, it was hard to see how this had found expression in the extended provisions of the Code. More recent revisions to the Code, however, have begun to accept and accommodate to such limitations.

The FRC led Revision of the Code in 2010

Since 2003, the FRC has conducted regular reviews of the Code. Here we discuss the changes the FRC made to the Code in 2010; changes which we argue marked a new phase in the attempt to refine the Code’s ability to influence the conduct of director’s conduct. These revisions arose in the context of the global financial crisis, and a government-initiated review of governance in banks and others financial institutions conducted by Sir David Walker, a former governor of the Bank of England. In the context of the financial crisis, the Walker review (2009) found that formal compliance with the Code was very high amongst all financial institutions, but that formal compliance with the Code did not give any clue as to why some institutions failed, whilst others survived. Instead, Walker argued that what differentiated the effective from ineffective boards of financial institutions was the largely invisible ‘behaviour and culture’ of individual directors and the board as a group. His review identified a whole series of actions that had contributed to the failure of governance in specific financial institutions. These included dominant /arrogant CEOs and a resultant absence of board debate, a lack of non-executive director ‘challenge on substantive issues as distinct from a conventional box-ticking focus on process’, and the short-term orientation of many shareholders and boards. However, Walker was then careful

to avoid making proposals that ‘risk attracting box-ticking conformity as a distraction from and alternative to much more important (though often more difficult) substantive behavioural change’ (2009, p.26).

These conclusions of the Walker review then informed a subsequent review of the UK Combined Code by the FRC, with a revised Code issued in 2010. For the first time a new Preface to the revised Code clearly stated both the purpose and limitations of the Code as a mode of regulation. It asserted, following Walker, that effectiveness ‘ultimately depends upon behaviour not process’, and, in doing so, explicitly acknowledged that the Code ‘cannot guarantee effective behaviour’ since it ‘is of necessity limited to being a guide only in general terms to principles, structures and process’ (FRC, 2010). Here the importance of the active agency of directors was emphasised in its urging directors to ‘think deeply, thoroughly and on a continuing basis about their overall tasks and the implications of these for the roles of their individual members’ (FRC, 2010). Whilst, as a necessary correlate to this, the FRC also recognised that, as regulator, it must itself refrain from too much prescription and its unintended consequence – what it termed the ‘fungus of the boiler plate’.

This new clarification of the dependence of board effectiveness on director conduct, and the consequent limits of the Code as a mode of regulation, was then given expression in the subsequent restructuring of the Code itself. Rather than add new rule-like provisions to an already extensive Code, the Code was restructured in an attempt to give new emphasis to the ‘spirit’ of its ‘principles’. The Code now began with a new section on ‘Comply or Explain’ which emphasized the importance of ‘trust’ in ensuring its ‘constructive use’. There then followed a section on ‘Main Principles’ presented under the new headings of ‘Leadership’, ‘Effectiveness’ and ‘Accountability’. Within this a number of revisions then attempted to draw back from earlier more prescriptive provisions. The requirement for a board to have a minimum of 50% independent non-executive directors, adopted in 2003, was dropped, recognizing that in some instances it had created large and unwieldy boards. Also removed was the restriction on an individual chairing more than one FTSE 100 company board. Instead, a new Code principle now only insisted that:-

‘The board and its committees should have the appropriate balance of skills, experience, independence and knowledge of the company to enable them to discharge their respective duties and responsibilities effectively’ (2010, B1)

The revised Code also included some minor, if important, changes to wording in relation to the need for non-executive director ‘challenge’ to strategy, the ‘leadership’ of a chairman, and the board’s responsibility for the ‘long term’ success of a business. This latter point went hand in hand with a new explicit recognition that institutional investors, who until then had been cast as responsible investors, were in practice a heterogeneous group, most of whom had very short-term horizons and objectives (see also the Kay Review, 2012). Those elements of the Code that related to investors were now to be embodied in a new Stewardship Code for investors, distinct from what was now to be called the UK Corporate Governance Code. The most recent 2018 version of the UK Code has crystallized this in a further shortening of the Code around its core principles of board leadership and company purpose, along with now separate ‘guidance on board effectiveness’ (FRC, 2018b).

EXPERIMENTING WITH SUBJECTION – COMPLIANCE AND/OR FORMS OF RESISTANCE

In the preceding section we have briefly sought to sketch what, in Foucault’s terms, could be called the ‘strategies’ of corporate governance as these have evolved through the repeated iterations of the Code. What is evident in these iterations is, first, a move towards greater and greater specification and prescription, which since 2010 has been consciously reversed with the explicit recognition that compliance with the Code ‘cannot guarantee’ effective governance. In its place has come a renewed emphasis on the Code’s normative objective to provide a set of principles for director conduct. Corporate governance here can be taken as a ‘regime de savior’ that defines what is relevant and appropriate in and for the conduct of directors. It should not be seen too narrowly as only what is contained within the Code, for it is tied in complex ways to notions of property, shareholder value, efficiency, competition and so on as these define a set of relevances and exclusions that define the taken for granted world of senior executives and those around them (Veldman and Willmott, 2016).

Foucault suggests that his ‘more empirical’ approach to the *how* of power relations might be best furthered by taking forms of resistance as a starting point. As he puts it:

‘at the heart of power relations and as a permanent condition of their existence there is an insubordination and a certain essential obstinacy on the part of the principles of freedom’ (1982, p.225). Resistance, for Foucault, is here defined alongside struggles against domination and exploitation as ‘struggles against subjection, against forms of subjectivity and submission’ (1982, p.212). He argues that such struggles assert:-

‘the right to be different and they underline everything which makes individuals truly individual. On the other hand, they attack everything which separates the individual, breaks his links with others, splits up community life, forces the individual back on himself and ties him to his own identity in a constraining way’ (1982, p.212).

The difficulty we want to explore concerns how to decide upon what constitutes effective resistance in relation to the three-fold characterisation that we develop below of director *refusal*, *cynical distance* and *whole-hearted embrace* of the UK Code.

In developing these characterizations, for illustrative purposes, we draw very lightly on quotations from a range of different pieces of qualitative UK board research conducted between 1995 and 2007, as well as subsequent work around the financial crisis (). The varied and iterative nature of this work sensitized us both to changes in the form and substance of the Code over this period, as well as to the varied responses of directors and boards to these.

Refusal

Refusal of the regime of corporate governance is perhaps the most obvious and explicit form of resistance, and, in its early years, the UK had its own prominent examples of such refusal – Sir Kenneth Morrison, executive chairman of Morrisons supermarkets, who refused to appoint non-executive directors to his board, and Marks and Spencer, where Sir Richard Greenbury refused to separate out his role of chairman and chief executive. As one interviewee suggested in relation to the latter:-

‘There was a lot of arrogance there. The results were coming through very strongly. There wasn’t a lot of respect from certain members of the board for the analyst and fund-manager community, because they didn’t feel they really understood the business’. Investor Relations Manager.

The prominence of these examples tells us something about the signal character of their resistance; they take the form of ambiguous morality tales. Whilst these companies prospered they were indeed free to refuse corporate governance, and institutional investors were impotent beyond complaining via the press about the neglect of their ownership rights. Consistent with MacNeil and Li's (2006) study of serial non-compliers with the Code, in these cases the principle of 'comply or explain' in practice appeared to be 'perform or explain'; investors tolerated non-compliance whilst profits flowed. However, both Sir Kenneth Morrison and Sir Richard Greenbury became vulnerable as soon as their companies' financial performance declined (The Guardian, 2005). Their former non-compliance meant that they then could find no support from an investor community that was pleased finally to be able to exercise its power. Both individuals were then easily forced from office making way for a more compliant regime of board governance to be introduced in both companies.

On the one hand, such resistance can be portrayed as an heroic struggle by entrepreneurial executives against the prevailing logic and rationality of governance procedures; their struggles against being subject to the Code were spirited. However, after the event, or at least with the wisdom of hindsight, the regime of knowledge that is corporate governance furnished directors, investors and the press with a way of reading their resistance differently. In particular, both individuals were re-depicted as exemplars of the very excesses of corporate power and executive entrenchment against which governance is designed to serve as a check. They were portrayed as individuals who had come to believe too fully in their own sovereignty within their organizations, and had come to exercise a destructive unrestrained power. In this way, their initial heroism could be recast as a morality tale that warned against the narcissism and excess of autonomy that often haunts those who pursue senior executive roles (Chatterjee & Hambrick, 2007). Importantly, such overt resistance to the Code has all but disappeared in the UK, no doubt in part as a result of the exclusion suffered in these two widely publicised cases. Where such resistance continues – for example, the recent criticisms of corporate governance by Tim Martin's, the founder/chairman of Wetherspoons– it possibly reflects both the continued operation of 'perform or explain', as well as the power of an executive who also retains a very substantial minority shareholding.

Cynical Distance

We characterize the second mode of compliance evident in our empirical research as ‘cynical distance’. It is manifest in continuous public criticisms by directors of corporate governance.

‘You go to conferences and hear people speak, and you get directors saying “Ah the trouble with Higgs is that it has kind of made us all into policemen. We are being driven down a compliance model, we don’t like governance because it is making us, its attacking the system of the unitary board because we are no longer able to get involved with strategy, we are no longer able to get involved in executive decisions, we are no longer able to be at one with the executives.”’
Company Secretary

These criticisms of corporate governance are particularly interesting because, consistent with Foucault, they seem to be motivated by a felt sense of intrusion upon director autonomy. As in the above quote, some directors resent the ‘dividing practices’ that the Code has introduced into the boardroom. However, the other significant aspect of this position is that, despite their complaints, these directors nevertheless still comply with the Code. The Code, and investors attitude to the Code, casts directors, in their own minds, as victims who have no choice but to ‘comply or be damned’. Foucault is helpful here precisely because he points to such directors’ complicity in compliance, for, in practice, it is they who practice compliance upon themselves and each other, even as they deny the freedom of their own agency. In their own analysis of such ‘cynical distance’, Fleming and Spicer (2003) argue that, paradoxically, such distancing makes compliance easier, as appears to be the case with directors. If one looks beyond their overt objections to the Code, and instead to their conduct, then this can be characterised as a rather pedantic application of the letter of the Code within their boards. Under the imagined gaze of the investor, the Code is followed rigidly in a way that ensures, in the event of a corporate failure, that as individuals they will not be criticized.

‘The problem is that if you don’t dot the I’s and cross the T’s you leave yourself and the rest of the board open to criticism. If, for example, you had poor performance and then it was discovered that there weren’t some T’s crossed, you’re guilty. If you had poor performance and your T’s were crossed, well, that’s all right. If you had great performance and there were no T’s crossed at all, people don’t care.’
Non-executive Director

As Power describes, in relation to the potentially ritualistic character of risk management practices, there is then a ‘potentially catastrophic downward spiral in which expert judgement shrinks to an empty form of defensible compliance’ (2007, p.42). Again, Foucault’s insistence that governance depends upon the freedom of the subject seems particularly telling, for with such cynical distance and passive, unthinking compliance, the Code begins to lose its proper purchase on the conduct of directors. The outer form of compliance takes precedence over its substantive effects; the opposite of the intentions of the original Cadbury Committee.

Whole-hearted Embrace – the ‘cultivation’ of the board

The third ‘subject position’ that we will touch on here is the opposite of the above – what we will term the whole-hearted embrace of the spirit of the Code. Here the Code, and the necessity of compliance with the Code, is accepted but taken as a necessary, but not sufficient condition for board effectiveness. Compliance is here rationalized as the price of director freedom; as something that is done primarily to give distant others confidence in the quality of board governance.

‘Like it or not, in today’s democracy, justice not only needs to be done but needs to be seen to be done. If the price of being free to run our business is to do this thing called corporate governance, then that is a very honourable and good reason for doing it. Truth be told, it doesn’t hurt to be a bit formalised’

Chairman

The mindset here is less paranoid and less obsessed with its own autonomy.

Paradoxically, however, this then seems to leave directors free to pursue their own version of best practice in the context of their own boards. On the one hand, this can be read as the fullest form of subjection to the Code; the spirit of the Code in relation to its ideals of board effectiveness is thoroughly embraced. Such directors believe in the importance of the work of the board, and work hard to achieve its effectiveness. In this sense, the Code has achieved a grip upon the ‘minds’ and ‘souls’ of directors. On the other hand, it is here that directors seem able to re-discover their own autonomy in relation to the Code.

Because of the way that boards function as a group, critical here is the attitude and conduct of the board chairman (Roberts and Stiles, 1999). Directors repeatedly report that the conduct of the chairman is decisive for the effectiveness of the board and the other non-executive directors.

‘I agree with the separation of the roles of chairman and chief executive. But that’s the sort of minimum, and you then have all the questions about how much commitment does the chairman give to build this board and what does that leave you with? And commitment means both time and energy and intellectual application. And the difference between a board where you have a chairman who gives the time and is really interested in having feedback in working out whether his board is effective, and if it’s not effective, what do you need to do next, and a chairman who gives a minimum of time commitment and wishes to be a figurehead, is huge.’ Non-executive Director

In part such ‘time, energy and intellectual application’ is applied to the relationship with the chief executive and executive directors, where the chairman acts as a coach and dependable advisor to the chief executive, whilst still respecting their executive authority. This serves as a valuable resource to the chief executive, but also furnishes the chairman with a knowledge and understanding of the company that then allows him or her to create the conditions for non-executive effectiveness. This depends upon the rigour and appropriateness of non-executive selection as well as subsequent induction and preparation – the quality of board papers, the structuring of the agenda and so on. But significantly, in such boards there are also often deliberate attempts to more fully develop the strategic role of the board.

‘We call it the three-strike rule, we give them three opportunities to look conceptually at what we are proposing, so that it’s obviously looking at an opportunity, and then that comes back to go through the detail with the board, answer any questions, and then we come back and get the approval. You wouldn’t be fulfilling that purpose if you didn’t do it like that, and actually nor would you really be tapping into the skills and experience that you should have appointed to your board. They are not there just to sit on the board and have the right number. They are there to add some value to your thinking in the business. You have to have a process that gets their thinking into it.’
Company Secretary

As noted above, although since 2003 the Code has included reference to the board’s role in strategy, it initially gave prominence to specifying the ‘control function’ of the ‘independent’ non-executive director. The dividing practices Cadbury introduced

emphasize, and were intended to emphasize, the potential for executive conflicts of interest, and how independent non-executives could be used to guard against these. But, if given too much weight, such dividing practices can encourage executive directors to see the board as something that is there to serve the interests of investors rather than their own. This can, in turn, feed a negative dynamic in which executives seek to minimize the role of the board (Pettigrew and McNulty, 1995). Whereas control and monitoring emphasize these divisions, significantly the fuller development of a board's strategic role can do much to re-constitute the substance of the unitary designation of UK boards (Pugliese et al, 2009). Strategy provides a shared object of attention - a common task - through which executives can draw upon the experience elsewhere of non-executive directors in support of their own performance. A whole variety of practices allow such a strategic focus to a board's work; the use of away days, the early exposure of executive thinking to the board, the careful management of the board agenda to create space for substantive discussions, the use of informal spaces like board dinners for discussion and debate. All this serves to make board processes more engaged and productive. Such boards are still fully Code compliant but 'divisive' control is framed within the shared task of longer-term strategy. Whilst such practices can be seen as the most thorough and complete form of director subjection, paradoxically, they can also be read as the most developed form of resistance for they serve to reclaim and assert the agency and authority of directors within a particular board.

DISCUSSION AND CONCLUSIONS

In the above we have sought to give an account of the repeated iterations of the UK Corporate Governance Code as an evolving *experiment in subjection*. The first and perhaps most important implication of such an analysis is indeed the suggestion that the target of the Code is director subjectivity; that the Code is seeking to influence how directors act upon themselves and upon each other. It seems highly probable that agency theory, as a 'dominant institutional logic' (Westphal and Graebner, 2010), was drawn upon by the Cadbury Committee in 1992, and shaped its focus on the 'control function' of the independent non-executive director. Nevertheless, from its inception in the UK, this agency logic was incorporated within the Code with the purpose of 'establishing best practice', rather than merely ensuring that independent non-executive directors monitored and supervised self-interested and opportunistic

executives. Disclosure in the form of ‘comply or explain’ then gave visibility to board structure and process, creating the potential for their accountability to shareholders. Nevertheless, the Code was primarily targeted at directors themselves whom it argued were ‘responsible for ensuring that their actions meet the spirit of the Code’ (1992; 3.10). In line with Foucault, the Cadbury report begins with an assertion of the ‘freedom’ of directors, arguing only that, with this, should come accountability – the terms of which the Code then sought to provide through requiring companies to ‘comply or explain’.

Following Foucault’s particular conception of governance as ‘a mode of action upon the action of others’, we have then sought to trace the history of the Code as an ongoing experiment in subjection. One side of this has involved our tracing of some of the key iterations of the Code. The original Cadbury conception introduced a series of dividing practices into boards – between chairman and chief executive, and executive and independent non-executive directors. In retrospect, however, its two-page Code of Best Practice seems light in terms of specific prescriptions that touch only on structure and process. In the face of subsequent corporate scandals, it was perhaps inevitable that the successors to Cadbury – Greenbury, Hampel, and then Higgs – would seek to elaborate the provisions of what was now the Combined Code. Here we have focused on the changes to the Code that followed the collapse of Enron and Worldcom in the United States, and the resultant UK Higgs review of the role and effectiveness of the non-executive director. This led to the further extension and sharpening of Code provisions in relation to the chairman and chief executive, the role of the chairman and senior independent director, an increase in the number of non-executives and detailed specification of their independence, and an elaboration of new objects of disclosure in relation to attendance, frequency of meetings and so on. But we have suggested that this seemingly rational elaboration of Code provisions possibly began to intrude excessively on the freedom of action that, Foucault insists, is the necessary condition of governance as subjection. Such, at least, was the explicit conclusion of the 2010 iteration to the Code which asserted that Code compliance does not in itself signify ‘good governance’, because this depends upon ‘effective behaviour’ which the Code ‘cannot guarantee’. Instead, in this more recent form, the Code sought to again emphasize the ‘spirit’ of its principles, whilst retreating from some of its earlier detailed and prescriptive rule-like provisions. In line with Higgs’

new provision for annual board appraisals, the new Code urged a ‘deep and continuous’ reflexivity on the part of directors. In this way, at least from a Foucauldian perspective on governance, the Code finally found its proper object in encouraging directors to reflect upon how their actions impact upon their colleagues and the task of the board.

As a complement to these changes to the form and focus of the Code, we have also sought to trace how director’s themselves have come to act in relation to its norms. Precisely because subjection targets the exercise of freedom by the subject, Foucault insists that it will always involve a certain recalcitrance or insubordination. Arguably, however, it has also taken time for directors simply to learn what it is to be subject to the Code; this too involves something of an experiment in subjection. In the above, drawing upon earlier empirical research, we have traced three ‘subject positions’ – refusal, cynical distance, and whole-hearted embrace - to describe three very different ways in which directors have, in practice, allowed the Code to ‘play upon themselves and each other’.

In the context of corporate governance, Foucault’s description of resistance as the defence of the ‘truly individual’ seems to be echoed in the heroic struggles of the few directors who chose to ignore or defy the new ‘regime de savoir’ of corporate governance. Their spirited defence of their autonomy was grounded, however, in their considerable hierarchical power. With the wisdom of hindsight and in the light of failing financial performance, this could then easily be recast as an example of the very managerial entrenchment and failures of accountability that the Code sought to remedy. In the history of the UK Code such extremes of outright rebellion have always been exceptional, and over time, have become more so, in part perhaps because so much effort has been given to constructing and maintaining consensus in relation to the Code’s normative specifications of best practice. As such the *refusal* of a few has served only to advertise the boundaries of the Code’s specification of acceptable director conduct. Judging by the current very high levels of formal compliance with the Code, after 28 years there is little thought amongst directors of an outright refusal (Sanderson *et al.*, 2010). However, empirical research suggests that this formal compliance masks important differences in quite how directors comply

with the Code, which in turn has very different consequences for the resultant board dynamic and its effects and effectiveness (Roberts, 2012).

By way of a conclusion to this paper, we want to draw upon Butler's (2005) reading of Foucault's later work to explore the important differences between the two very different forms of compliance that we have characterised above as *cynical distance* and *whole-hearted embrace*. The distinction usefully captures both the undesirable, if unintended, consequences that can arise within a board if too much weight is given to visible formal compliance, as well as the positive potentials for board effectiveness of understanding compliance as subjection. For the *cynical* director, as with refusal, the Code is resented for the divisions and perceived dysfunctions that it has introduced into the UK unitary board. However, unlike refusal, cynical distance sees no alternative but to comply with the Code and therefore, reluctantly and somewhat grudgingly, follows the letter of the Code. By contrast *whole-hearted embrace* seems to be founded in a more creative form of compliance with the norms that the Code advertises.

In her own reading of Foucault, Butler sees an evolution in his thinking which possibly allows us to better understand the relation between these two forms of compliance. He draws a contrast between the punitive account of the formation of the subject that Nietzsche (and Freud) offers – of conscience as the turning of an original aggression back on the self, and hence of codes of morality as codes of punishment, – and Foucault's attempt in his later work to conceive of ethics as a 'cultivation' or 'care of the self' (Foucault, 1986, 1987).

'Whereas in his earlier work, he (Foucault) treats the subject as an 'effect' of discourse, in his later writings he nuances and refines his position as follows: The subject forms itself in relation to a set of codes, prescriptions, or norms and does so in ways that not only (a) reveal self-constitution to be a kind of *poiesis* but (b) establish self making as part of the broader operation of critique' (Butler, 2005, p.17).

The *cynical* response to the Code described above can perhaps be explained as a way in which directors effectively treat their own agency as an 'effect' of the Code. As the earlier quote about crossing 'I's and 't's' implied, the mechanism of this is director's desire for investor recognition. To use the language of Lacan (1977), it is as if the

director is caught in the ‘lure’ of the imagined gaze of the investor, and must conform in order to avoid personal reputational damage. Given the emphasis within the text of the Code on the ‘control function’ of the non-executive director, it is this that non-executive directors then enact within the board. For them, however, it is as if the Code has robbed them of their own agency, is ‘making them’ into policemen in a way that divides the unitary board, and excludes them from effective involvement in executive strategy making. The only remnant of agency lies in their capacity to complain of the negative effects of the Code.

In contrast to this, *whole-hearted embrace* seems to (re-)open the possibility of director agency; to reclaim it as a form of *poieses* or self-making by directors, as a creative relation to the norms advertised by the Code. Butler’s pertinent observation here is that ‘there is no making of oneself (*poiesis*) outside of a mode of subjectivation (*asujettissement*) and, hence, no self-making outside of the norms that orchestrate the possible forms that a subject may take’ (2005, p.17). The implication here is of the illusion of an absolute autonomy or self determination; of freedom as an absence, rather than a creative relation to constraint. There is no alternative but for directors to be subject to the Code, but with *whole-hearted embrace* this is consciously acknowledged as the need to be seen to comply, which is accepted as ‘the price of freedom’ to then run the business. Critique then takes the more active form of seeking, within the context of a particular board, to overcome the potential dysfunctions created by the emphasis that the Code places on the control function, and, through their own efforts, to give greater emphasis to the strategic work of the board as a group. This is subjection, but an active and creative form of subjection. As the Cadbury Committee argued, and the 2010 revisions reasserted, the spirit of the Code is ‘to be followed by individuals and companies in the light of their own particular circumstances’ (1992: 3.10). But this following, in its ‘care’ or ‘cultivation’ of the board as an effective group, immediately escapes the unavoidably limited written provisions of the Code, and in this way begins to develop new practices that may themselves later come to be formally codified.

A clear methodological implication of the above analysis of corporate governance as *subjection* is that qualitative empirical research is essential in order to understand the actual effects of the Code (McNulty *et al.*, 2013). The still dominant mode of inquiry

into corporate governance is distant, positivist research that typically seeks, using large data sets, to test aspects of formal compliance against company performance. Whilst corporate governance as a project has always been driven by a concern to restore or sustain investor confidence in equity markets, its most important consequence lies in the way that it frames director subjectivity by setting norms for their conduct. For such powerful ‘individuals’ to be subject to the Code, and, through this, to be subject to some form of accountability from fellow directors and investors, is an essential check upon the fantasies of omniscience and omnipotence that haunts what Foucault calls ‘the fiction of the individual’. If, as we have argued above, the target of corporate governance is the subjectivity of directors – how they act upon themselves and upon each other – then this can only be explored and understood through encounters with them as subjects. As the Code now explicitly acknowledges, to study the effects of the Code only through the lens of formal compliance is at best a very weak, and, at worst, a positively misleading proxy for these subjective effects and how they impact upon actual board effectiveness.

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