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Corporate Sustainability

Gender as an Agent for Change?

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14.1 The Sustainability Imperative

There is an overwhelmingly clear imperative for a shift of business and finance away from 'business as usual', which is becoming a very certain path towards a very uncertain and unsustainable future. Sustainability is the grand challenge of our time, and finding out how to secure the social foundation for people now and in the future while staying within planetary boundaries[1] is arguably the greatest challenge humanity has ever faced. Business and finance are a necessary part of this shift. Although there are some indications that the shift may be beginning, it is still on the fringe of mainstream business and finance, and there are forces that serve to entrench and even exacerbate the exploitation of nature and of people and the undermining of the financial and economic stability of our societies. Positive change accordingly still appears to be incremental at best.

As we outlined in the introductory chapter to this volume,[2] while our concern is with business (law and finance, because of their interconnected nature) generally, we as editors chose the corporation as our focal point. The corporate form remains the dominant form and we have taken the view that while other legal forms may present very interesting alternative ways of organising business (as discussed by Aikaterini Argyrou et al. and Victoria Baumfield in their contributions),[3] we must not let them act as deflection devices. The corporation, this 'chief centre

[1] M. Leach, K. Raworth and J. Rockström, 'Between social and planetary boundaries: Navigating pathways in the safe and just pathway for humanity' in *World Social Science Report 2013: Changing Global Environments* (OECD, 2013), pp. 84–90, see www.worldsocialscience.org/activities/world-social-science-report/the-2013-report.

[2] Ch. 1. [3] Ch. 8; Ch. 9.

of power outside of government' as Adolf Berle called it already in 1954,[4] must be the focus of a real shift towards sustainability – indeed, that is why we speak about 'corporate sustainability' as a concept encompassing sustainable business and finance.

The corporation (as shaped by law, economics, finance and politics) has a broader and more benevolent history and current purpose than the drive for maximisation of returns for shareholders/investors that we see today (and which has been identified as the main barrier to corporate sustainability).[5] While we use 'shareholder primacy' as a short form to indicate most of what has gone wrong in the current use of the corporate form, we recognise that this is merely one, albeit crucial, aspect of a broader economic system, indeed of organising our societies,[6] that appears to be fundamentally on an unsustainable and increasingly risky path.

The question that this volume discusses, and which this concluding chapter summarises and reflects upon, is whether gender can be an agent for changing how we view corporations and how we make progress towards sustainability. There is a potential for such an influence of gender on several levels and in various ways, as this volume has demonstrated.

Discussing gender as an agent for change gives rise to a number of questions. A fundamental one is whether the values and traits that we see reflected in the unsustainable 'business as usual' approach are specifically male values and traits. We do know that we have a concurrence of male

[4] A. Berle, *The 20th Century Capitalist Revolution* (New York: Harcourt, 1954), as quoted by C. Liao in Ch. 13.

[5] B. Sjåfjell, A. Johnston, L. Anker-Sorensen & D. Millon, 'Shareholder primacy: The main barrier to sustainable companies', in B. Sjåfjell and B. J. Richardson (eds.), *Company Law and Sustainability* (Cambridge: Cambridge University Press, 2015), pp. 79–147; see also the substantive contributions in the progressive corporate law scholarship from the 1990s onwards, pushing back against the shareholder primacy domination of the Chicago School, including D. Millon, 'Theories of the Corporation' (1990) *Duke L. J*, 201; L. E. Mitchell (ed.), *Progressive Corporate Law: New Perspectives on Law, Culture and Society* (Boulder, CO: Westview Press, 1995); I. Lynch Fannon, *Working Within Two Kinds of Capitalism* (Oxford and Portland, OR: Hart, 2003); K. Greenfield, 'New Principles for Corporate Law' (2005) *1 Hastings Business Law Journal* 87; C. Mayer, *Firm Commitment: Why the Corporation is Failing Us and How to Restore Trust in It* (Oxford University Press, 2013); and M. A. Welsh, P. Spender, I. Lynch Fannon and K. Hall, 'The End of the End of History for Corporate Law' (2014) 29 *AJCL*, 147–168.

[6] Lynch Fannon, *Working Within Two Kinds of Capitalism*, illustrates how different political structures, different legislative systems yield different understandings of corporate function; see in particular chapter 4: 'The Same Questions, Different Answers'.

domination and an unsustainable mainstream business and finance model within what appears to be a systemically flawed economic system. The restricted and fragmented economic theories that have been allowed to dominate our understanding of corporations (and of the economy, of society and even of individual humans[7]) also express a de facto male dominance over public debate.[8] As Carol Liao points out, just as the lack of women in executive positions and corporate boardrooms are a direct consequence of our male-dominated history, so are the laws and norms guiding these institutions.[9] As Catherine O'Sullivan shows in her contribution to this volume, there are values and traits in business and finance that cannot be concluded as being (biologically) male but that are evidentially (culturally) masculine. These are intrinsically a part of unsustainable behaviour and performance. These negative aspects have broader implications, ranging from the macro political-economic sphere through business and finance and to the micro level of our individual lives. O'Sullivan introduces the concept of hegemonic masculinity to contest popular analysis after the recent crash that proposed the insertion of women into corporate governance structures as 'the prophylactic against future recklessness in high finance'.[10]

In this context, an alternative approach and outsider perspective is the female perspective. The question of what a female perspective can bring into this debate is therefore of interest. Firstly, as indicated in Chapter 1, a female approach in a male-dominated area may bring in new perspectives and different values – and a basis for challenging underlying assumptions of status quo. Secondly, drawing on gender organisational studies helps recognise the extent to which organisations are gendered, and how typical masculine values dominate, as discussed in several contributions in this volume.[11] Thirdly, drawing on feminist organisational change strategies, we present a tentative basis for a deeper discussion of whether gender can be an agent for change, to mitigate shareholder primacy, or more positively phrased, to create or facilitate corporate sustainability. The latter resonates with the title of our volume:

[7] K. Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (London: Cornerstone, 2017).

[8] See, e.g., E. Prügl, '"If Lehman Brothers Had Been Lehman Sisters..." Gender and Myth in the Aftermath of the Financial Crisis', *International Political Sociology*, 6, no. 1 (March 2012), pp. 21–35, referring to a study that suggests that the 'virtual male monopoly on financial policymaking produces gender-biased policies, including the groupthink that facilitated the financial crisis of 2008–09'.

[9] Ch. 13. [10] Ch. 12. [11] Ch. 10, 12 and 13.

Creating Corporate Sustainability: Gender as an Agent for Change, and is a much-needed analysis. Feminist theory has, together with critical theory, with which it has much in common, often been 'better at critiquing the status quo than changing it'.[12]

Accordingly, and in recognition of the sustainability imperative for change, this concluding chapter reflects on the contributions to this volume through the lens of organisational change strategies. We do this inspired by Kate Grosser's compilation of such strategies from a feminist-theoretical perspective,[13] which in turn is based on a literature review that focuses on action-based strategies for change (as opposed to, for example, epistemological analyses).[14] Thereafter, in the concluding section of this last chapter, we return to the grand challenge of our time and how we can begin to go about dealing with it.

14.2 Gender and Organisational Change

14.2.1 Liberal Individualism and Valuing the Feminine

A first strategy to achieve gender equality in and/or to change business and finance, on the individual level, is that which is denoted as *fixing individual women* or *liberal individualism*. The idea is here to help

[12] J. Martin, 'Feminist Theory and Critical Theory: Unexplored Synergies', in M. Alvesson, M. & H. Willmott (eds.), *Studying Management Critically* (London: Sage Publications, 2003), chapter 4, p. 67.

[13] This includes well-established feminist research streams that take an action-oriented approach to system change, as well as two strategies: 'hypocrisy as a resource' and external agents as change-makers, which Grosser identifies based on her literature review of gender organisational studies and CSR literature; K. Grosser, 'Corporate social responsibility, gender equality and organizational change: a feminist perspective', PhD thesis, University of Nottingham (2011), see http://eprints.nottingham.ac.uk/12138/2/KateGrosserPhDThesis2011._Corporate_Social_Responsibility%2C_Gender_Equality_and_Organizational_Change.pdf, ch. 2.3.4 'Feminist strategies for organizational change', drawing on P. Y. Martin, '"Said and Done" versus "saying and doing". Gendering Practices and Practicing Gender at Work' (2003) *Gender and Society*, 17, 342–366; D. E. Meyerson and D. M. Kolb, '"Moving out of the `Armchair": Developing a Framework to Bridge the Gap between Feminist Theory and Practice' (2000) *Organisation* 7 (4), 553–571; G. Coleman and A. Rippin, 'Putting Feminist Theory to Work: Collaboration as a Means towards Organizational Change' (2000) *Organisation* 7 (4) 573–587; and R. J. Ely and D. E. Meyerson, 'Theories of Gender in Organizations: A New Approach to Organizational Analysis and Change', *Research in Organizational Behavior* (2000) 22, 103–151.

[14] Our emphasis is somewhat different than Grosser's as ours is on corporate sustainability with gender as an agent for change and not gender equality as a goal in itself, while Grosser's work is an iterative analysis of literature on gender equality and CSR literature.

women succeed by changing them, and arguably empowering them, as we see reflected today in Sheryl Sandberg's 'Lean In' campaign.[15] Although it is arguably helpful for the individual woman to be encouraged to go into a male-dominated area and to succeed there (and indeed a network like Daughters of Themis also has a role in informally mentoring younger female scholars and supporting each other), as a strategy to achieve organisational change towards sustainability, it is clearly insufficient and inadequate. It could only be sufficient if liberal individualism led to a critical mass of women in business and if that in itself led to corporate sustainability.

This is of course also relevant for us as female business scholars – if the prerequisite for academic success were to behave like a male academic (for example, based on assumptions of assertiveness being a male rather than a female attribute), what challenge if any to the male-dominated status quo would more female business scholars make? Making 'leaning in' an individual responsibility risks conveying the message the female business academics should choose between conforming to succeed and leaving academia. On the other hand, understanding both the male-dominated thinking which informs the unsustainable status quo as well as gender inequality in academia (and more broadly in society) as systemic issues may better pave the way for nonconformist female (and progressive male) business scholars to challenge unsustainable aspects of the current dominant systems.

Liberal individualism has a limited effect on gendered organisations,[16] and as several of the contributions in our volume highlight, gendered organisations are part of the problem.[17] Liberal individualism also leaves men constrained by accepted norms of masculinity, as O'Sullivan shows in her contribution. As Roseanne Russell emphasises, both men and women 'need to be liberated from a rapacious economic system that both degrades the environment and does not value the necessary work that goes into maintaining social life'.[18]

[15] See, e.g., K. Bellstrom, 'Sheryl Sandberg, These Are the Biggest Obstacles For Women Trying to "Lean In"',; (27 September 2016) *Fortune*, which also contains Sandberg's suggestions about what businesses should do to facilitate gender equality to mitigate the tendency of 'pushing back'; and Ch. 11.

[16] The 'how to succeed' perspective may tend to be uncritical (or ignorant of) gendered organisations; K. Grosser and J. Moon, 'CSR and Feminist Organization Studies: Towards an Integrated Theorization for the Analysis of Gender Issues' (23 March 2017) *Journal of Business Ethics*.

[17] Chs. 11–13. [18] Ch. 11.

The second strategy, related to liberal individualism, is that which may be denoted as *valuing the feminine*. This strategy identifies certain traits as 'feminine' and attempts to revalue them as equal to, or superior to, perceived masculine characteristics. The strategy tends to reify differences and reinforce gendered stereotypes. This strategy also gives primacy to instrumental organisational goals. As we will see in the next section, this is reflected in initiatives aimed to facilitate improved gender balance on corporate boards.

14.2.2 Liberal Structuralism

A third and broader but interconnected strategy is that of *liberal structuralism*, an appropriate label for much of what is currently in place of insufficient and inadequate legislative strategies to affect changes in business and finance. Liberal structuralism denotes minimal structural change, such as, notably, rules to promote greater gender balance on corporate boards; the trend with corporate reporting requirements concerning environmental, social and governance issues; and the stewardship rules.[19] These rules have the aim of affecting changes in corporations and in investor behaviour, which in turn will affect corporations. However, these rules operate in a restrained manner as they generally operate on a 'comply or explain' basis.

While promoting more women on corporate boards may be informed by three interlinked legislative objectives – gender equality, improved corporate governance, and corporate sustainability – we see that the business case argument is frequently used whatever the starting point, reflecting the *valuing the feminine* strategy.[20] Whether gender-balanced corporate boards could facilitate corporate sustainability is a very broad and contested issue,[21] and is in itself limited by the business case argument. Indeed, liberal structuralism leaving deeper systemic issues untouched gives us the double limitation of instrumentality: gender equality in business is seen as relevant only if it is good for business,

[19] Gender balance on boards and the reporting rules are discussed here, and the stewardship briefly in Section 14.2.5.

[20] Ch. 6. Much CSR research that has interacted with gender issues has also taken this business case perspective; Grosser and Moon, 'CSR and Feminist Organization Studies'.

[21] Discussed in B. Sjåfjell, 'Gender Diversity in the Boardroom and Its Impacts: Is the Example of Norway a Way Forward?' (2014) 19 *Deakin Law Review* 25. See also Ch. 7.

and corporate sustainability is only seen as a goal to strive for to the extent that it leads to better long-term returns to investors.

The Norwegian legislative reform, which may be said to have sparked an international discourse and inspired numerous legislative initiatives, remains one of the few (if not the only) example of mandatory legislation to this effect, with dissolution of the corporation as the ultimate consequence in case of non-compliance.[22] Conversely, a number of the other legislative initiatives remain tentative in their approach, an aspect they have in common with legislative reforms concerning reporting.[23]

On the EU level, as Irene Lynch Fannon shows us, even a proposal for a Directive with such a limited approach has become surprisingly divisive,[24] in stark contrast to the EU's earlier significant achievements in the field of gender equality.[25] Voluntarism as a defence to legislative interference is the currently preferred approach to these issues.[26] Idoya Ferrero-Ferrero et al. challenge this approach in their empirical study of gender initiatives in a panel of European listed corporations.[27] Their study shows that corporations may also tend to adopt gender policies in a symbolic manner only, reflecting the liberal structuralism that we see on the legislative level. They posit that this may explain the mixed findings in previous research about the relationship between gender diversity and corporate sustainability (as many of these analyses use

[22] Also in one of the most egalitarian countries in the world, the idea of a gender equality rule for corporate boards led to very strong opposition, with a 'business case' argument combined with a 'coup by tabloids' necessary to see the rule adopted; Sjåfjell, 'Gender Diversity in the Boardroom and Its Impacts'.

[23] Ch. 5.

[24] Adopted by the European Parliament, Members of the European Parliament urge the Council and EU Member States to move forward with this Directive, 'which has been on hold in the Council since 2013', see 'EU is stuck half way to achieving gender equality, MEPs say' (14 March 2017) *European Parliament News*, see www.europarl.europa.eu/news/en/press-room/20170308IPR65678/eu-is-stuck-half-way-to-achieving-gender-equality-meps-say.

[25] Ch. 6.

[26] That was also an argument against the Norwegian rule, leading the Norwegian legislators to give business a two-year grace period before the rule entered into force – if business had achieved a 40% female board membership on average, the rule would not have entered into force (Sjåfjell, 'Gender Diversity in the Boardroom and Its Impacts'). CSR is often misappropriated in this way, by those seeking voluntary change as a path to resisting legislative interference; I. Lynch Fannon, 'The Corporate Social Responsibility Movement and Law's Empire: Is there a Conflict?' (2007) 58(1) *Northern Ireland Legal Quarterly*, 1–21.

[27] Ch. 7.

percentage of women on the board as a proxy of effective gender diversity).[28] This is also interesting in light of the Norwegian debate, where criticism against the corporate law reform has shifted from criticising the rule itself to criticising the rule for not improving gender balance on management level.[29] This may serve to illustrate that when male domination is deeply entrenched, legal reform in one area may change that specific area but not the rest of business. Further, this supports the argument that increased gender diversity on boards most likely is insufficient to achieve corporate sustainability in itself, even if one presupposes that mitigating groupthink on corporate boards could be a small contribution to this.[30]

The compromise solution of reporting requirements is also illustrative of liberal structuralism, in that they aim to nudge corporations in the right direction, without addressing the systemic issues that have rendered so much of business and finance unsustainable. Informed by reflexive law theory, the idea is that having to report annually on issues will lead to increased consciousness of these issues amongst corporate decision-makers (notably the board), and thereby facilitate corporate sustainability. The problem is, of course, that this does not have much of an opportunity to function in practice because of the lax regulatory approaches which generally are not enforced and where the information that is reported is not verified.[31] As Gill North emphasises, despite increased corporate recognition of the need for corporate sustainability, numerous interconnected issues are compounded into a significant barrier to achieving high-quality sustainability-relevant information, with the much-lauded EU reform of 2014 and other such reporting regimes lacking sufficient substance, specificity and supervisory teeth to disrupt the entrenched power and information imbalances between corporations, investors and members of society.[32] The EU Directive is also illustrative through the language it uses – by denoting environmental impacts, human rights and other fundamental social issues, and other governance issues as 'non-financial', it is unintentionally

[28] Ibid. [29] Sjåfjell, 'Gender Diversity in the Boardroom and Its Impacts'. [30] Ibid.

[31] C. Villiers and J. Mähönen, 'Accounting, Auditing, and Reporting: Supporting or Obstructing the Sustainable Companies Objective?' in B. Sjåfjell and B. J. Richardson (eds.), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, 2015).

[32] Ch. 5, concerning Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

signalling that these issues are subordinated to and less important than the hard-core financial issues.[33]

14.2.3 From Dual Objectives to Separatism

A fourth organisational change strategy is that which is denoted *making small, deep cultural changes with dual objectives*. This strategy involves changing relatively small aspects with deeply embedded implications, and is in the literature used to describe what we may refer to as action-based case studies or pilot projects. The *dual objectives* aspect encompasses, for example, gender equality together with the aim of increasing efficiency.[34] The instrumental aim (i.e., the business case for change) may then tend to dominate. Indeed, in the one study, the researchers (Meyerson and Kolb) found that even for themselves the gender equality aim began slipping away because it was so often perceived as strategically advantageous not to mention it.[35] In our corporate sustainability context, action-based research and collaboration between business and academia arguably is a necessary contribution to achieving change, and may be highly successful in creating such 'pockets' of corporate sustainability; however, it may bring with it a risk of corporate capture. The dual goal of corporate sustainability and improvement of corporate economic performance may turn into a combination of objectives, with economic performance being the superior goal and corporate sustainability only being perceived as relevant insofar as it contributes to the superior objective. Waiting for incremental change and exceptional cases to become the norm is most likely insufficient.

Fifth, and a somewhat defensive organisational change strategy, turning away from dual objectives, is that of *separatism*, which we see reflected in the social entrepreneurship trend. While not inherently new (rather, the oldest business form arguably is the traditional social entrepreneurship of the cooperative),[36] there is a development of new forms of social entrepreneurship both through legislative initiatives, on an ad hoc

[33] B. Sjåfjell, 'Bridge Over Troubled Water: Corporate Law Reform for Life-Cycle Based Governance and Reporting' (2016) *University of Oslo Faculty of Law Research Paper* No 2016–23, see www.ssrn.com/abstract=2874270.

[34] Meyerson and Kolb, '"Moving out of the `Armchair"', p. 555.

[35] Ibid., p. 569.

[36] And is lauded as the most sustainable business form by some, see, e.g., Andrew Bibby, 'Co-operatives are an inherently more sustainable form of business' (1 March 2014) *The Guardian*, see www.theguardian.com/social-enterprise-network/2014/mar/11/co-op-business-sustainability.

business level and through business policy initiatives such as, notably, the B Corps described by Baumfield.[37]

Undoubtedly, there are positive implications of the social entrepreneurship trend, as Argyrou et al. show in their contribution, including that these can be real-life experiments on how to do business in a different way. Whilst we may find inspiration in these models for reform of the corporation, including stakeholder governance, we do not believe that this separate stream of business form will outcompete today's corporations thereby ensuring corporate sustainability. We see the potential for testing out new approaches, and together with microfinance, that social entrepreneurship (as a broad and general term) can bring new opportunities for bottom-up innovation. Nevertheless, as Baumfield indicates in her contribution, there is a risk that these new structures will be used 'ultimately just a sideshow to distract from the failure to reform traditional corporations'.[38]

14.2.4 Transforming Gendered Society: The Necessity of External Agents

The sixth organisational change strategy, *transforming gendered society*, situates corporations in society, and transcends institutional boundaries between the state, corporations, academia and civil society. The fundamental unsustainability of business today is so entrenched that such change is necessary, and understanding the implications our gendered society has on these issues is crucial. As O'Sullivan emphasises, when the kinds of considerations that inform corporate sustainability, such as concern for social justice and environmental issues, are 'coded feminine', they become 'unspeakable for those seeking to present themselves as conforming to the hegemonic norm'.[39] On the other hand, innovative approaches such as Yue Ang's analysis of emerging trends in corporate law through the lens of feminist theories (spatial justice and the ethic of care) indicate how it can be possible for law to evolve towards a legal infrastructure that promotes corporate sustainability.[40] To achieve transformational change, as Liao points out, power structures that have been erected within a male-dominated history need challenging, which will include critical analysis of long-held beliefs in corporate law as well as pushing back against male domination in business and finance.[41]

[37] Ch. 9. [38] Ibid. [39] Ch. 12. [40] Ch. 10. [41] Ch. 13.

This underlines the need for a systemic approach. Transforming a gendered – and unsustainable – society into a fair and sustainable society requires a whole jigsaw puzzle of sustainability. While Ragnhild Lunner's contribution highlights how negative corporate impact may be compounded with negative aspects of patriarchal society to render women doubly discriminated against,[42] Adaeze Okoye and Emmanuel Osuteye's contribution show how the bottom-up actions of women breaking out of their conventional roles may be a driver for corporate sustainability from below.[43] Indeed, Okoye and Osuteye demonstrate that this contribution 'from below' is a vital aspect, if we are to aim for a comprehensive shift towards corporate sustainability. Lorraine Talbot also makes the argument that it is necessary for women to act politically and in a coordinated manner for the women's own sake, and to contribute to corporate sustainability.[44] From different perspectives, Talbot and Lunner show how a broader and systemic approach is needed to understand both the impacts of corporate practice and what is necessary to achieve change from within the system.[45] The contribution of women as agents for corporate sustainability is necessary but not sufficient.

The seventh strategy, *external agents of organisational change*, is arguably necessary to achieve corporate sustainability and as such is a crucial organisational change strategy. Multijurisdictional comparative analysis of the barriers to environmental corporate sustainability has, together with other contributions to the area, shown that leaving corporate sustainability to market forces (whether from investors, consumers or procurers), or to business itself through CSR initiatives, is insufficient.[46] Shareholder primacy is so deeply entrenched that the competing social norms of corporate social responsibility and business and human rights appear unable to replace it. Liberal structuralist initiatives such as the reporting requirements remain inadequate. All this speaks to the necessity of a broader regulatory understanding and a comprehensive approach,[47] which could – and should – inform a deeper understanding of what makes effective law; that is, in our context, law that would

[42] Ch. 3. [43] Ch. 4. [44] Ch. 2. [45] Chs. 1, 3.

[46] Sjåfjell et al., 'Shareholder Primacy'.

[47] See the regulatory ecology approach, which encompasses law, social norms, markets and 'architecture' as modalities of regulation, in B. Sjåfjell and M. B. Taylor, 'Planetary Boundaries and Company Law: Towards a Regulatory Ecology of Corporate Sustainability' (2015) University of Oslo Faculty of Law Research Paper No. 2015–11, see https://ssrn.com/abstract=2610583.

challenge the deep systemic reasons for corporate unsustainability and enable the shift to sustainability.[48]

14.2.5 Taking Sustainability Goals Seriously ('Hypocrisy as a Resource')

The eighth and last of the organisational change strategies we include here is the intriguingly formulated strategy of *hypocrisy as a resource*. It may be seen as an intermediate strategy – and an important and useful one – to achieving recognition for a more systemic change. In our context we see this as an inspiration to take sustainability goals seriously (and rephrase the strategy accordingly), with the aim of contributing to finding out how to operationalise them.

International law and policy shows that there is high-level support for sustainability as an overarching goal both in international treaties[49] and through the adoption of the UN Sustainable Development Goals (SDGs) in 2015.[50] On the EU Treaty level there has been an unprecedented development from the start of the European Economic Community where sustainability issues were barely recognised in the Treaty, to the current Treaties of the European Union. The Treaty on the European Union (TEU) now emphasises the position of sustainable development, in Europe and globally.[51] This is closely linked to a growing recognition in international law and politics of sustainable development as an all-important objective and as a general principle of international law.[52]

[48] A successful legal norm may have its origins in social or moral norms and may over time create social norms and even moral norms; J. Elster, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences* (Cambridge: Cambridge University Press, 2007), pp. 358–359.

[49] See, e.g., M.-C. Cordonier Segger, 'Sustainable Development in International Law' in H. C. Bugge and C. Voigt (eds.), *Sustainable Development in International and National Law* (Groningen: Europa Law Publishing, 2008), p. 117.

[50] United Nations General Assembly resolution 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, (25 September 2015), see www.undocs.org/A/RES/70/1 and www.un.org/sustainabledevelopment/sustainable-development-goals.

[51] Articles 3(3) TEU and 3(5) TEU; see also Art. 21(2)(d) and (f) TEU.

[52] Cordonier Segger, 'Sustainable Development in International Law'; P. Birnie, A. Boyle and C. Redgwell (eds.), *International Law and the Environment*, 3rd edition (Oxford: Oxford University Press, 2009), pp. 125–127; C. Voigt, *Sustainable Development as a Principle of Integration in International Law. Resolving Potential Conflicts between Climate Measures and WTO Law* (Leiden: Martinus Nijhoff Publishers, 2009).

On the national level, a growing number of constitutions have been adopted or amended to include sustainability or aspects of sustainability, such as the right to a clean environment or the promotion of human rights as national goals.[53] On the international, European and national levels, the significance of business and finance contributing to the overarching goal of sustainability – environmentally, socially and economically – is recognised.[54] Notable international policy initiatives are the UN Guiding Principles for Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and the UN Global Compact.[55] Indeed, business and investors also increasingly sign up to this recognition, as may be illustrated by the SDG Business Hub – a business response to the UN Sustainable Development Goals.[56]

Yet, in the face of continued unsustainable 'business as usual' by both business and finance, legislative initiatives are insufficiently coherent or co-ordinated to regulate business and finance to promote a shift to sustainability. It therefore remains an urgent issue for academia to take these sustainability goals seriously and spell out what is needed to achieve them.

The EU makes for an interesting case study here. Despite its tendency towards liberal structuralism over the last decade or so, the EU is still the trade block that appears to have the greatest potential for being a front-runner for sustainability. The EU is concerned with how to achieve policy coherence for sustainability, and indeed, how to achieve coherence poses itself as a crucial question, and as a main avenue for ongoing and future research.[57] As a regional and global actor, the EU presents itself as a being at the forefront regarding sustainability measures. The EU Treaties show that to achieve the EU's ultimate aim of promotion of peace, the

[53] See, e.g., D. R. Boyd, 'The Constitutional Right to a Healthy Environment' (2012) *Environment Magazine,* see www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html.

[54] See amongst numerous examples notably the SDGs, fn. 50.

[55] United Nations, *Guiding principles on business and human rights – implementing the United Nations 'Protect, Respect and Remedy' framework* (Office of the High Commissioner for Human Rights, 2011), see www.unglobalcompact.org/library/2; OECD, *Guidelines for multinational enterprises*, see www.oecd.org/corporate/mne; and the UN Global Compact, see www.unglobalcompact.org.

[56] The SDG Business Hub, see www.sdghub.com.

[57] The SMART Project is funded under the EU's Framework Programme, under the call for greater policy coherence for development (see smart.uio.no).

EU's values[58] and the well-being of its peoples,[59] sustainable development is a prerequisite. Sustainable development is an overarching objective and meant to be the guiding principle for the EU's policies and activities.[60] While progress has been made in some areas, this cross-sectorial principle has not been integrated fully in all sectors of the EU, with hardly any trace of discussion of these issues in corporate law and financial law until after the financial crisis of 2007–2008.[61]

The financial crisis naturally led to a reconsideration of the organisation of business and finance, including reflections on the problematic nature of short-termism, with the Internal Market and Services Commissioner Michel Barnier in 2014 stating that: 'The last years have shown time and time again how short-termism damages European companies and the economy. Sound corporate governance can help to change that'.[62] Nevertheless, the final compromise text of the recent reform of the Shareholder Rights Directive contents itself with gently encouraging institutional investors to be active, long-term and sustainability-oriented, through very tentative requirements asking institutional investors to present their policies or explain why they do not have any.[63]

[58] The European Union is according to Article 2 of the Treaty on the European Union (TEU) founded on the following values: 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.

[59] Article 3(1) TEU.

[60] B. Sjåfjell, 'The Legal Significance of Article 11 TFEU for EU Institutions and Member States' in B. Sjåfjell and A. Wiesbrock (eds.), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (London and New York: Routledge, 2015), see https://ssrn.com/abstract=2530006.

[61] Ibid. See also I. Lynch Fannon, 'Corporate Responsibility and European Corporate Governance, The View from Now' in A. Beck and S. Skeffington (eds), *The Impact of European Law on the Corporate World* (Dublin: The Irish Centre for European Law, 2010), www.icel.ie/userfiles/file/papers/ICEL%202008%20No.%204.pdf.

[62] European Commission Press Release, 9 April 2014, p. 1, see www.europa.eu/rapid/press-release_IP-14-396_en.htm and the focus in the EU on unrestricted short-termism as a problem in the *Green Paper on Corporate Governance*, COM (2011) 164 final.

[63] See 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. The reform of the EU Directive on Institutions for Occupational Retirement Provision (IORP) goes in the same direction, see Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs). See B. Sjåfjell, 'When the solution becomes the problem: the triple failure of

Much of what is relevant to corporate sustainability continues to be discussed not as corporate governance proper but rather under the umbrella of corporate social responsibility (CSR). The EU's efforts to promote social sustainability and labour standards in international trade, for example, took the form of encouraging 'companies to practice corporate social responsibility, while recognizing the voluntary nature of such initiatives'.[64] This is in line with the EU Commission's definition of CSR in 2001, as a concept 'whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders *on a voluntary basis* '.[65] However, with the rising recognition of the significance of corporate sustainability, there has been a paradigm shift of the EU Commission's concept of CSR. In 2011 the concept was redefined as the *'the responsibility of enterprises for their impacts on society'* requiring an integration of 'social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy'.[66] While the paradigm shift is laudable, this approach has achieved only very tentative and incremental progress, besides the 2014 reporting directive, which is insufficient unless followed strongly and clearly up by Member States. The EU has not yet adopted a new CSR strategy, in spite of the last one now being out of date.[67]

The EU's approach to promoting corporate sustainability arguably reflects how also relatively progressive legislators such as the EU continue to be influenced by mainstream economic postulates and their simplistic understanding of the relationship between shareholders, markets and corporations. This also reflects a lack of recognition of the deeper systemic issues that inform the unsustainable state we are in. Considering

corporate governance codes' in J. J. du Plessis & C. K. Low (eds.), *Corporate Governance Codes for the 21st Century* (Berlin: Springer, 2017), p. 28.

64 European Commission, Communication from the Commission to the Council, the European Parliament and Social Committee and the Commission of the Regions on Promoting Core Labour Standards and improving social governance in the Context of Globalisation, COM (2001) 416.

65 COM (2001) 366 final (emphasis added). Although the Communication went on to speak of 'not only fulfilling legal expectation, but also going beyond compliance and investing "more" into human capital, the environment and the relations with stakeholders' (paras 20–21), the definition of CSR as voluntary has been dominant.

66 COM (2011) 681 final, Sect. 3.1 (emphasis added).

67 The marginalisation of CSR in the renamed DG GROW, the European Commission's Directorate General for Internal Market, Industry, Entrepreneurship and SMEs, is also discouraging, with only two officers dedicated to CSR, see www.ec.europa.eu/growth/index_en.

the origins of the shareholder primacy drive in the Anglo-American understanding of corporations and corporate governance, this gives rise to the question of whether the EU Commission will reconsider these issues more closely now that the United Kingdom is set to leave the EU. It also remains to be seen whether and to what extent the Commission's initiative on Sustainable Finance will bring a deeper integration of corporate sustainability into the regulation of business and finance.[68]

14.3 Responding to the Sustainability Imperative

In considering the grand challenge that we face on a global scale, our contributors appropriately range from Africa, to Europe, to North America and Australia, and have interconnected with each other to provide shared insights into the many problems that are raised when we consider corporate action in the context of sustainability. Including also the role, position and perspective of women in lower-income countries (as we do in Part I), contributes to opening up the corporate sustainability debate beyond the traditional Western, top-down and masculine perspectives.[69]

To the forefront of this collection of essays are insights on the role of the corporation which pivot on problems that are at first presented as gender specific but provide insights into the resolution of the bigger challenge of sustainability. By providing insights into the oftentimes failed resolution of apparently easy problems, we shed light on the scale of the grander challenge of sustainability. If we need to be much more proactive regarding the resolution of simple problems of securing gender equality, how much more should be done to respond to complex or 'wicked' problems of creating corporate sustainability?

It is clear that the modern corporation needs to be rethought.[70] While the purpose of the corporation and its role in society was a topic of

[68] The High-Level Expert Group on Sustainable Finance appointed by the Commission will present its report by the end of 2017, intended to be a first step towards an EU sustainable finance strategy, see www.ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance_en.

[69] As Grosser and Moon, 'CSR and Feminist Organization Studies', point out, these perspectives have been scarcely included in the CSR and business ethics literature, which an application of transnational feminist theory would have indicated.

[70] A recognition of this is expressed in recent publications such as B. Choudhury and M. Petrin (eds.), *Understanding the Company: Corporate Governance and Theory* (Cambridge: Cambridge University Press, 2017) and N. Boeger and C. Villiers, *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Oxford and Portland, OR: Hart, 2018).

intellectually stimulating and heated discussions from the nineteenth century, recent decades have witnessed a narrowing of the debate, increasingly dominated by the law-and-economics inspired view of the corporation, first as the shareholders' property, and latterly as a 'nexus of contracts' in which only the shareholders require protection. Rather than witnessing an ever-evolving analysis and evaluation of assumptions, means and goals in this area, public debates about corporate law over the last few decades have been dominated by unsubstantiated axioms which have been very difficult to question, even in light of their apparent failure. Specifically, the rise to prominence in Anglo-American scholarship and public policy discourse of the social norm of shareholder primacy has dominated debates about corporate law reform across the world. This has sidelined the great tradition of lively debates in corporate law scholarship about the nature, purpose and interests of the corporation, which had taken place from the 1850s onwards, especially in Germany and in the United States.[71] As a reaction to this, from the 1990s onwards progressive corporate lawyers sought to respond to the increasingly hegemonic law and economics school (Chicago School) of corporate law theory. However, progressive corporate law scholarship was diverse, addressing different kinds of problems, and perhaps as indicated in our introduction did not deliver a 'big idea' that was sufficiently simple or coherent to gain traction.[72]

As a new reiteration of the progressive corporate law initiative, the corporate sustainability movement may stand a better chance of achieving the necessary change.[73] Firstly, because the context is different now than it was in the 1990s. After the financial crisis of 2007–2008, even many who wholeheartedly espoused a mainstream law and economics analysis can see that this theory of corporate function is limited. The issues of sustainability have become far more pressing. In terms of planetary boundaries, where four of the currently identified nine boundaries have been transgressed, climate change and biodiversity are the two most recognised yet still not properly dealt with.[74] And in terms of

[71] Including the famous Berle and Dodd debate in the 1930s, see, e.g., W. W. Bratton and M. L. Wachter, 'Shareholder Primacy's Corporatist Origins: A. Berle and 'the Modern Corporation' (2008) 34 *Journal of Corporation Law* 99.

[72] Ch. 1. [73] Ch. 13.

[74] It is estimated that humanity has already transgressed or is at risk of transgressing at least four of the currently identified nine planetary Boundaries, including climate change, biosphere integrity, biogeochemical flows and land-system integrity. The other five being global freshwater use, ocean acidification, atmospheric aerosol loading, stratospheric

securing not only a safe but also a *just* operating space for humanity, income inequality within and between countries continues to emerge as a very serious issue of our time, threatening the stability of our societies.[75] Secondly, with a modern feminist agenda dovetailing with that of corporate sustainability, we are tapping into a new well of theoretical understanding, of compassion across genders and borders, and of a drive to contribute to a viable world. Thirdly, and interconnected, we share a common vision, the 'big idea', of business and finance that will contribute to a safe and just operating space for humanity.[76]

A new understanding of the corporation involves understanding the many different ways in which issues of gender and feminist theories interact with current conceptions of the corporation. It involves realising that in creating an ethical corporation for the future, the experience of women as outsiders, whether in developing countries in Africa or as putative ethical saviours of western corporations post crisis, has something to tell us about corporate sustainability. Policy makers, lawyers, economists and sociologists who are attempting to develop the corporation in responsive ways meet obstacles, the contours of which are described in part by our contributors.

Just as Kate Raworth has described the development of economics as a complex dynamic and ever-evolving discipline or mechanism,[77] so too the corporation is complex, dynamic and ever evolving. Understanding the corporation as the centre of a regulatory ecology which so far has kept it in on an unsustainable path can contribute to identifying how change can be brought about, and how the 'wicked' or complex issue of securing corporate sustainability can be dealt with.[78] This involves also understanding the connections between the corporation as a vital

ozone depletion and novel entities (e.g. nanomaterials and microbeads of plastic); W. Steffen, K. Richardson, J. Rockström, S. E. Cornell, I. Fetzer, E. M. Bennett, R. Biggs, S. R. Carpenter, W. de Vries, W. C. A. de Wit, C. Folke, D. Gerten, J. Heinke, G. M. Mace, L. M. Persson, V. Ramanathan, B. Reyers, S. Sorlin, 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) *Science*, 347.

[75] T. Piketty, *Capital in the Twenty-First Century* (Cambridge, MA: Harvard University Press, 2014).

[76] Leach, Raworth and Rockström, 'Between social and planetary boundaries: Navigating pathways in the safe and just pathway for humanity'.

[77] Raworth, 'Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist'.

[78] B. Sjåfjell and M. B. Taylor, 'Planetary Boundaries and Company Law: Towards a Regulatory Ecology of Corporate Sustainability' (26 May 2015) University of Oslo Faculty of Law Research Paper No. 2015–11, see https://ssrn.com/abstract=2610583.

component of our economies and the broader macro-economic picture. The problem we encounter on the corporate theory level, with the domination of the Chicago School thinking, is reflected in the way mainstream economic theory is disconnected from the grand challenge of our time. As the Nobel prize-winning Elinor Ostrom said: 'We have never had to deal with problems of the scale facing today's globally interconnected society'.[79]

The recognition of the unsustainability of our current system appears still tentative, and high-level policy goals not sufficiently coherent. On the one hand, we see that there is an encouraging consensus internationally on sustainability as a goal. The UN SDGs contain all the elements that are necessary for a safe and just operating space for humanity, except for coherence and consistency. The SDGs do not address the pervasive question of whether sustained (indefinite) economic growth is compatible with planetary boundaries, which we are already putting increasingly under stress. On the EU level, the Seventh Environment Action Programme 'Living well, within the limits of our planet', clearly recognises that there are planetary limits, while indicating that it may possible to totally decouple growth from resource use, 'setting the pace for a safe and sustainable global society'.[80] The EU's Agenda 2020, with is goal of smart, sustainable and inclusive growth, does not explicitly discuss how this decoupling is to be achieved.[81] Tim Jackson convincingly argues that sufficient total decoupling is not possible,[82] while Raworth posits that we must become agnostic about growth, focusing rather on the important question of how we can ensure that humanity can thrive and prosper, independently of whether the economy grows, shrinks or levels out.[83] Given the current discussion amongst economists, the EU, to be ahead of the curve, needs to engage with this issue.

[79] Quoted by Kate Raworth, 'Old Economics is Based on the False Laws of Physics', *Guardian*, 6 April 2017.

[80] Environment Action Programme to 2020, Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020, *Living well, within the limits of our planet*, OJ L 354, 28.12.2013, pp. 171–200.

[81] European Commission, *EUROPE 2020 A strategy for smart, sustainable and inclusive growth*, COM/2010/2020 final.

[82] T. Jackson, *Prosperity without Growth: Economics for a Finite Planet*, 2nd ed. (London: Earthscan, 2017).

[83] For an alternative approach, placing economics firmly within planetary boundaries and with the aim of securing a safe and just operating space for humanity, see Raworth, *Doughnut Economics*.

The corporation is at the heart of this arguably unsustainable economic system. The mantra of maximisation of returns for shareholders is the corporate version of the fixation on economic growth, and is exacerbated through the pressure for highest possible returns amongst institutional investors, and supported by the throw-away consumer society encouraged by corporations (wishing to sell their goods) and politicians (desiring to see their economy grow) alike. Redefining the corporation may be key to reinventing a sustainable new economy, an essential piece of the jigsaw puzzle of sustainability that we urgently need to get into place.

This gives rise to a number of avenues for future research. Can corporate sustainability be achieved within an arguably unsustainable macro-economic system? Can corporate sustainability be a sufficient driver for global sustainability, or will the macro-economic drivers for unsustainability, for relentless continued economic growth, squash any attempts at corporate sustainability? Is indeed capitalism itself the problem? We think that capitalism can be changed from within; indeed, it has always been more than the mainstream Anglo-American version that we see today.[84]

Future research will discuss how to operationalise planetary boundaries and the social foundation of a safe and just operating space on a corporate level. Discussions may also involve how we can move from concentrating on property and profit to focusing on commons and community, as is eloquently outlined in Fritjof Capra and Ugo Mattei's *Ecology of Law*,[85] and drawing on the rich possibilities depicted by Elinor Ostrom in her groundbreaking work on commons.[86] We must aim to understand the connections between the decision making in corporations, the workings of the financial markets and the macro-political and economic drivers of our unsustainable state, as well as the natural science insights into the ecological boundaries for humanity, and the social and political aspects of the social foundation that we must secure.

[84] See generally, Lynch Fannon, *Working Within Two Kinds of Capitalism*. See further I. Lynch Fannon, 'From workers to global politics: how the way we work provides answers to corporate governance questions' in J. O'Brien (ed.), *Governing the Corporation, Regulation and Corporate Governance in an Age of Scandal and Global Markets* (London: Wiley Publications, 2005).

[85] F. Capra and U. Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland, CA: Berrett-Koehler Publishers, 2015).

[86] E. Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems', (2010) *American Economic Review* 100 (3) 641–72.

To respond to the grand challenge of our time, unprecedented collaboration within and beyond academia is necessary. Interdisciplinary collaboration must gradually become the norm, not the exception.

Gender can be an agent for change, not on its own but as an important contribution, which also forms a basis for identifying important issues for future research. As a transdisciplinary group of female scholars, we contribute in this volume to positioning the problem in a larger theoretical, societal and value-based context. Insights into the gendered nature of organisations and indeed of society highlights that this affects all of us – regardless of sex, gender, nationality or social position. We see the significance of (gender) diversity and stakeholder engagement to achieving the necessary change of the combination of bottom-up and top-down initiatives within the complexity of multilayered regulatory structures, and the necessity of combining external regulation and enforcement and inside activism. We have a role in contributing to the public debate to stimulate the social mobilisation, where we can challenge the masculine hegemony of language in our field, which may contribute to explaining the fixation on growth and maximising returns, and the deeply entrenched societal tendency to monetise everything.[87] To propose solutions, to meet the grand challenge of our time, requires a systemic approach, and involves a discussion of values based on a vision. Our vision is business and finance contributing to a safe and just operating space for humanity. We look forward to continuing the discussion on how to get there.

[87] Ch. 11, and P. Cornelius and B. Kogut, 'Introduction' in P. Cornelius and B. Kogut (eds.), *Corporate Governance and Capital Flows in a Global Economy* (New York and Oxford: Oxford University Press, 2003), p. 21.