

## Book Reviews

*Company Law and Sustainability: Legal Barriers and Opportunities*, edited by BEATE SJÅFJELL and BENJAMIN J RICHARDSON. Cambridge: Cambridge University Press, 2015, xvi + 340pp + (index) 15pp (£80 hardback). ISBN: 9781107043275.

Against the backdrop of anthropogenic climate change and other environmental concerns, the discourse in this edited volume<sup>1</sup> emerges from the recognition that corporations around the globe are on an entirely unsustainable trajectory. Based on research conducted by the Sustainable Companies Project,<sup>2</sup> it tackles head on the need for companies and their stakeholders to play a more substantial role in reducing global emissions by pursuing environmentally sustainable business practices. The book identifies some existing mechanisms as partial solutions to the problem, as well as current barriers in motivating corporate sustainability for the future. As a whole, the book adopts a very broad comparative focus and is described in its foreword (by Richard Howitt MEP) as providing an analysis that is ‘truly global in character’.<sup>3</sup> It is true to say that the book, for the most part, does not leave the reader wanting in this regard. This is especially important and indeed central to the success of the volume, given the universality of environmental concerns. It is particularly refreshing that the contributors to the book themselves represent a wide variety of disciplines and jurisdictions, as well as considerable expertise as a collective as, in this volume, the editors have brought together a compelling selection of eight thought-provoking chapters with commentary across the UK, the USA, Canada, New Zealand, Australia, Norway and Finland, as well as the rest of continental Europe, amongst others.

This is not the book for a reader looking for an in-depth discussion of black letter environmental or corporate law, or some hybrid of the two. The first three chapters of the book instead offer a more theoretical discourse on key governance matters including corporate social responsibility (CSR) and shareholder primacy, though the discussion is framed entirely in the context of sustainability. For the remainder of the book, more specialist chapters emerge on themes such as the role of directors in promoting sustainability, accounting and auditing in the sustainability context, sustainability reporting, socially responsible investments (SRI) and alternative legal structures. Each chapter offers a grassroots approach to many of the issues, concepts and criticisms put forward. This is to be applauded, as it means that what can otherwise be an insipid and complex area of study is rendered perfectly accessible by the contributors, even for those without any specific expertise in fields of governance theory, corporate law or environmental law. Given the pervasiveness of the issues being discussed throughout the book, accessibility is clearly crucial. For this reason alone, the book will appeal to a wide readership, but it will also no doubt prove to be an invaluable point of reference for those specifically interested in a substantive comparative study on the topic of sustainability.

1. B Sjøfjell and B Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge: Cambridge University Press, 2015).

2. See <http://www.jus.uio.no/itp/english/research/projects/sustainable-companies/index.html> (accessed 15 January 2016).

3. R Howitt ‘Foreword’ in Sjøfjell and Richardson, above n 1.

The book does not in any way profess to create a roadmap of future reform; nor does it purport to hold all of the answers to the global environmental crisis. Indeed, the focus is expressed early on by the editors as being simply to 'deepen our understanding of the barriers to creating sustainable companies',<sup>4</sup> justified on the basis that 'sweeping, universal blueprints for change are problematic'.<sup>5</sup> In other words, there is probably no single solution to promoting sustainability within companies. But, given the difficulties of conducting such a broad comparative study, merely raising these issues in an accessible form should be considered a triumph. On a psychological level, raising awareness and supplanting ideas of sustainable business practices into the minds of key stakeholders may in itself be prove to a small, yet important, element of what is undoubtedly a mosaic solution to a global problem.

The first chapter, written by the editors,<sup>6</sup> serves as an introduction to many of the core ideas presented throughout the volume. The authors begin by addressing the limitations of current corporate governance models in the context of sustainability. Sustainability, they argue, is not simply about reducing a company's dependency on natural resources or lowering emissions. Equally, 'sustainable business should not be a discretionary preference, to follow only if corporate leaders perceive an economic benefit for their company'.<sup>7</sup> Instead, the authors argue strongly that environmental standards and sustainable business practices should be enshrined within the governance of the corporation, and therefore should be at the very heart of its existence. As a primer for the discussion that follows, the authors review some of the existing mechanisms and partial solutions to the identified problem. Solutions such as CSR, discussed in chapter 2,<sup>8</sup> and SRI, discussed in chapter 6,<sup>9</sup> are, according to Richardson and Sjøfjell, of fleeting significance given the stark reality that 'most [investors] are unwilling to sacrifice profits for environmental gains'.<sup>10</sup> They submit that voluntary and discretionary initiatives are unlikely to instigate substantial changes in corporate attitudes, an idea discussed further in chapter 2.<sup>11</sup> On the subject of environmental law, the authors identify it as only 'modestly mitigating'<sup>12</sup> the current crisis, and argue that it merely regulates the 'worst excesses of the dominant model of economic development rather than fundamentally challenging or transforming it'.<sup>13</sup> Orchestrating such fundamental change is without doubt something of a Herculean task, though the authors are under no illusion as to the associated challenges. They recognise that '[p]utting the economy on a sustainable path requires a more comprehensive and fundamental strategy'.<sup>14</sup> What that strategy might be and how current corporate governance approaches may be

4. B Sjøfjell and B Richardson 'Capitalism, the sustainability crisis, and the limitations of current business governance' in Sjøfjell and Richardson, above n 1, p 1.

5. Ibid, p 29.

6. Sjøfjell and Richardson, above n 4.

7. Ibid, p 2.

8. D Millon 'Corporate social responsibility and environmental sustainability' in Sjøfjell and Richardson, above n 1.

9. B Richardson 'Financial markets and socially responsible investing' in Sjøfjell and Richardson, above n 1.

10. Sjøfjell and Richardson, above n 4, p 3.

11. Millon, above n 8.

12. Sjøfjell and Richardson, above n 4, p 13.

13. Ibid.

14. Ibid, p 2.

reimagined to encompass sustainability is at the core of *Company Law and Sustainability*.

David Millon shifts the focus in chapter 2<sup>15</sup> to discuss CSR as a partial solution to the current sustainability crisis. Millon begins by identifying the difficulties associated with attempts to define CSR, and then discusses two of the dominant theories: ethical and strategic CSR. Within this discussion, Millon inevitably has to provide a précis of shareholder primacy, the business judgement rule and the concept of enlightened shareholder value. This results in some overlap with chapter 3,<sup>16</sup> where these ideas are revisited. Millon explains ethical CSR as embodying the principle that corporations are responsible and accountable to their stakeholders, without consideration of whether financial performance is enhanced in the process of doing so.<sup>17</sup> He argues that, because of this, the success of ethical CSR may vary significantly depending upon the place of incorporation. One notable omission here, which Millon self-identifies,<sup>18</sup> is a discussion of the impact of CSR in Japan, a country generally ubiquitous in any comparative discussion of CSR. In the context of sustainability, it is suggested this would have provided an interesting, much needed, point of comparison. Strategic CSR, on the other hand, incorporates an ethical element as well as a 'business case'. Millon illustrates various examples of strategic CSR at work, such as the development of hybrid electric vehicles by Toyota. Despite initial research and development costs, these vehicles are beneficial to the environment and will undoubtedly increase shareholder wealth in the long term. It is in this latter point where the crux of the difficulties with strategic CSR lies: the business case can be proven, but only in the longer term. The author therefore suggests that corporations in jurisdictions such as the UK and the USA, where there is a predominantly myopic approach to decision making, may simply be unwilling to adopt CSR mechanisms for this reason. Although Millon gives credence to the value of CSR, it being 'the best currently available option for moving forward',<sup>19</sup> the overall prospect for the future, he writes, is bleak.

In chapter 3, Sjøfjell et al deal with the social norm of shareholder primacy, described as being the most formidable barrier to sustainable companies.<sup>20</sup> The chapter begins with a comparative analysis of both the societal *purpose* of the company and the *interests* of the company as distinct terms. The authors remark that much of the academic literature conflates the two concepts, or at the very least diverts attention from the former to the latter. It does not help, as they explain, that company law itself rarely contains any explicit statement about purpose. In something of a historical accident, the authors stress that this is why shareholder primacy has developed in the way it has. The authors criticise scholars who 'equate the purpose of the company with the assumed common purpose of ... shareholders'<sup>21</sup> and instead suggest that 'the company as a matter of company law has a much broader purpose';<sup>22</sup> in other words, to create benefits for stakeholders in a way that contributes to, or at least does not harm, overarching societal

15. Millon, above n 8.

16. B Sjøfjell et al 'Shareholder primacy: the main barrier to sustainable companies' in Sjøfjell and Richardson, above n 1.

17. Millon, above n 8, p 64.

18. Ibid, p 65.

19. Ibid, p 78.

20. Sjøfjell et al, above n 16.

21. Ibid, p 91.

22. Ibid, p 92.

goals.<sup>23</sup> Care is also taken to discern between shareholder value – that is, the legal duties imposed on directors to run a company for the benefit of shareholders – and shareholder primacy. Again, as a result of a failure to distinguish between these terms, the authors posit that shareholder primacy has been allowed to evolve to become the goal, rather than merely one of a multitude of ways in which companies can be governed.<sup>24</sup> To the contrary however, through their broad comparative analysis across jurisdictions including Norway and Finland, the authors uncover that ‘no jurisdiction intends the maximisation of returns to shareholders to be the ultimate or only goal given to companies by the societies which through law recognise their existence’.<sup>25</sup> The question therefore presented is this: how can the law contribute to moving companies away from this entrenched ‘business as usual’ approach and instead on to an environmentally sustainable path? The authors proceed to conduct a global analysis of whether the law itself permits directors to consider factors such as the environment in their decision making. They determine that in practice directors have considerable discretion to do so in many jurisdictions, largely due to the existence of the business judgement rule. The conclusion drawn, however, is that due to the pervasiveness of shareholder primacy, and both formal and informal mechanisms that shareholders may use to exert their dominance, the reality is that boards rarely harness the discretion they are afforded in order to promote a plurality of interests. The authors therefore recommend, as a starting point, that the relevant company law be revisited. Legislators, they argue, should define *precisely* the societal purpose of companies, as well as detailing the duties and liabilities of the board in relation to that purpose. In doing so, perhaps the grip of shareholder primacy may be loosened, if only slightly. But, as discussed previously in this review, the authors are acutely aware that the solution to the corporate world’s environmental issues is likely to be a multi-faceted one. Certainly, fundamental change in matters of governance cannot be effected overnight. Thus, despite advocating significant company law reform, they caution that it is by no means a total solution; rather, it is ‘a crucial piece of the jigsaw puzzle that urgently needs to be put in place’.<sup>26</sup>

At the midpoint of the book, the discussion moves away from basic corporate governance ideas and principles to focus on more specialist topics of interest. Blanaid Clarke looks at the role of company directors, including non-executive directors, in promoting sustainability within companies.<sup>27</sup> The importance of director engagement with issues of environmental sustainability is emphasised by Clarke, particularly in companies that already adopt CSR principles, but even in those where the sole driving focus is to enhance shareholder wealth. Following a historical introduction to what is now the UK Corporate Governance Code, the extent of its EU adoption and an evaluation of its benefits, Clarke concludes that these codes both permit and encourage directors to consider environmental issues. However, ultimately, given their soft-law status, their success ‘clearly depends on the level of engagement by boards’.<sup>28</sup> After setting out the role of directors in enhancing the adoption of sustainable business practices, Clarke proceeds to consider the composition of boards and the attributes that directors and non-executive directors should possess, the goal being to determine whether directors’

23. Ibid, p 94.

24. Ibid, p 85.

25. Ibid, p 94.

26. Ibid, p 147.

27. B Clarke ‘The role of board directors in promoting environmental sustainability’ in Sjøfjell and Richardson, above n 1.

28. Ibid, p 153.

attributes might encourage the adoption of sustainable business practices. In pursuit of this, Clarke examines attributes such as independence, diversity, knowledge, and character and integrity. For instance, the author comments that it has been shown empirically that there is a link between boardroom gender diversity and improved CSR. Clarke cautions, however, that a balance must be struck so that expertise is not sacrificed on grounds of diversity. In sum, Clarke argues that directors and non-executive directors have an important role to play, indeed a responsibility, in ensuring the adoption of high environmental standards. However, she suggests that an issue of equal importance is having the right people for the job. In other words, boards should seek to balance all of these desirable attributes in order to ensure that the potential for the company to embrace sustainable business practices is maximised.

The seventh chapter, written by Carol Liao, is particularly excellent.<sup>29</sup> The author provides a creative analysis of some of the available alternative legal structures for companies and, in the spirit of the book, does so across the UK, Canada and the USA. In their own distinct ways, each of these jurisdictions provides so-called 'hybrid' corporate structures largely aimed at socially and community minded entrepreneurs, as an alternative to the more traditional limited liability company. The importance of these hybrids lies in the fact that they are not simply facilitative of initiatives such as CSR but, rather, generally *require* such mechanisms to be embodied within their governance as a precondition to adopting the structure. Given the potential this houses for spurring on reform in current attitudes towards governance, Liao cautiously suggests that 'hybrids may be a key contributor in establishing the critical infrastructure to help solve some of the most pressing social and environmental issues of our time'.<sup>30</sup> In the first part of the chapter, Liao conducts a brief exposition of some of the book's core findings to date: namely that CSR and other mechanisms, although important, have done little to curtail the sustainability crisis compounded by a model of governance based on shareholder primacy dogma. In truth, this part of the chapter adds little, given that it largely revisits much of the discussion found earlier in chapters 1–3. From this preliminary discussion, however, emerges a point of significant interest. It becomes clear that Liao attributes much of the success and dominance of shareholder primacy to the fact that 'there continues to be a lack of consensus or at least strong support for a better theoretical alternative'.<sup>31</sup> Liao's argument here raises questions, at least in the mind of this reviewer, as to whether attempting to challenge the entrenched ideologies embodied within the mainstream model is something of a lost cause. Instead, Liao positions hybrid structures as being one alternative with the potential to mount such a challenge, albeit indirectly. Rather than attempting to disentrench shareholder primacy, one may simply sidestep it altogether. In the core part of the chapter, Liao engages in analysis of the familiar cooperative structure – noted as being the oldest corporate vehicle in the world – as well as some emerging hybrid structures, namely Community Interest Companies (CIC) (UK), Community Contribution Companies (Canada), Low Profit Limited Liability Companies and privately regulated B Corporations (USA). Liao praises the cooperative as being a structure that facilitates the embodiment of sustainable business practices due to its focus on the needs of members, rather than purely financial concerns. In spite of the potential of the model, Liao notes that cooperatives

29. C Liao 'Limits to corporate reform and alternative legal structures' in Sjøfjell and Richardson, above n 1.

30. Ibid, p 275.

31. Ibid, p 284.

often struggle to obtain capital; she suggests, based on the research of the International Cooperative Alliance (ICA), that this is largely because investors do not see benefits and returns comparable to those found in traditional company structures. One crucial factor that sets cooperatives apart from any of the other hybrids discussed, a factor not considered by Liao, is both their resilience and prevalence. Not only has the model stood the test of time but it is also a structure adopted throughout the world.<sup>32</sup> While this does not detract from the validity of Liao's concerns vis-à-vis sustainability, I would suggest that a more in-depth analysis of the cooperative might have been warranted at this juncture: when one considers the widespread acceptance and usage of the structure on the international plane, a comparative discussion of the impact (if any) of cooperatives in curbing unsustainable business practices would have been beneficial to the argument as a whole. The point Liao ultimately makes, however, is sound: more needs to be done to try to exploit this structure, though it is currently unclear how that is to be achieved. With both the cooperative and other contemporary hybrid structures, what stems from Liao's analysis is that a lot more consideration is needed with regard to improving their access to capital. The author is very careful, like many of the other contributors to the book, not to present the situation optimistically, and she expresses the view that hybrids are, in the future, likely to occupy no more than a niche sector of the market. At the very least, Liao maintains they should not be overlooked as an alternative with some untapped potential, though – as identified previously – more research is needed to be certain of their viability in being a contender to the mainstream approach to governance.

The final chapter of the book, chapter 8,<sup>33</sup> revisits the key findings of the book and reiterates the pressing need for fundamental global change. Action needs to be taken, and it needs to be taken now. Based on the analysis in chapter 3, the authors argue that the failure of company law to define the societal purpose of companies provides an opportunity for reform. They suggest that '[a] reform that clearly spells out the societal purpose in a principle-based manner could dramatically enable forward-looking sustainable business'.<sup>34</sup> On that premise, the authors outline two potential company law reforms: first, to place 'a duty on key corporate decision-makers to manage their business for the long term'<sup>35</sup> and, second, 'a duty of environmental care'.<sup>36</sup> The authors present the strong argument that embodiment of these duties in statute would mitigate the current climate of myopic corporate behaviours and reinforce the responsibility of decision makers to adopt high environmental standards. Without doubt, the reforms proposed are radical, though by this point in the book one can appreciate that it may indeed be that radical measures are warranted. Some of the substantial difficulties with this type of wide-reaching reform are assessed by the authors, and they proceed to comment on matters such as enforcement, the assessment of a company's sustainability

32. See CICOPA *Cooperatives and Employment: A Global Report*, available at <http://bit.ly/1j9p1WI> (accessed 15 January 2016). This 2014 report, which surveyed 74 countries, suggests that at least 250 million people are involved in cooperatives in some way. Within the G20, cooperatives account for 12% of the entire employed population. In Britain alone, some 7,000 cooperatives contribute approximately £37 billion to the economy, and in the USA there are over 30,000 cooperatives accounting for \$600 billion in revenues.

33. B Sjøfjell and B Richardson 'The future of company law and sustainability' in Sjøfjell and Richardson, above n 1.

34. *Ibid.*, p 324.

35. *Ibid.*

36. *Ibid.*

performance and the interaction of the new duties with traditional environmental regulation. In spite of the difficulties, the authors firmly reject the notion that the argument for change is inconceivable, though they accept that there is greater research that needs to be undertaken in the area.

Towards the end of the chapter the attention shifts to this need for future research, and one topic of discussion here is private companies and SMEs. It should be noted that a particularly glaring omission throughout the volume is the limited discourse on these types of companies. As the editors identify, much of the analysis would be unlikely to apply in equal measure to SMEs and, further, it is suggested by this reviewer that some topics of discussion – such as auditing, discussed in chapter 5 – may be of very limited relevance indeed. They suggest that dealing with sustainability issues in private companies will require ‘an equally powerful transition in the reform of company law’<sup>37</sup> and that a ‘reform proposal modulated on large companies cannot ... be superimposed on SMEs without further analysis’.<sup>38</sup> In other words, one suspects that an entirely different volume would need to be written to cover this ground. It is suggested here, however, that the constraints of the book in this regard should have been acknowledged in the very first chapter, as opposed to in its concluding statements. The editors go on to justify the rationale for their sole focus on public companies. They do so on three grounds: first, public companies are ‘especially dominant’<sup>39</sup>; secondly, they are ‘perceived particularly difficult to regulate for national legislators because of their transnational nature’<sup>40</sup>; and, thirdly, because they ‘are most affected by the social norm of shareholder primacy’.<sup>41</sup> Two criticisms are put forward in relation to this. First, while there is evidently a social perception of dominance, on a simple mathematical exercise SMEs represent such a large part of the global economy that to ignore them is, surely, to ignore a large part of the sustainability problem.<sup>42</sup> Secondly, as has already been explored, a core argument made throughout the volume is that the social norm of shareholder primacy is the most considerable barrier in the pursuit of sustainable companies. Yet the editors impliedly concede that SMEs are thought to be less affected by the norm. Given this recognition, one might have expected an examination, even if cursory, of the validity and applicability of the arguments presented in the book through the lens of the private company.

Regardless, *Company Law and Sustainability* is clearly one of the most comprehensive works on the topic to date. Overall, the book embodies a truly accessible and well thought out comparative approach to many of the key issues discussed, as well as some ideas for future reform. One can only hope that those with the power to instigate change discover it, before it is too late.

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37. Ibid, p 320.

38. Ibid, p 336.

39. Ibid.

40. Ibid.

41. Ibid.

42. Official statistics from 2014 show that SMEs accounted for 99.8% of non-financial businesses across the EU28, employ 67% of the workers, and contribute to the economy 58% of gross value added. See European Commission *Annual Report on European SMEs 2014–15*, available at <http://bit.ly/1CZVkrV> (accessed 15 January 2016).