

**PART I**

Foundations

## 1

## Global Shareholder Stewardship

*Complexities, Challenges and Possibilities*

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## 1.1 INTRODUCTION

In 2019, when we started this research project, the world was a very different place. Not only could we never have anticipated that, as this book went to press, facemasks would be a ubiquitous accessory, but it was beyond our wildest imaginations how much our understanding of *shareholder stewardship* would expand and evolve. As the excitement of research lies in discovering the unknown, the pages that follow in this book are full of excitement as they reveal many important discoveries.

Upon reflection, perhaps from the outset, we should have been more sanguine about the prospects for this research project. In 2010, the United Kingdom hastily released the world's first stewardship code (UK Code 2010) in response to the 2008 Global Financial Crisis (GFC).<sup>1</sup> The UK Code 2010 was designed to cure what was perceived to be the UK's primary corporate governance malady: rationally passive institutional investors in a country characterized by a dispersed ownership structure. It sought to achieve this by using a 'soft'<sup>2</sup> law code to incentivize institutional investors – who own most of the shares in UK listed companies<sup>3</sup> – to become actively engaged shareholder 'stewards'.

In the 2010s, this bespoke solution to the UK's 'ownerless corporations' problem went global. UK-style stewardship codes (in the broad sense) now exist in twenty jurisdictions, on six

\* The authors would like to thank the Centre for Asian Legal Studies at the National University of Singapore Faculty of Law for funding the research assistance for the chapter and Jordan Ng for his exceptional work as a research assistant. Any errors remain our own.

<sup>1</sup> Financial Reporting Council, *The UK Stewardship Code* (July 2010) [www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf](http://www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf) accessed 25 May 2021 [hereinafter UK Code 2010].

<sup>2</sup> 'Soft', non-binding and more often non-statist rules in corporate governance – as opposed to 'hard', legally binding and statist rules – have a long history back to the exponential rise of corporate governance codes in the 1990s. While this binary distinction between soft and hard law rules is important in heuristic terms, it is important to recognize that in practice there are overlaps between the two and soft corporate governance norms often bear a high degree of coerciveness. See e.g. Gregory C Shaffer and Mark A Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94 *Minnesota Law Review* 706, 716 (examining the relationship between hard and soft law and noting that 'hard and soft law are best seen not as binary categories but rather as choices arrayed along a continuum'). For a more recent discussion in the area of corporate governance rules, see Dionysia Katelouzou and Peer Zumbansen, 'The New Geographies of Corporate Governance' (2020) 42 *University of Pennsylvania Journal of International Law* 51, 114–20.

<sup>3</sup> The latest data from the Office of National Statistics reveal that 80.4% of UK public equity as of 2018 is in the hands of institutional investors, but the majority of them (54.9%) are foreign (non-UK) investors. See Office for National Statistics, 'Ownership of UK Quoted Shares: 2018' (14 January 2020) [www.ons.gov.uk/releases/ownershipofukquotedshares2018](http://www.ons.gov.uk/releases/ownershipofukquotedshares2018) accessed 4 February 2022.

continents, and are embedded in a panoply of legal systems, shareholder markets and corporate cultures.<sup>4</sup> In addition, stewardship codes have been developed at international and regional levels,<sup>5</sup> making shareholder stewardship an international corporate law phenomenon.<sup>6</sup> The appearance of UK-style stewardship codes and similar initiatives in such diverse and foreign environments should have alerted us to the fact that there was still much to be explored – but the existing Anglo-American-centric scholarship was blinding.<sup>7</sup>

To the best of our knowledge, before this project, never before had corporate law experts from each of the twenty jurisdictions with a stewardship code been brought together to undertake an in-depth contextual, comparative and empirical analysis of shareholder stewardship.<sup>8</sup> The result of this undertaking – which also includes analyses of stewardship in the world's two largest economies without stewardship codes (China and Germany) – is the revelation that stewardship

<sup>4</sup> Appendix (Table 1.5) and Table 1.2. We adopt the broadest definition of stewardship codes as including 'preliminary stewardship initiatives'. As such, we have included Norway in the appendix of stewardship codes in this chapter (see Appendix, Table 1.5) and included a chapter on Norway in this book for comparative purposes. For the definitional distinction between stewardship codes and preliminary stewardship initiatives on the basis of three criteria (drafting style, content and scope), see Katelouzou and Siems, *The Global Diffusion of Stewardship Codes*, Chapter 30. See also Mähönen, Sjäffell and Mee, *Stewardship Norwegian-Style*, Chapter 8 (noting that Norway does not have a stewardship code in the conventional sense but a 'preliminary stewardship initiative').

<sup>5</sup> The most important transnational stewardship codes include the ones developed by the European Fund and Asset Management Association (EFAMA) and the International Corporate Governance Network (ICGN). The revised EU Shareholder Rights Directive (Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/1 (SRD II)) also incorporates aspects of shareholder stewardship usually found in stewardship codes in its articles 3g (engagement policy), 3h (investment strategy of institutional investors and arrangements with asset managers) and 3i (transparency of asset managers), but it is excluded from the Appendix (Table 1.5) because of its legal nature as a directive rather than a code. Further on the stewardship provisions of the SRD II, see Iris H-Y Chiu and Dionysia Katelouzou, 'From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?' in Hanne S Birkmose (ed), *Shareholders' Duties* (Kluwer Law International 2017) 131–52 and Dionysia Katelouzou and Konstantinos Sergakis, 'When Harmonization Is Not Enough: Shareholder Stewardship in the European Union' (2021) 22 *European Business Organization Law Review* 203.

<sup>6</sup> The role of international organizations as key standard-setters of corporate law today is illuminated in the recent work by Pargendler, who highlights that, in the area of stewardship, the IMF and the World Bank have also supported the diffusion of norms through their ROSC (Report on the Observance of Standards and Codes) assessments. See Mariana Pargendler, 'The Rise of International Corporate Law' (2021) 98 *Washington University Law Review* 1765.

<sup>7</sup> Gen Goto, Alan K Koh and Dan W Puchniak, 'Diversity of Shareholder Stewardship in Asia: Faux Convergence' (2020) 53 *Vanderbilt Journal of Transnational Law* 829. See also Koh, Puchniak and Goto, *Shareholder Stewardship in Asia*, Chapter 29. It should be noted that Jennifer Hill's article (Jennifer G Hill, 'Good Activist/Bad Activist: The Rise of International Stewardship Codes' (2018) 41 *Seattle University Law Review* 497) stands out as a piece of research that preceded this project in undertaking a comparative analysis of stewardship. However, as noted in Chapter 29, '[a]lthough Hill correctly identifies the difference in policy objectives between [codes,] she does not go so far as to consider the alternative possibility that stewardship itself means different things in [different jurisdictions]'. In a subsequent article, Hill summarized recent developments in Asia as follows: 'Japan adopted its own Stewardship Code, based on the U.K. model, in 2014, and many other Asian jurisdictions have now followed suit.' See Jennifer G Hill, 'The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat' [2019] *University of Illinois Law Review* 507, 516.

<sup>8</sup> The following chapters all contain empirical evidence: Van der Elst and Lafarre, *Shareholder Stewardship in the Netherlands*, Chapter 4; Birkmose and Madsen, *The Danish Stewardship Code*, Chapter 7; Ringe, *Stewardship and Shareholder Engagement in Germany*, Chapter 9; Kang and Chun, *Korea's Stewardship Code and the Rise of Shareholder Activism*, Chapter 11; Lin, *The Assessment of Taiwan's Shareholder Stewardship Codes*, Chapter 12; Donald, *Stewardship in the Hong Kong International Financial Centre*, Chapter 13; Tan, *Institutional Investor Stewardship in Malaysia*, Chapter 15; Kowpatanakit and Bunaramueang, *Thai Institutional Investors Stewardship Code and Its Implementation*, Chapter 16; Varottil, *Shareholder Stewardship in India*, Chapter 17; Puchniak and Lin, *Institutional Investors in China*, Chapter 18; Ouko, *Stewardship Code in Kenya*, Chapter 23; Katelouzou and Klettner, *Sustainable Finance and Stewardship*, Chapter 26; Katelouzou and Sergakis, *Shareholder Stewardship Enforcement*, Chapter 27; Katelouzou and Siems, *The Global Diffusion of Stewardship Codes*, Chapter 30.

is far more complex than originally understood. However, merely revealing that something is complex is of marginal benefit – understanding the drivers and consequences of the complexity is where valuable insights are gained.

Against this backdrop, the goal of this chapter is to explain why shareholder stewardship around the world – *global shareholder stewardship* – is far more complex than the existing literature suggests, and how this complexity impacts current theories and existing practices. To explain complexity, this chapter provides a loose taxonomy of global shareholder stewardship by categorizing stewardship along three dimensions. The first dimension illuminates how stewardship can be *conceived* in a variety of ways – which makes the intellectual exercise of understanding stewardship complex and presents a challenge for policymakers to implement an idea with multiple conceptions. The second dimension compares the *formal design* and the *content* of stewardship codes globally and reveals that they have largely been modelled after the first version of the UK Code (2010/2012) – creating a mirage of global uniformity based on the UK model of stewardship. The third dimension demonstrates how the different origins of the codes (government codes versus institutional investor codes), a variety of mechanisms for enforcing (or not enforcing) codes, and jurisdiction-specific corporate governance factors that impact how the codes *function*, result in stewardship serving a variety of functions which would have never been anticipated by the original drafters of the UK Code. This complexity, which has largely been overlooked in the literature, creates *distinct varieties of stewardship*. Based on the distinct varieties of stewardship in jurisdictions around the world, this chapter concludes by illuminating the *challenges* and *possibilities* of global shareholder stewardship. The taxonomy also serves as a useful lens for observing the common themes and points of intersection that make the whole of this book greater than the sum of its individual chapters.

## 1.2 MULTIPLE CONCEPTIONS OF SHAREHOLDER STEWARDSHIP: INTELLECTUAL COMPLEXITY REVEALED

The starting point for any comparative analysis is to identify the subject of comparison. At the outset of this project, we (incorrectly) assumed that this would be relatively simple as the project was focused on a global comparison of ‘shareholder stewardship’. What we quickly realized, however, was that ‘shareholder stewardship’ is an ambiguous term which has come to mean different things, at different times, in different places.

From our review of the chapters in this book, there are at least five conceptions of what the term ‘shareholder stewardship’ means. The first conception is that institutional investors will *actively engage* as ‘stewards’ in the *corporate governance* of companies in which they are shareholders. This concept of stewardship fits with the idea behind the original UK Code 2010 and its revised 2012 version:<sup>9</sup> to incentivize passive institutional investors to become active shareholder stewards by using a ‘comply or explain’ code.<sup>10</sup> In theory, this concept of stewardship made sense in the UK context as institutional investors own a majority of shares in listed companies and, therefore, collectively have the legal right to steward them *if* they have the incentive to do so. Although, in theory, the concept was sound, in practice, after a decade, the

<sup>9</sup> Financial Reporting Council, *The UK Stewardship Code* (September 2012) <[www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-\(September-2012\).pdf](http://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf)> accessed 25 May 2021 [hereinafter UK Code 2012].

<sup>10</sup> The overall aim of shareholder stewardship in the original UK codes was to promote long-term shareholder value in alignment with the principle of enlightened shareholder value which is mandated under the Companies Act 2006, s 172. See Dionysia Katelouzou, *The Path to Enlightened Shareholder Stewardship* (CUP) (forthcoming).

consensus is that the UK Codes 2010 and 2012 (which are fundamentally the same)<sup>11</sup> failed to incentivize institutional investors to become actively engaged shareholder stewards.<sup>12</sup> Surprisingly, despite this domestic failure, this original, corporate governance-focused concept of stewardship appears in the overwhelming majority of the jurisdictions in the world that have adopted a stewardship code (a curiosity that we will examine in detail).

However, despite its global ubiquity, this original, corporate governance-focused concept of stewardship is a *misfit* in all the jurisdictions that have adopted a code, with the notable exceptions of the UK and the US.<sup>13</sup> This is because, outside of the UK and the US, institutional investors rarely own a majority of shares in listed companies.<sup>14</sup> Therefore, even if the code succeeds in transforming institutional investors into actively engaged shareholders, they will not have the collective legal power to ‘steward’ listed companies in most of the jurisdictions around the world. This is reinforced by the fact that, outside of the UK and the US, and a handful of other jurisdictions, a substantial portion of companies have a rationally active *controlling-block shareholder* who has both the legal rights and the economic incentive to steward the company.<sup>15</sup> In these jurisdictions, ‘ownerless companies’ are virtually non-existent and passive institutional investors – who own only a minority of shares in listed companies – are more akin to ‘absentee tenants’ than ‘absentee landlords’.<sup>16</sup> Thus, in practice, outside of the UK and the US, the original corporate governance-focused conception of stewardship on the part of institutional investors theoretically should have a completely different target.

This is how the second conception of stewardship emerged. While in the UK and the US the direct target of shareholder stewardship is corporate (mis)management, in jurisdictions with increased concentration of equity ownership, shareholder stewardship arguably should be conceived to transform institutional investors into actively engaged shareholders to monitor controlling shareholders and reduce ‘tunnelling’.<sup>17</sup> Using the economic jargon, while the first conception of shareholder stewardship aims to minimize the agency problems between corporate managers and shareholders, the second conception aims to solve the agency problems between minority and controlling shareholders.<sup>18</sup> Although controlling shareholders, rather than management, should be the key target of corporate governance-focused shareholder stewardship where concentrated ownership structures prevail, there is surprisingly no stewardship code which has explicitly adopted this second conception of stewardship. Rather, as will be explained, almost all stewardship codes have been modelled on the UK Code 2010/2012, and there are only passing references to the need for engagement by institutional investor-stewards with controlling shareholders in two jurisdictional-specific codes, those of

<sup>11</sup> See also Davies, *The UK Stewardship Code 2010–2020*, Chapter 2, and Katelouzou (n 10) (referring to them together as the ‘first version’ or ‘first generation’ of the UK Code, respectively).

<sup>12</sup> For an early critique, see Brian R Cheffins, ‘The Stewardship Code’s Achilles’ Heel’ (2010) 73 *Modern Law Review* 1004. More recently, see John Kingman, ‘Independent Review of the Financial Reporting Council’ (Department for Business, Energy and Industrial Strategy, December 2018) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/767387/frc-independent-review-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387/frc-independent-review-final-report.pdf) accessed 4 February 2022 [hereinafter Kingman Review]; Edward Rock, ‘Institutional Investors in Corporate Governance’ in Jeffrey Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (OUP 2018) 16–28.

<sup>13</sup> Dan W Puchniak, ‘The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit’ *The American Journal of Comparative Law* (forthcoming).

<sup>14</sup> Puchniak (n 13); see also Lim and Puchniak, *Can a Global Legal Misfit Be Fixed?*, Chapter 28.

<sup>15</sup> Puchniak (n 13). For a detailed discussion, see this chapter, Section 1.4.

<sup>16</sup> Puchniak (n 13); see also Lim and Puchniak, *Can a Global Legal Misfit Be Fixed?*, Chapter 28.

<sup>17</sup> Puchniak (n 13). See also Lim and Puchniak, *Can a Global Legal Misfit Be Fixed?*, Chapter 28; Koh, Puchniak and Goto, *Shareholder Stewardship in Asia*, Chapter 29; Goto, Koh and Puchniak (n 7).

<sup>18</sup> For a seminal analysis of the various legal strategies to mitigate these agency problems, see Reinier Kraakman and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2017).

Canada and Kenya.<sup>19</sup> The International Corporate Governance Network (ICGN) model code also provides that, '[i]n the case of controlled companies, investor engagement may also extend to meeting with controlling shareholders'.<sup>20</sup> But these passing references to controlling shareholders in the current stewardship codes fall short of focusing on the potential of institutional shareholder-driven stewardship to act as a check on controlling shareholder power.<sup>21</sup>

The third conception of stewardship identifies the corporate governance actor who has actual control over the company and creates a code to try to encourage that actor to steward the company in a way that maximizes the benefits for all stakeholders. The most prominent example of this is the 'Stewardship Principles for Family Businesses' in Singapore (Singapore Family Code).<sup>22</sup> The concept at the core of the Singapore Family Code is to use soft law to incentivize family controllers to use their controlling power to benefit all corporate stakeholders and society. This concept of stewardship arguably makes sense in the Singaporean context as a majority of listed companies are family firms with controlling shareholders who have both the legal right and the economic incentive to steward the company.<sup>23</sup> Stewardship Asia, which is based in Singapore and released the Singapore Family Code, has been promoting it throughout Asia where family firms make up a significant portion of listed companies in many jurisdictions.<sup>24</sup> While the Family Code has not yet gained traction in other jurisdictions, conceiving of controlling shareholders, such as family controllers or the state, as stewards is not alien to the way in which shareholder stewardship is, in reality, already practised in many jurisdictions with concentrated ownership structures.<sup>25</sup> Private benefits of control may jeopardize the effectiveness and efficiency of this type of stewardship,<sup>26</sup> but what becomes clear is that current stewardship

<sup>19</sup> See Principle 4 of the Canadian Code (Canadian Coalition for Good Governance, 'Stewardship Principles' (May 2020) <<https://ccgg.ca/wp-content/uploads/2020/05/2020-Stewardship-Principles-CCGG-new-branding.pdf>> accessed 25 May 2021) and paragraph 2 of the application section of the Kenyan Code (Stewardship Code for Institutional Investors 2017 (9 May 2017), enacted by the Capital Markets Authority vide Kenya Gazette Notice No. 6016 dated 23 June 2017), respectively. It is also notable that the Securities and Futures Commission in its consultation preceding the adoption of the Hong Kong code noted that '[i]n a market dominated by controlling shareholders, there is evidence to support the view that investors will often find it more productive to engage directly with the controlling shareholder rather than seek to engage with the board of directors as a whole through the usual voting channels'. See Securities and Futures Commission, 'Consultation Paper on the Principles of Responsible Ownership' (2015) 6, para 25 <[www.sfc.hk/edistributionWeb/gateway/EN/consultation/openFile?refNo=15CP2](http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/openFile?refNo=15CP2)> accessed 29 May 2021. But this different target of stewardship was not incorporated in the final Hong Kong code: see Koh, Puchniak and Goto, *Shareholder Stewardship in Asia*, Chapter 29. See also Goto, Koh and Puchniak (n 7).

<sup>20</sup> International Corporate Governance Network, *ICGN Global Governance Principles* (2016) 17, Principle 4.4 <<http://icgn.flpbks.com/icgn-global-stewardship-principles/files/extfile/DownloadURL.pdf>> accessed 25 May 2021. For a discussion of this point, see Goto, Koh and Puchniak (n 7).

<sup>21</sup> It is noteworthy that the 2018 Chinese Corporate Governance Code appears to adopt the second concept of stewardship in its attempt to incentivize institutional investors to engagement in the corporate governance of their investee companies to act as a check on controlling shareholders. However, as explained in Puchniak and Lin, *Institutional Investors in China*, Chapter 18, this use of institutional investors as a check on controlling shareholder power has a long history in China and must be understood on its own terms. To label it as 'stewardship' would be to incorrectly impose an Anglo-American understanding on an autochthon Chinese corporate governance mechanism.

<sup>22</sup> Stewardship Asia Centre, *Stewardship Principles for Family Businesses* (2018) <[www.stewardshipasia.com.sg/sites/default/files/2020-09/SPFB-brochure-0913.pdf](http://www.stewardshipasia.com.sg/sites/default/files/2020-09/SPFB-brochure-0913.pdf)> accessed 25 May 2021 [hereinafter Singapore Family Code]. Puchniak and Tang, *Singapore's Embrace of Shareholder Stewardship*, Chapter 14.

<sup>23</sup> Puchniak and Tang, *Singapore's Embrace of Shareholder Stewardship*, Chapter 14. See Lim and Puchniak, *Can a Global Legal Misfit Be Fixed?*, Chapter 28 for a critique of the Singapore Family Code (n 22) as a mechanism for mitigating the majority/minority agency problem that is prominent in jurisdictions dominated by controlling shareholders.

<sup>24</sup> Puchniak and Tang, *Singapore's Embrace of Shareholder Stewardship*, Chapter 14.

<sup>25</sup> Puchniak (n 13). See also Puchniak and Tang, *Singapore's Embrace of Shareholder Stewardship*, Chapter 14; Lim and Puchniak, *Can a Global Legal Misfit Be Fixed?*, Chapter 28; Koh, Puchniak and Goto, *Shareholder Stewardship in Asia*, Chapter 29.

<sup>26</sup> Lim and Puchniak, *Can a Global Legal Misfit Be Fixed?*, Chapter 28.

practices are indicative of the conventional boundaries between the different stewards – ‘institutional investor stewards’ versus ‘non-institutional investor stewards’ – already being blurred in most non-UK/US jurisdictions, as they tend to have an abundance of controlling shareholders.

A fourth conception of stewardship – which only recently began to increase in prominence – is institutional investor-driven stewardship with the aim of advancing the environmental, social and governance (ESG) movement. This conception of stewardship differs from the previous ones in two respects. First, the primary target of stewardship is not to solve any specific agency problem but rather to incentivize the companies in which institutional investors invest to adopt an ESG agenda.<sup>27</sup> Second, it aims to provide the ultimate beneficiaries of institutional investors with the information and means to channel their funds towards ESG investments. Although this concept of stewardship was non-existent in the UK Code 2010 and received only a fleeting reference in the UK Code 2012, it is at the core of the latest version of the UK Code (UK Code 2020).<sup>28</sup> This recent shift in the focus of stewardship in the UK has been described by a pre-eminent UK corporate law academic as a movement ‘from saving the company to saving the planet’.<sup>29</sup> It is also noteworthy that, over the last decade, this ESG concept of stewardship has found its way into stewardship codes around the world. Empirical evidence based on a review of the text of the latest versions of stewardship codes reveals that 84 per cent of the codes now refer ‘at least once to ESG factors’ and that only four current codes (i.e., Danish Code 2016, Korean Code 2016, Swiss Code 2013 and US Code 2017) do not mention ESG factors at all.<sup>30</sup>

The fifth – and final – conception of stewardship is about what stewardship means ‘inwards’ for the institutional investors themselves. This conception is focused on the ‘investment management’ side of stewardship, that is, the relationship between the institutional investor – an investment intermediary – and their ultimate beneficiaries/clients. Most investors are organized on the basis of what has been described as a ‘separation of funds and managers’.<sup>31</sup> This means that the investors’ assets and liabilities are placed into one entity, the fund, whereas the fund’s assets are managed by a separate entity, the management company.<sup>32</sup> The primary goal of this conception of stewardship is to reconcile a constructive stewardship role with the investors’ own internal business models. The inaugural UK Code 2010/2012 incorporated good investment management practices within the notion of shareholder stewardship, such as managing conflicts of interest (between funds, between managers and fund investors, and between investors) in discharging stewardship and promoting transparency across the investment chain. These

<sup>27</sup> There is a portion of ESG stewardship which may fall under the agency problem between the company and society, which is explained as the third type of agency problem that corporate law may address: Kraakman and others (n 18) 36. However, ESG is more than preventing companies from producing ‘negative externalities’; it also includes incentivizing companies to be agents of positive change to solve societal problems that they themselves may not have created.

<sup>28</sup> Financial Reporting Council, *The UK Stewardship Code 2020* (2019) <[www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code\\_Dec-19-Final-Corrected.pdf](http://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf)> accessed 4 February 2022 [hereinafter UK Code 2020].

<sup>29</sup> Davies, *The UK Stewardship Code 2010–2020*, Chapter 2. See also Katelouzou (n 10) for a thorough analysis of this ‘enlightened’ conception of stewardship.

<sup>30</sup> Katelouzou and Klettner, *Sustainable Finance and Stewardship*, Chapter 26. This change in the focus of shareholder stewardship from corporate governance problems to societal problems needs to be understood within the increasing shift of ‘corporate purpose’ away from a sole focus on shareholder primacy. The debate is currently taking prominence in the US and the UK, the two countries where the original corporate governance-focused conception of stewards found fertile ground. For a good overview of the relevant literature, see Edward Rock, ‘For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose’ (2021) 76 *The Business Lawyer* 363.

<sup>31</sup> John Morley, ‘The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation’ (2014) 123 *Yale Law Journal* 1228, 1232.

<sup>32</sup> The resulting separation of funds and managers alienates the owners of record and the beneficial owners and results in what has been defined as ‘the agency costs of agency capitalism’. See Ronald Gilson and Jeffrey Gordon, ‘The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights’ (2013) 113 *Columbia Law Review* 863.

principles travelled well around the world,<sup>33</sup> but, even though the corporate governance and investment management sides of stewardship are intertwined,<sup>34</sup> the investment management side of stewardship has remained at the periphery of the academic and policy debates.<sup>35</sup> One explanation may be that the original UK Code did not make it clear whether institutional investors, by discharging their stewardship obligations as shareholders in their investee companies (i.e., the ‘corporate governance side’ of stewardship), were concurrently discharging their duties to their clients and ultimate beneficiaries (i.e., the ‘investment management side’ of stewardship). The failure to explicitly identify the difference between the corporate governance and investment management sides of stewardship, and how they interrelate, has often resulted in the importance of the investment management side of stewardship being overlooked.<sup>36</sup>

Against a largely monolithic literature and practice with a narrow focus on the first conception of shareholder stewardship as good corporate governance by institutional investors in dispersed-owned companies – and more recently on ESG – our taxonomy adds significant value in capturing a variety of stewards (institutional investors and various controlling shareholders) and targets (corporate governance, ESG, and investment management) which all contribute to how shareholder stewardship is *conceived*. Indeed, without all five conceptions it is impossible to accurately understand the past or anticipate the future of global shareholder stewardship. By recognizing the existence of and the problems and possibilities raised by the five conceptions of global shareholder stewardship and their overlap, this book adds significant insight and detail to what we know of stewardship around the world.

Finally, before moving on, two important points concerning the terminology used for this comparative and contextual analysis must be explained. We chose to use the term ‘shareholder stewardship’ over the term ‘investor stewardship’ for two reasons: first, we do not solely focus on ‘institutional investor stewards’ but also consider ‘non-institutional investor stewards’ (e.g. different types of controlling shareholders); and second, our focus is on the roles of these stewards as shareholders of public companies and does not take into account stewardship in other assets beyond equities. We also prefer the term ‘shareholder stewardship’ over merely the term ‘stewardship’, which is too broad to be analytically useful.

### 1.3 HOW THE SEVEN PRINCIPLES OF THE UK CODE WENT GLOBAL

#### 1.3.1 *The Historical Roots of the UK-cum-Global Stewardship Code Model*

In 1991, the Institutional Shareholders’ Committee (ISC), a private body composed of four prominent UK institutional investors and fund managers, released a statement entitled ‘The

<sup>33</sup> See Section 1.3.

<sup>34</sup> For a thorough analysis of the links between the two sides of stewardship in the UK, see Roger M Barker and Iris H-Y Chiu, *Corporate Governance and Investment Management: The Promises and Limitations of the New Financial Economy* (Edward Elgar 2017) 4 (calling this ‘the “governance nexus” between the fund management sector and the corporate sector’). It is also important to note here that the investment management side of stewardship is interrelated to all the other conceptions of stewardship except for the third one, which views controlling shareholders as the potential stewards. For all the other conceptions of stewardship, investment management sets the means, limits and possibilities for the institutional investors’ stewardship abilities and capacities.

<sup>35</sup> For an exception, see Barker and Chiu, *Investment Management, Stewardship and Corporate Governance Roles*, Chapter 25. On the incentives and abilities of index funds to pursue stewardship, see Fisch, *The Uncertain Stewardship Potential of Index Funds*, Chapter 21.

<sup>36</sup> This gap was filled by the UK Code 2020 (n 28) which clarifies that shareholder engagement is part of good investment management and emphasizes on the governance of stewardship and its integration with investment management. See, further, Katelouzou (n 10).



TABLE 1.1 *The seven core principles in the UK Code 2010/2012*

Principle 1	Publicly disclose their policies on how they will discharge stewardship responsibility
Principle 2	Have a robust policy on managing conflicts of interest
Principle 3	Monitor investee companies
Principle 4	Establish clear guidelines on when and how to escalate stewardship activities
Principle 5	[Be] willing to work collectively with other investors
Principle 6	Have a clear policy on voting and disclosure of voting activity
Principle 7	Report periodically on stewardship and voting activities to their clients/beneficiaries

Responsibilities of Institutional Shareholders in the UK'.<sup>37</sup> This statement, which was only three pages long and included nine principles of good practice, can be seen as the genesis of the first corporate governance–focused conception of shareholder stewardship – despite the intriguing absence of the word ‘stewardship’ from its text. It was revised three times, in 2002, 2005 and 2007, until in 2009 it was reformulated into seven principles – ‘The ISC Code on the Responsibilities of Institutional Investors’ – which formed the basis for the UK Code in 2010.<sup>38</sup>

Although the ISC Code can be seen as the genesis of shareholder stewardship codes, the UK Code 2010 is often referred to as the world’s first stewardship code. This is largely because the UK Code 2010 was released by the Financial Reporting Council (FRC), a quasi-government body, which gave it the imprimatur of the UK government. By 2010, the UK had established itself as a global corporate governance leader by creating the world’s first corporate governance code, which had by then been transplanted around the world. In this context, the UK Code 2010 seemed like an encore by the UK to reaffirm its status as a global corporate governance leader – but this time by focusing on shareholder stewardship.<sup>39</sup> The position of the UK Code as the global ‘gold standard’ has been reinforced by European and international bodies (both public and private ones)<sup>40</sup> adopting to a large extent the UK Code 2010/2012 model of the seven principles – part of a larger movement which has recently been coined ‘international corporate governance’.<sup>41</sup> Several chapters in this book analyze the seven principles of the UK Code 2010/2012 so the details will not be repeated here. Table 1.1 provides a snapshot of the seven core principles of the UK Code 2010, which were transferred almost completely into the revised UK Code 2012.

The UK Code 2010/2012 has had a significant impact globally. Before the publication of the UK Code in 2010, the only trace of shareholder stewardship outside the UK was in the 2005 Canadian Coalition for Good Governance statement on shareholder involvement by a group of Canadian institutional investors.<sup>42</sup> Internationally, some early stewardship traces can be found in the ICGN ‘Statement on Institutional Shareholder Responsibilities’ published in

<sup>37</sup> See Katelouzou and Zumbansen (n 2) 91–92 (elaborating the synthesis of the ISC and the evolution of its principles).

<sup>38</sup> In its consultation preceding the introduction of the UK Code, the FRC recognized the ISC 2009 Code as a ‘good starting code’ for the UK Code and included it in its Appendix B. See Financial Reporting Council, ‘Consultation on a Stewardship Code for Institutional Investors’ (19 January 2010) <[www.frc.org.uk/consultation-list/2010/consultation-on-a-stewardship-code-for-institution](http://www.frc.org.uk/consultation-list/2010/consultation-on-a-stewardship-code-for-institution)> accessed 4 February 2022. For a comprehensive analysis of the history of the UK Code, see Katelouzou (n 10).

<sup>39</sup> Recommendation 17 of the Walker Review recommended FRC to ‘ratify’ the ISC Code. See David Walker, ‘A Review of Corporate Governance in UK Banks and Other Financial Industry Entities. Final Recommendations’ (26 November 2009) <[https://ecgi.global/sites/default/files/codes/documents/walker\\_review\\_261109.pdf](https://ecgi.global/sites/default/files/codes/documents/walker_review_261109.pdf)> accessed 25 May 2021 [hereinafter Walker Review]. See further Katelouzou (n 10).

<sup>40</sup> See text accompanying n 6.

<sup>41</sup> Pargendler (n 6).

<sup>42</sup> Williams, *Stewardship Principles in Canada*, Chapter 20.

2003.<sup>43</sup> However, these two pre-2010 stewardship initiatives bear little resemblance to the stewardship codes that proliferated after 2010 based on the UK Code 2010/2012.<sup>44</sup>

Following the publication of the UK Code in 2010, stewardship codes have been issued in twenty jurisdictions on six continents (eight in Asia, six in Europe, two in Africa, two in North America, one in Australia and one in South America).<sup>45</sup> In three jurisdictions, more than one type of stewardship code has been issued to deal with either different types of institutional investor (Australia/India) or different types of shareholder (Singapore).<sup>46</sup> In addition, in several jurisdictions (Canada, India, Italy, Japan, the Netherlands, Norway and the UK) a subsequent amended version(s) of the inaugural stewardship code has been issued – resulting in a total of thirty-five codes having been issued in twenty jurisdictions.<sup>47</sup> To this impressive list one should add the European Fund and Asset Management Association (EFAMA) and ICGN codes which were issued by regional and international bodies respectively – resulting in a total of thirty-nine stewardship codes being issued after 2010.

### 1.3.2 Evidence from the Formal Design and Content of Non-UK Stewardship Codes

#### 1.3.2.1 The Core Principles of the UK Code Have Been Transplanted Around the World

Prior to this book project, it was often assumed that UK-style stewardship had been transplanted around the world.<sup>48</sup> However, this claim had never been tested. This assumption likely arose for good reasons. First, the UK Code 2010 has widely come to be considered the world's first stewardship code and stewardship codes began to appear around the world following its release. Second, over the previous two decades, UK-style corporate governance codes had been adopted in ninety jurisdictions around the world and stewardship codes were seen to likely follow the same path.<sup>49</sup> Third, and perhaps most importantly, in jurisdictions that adopted codes, leading academics, government officials and/or the text of the code itself explicitly recognize the influence of the UK Code 2010/2012.<sup>50</sup> Indeed, in the main conference which brought together leading corporate governance scholars and policymakers from all the jurisdictions with codes for

<sup>43</sup> International Corporate Governance Network, 'ICGN Statement on Institutional Shareholder Responsibilities' (2003) <[www.icgn.org/sites/default/files/2003%20Statement%20on%20Shareholder%20Responsibilities.pdf](http://www.icgn.org/sites/default/files/2003%20Statement%20on%20Shareholder%20Responsibilities.pdf)> accessed 25 May 2021.

<sup>44</sup> For empirical evidence, see Katelouzou and Siems, *The Global Diffusion of Stewardship Codes*, Chapter 30.

<sup>45</sup> See the Appendix to this chapter (Table 1.5) for the full list of stewardship codes. We adopt a broad definition of stewardship codes as including 'preliminary stewardship initiatives', like the one in Norway. For the definitional details, see Katelouzou and Siems, *The Global Diffusion of Stewardship Codes*, Chapter 30, Section 30.3.1.

<sup>46</sup> See the Appendix (Table 1.5) for details.

<sup>47</sup> *ibid.*

<sup>48</sup> Koh, Puchniak and Goto, *Shareholder Stewardship in Asia*, Chapter 29.

<sup>49</sup> However, despite comparisons between the global spread of UK-style corporate governance codes and that of UK-style stewardship codes, the proliferation of the former has been far greater: corporate governance codes now exist in almost ninety jurisdictions and have made independent directors globally ubiquitous. See Puchniak (n 13).

<sup>50</sup> Australian Council of Superannuation Investors, 'Australian Asset Owner Stewardship Code' (May 2018) 1 <[https://acsi.org.au/wp-content/uploads/2020/01/AAOSC\\_The\\_Code.pdf](https://acsi.org.au/wp-content/uploads/2020/01/AAOSC_The_Code.pdf)> accessed 25 May 2021 [hereinafter Australian (ACSI) Code 2018]; Financial Services Council, 'FSC Standard 23: Principles of Internal Governance and Asset Stewardship' (July 2017) 7 <[www.fsc.org.au/web-page-resources/fsc-standards/1522-23s-internal-governance-and-asset-stewardship](http://www.fsc.org.au/web-page-resources/fsc-standards/1522-23s-internal-governance-and-asset-stewardship)> accessed 25 May 2021 [hereinafter Australian (FSC) Code 2017]; Associação de Investidores no Mercado de Capitais (AMEC), 'Código AMEC de Princípios e Deveres dos Investidores Institucionais: Stewardship [AMEC Code of Principles and Duties of Institutional Investors: Stewardship]' (27 October 2016) 6 <[www.amecbrasil.org.br/wp-content/uploads/2016/06/CODIGOAMECSTEWARDSHIPMinutaparaConsultaPublica.pdf](http://www.amecbrasil.org.br/wp-content/uploads/2016/06/CODIGOAMECSTEWARDSHIPMinutaparaConsultaPublica.pdf)> accessed 9 February 2022 [hereinafter Brazil Code 2016]; Williams, *Stewardship Principles in Canada*, Chapter 20; The Committee on Corporate Governance, 'Stewardship Code' (November 2016) 3 <[https://corporategovernance.dk/sites/default/files/t80116\\_stewardship\\_code.pdf](https://corporategovernance.dk/sites/default/files/t80116_stewardship_code.pdf)> accessed 25 May 2021 [hereinafter Danish Code 2016]; Donald,