

## Book Reviews

**Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case**, by Beate Sjøfjell, (Alphen aan den Rijn: Kluwer Law International, 2009), xxix + 560pp. inc. index, hardback, £100, ISBN: 978-90-411-2768-6.

Supranational debates about corporate governance have for too long been dominated by a simplistic shareholder value model. This draws on a narrow Anglo-American approach to law and economics, assuming that importing rules and institutions from the United States and the United Kingdom into continental systems will automatically further the public good. This excellent and thought-provoking book questions this assumption from a novel perspective—that European company law and corporate governance regulation should take account of sustainable development. In considering whether EU law imposes an obligation on the EU institutions to take account of sustainable development in their activities, and whether they complied with that obligation in introducing the European Takeover Directive, Beate Sjøfjell takes the reader on a journey through the state of the art in corporate and regulatory theory, and comparative corporate governance. Accordingly, in addition to making an important contribution to the contemporary debate about the scope and functions of corporate governance, the book serves as a thorough guide to the takeover directive and its underlying policies and assumptions.

Sjøfjell's normative and descriptive starting point is that social acceptance of the company as a separate legal entity requires the company to fulfil certain social goals, and that companies and social goals co-evolve as regulators make changes to the law. She traces the different approaches taken to the role of the board in the United Kingdom, Germany and the Nordic countries, while emphasising—and accepting—that shareholder profit is a common and necessary theme in all jurisdictions. However, she also points out that, in Germany and the Nordic countries at least, any temptation towards short-termism on the part of corporate management is tempered by the law. Whatever the differences in the regulatory framework at national level, social acceptance requires the board to ensure that the company is run so that it contributes to the best interests of all involved, including society in general.

As Sjøfjell points out, a rigorous economic argument insists that maximising shareholder value can be equated with maximising social wealth in the absence of externalities. However, when this concept is translated into the ideology of shareholder value, the requirement of no externalities is either lost, or at best it is vaguely assumed that legislation can deal adequately with any externalities. Sjøfjell's review of the nuances of a number of national systems demonstrates that shareholders occupy a central position in company law. However, she emphasises that it should not be assumed either that the legislator has made a normative choice that shareholders have preferential status, or that shareholder vulnerability to opportunism automatically makes them the group best equipped to supervise management.

Sjøfjell then examines the position of the various corporate stakeholders in considerable detail, and emphasises that the societal goal of sustainable development cannot be equated with maximising or focusing on the interests of any particular stakeholder: for example, vested interests in the continued deployment of obsolete or environmentally damaging production technologies may be just as socially damaging as shareholder short-termism. Similarly, in response to the oft-heard argument that allowing corporate managers to pursue a plurality of goals will make them unaccountable to anyone, Sjøfjell argues that the heterogeneity of shareholder interests makes shareholder value a vague and conflicted concept too. Leaving aside the narrow, short-termist variant driven and advocated by hedge funds, which is not a legal norm in any EU jurisdiction, even the much vaunted notion of “enlightened shareholder value” cannot escape the need for balancing of the various interests. Shareholder value, Sjøfjell correctly insists,

is the consequence of a well-run company, rather than a guideline as to how a company should be run. The true balancing point is to be found in the interests of the company itself or as an enterprise: the interdependency of the various interests which come together under the label “the company” means that the legislator cannot expect them to protect themselves through normal market mechanisms. Sjøfjell emphasises that the laws in all jurisdictions are premised on some kind of balancing and that there is no,

“company legislation intended to secure profits for the shareholders though e.g. creditors being cheated, employees being exploited or the degradation of the environment — with all the social costs such scenarios would entail.”

However, the central—and highly persuasive—argument which runs through this book is that the board is best placed to carry out the balancing necessary for sustainability.

This overview of the various interests in corporate governance then leads on to a discussion of the ways in which the law can combine incentives and protection, balancing productivity and efficiency with sustainable development. Given her earlier normative argument that corporations must contribute to the achievement of social goals, Sjøfjell argues that, given their power in terms of resource allocation, corporations should make a contribution to the overarching social goal of sustainable development by balancing economic, social and environmental goals. Here Sjøfjell unveils her radical approach to achieving adequate balance: there should be two overarching corporate guidelines for management decision-making, with law and social norms holding the board to them. The first is that they should take a broader view of the company interest which focuses on the economic viability of the enterprise, and which may in itself be sufficient to overcome a number of the inter-stakeholder conflicts. The second is sustainable development, which is required because the interest of the global community has begun to differ from that of the other stakeholders. The implication of the second guideline is that the company should prefer decisions which further sustainable development, even if, at the extreme, this entails closing down its business. She recognises that identifying an appropriate balance between environmental, human and economic considerations will be a demanding task for the board, but insists that it is a necessary one given that the earth’s resources are finite. This admittedly controversial expansion of the corporate guidelines would bring corporate law and corporate governance into line with broader social expectations, instead of the current position, in which corporate social responsibility forms a limited exception to an implicit and generalised social irresponsibility.

The main difficulty with these proposed changes to corporate guidelines is not normative: as Sjøfjell demonstrates so eloquently, it can be argued that corporate governance is a more appropriate and flexible locus for a balancing exercise of this kind to occur than through legislation or voluntary measures of corporate social responsibility. However, these changes alone will not equip corporate boards to know whether a particular course of action is either in the long term interests of the enterprise or sustainable. How are boards to obtain information or learn about these questions? How can they measure sustainability or responsibility? It might be suggested that a more detailed examination of Teubner’s arguments (“Enterprise Corporatism — New Industrial-Policy and the Essence of the Legal Person” (1988) 36 *American Journal of Comparative Law* 30 and *Law as an Autopoietic System* (1993)) about the “interest of the company in itself” would have been useful here. For Teubner, the key to responsible decision-making is the design of processes which result in the interests of the corporation being identified and furthered on an ongoing basis. An expanded and enhanced set of corporate goals would undoubtedly be a vital prerequisite to any comprehensive system of law reform in this direction. However, far more would be required from the law than this, with regulators needing to design procedures which increase the likelihood that corporate externalities will be identified and subsequently internalised. The lack of concrete proposals in this regard is not a serious criticism of Sjøfjell’s book, which emphasises that the legal implementation of this model, and the structure and powers of boards in particular, remains a question for further research.

She also recognises that it is impossible to “predefine” sustainable development, but argues that should not excuse inaction or a refusal to integrate it into supranational regulatory activities. Given these difficulties, Sjøfjell explicitly sets herself—and achieves—two more realistic tasks: to ascertain the extent to which European law obliges the supranational institutions to take account of sustainable development in their activities, and whether, in introducing the takeover directive, the EC institutions complied with that obligation.

In the second part of her book, Sjøfjell makes a persuasive case that the Treaties create an obligation on the institutions to take account of, and integrate, sustainable development considerations into their decision-making and regulatory activities. While economic development is a crucial intermediate goal for achieving the broader goals of European integration, it cannot be unfettered and must at some point yield to sustainable development, which is an aspect of the ultimate goals of the European Union. This argument has yet to have any resonance in the debates surrounding companies and securities regulation at the supranational level, where a narrow focus on shareholder primacy prevails. There is no better example of this than in the Winter Report which preceded the final compromise on the Takeover Directive. The guiding assumption underlying the various proposals was that the introduction of a pan-European market for corporate control, underpinned by the possibility of hostile takeovers, should be equated with increasing social wealth. Sjøfjell examines how hostile takeovers depend on a norm of managerial passivity, which sidelines board decision-making with all its balancing potential in favour of a “blind” decision on the part of the shareholders as to whether or not to sell their shares. Whether the broader social interest in sustainable development is served by a particular takeover is a complex question which the target board is better placed to assess than the “market”. By sidelining the board—allegedly because of a conflict of interest—this wider interest cannot be articulated in the takeover process and is therefore lost from consideration.

After detailed analysis of the goals and provisions of the directive, Sjøfjell judges it a failure not only in terms of furthering the overarching goal of sustainable development, but also on its own terms, because its mandatory bid rule undermines its aim of stimulating corporate restructuring by raising the cost and therefore feasibility of acquiring control of a corporation. While these arguments are broadly convincing, greater emphasis might have been placed on the optionality provision which was crucial to the final adoption of the takeover directive. Broadly speaking, this gives Member States the option not to apply a board neutrality rule, and therefore at least potentially allows the Member States to restrict the operation of the market for corporate control and give the board a greater say over the outcome of hostile takeovers. That option—just like the existing national option of reforming corporate goals towards sustainability—may well be constrained in practice by the growth of regulatory competition facilitated by the ECJ’s jurisprudence in *Centros* (C-212/97) [1999] E.C.R. I-1459 and *Cartesio* (C-210/06) [2008] E.C.R. I-9641. However, it could be argued that the directive’s “political” compromise is a clear statement that the Member States are permitted to make their own choices about the extent to which the shareholder interest should influence corporate decision-making. Nevertheless, mere permission may not be enough because, as Sjøfjell makes so abundantly clear, if EU corporate regulation is to move beyond mere damage limitation, it must become part of a regulatory system, the component parts of which operate harmoniously in pursuit of sustainable development.

While the prospect of European corporate regulation which integrates sustainable development concerns seems remote, Sjøfjell’s book yields a radical but strongly persuasive conclusion which we can only hope will have some influence on policy debates at the supranational level: the purpose of the company should act as a “counterweight against shareholder primacy” and should clarify that the goal is,

“profit within the framework of sustainable development — not voluntary corporate social responsibility in so far as there is room within the framework of profit maximization.”

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**The Twilight of Constitutionalism?**, by Petra Doubner and Martin Loughlin, (Oxford: Oxford University Press, 2010), xvi +352pp. inc. index, hardback, £50, ISBN: 978-0-19-958500-7.

The use of constitutional language and concepts has enjoyed a widespread expansion in recent decades. From the relatively narrow confinement within national constitutional law discourses it has, in the wake of globalisation, crept into almost all legal sub-disciplines as well as into political science, international relations and sociology. Does this development mark the triumph of constitutionalism or is it rather an indication of its demise taking the form of an increasingly desperate attempt to maintain the constitutional outlook in the face of structural developments which threaten to undermine state-based constitutional orders? This crucial question, which goes to the core of the future of democracy and the rule of law, is the topic of this brilliantly edited volume.

The volume is to a large extent based on work carried out at the Berlin Institute of Advanced Study (Wissenschaftskolleg zu Berlin). This is also reflected in the composition of the group of contributors: 11 Germans, two Austrians, an Italian, an Englishman and a Scot. Thus, to a certain extent, the volume can also be understood as a presentation of and reflection upon the constitutional discourse in contemporary German inspired academia.

Part I starts with an introduction to “constitutional nostalgia” as research agenda by Dieter Grimm. Grimm sets forth his decade-long attempt to safeguard the “sacredness” of the state-based constitutional order and his rejection of any attempt to dilute the assumed value and dignity of the state-based constitutional concept. Constitutionalism, following Grimm, is both conceptually and historically intrinsically linked to democratic statehood. The erosion of the state as the sole source of authority implies an erosion of constitutionalism, in the sense that “the constitution shrinks to a partial order” (p.16). The attempt to transfer the constitutional concept to regional and global (e.g. the European Union and the United Nations) or to various forms of “private” forms of ordering does not live up to the high normative standards of constitutionalism. In the next chapter, Ulrich K. Preuss provides an excellent analysis which also departs from the position that historically speaking “the idea of constitutionalism as a pattern of order is only meaningful within states” (p.25). But subsequently he revises this thesis on the basis of the insight that in the wake of the American and French revolutions, society and not the state became the true object of constitutionalism. Not territorial control but the collective self-rule of a multitude is the purpose of constitutionalism. This makes it, in principle, possible to imagine,

“[a] re-conceptualisation of the idea of collective self-rule as the capacity of a collective to interact with other communities and share with them the control of their life conditions on a global scale irrespective of territorial boundaries.”(p.39)

Martin Loughlin offers a much needed and extremely concise conceptual clarification of the concepts of constitution, constitutionalism and constitutionalisation in the following contribution. Mainly drawing on Paine, Loughlin also emphasises civil society and not the state as the source and object of modern constitutions but gives an additional twist by adding the old Hegelian insight that a coherent outcome of civil society processes is conditioned by government regulation. Subsequently, the concept of