Constructing Sustainability through Corporate Law: A Comment on Beate Sjåfjell's Paper

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The Sustainable Companies project is a vital and timely one, and it poses a serious theoretical challenge to dominant theories of shareholder value corporate governance. In this comment, I will briefly discuss what the law must do if it is to steer corporations towards greater sustainability, and then what the law must do to break the stranglehold of shareholder value, releasing managers to pursue sustainability.

There is no doubt that, if we want corporations to pursue sustainability, imposing a legal duty at the level of the 'interests of the company' would be the right starting point. We might, for example, require directors and managers to act in good faith in the interests of the company whilst ensuring that the corporation acts in a sustainable way. However, this duty would need to be complemented by procedural regulation because it cannot simply be assumed that corporate managers know whether corporate activities are sustainable. This idea can perhaps best be understood in the language of social constructivism. The operations of corporations create many externalities, and, before they can internalise them, corporations must learn about them. In order to steer corporations to learn about their externalities, the law should require managers to engage in dialogue with groups who consider themselves affected by corporate operations. The aim of this would be to trace the externalities and find ways of internalising them. Corporations would then have a clearer picture of the effects they have on their environment. Unsustainable business activities are probably the most complex externalities of all, because they are market failures with a significant intergenerational dimension. If we want to use corporate governance as a means to the end of sustainability, we have to ensure that corporations actively construct it. The interests of future generations have to be articulated within this dialogue. There is therefore a pressing need for further research on how to identify proxies for the interests of future generations. To summarise, before managers can fulfil any duty to take sustainable decisions, they have to know what this requires in a particular context. Only after dialogue with affected groups will corporate managers have access to the 'facts' about whether particular activities are sustainable. The duty to act sustainability will then have determinate content. Managers would then have to make a business judgement as to how sustainability should be pursued, making tradeoffs as necessary between conflicting interests.

However, the very idea that corporations might be required to pursue sustainability brings us directly into conflict with shareholder value corporate governance. While there are very strong political and economic arguments that corporations should be required to consider sustainability in their decision-making, the current configuration of corporate governance makes it impossible for managers to play the neutral role of 'mediating hierarchs'. They have been effectively captured by a powerful rent-seeking lobby. As the 'agents' of the shareholders, managers have strong incentives not to do anything which reduces short-term profitability. If it is serious about sustainability, the law should intervene to ensure greater neutrality on the part of managers. At the very least, significant legal reform is required of both executive remuneration and the regulation of hostile takeovers. Only then will corporate managers be willing to pursue sustainability alongside the interests of the company. There is no doubt that this would be very demanding politically, and international cooperation would be essential: few countries would be willing to act unilaterally and legislate against the foundations of the shareholder value model of corporate governance.

Despite these difficulties, I am strongly of the view that sustainability is only achievable through the corporate decision-making process. This project has the potential to create major change in the way people think about corporate governance and the role it might play in achieving the common good.