

Company Law and Sustainability: Legal Barriers and Opportunities

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There have been constant calls for companies to be more socially responsible. However, there exists a widespread uncertainty regarding the place (if any) of socially responsible investment (SRI), corporate social responsibility (CSR) and environmental sustainability in mainstream company law. The uncertainty stems from global company law's insistence of the pursuit of financial interests of shareholders by management. Acknowledgement of other stakeholders does exist but its parameters have not been established. The book, *Company Law and Sustainability: Legal Barriers and Opportunities*, attempts to address this uncertainty by highlighting weaknesses and opportunities inherent in comparative company law for the creation of sustainable companies.

The book originates from the Sustainable Companies Project,¹ the primary objective of which was the attainment of a better understanding of the relationship between company law and CSR. More specifically, the aim was to analyse company law in terms of its potential in hindering or promoting CSR. The book is not a company law text but rather an interdisciplinary endeavour that would be of interest to all who advocate for a more sustainable future.

The authors begin by addressing the main shortcoming of SRI and CSR initiatives. The shortcoming derives from the fact that SRI and CSR are backed by soft law mechanisms, that is, they are voluntary in nature. Moreover, not only must the management of companies choose to pursue SRI and CSR initiatives but also the pursuit must not undermine the overarching financial interests of the shareholders. Consequently, the authors highlight that such voluntarism increases the likelihood that sustainability practices will not be enforced, creating a varied level of adherence across companies. The authors contend that SRI and CSR initiatives as they exist are partial makeshift solutions to the creation of sustainable companies due to their voluntary nature. The contribution of the authors lies not in identifying this long-established dilemma, but rather in the precise way they illustrate the implications of the dilemma for mainstream company law for an inter-disciplinary reader.

The book's main argument is that the key barrier to the creation and promotion of sustainable companies is the shareholder primacy norm. The shareholder primacy norm comprises of judging corporate activity through

¹ Department of Private Law, University of Oslo, *The Sustainable Companies Project* (2013) <<http://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/index.html>>.

the narrow lens of financial performance for the short-term benefit of the company. This norm is prevalent in not only the companies but also the institutional investors that finance them such as pension funds and hedge funds. In relation to companies, this norm translates into the best short-term financial interests of the shareholders across jurisdictions. The authors build on earlier contributions² to the discourse in this area and argue that this approach ignores the public and social costs that flow from corporate activity.³ They further argue that this approach removes any CSR, SRI or sustainable strategies that cannot translate into the best interests of the corporation/shareholders in the short-term.

The authors innovatively distinguish the social norm of shareholder primacy from the legal requirement of shareholder primacy. According to the authors, no jurisdiction legally mandates the shareholder primacy orientation of corporate law.⁴ Yet this orientation exists globally due to the prevalent social norm of shareholder primacy.⁵ Furthermore, their comparative jurisdictional analysis of company law reveals that there is no mandatory requirement to promote the shareholder primacy norm that translates into short-term financial benefit. They contend that this social norm of shareholder primacy has been festering in mainstream company law due to the lack of any legislative statement as to the exact purpose of companies. Thus, the authors concede that corporate law reform is required as a first step to counteract this pervasive social norm and promote socially responsible companies.⁶

The final chapters of the book provide a thought provoking climax. First, Richardson highlights the paramount role of corporate investors and financiers, specifically institutional investors such as pension funds. This is consistent with the book's aim of understanding the purpose of the company. These institutional investors finance the company and thus an awareness of these investors is necessary for the better understanding of companies. Richardson argues that orienting such institutional investors with SRI has the potential for fostering socially responsible companies. However, he concedes that this SRI orientation requires governmental

² See S Lydenberg, 'Beyond Risk: Notes Toward a Responsible Investment Theory' in James P Hawley, Shyam J Kamath and Andrew T Williams (eds), *Corporate Governance Failures: The Role of Institutional Investors in the Global Financial Crisis* (University of Pennsylvania Press, 2011) 36; Edward J Waitzer and Douglas Sarro, 'Pension Fiduciaries and Public Responsibilities: Emerging Themes in the Law' (2013) 6(2) *Rotman International Journal of Pension Management* 28.

³ B Sjafjell et al, 'Shareholder Primacy: the Main Barrier to Sustainable Companies' in Benjamin J Richardson and Beate Sjafjell (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, 2015) 79, 94.

⁴ Ibid 95.

⁵ Ibid 121.

⁶ B J Richardson and B Sjafjell, 'Capitalism, the Sustainability Crises, and the Limitations of Current Business Governance' in Benjamin J Richardson and Beate Sjafjell (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, 2015) 1, 25.

engagement and participation.⁷ In the following chapter, Liao highlights alternative corporate structures on the rise in the UK and North America termed as corporate hybrids. These corporate hybrids, Liao argues, can bring about a new era of responsible investment as CSR practices are imbedded within their corporate practices.⁸ Liao's chapter usefully highlights contemporary solutions for the promotion of sustainable companies.

The book's aim is ambitious and its arguments genuine and innovative as dissecting the social norm from the legal requirement of shareholder primacy may be the first real step towards the promotion of sustainable companies. However, the book is not consistent in this regard, as chapters four and five, which pertain to reform of corporate boards and reporting standards, are present in most corporate governance and company law texts. These chapters cover issues already well explored in the existing literature and distract from the central theme of the book, of understanding the true purposes of the company and the influence of the social norm of shareholder primacy. The book is at its strongest where it consistently identified the social norm of shareholder primacy and the opportunities for counteracting it. Liao's chapter is particularly valuable in terms of elucidating practical reforms such as corporate hybrids.⁹

The book accomplishes its essential purpose by illustrating the social norm of shareholder primacy as the main barrier to sustainable companies. The better understanding and awareness of this social norm will enhance further research and debates on this issue. The book's strength lies in its clear illustration of the relationship between CSR and company law. This book is essential reading, not only for practitioners and academics of company law, but also for interdisciplinary researchers concerned with environmental law, the CSR and SRI movement. Economists who are critical of the prevalence of the financial interests of shareholders as the sole determinant of corporate activity will also derive valuable insights.

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⁷ B J Richardson, 'Financial Markets and Socially Responsible Investing' in Benjamin J Richardson and Beate Sjaafjell (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, 2015) 226, 260–70.

⁸ C Liao, 'Limits to Corporate Reform and Alternative Legal Structures' in Benjamin J Richardson and Beate Sjaafjell (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, 2015) 274, 292.

⁹ Ibid 274.

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