

Scholarly Articles

How Company Law has Failed Human Rights – and What to Do About It

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Abstract

This article discusses three questions. First, what drives business to ignore human rights, or even worse, consciously undermine the achievement of human rights? Second, given the state of affairs of business and human rights, why is there not a quick regulatory fix to the problems that we see? Third, in light of the failure of business and of regulation so far, what can be done? The article posits that reform of company law is key to ensuring business respect for human rights, as an intrinsic element of the transition to sustainability. The article outlines how company law can facilitate sustainable business. It concludes with some reflections on the drivers for change that make it possible to envisage that the necessary reform of company law will be enacted.

Keywords: business, complexity, global value chains, social foundation, sustainability

I. INTRODUCTION

We tend to take for granted that there is a problem with the way business deals with human rights issues. However, given the extent of the problem, it is worth taking a step back and asking what drives business to ignore human rights, or even worse, consciously undermine the achievement of human rights and commit human rights violations? Furthermore, given the state of affairs of business and human rights (BHR), why is there not a quick regulatory fix to the problems that we see? Moreover, in light of the failure of business and of regulation so far, what can be done? These are the three questions to which this article this responds.

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Section II responds to the first question, outlining the systemic theoretical explanation for the lack of respect for human rights, connecting it to a commodification of labour exacerbated through a further abstraction of business from society.

Section III turns to the second question examined in this article. Companies, as a dominant legal form for doing business, are creatures of law and rely on law for their existence, and as such are directly accessible for regulation. Company law provides the regulatory infrastructure for companies, with significance for the perception of the purpose of companies and the duties of their decision-makers. Company law could have contributed to securing business respect for human rights. Instead, drawing on a wealth of multi-jurisdictional analysis, this section shows that the failure of company law is at the heart of the problem.

Section IV outlines the response to the problem and thereby to the third question of the article. The article argues that company law reform is necessary as key to securing business respect for human rights, not as an isolated element but as an intrinsic part of the transition of business to sustainability. This entails that we must also discuss what protection of human rights means in the context of business, how this can be encompassed in a company law reform, and how to make sure that a possible law reform is not just another box-ticking exercise or a new avenue for the sustainable development goals (SDG) washing. The discussion of reform proposals is positioned within the context of European Union (EU) company law.

Section V concludes the article with some reflections on the current context that makes it possible to envisage that the necessary reform of company law will be enacted.

II. WHY IS THERE A BUSINESS AND HUMAN RIGHTS PROBLEM?

The root of the reluctance of business to respect human rights may be said to be the commodification of labour; that labour is perceived as a factor of production and therefore abstracted from society.¹ Indeed, the three Polanyian ‘fictitious commodities’ – land (nature), labour and money² – explain not only the BHR problem but the problem with business (including finance) more generally. The problem with the abstraction of labour from society is further exacerbated by business itself being abstracted from society. This was not originally the case; history has seen companies subject to charter by sovereigns, with the aim – however misguided and colonialist they may have been – to do something that society (for example, the British Empire) desired.³

However, business has, informed by an Anglo-American law-and-economics inspired drive for simplification and efficiency, become to be seen as an object of private contract and private property, something where the main problems to be addressed have been the

¹ Karl Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (Boston: Beacon Press, reprinted 2001) 185.

² *Ibid.*, 71–80.

³ For example, John Micklethwait and Adrian Wooldridge, *The Company. A Short History of a Revolutionary Idea* (New York: Modern Library, 2003).

separation of investors' capital and control⁴ and the legislative barriers to optimal business solutions. The solution, in addition to de-regulation, has been various modes of intervention to increase the power of the shareholders, and to ensure and enforce the board's dedication to efficient maximization of returns to investors.⁵ The double abstraction of business from society and of labour from society through its commodification, together with the commodification of nature, has erected seemingly impregnable barriers between business and society.

There are laudable attempts at integrating societal concerns in the decision making of business, such as the responsibility of all business enterprises to conduct human rights due diligence under the UN Guiding Principles on Business and Human Rights (UNGPs). However, there is a tendency for initiatives aimed at reconnecting business with society to do so on the terms of abstraction and commodification. For example, one of the most ambitious attempts at rectifying the problem with business is integrated reporting, which attempts to include people and nature in the decision making of business by defining them – us – and the basis of our existence as 'capitals'.⁶

III. THE FAILURE OF COMPANY LAW

A. The Significance of Company Law

I now turn to the second question that this article examines. Companies, as a dominant legal form for doing business, are creatures of law and rely on law for their existence, and as such are directly accessible for regulation. So, why has law not ensured that business respects human rights?

We could speak here about international human rights law regulating states and not companies.⁷ We could discuss the problem of the regulation of business mainly being at the national level while business is transboundary,⁸ and most of the human rights violations occur across global value chains and in many – albeit not all – cases in countries where the national legislation to protect its peoples is lacking or weak in enforcement.⁹ We could reiterate how these countries tend to have limited capacity

⁴ Klaus J Hopt and Patrick C Leyens, 'Board Models in Europe: Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy' (2004) 1 *European Company and Financial Law Review* 136.

⁵ For example, Beate Sjøfjell, 'When the Solution Becomes the Problem: The Triple Failure of Corporate Governance Codes' in Jean J Du Plessis and CK Low (eds), *Corporate Governance Codes for the 21st Century* (Cham: Springer, 2017) 23–55.

⁶ Charlotte Villiers and Jukka Mähönen, 'Article 11: Integrated Reporting or Non-Financial Reporting' in Beate Sjøfjell and Anja Wiesbrock (eds), *The Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously* (Oxon: Routledge, 2015) 118–143.

⁷ See, e.g., John G Ruggie, 'Multinationals as Global Institution: Power, Authority and Relative Autonomy' (2018) 12 *Regulation & Governance* 317.

⁸ 'The fact that public law (national and international) does not generally encompass the economic unity of the multinational firm is the single most important contextual factor shaping its power, authority, and relative autonomy.' *Ibid.*, 321.

⁹ As eloquently elaborated on in Janet Dine, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press, 2005).

and are reticent of making demands of international business bringing investments into the country.¹⁰

However, at the heart of the BHR problem is the failure of company law. Company law has for far too long has been left out of the discussion of how to improve the impact business has on society. This is symptomatic of silo-thinking, which has given us such a fragmented and incoherent regulatory landscape.¹¹ It is also a result of the Anglo-American drive for simplification and efficiency, where company law has been perceived as providing a default contract for shareholders (and perhaps creditors), and nothing more. Societal impact of business has been regarded as irrelevant to company law, based on a narrow definition of what company law should be concerned with.¹²

Yet, company law has a crucial role to play. Company law provides the regulatory infrastructure for companies, with significance for the perception of the purpose of companies and the duties of their decision-makers. This includes the vital question of which interests and possible impacts are mandatory or permissible to include in decision-making, and which are not. National legislators can through company law regulate decision-making and questions of responsibility and liability for domestic companies (including extra-territorial activities of domestic companies). When the domestic companies, for example, are parent companies in transnational corporate groups, or controlling entities in international technology-based networks, or lead companies of global value chains – often all three in various forms of combinations – regulating the company has potential to influence transboundary business operations.¹³ As a notable example, EU company law, which has the power to mandate the content of the company law of all countries in the European Economic Area,¹⁴ therefore has far-reaching power.

B. The Externalization of the Impacts of Business on Society

The failure of company law lies notably in what company law does *not* say about the purpose of the company and the duties of the decision-makers – and how it does not encompass the complexity of international business.¹⁵ Through this failure, the social

¹⁰ *Ibid.*

¹¹ Beate Sjøfjell and Mark B Taylor, 'Clash of Norms: Shareholder Primacy vs Sustainable Corporate Purpose' (2019) 13 *International and Comparative Corporate Law Journal* 40.

¹² Luca Enriques et al, 'The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies' in Reinier Kraakman et al (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 3rd edn (Oxford: Oxford University Press, 2017) 107. See also Beate Sjøfjell, 'Redefining Agency Theory to Internalize Environmental Product Externalities: A Tentative Proposal Based on Life Cycle Thinking' in Eléonore Maitre-Ekern, Carl Dalhammar and Hans Christian Bugge (eds), *Preventing Environmental Damage from Products* (Cambridge: Cambridge University Press, 2018) 101.

¹³ See Olivier De Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084.

¹⁴ All member states of the European Union and the three affiliated European Free Trade Association (EFTA) States – Norway, Iceland and Lichtenstein – are members of the European Economic Area Agreement.

¹⁵ The summary here builds on multi-jurisdictional analyses through two international research projects and one international research handbook. The Sustainable Companies Project, the main results of which are published in Beate Sjøfjell et al, 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in Beate Sjøfjell and Benjamin J Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge: Cambridge University Press, 2015) 79. For the SMART Project, see Beate Sjøfjell et al, *Obstacles to Sustainable Global Business* (SMART report 2018), <https://ssrn.com/abstract=3354401> (accessed 30 March 2020) and Beate Sjøfjell

norm of shareholder primacy – a short form for a range of interconnected issues on which I will elaborate below – has been allowed to develop and dominate. The result is an extreme externalization of social costs of production onto people, notably a lack of respect for human rights.

However, this is not an isolated human rights issue; shareholder primacy is the main barrier to *sustainable business*, understood as business that contributes to and does not undermine society's capability of achieving sustainability:¹⁶ of securing the social foundation for humanity now and in the future within planetary boundaries.¹⁷ This article positions the discussion of securing business respect for human rights in the context of achieving the contribution of business to the transition to sustainability. Achieving sustainability is intrinsic to securing human rights – and *vice versa*.

Company law's silence about the purpose of the company and the interconnected concept of the interests of the company, which is the board's duty to promote, has given room for the Anglo-American, law-and-economics inspired social norm of shareholder primacy to dominate.¹⁸ Shareholder primacy, with its narrow and short-term fixation on maximization of returns for shareholders, is reinforced through the intermediary structures of capital markets.¹⁹ This social norm has taken over the space that company law gives to individual companies to define their own over-arching purpose, and for the board, to make its own assessment of what the interests of the company are and how they should be pursued. The systemically entrenched shareholder primacy drive has thereby taken the disembedding of the economy from society that Polanyi identified to an even deeper extreme of abstraction.²⁰

Denoting *shareholder primacy* as a barrier of such significance is a short form for a complex mix of perceived market signals and economic incentives, informed by path-dependent corporate governance assumptions and postulates from legal-economic theories.²¹ Through this, the purpose of the company, and the interconnected duty of the board, has been redefined – at least as a matter of public perception – as maximizing

and Christopher M Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge: Cambridge University Press, 2019).

¹⁶ Beate Sjøfjell and Christopher M Bruner, 'Corporations and Sustainability' in Sjøfjell and Bruner (eds), *ibid.*, 3–12.

¹⁷ Johan Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14 *Ecology and Society*; Will Steffen et al, 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) 347 *Science* [online] 1259855; Melissa Leach, Kate Raworth and Johan Rockström, 'Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Pathway for Humanity', *World Social Science Report 2013* (OECD Publishing, 2013) 84–90.

¹⁸ The promotion of the shareholder primacy norm is a part of the massive discursive shift that has benefited corporate globalization. Ruggie, note 7, 325. See also Christopher M Bruner, *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power* (Cambridge: Cambridge University Press, 2013).

¹⁹ Sjøfjell et al (2015), note 15.

²⁰ Of course, Tonia Novitz is correct in that the economy, or its key components (markets and business), cannot be disembedded or abstracted in the sense that they are without any connection to society, markets and business – and the economy itself – relies on the constitutive support of law. Tonia Novitz, 'Past and Future Work at the International Labour Organization: Labour as a Fictitious Commodity, Countermovement and Sustainability' (2019) 17 *International Organizations Law Review* (in press). My use of disembeddedness and abstraction is applied to the way in which business (and markets and the economy) appears to operate as if it were in a bubble without having to rely on society and the environment of which in reality it is an interconnected part, including how it has commodified and exploited labour and the environment.

²¹ Sjøfjell et al (2015), note 15.

returns for investors. In that context, regulation is perceived as an external cost, the compliance with which may be considered in a perverted cost–benefit analysis (for example, the risk of being caught for polluting the environment and the cost of a fine *versus* the extra profits by cutting corners). Shareholder primacy is such a pervasive social norm that it has become a legal myth, with pervasive influence on business practice.²²

Shareholder primacy, as the term used in this article, should be distinguished from the legal norm denoted *shareholder value*, which we find notably in the United Kingdom (UK) – David Millon makes a similar distinction between radical and traditional shareholder primacy.²³ The fact that this distinction is often not made is symptomatic of the dominance of the shareholder primacy thinking, also in corporate law doctrine. The Anglo-American, law-and-economics theories of the corporate firm have since the 1970s become the mainstream point of reference in discussions about what business is, what it does and what it should do. Without an empirical basis and in spite of evidence to the contrary, it is assumed that promoting shareholder primacy will be beneficial to society as shareholders, misleadingly presented as the sole ‘residual interest’ bearer, will receive returns only if all other involved parties and affected interests receive their due and are adequately compensated.²⁴ The theoretical basis is thereby one that concentrates on the legal form and understands its relationship with society and the environment in a reductionist economic way, instead of seeing business as a system, including but not limited to legal entities, and a key component of our economies and our societies and the ecological systems on which we depend.

C. Corporate Groups, Global Value Chains and the Complexity of Business

The complexity and opacity of modern systems of business has widened the gap between the still dominating theories and business reality. This exacerbates the impact of shareholder primacy.

Company law allows for fragmentation of one business into numerous legal entities through corporate groups. Only to an extremely limited extent does company law match the power that a parent company has over the governance of subsidiaries and their decisions across a corporate group with responsibility and liability for the parent company for wrongdoing through its subsidiaries.²⁵

The complexity of business is not limited to the use and abuse of the possibilities company law gives to structure business across corporate groups. It includes governance through contracts across global value chains, and through technology-based networks.²⁶ We are dealing with a deep complexity and opacity, through organization, control and

²² Together with that of shareholders owning companies, which they clearly do not as a matter of company law, e.g., Paddy Ireland ‘Company Law and the Myth of Shareholder Ownership’ (1999) 62 *Modern Law Review* 32.

²³ David Millon, ‘Radical Shareholder Primacy’ (2013) 10 *University of St Thomas Law Journal* 1013.

²⁴ Sjøfjell et al (2015), note 15.

²⁵ *Ibid.*

²⁶ Ruggie, note 7; Jaakko Salminen, ‘Sustainability and the Move from Corporate Governance to Governance through Contract’ in Sjøfjell and Bruner (eds), note 15, 57.

governance decoupling, financial engineering and the possibilities offered through increasing digitalization.²⁷ This in itself has dire implications for regulating business to achieve sustainability because of the difficulties – and in some cases – impossibility, of identifying who or what is in control and what constitutes economic enterprises as opposed to legal entities.²⁸ It takes the autonomy of business that John Ruggie²⁹ speaks of to an ever-deeper level of unregulated or at very best poorly and sketchily regulated territory.

The logic of shareholder primacy entails that using these possibilities to organize business to evade and avoid regulatory requirements or conceal the dirtiest aspects from public perception is not perceived as unlawful or unethical but rather an economic optimization and good business sense.

Understanding business reality entails identifying and analysing the rapid developments of new ways of doing, governing and financing business, including digitalized forms of control, finance through cryptocurrencies, decentralized autonomous organizations, created through possibilities of law and technology combined with human ingenuity. New ways of doing business show deficiencies in company law, based on dated perceptions of the functioning of business instead of the reality with businesses consisting of open, interconnected and complex systems.

D. The Complexity of Business Interacting with Society and the Environment

The complexity of business goes beyond that which is outlined above. To understand business and its impact on society, and thereby how to think about regulating business, a recognition of the interconnectedness and interdependency between business and the rest of society and the environment, is required. Drawing on sustainability science, business can be treated as an interconnected element of complex adaptive social-ecological systems, of ‘integrated system(s) of ecosystems and human society with reciprocal feedbacks and interdependence’.³⁰ The systems are ‘complex’ in that they are open, non-linear and have interconnected and interacting elements.³¹ The systems are ‘adaptive’ because of their ability to ‘change and evolve over time in response to feedbacks and changes in the system context’.³² ‘Resilience’ is the capacity of elements

²⁷ Henry TC Hu and Bernard Black, ‘Hedge Funds, Insiders, and the Decoupling of Economic and Voting Ownership: Empty Voting and Hidden (Morphable) Ownership’ (2007) 13 *Journal of Corporate Finance* 343. See also Linn Cecilie Anker-Sørensen, *The Multifaceted Corporate Group. Testing EU’s Response to Hidden Control Structures*, PhD thesis (University of Oslo, 2019), on file with the author; Linn Cecilie Anker-Sørensen, ‘Financial Engineering as an Alternative Veil for the Corporate Group’ (2016) 13 *European Company Law* 158.

²⁸ Anker-Sørensen (2019), note 27.

²⁹ Ruggie, note 7.

³⁰ Rika Preiser et al, ‘Social-Ecological Systems as Complex Adaptive Systems: Organizing Principles for Advancing Research Methods and Approaches’ (2018) 23:4 *Ecology and Society* 46, <https://doi.org/10.5751/ES-10558-230446> (accessed 30 March 2020); Carl Folke et al, ‘Resilience Thinking: Integrating Resilience, Adaptability and Transformability’ (2010) 15 *Ecology and Society* 20 [online]; Fikret Berkes, ‘Environmental Governance for the Anthropocene? Social-Ecological Systems, Resilience, and Collaborative Learning’ (2017) 9 *Sustainability* [online] 1232.

³¹ Stefan Thurner, Peter Klimek and Rudolf Hanel, *Introduction to the Theory of Complex Systems* (Oxford: Oxford University Press, 2018); Andreas Duit and Victor Galaz, ‘Governance and Complexity. Emerging Issues for Governance Theory’ (2008) 21 *Governance* 311.

³² Preiser et al, note 30.

and the social-ecological systems as a whole to ‘absorb disturbances’ and still retain ‘basic function and structure’.³³

Analysing business as an element of social-ecological systems entails recognizing ecological complexity, uncertainty and turbulence as a part of the context in which business operates. This is reflected in the planetary boundaries framework and its identification of Earth system processes that are crucial to human existence on this planet,³⁴ and whereof several, including the core boundaries of climate change and biodiversity, are under threat.³⁵ It also requires acknowledging societal complexity and turbulence, with rising inequality, populism and unrest,³⁶ exacerbated through the undermining of the economic bases for functioning societies, and the lack of resilience and resulting instability of our financial systems.³⁷ All of this impacts on policy-makers’ practical possibilities and courage to implement necessary policy changes to mitigate environmental harm – which again affects those most vulnerable.

Business interacts in malignant or benign ways with the social-ecological systems of which it is a part, contributing to the systems thriving or degenerating and ultimately collapsing.³⁸ The resilience of these systems is intrinsic to sustainability: to the goal of a safe and just operating space for humanity.³⁹

While the still prevailing theories on business and markets may wish to continue as if business and markets existed in separate economic bubbles from society and the ecosystems on which we all depend,⁴⁰ the reality of the complex social-ecological systems shows a deep and inextricable interconnectedness that we have just begun to fathom.⁴¹ The predicted effects of the current trajectories indicate that even in the best case, we will see increased ecological and societal turbulence before we see an improvement.⁴² This reinforces the imperative to resolve secure business respect for

³³ Brian Walker and David Salt, *Resilience Thinking* (Washington DC: Island Press, 2012) 1. See also Folke et al, note 30.

³⁴ Rockström et al, note 17.

³⁵ Steffen et al, note 17. See also Patricia Villarrubia-Gómez, Sarah E Cornell, and Joan Fabres, ‘Marine Plastic Pollution as a Planetary Boundary Threat – The Drifting Piece in the Sustainability Puzzle’ (2018) 96 *Marine Policy* 213.

³⁶ See, e.g., Facundo Alvaredo et al, *World Inequality Report 2018*, <https://wir2018.wid.world/> (accessed 30 March 2020); and Michael Cox, ‘Understanding the Global Rise of Populism’, *Medium* (12 February 2018), <https://medium.com/@lseideas/understanding-the-global-rise-of-populism-27305a1c5355> (accessed 30 March 2020).

³⁷ Christopher M Bruner, ‘Corporate Governance Reform in Post-Crisis Financial Firms: Two Fundamental Tensions’ (2018) 60 *Arizona Law Review* 959.

³⁸ Beate Sjøfjell, Tiina Häyhä and Sarah Cornell, *A Research-Based Approach to the UN Sustainable Development Goals. A Prerequisite to Sustainable Business and Finance*, Working Paper 28 (January 2020), <https://ssrn.com/abstract=3526744> (accessed 1 March 2020); Victor Galaz, *Global Environmental Governance, Technology and Politics: The Anthropocene Gap* (Cheltenham: Edward Elgar, 2014).

³⁹ Rockström et al, note 17; Steffen et al, note 17; Leach, Raworth and Rockström, note 17.

⁴⁰ On the tendency of economics to ignore the ‘scientific principle in the sense that data, even if they are available, are not taken seriously’, including the efficient market hypothesis amongst ‘influential “theories” that are in plain contrast to experimental evidence’, see Thurner et al, note 31, 20. See also Beate Sjøfjell, ‘Theories of the Firm: What They are Good For and What They are Really Bad At’, Working Paper (30 September 2019), <https://ssrn.com/abstract=3461603> (accessed 23 March 2020).

⁴¹ This calls for a new type of sustainability research. Sarah Cornell et al, ‘Opening Up Knowledge Systems for Better Responses to Global Environmental Change’ (2013) 28 *Environmental Science & Policy* 60.

⁴² As evident from the trajectories of climate change, as one of the core planetary boundaries, in different scenarios depending on extent of mitigation, Valérie Masson-Delmotte et al (eds), *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Geneva: World Meteorological Organization, 2018).

human rights as an intrinsic element of ensuring the contribution of business to sustainability.⁴³

E. Company Law Attempts at Improving Business Behaviour

As a matter of company law, one of the most discussed attempts at mitigating the negative impacts of business is the so-called ‘enlightened shareholder value’ enshrined in Section 172 of the UK’s Companies Act 2006.⁴⁴ However, this provision firstly does not go beyond stating a duty for the board to ‘have regard to’ various interests, including those of the company’s employees and ‘the impact of the company’s operations on the community and the environment’. Secondly, it subordinates all such interests to those of the shareholders, thereby confirming the UK position as one of shareholder value.⁴⁵ Another much-discussed approach is that which was first adopted in Mauritius and later taken up *inter alia* by India, namely that of mandating that, for example, two per cent of profits, must be used for some kind of social activity.⁴⁶ Setting aside other criticisms of the way that this has been followed up in practice in the various countries, this clearly has limited effect in changing the way that business operates.⁴⁷

Somewhat more progressive approaches, historically and in terms of innovation, in other jurisdictions such as South Africa have tended to be ignored⁴⁸ – reflecting the far-reaching impact of the social norm of shareholder primacy. However, some recent innovative examples, notably the French Duty of Vigilance Law, have contributed to an unprecedented discussion of the need for reforming core company law, especially in the EU.⁴⁹ This is sorely needed. Based on international comparative research, most recently the *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, the sad conclusion is that no company law approach hitherto identified goes far enough.⁵⁰ Most legislative initiatives so far are insufficient to push back against shareholder primacy – this legal myth that has influenced perceptions and business practice across the world. This includes various attempts at establishing ‘socially

⁴³ It is also a call for a transdisciplinary discussion of the role of the law if it is to be a meaningful contribution to securing the safe and just space for humanity, instead of going down in history as having failed us all. See Louis J Kotzé and Rakhyun E Kim, ‘Earth System Law: The Juridical Dimensions of Earth System Governance’ (2019) *Earth System Governance* 1: ‘a business-as-usual approach to law, legal regulation and juridical science will arguably not be tenable any longer’.

⁴⁴ See Surya Deva, ‘Sustainable Development: What Role for the Company Law?’ (2011) 8 *International and Comparative Corporate Law Journal* 76.

⁴⁵ Andrew Johnston, ‘Market-Led Sustainability through Information Disclosure: The UK Approach’ in Sjäffjell and Bruner (eds), note 15, 204.

⁴⁶ Renginee G Pillay et al, ‘Enlightenment or Resistance? Promoting Sustainability Through Corporate Law and Governance in Mauritius’ in Sjäffjell and Bruner (eds), note 15, 387–401; Surya Deva, ‘Socially Responsible Business in India: Has the Elephant Finally Woken Up to the Tunes of International Trends?’ (2012) 41:4 *Common Law World Review* 299; Afra Afsharipour, ‘The Promise and Challenges of India’s Corporate Governance Reforms’ (2010) 1 *Indian Journal of Law & Economics* 33.

⁴⁷ Pillay, note 46.

⁴⁸ Tshepo H Mongalo, ‘The Social and Ethics Committee: Innovating Corporate Governance in South Africa’, in Sjäffjell and Bruner (eds), note 15, 360.

⁴⁹ Véronique Magnier, ‘Old-Fashioned Yet Innovative: Corporate Law, Corporate Governance and Sustainability in France’ in Sjäffjell and Bruner (eds), note 15, 276 (also discusses the limitations of the Act).

⁵⁰ Christopher M Bruner and Beate Sjäffjell, ‘Corporate Law, Corporate Governance and the Pursuit of Sustainability’ in Sjäffjell and Bruner (eds), note 15, 713.

responsible' alternatives to mainstream companies, whether through public, private or hybrid initiatives.⁵¹ We even see some cases of reinforcement of shareholder primacy through argumentation for use of private initiatives and the public codification of such, whether through lack of knowledge or due to more cynical marketing strategies.⁵²

In parallel with the multi-jurisdictional comparative analysis of the Sustainable Companies Project, focusing on the extent to which company law prevents, encourages or mandates the inclusion of environmental concerns into decision-making in companies, the Company Law Project under the leadership of John Ruggie, with the help of law firms around the world, canvassed similar questions concerning human rights.⁵³ Ruggie's project was part of the work leading to the UN Human Rights Council's endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs).⁵⁴ The UNGPs have been and are important as a driver to change social norms and corporate culture, together with the OECD Guidelines.⁵⁵ However, on their own they are insufficient to combat the social norm of shareholder primacy.⁵⁶

The preferred legislative response has been one of asking for disclosure,⁵⁷ with the EU Non-Financial Reporting Directive being the main result of the EU's Corporate Social Responsibility (CSR) work. While the Directive has (unrealized) potential, it reflects also the inadequacy of the CSR movement, with its 'triple-bottom line', or the 'people, planet, profit' concept,⁵⁸ which has tended to promote a 'weak' sustainability with its trade-off mentality.⁵⁹

⁵¹ Carol Liao, 'Social Enterprise Law: Friend or Foe to Corporate Sustainability?' in Sjøfjell and Bruner (eds), note 15, 655.

⁵² The debate in Canada in 2019 has emphasized both this danger and highlighted how promoting allegedly more socially responsible business can become a business venture in itself. See Carol Liao, 'B.C. MLAs Should Recognize "Benefit Corporation" is an American Branding Exercise', *The Globe and Mail* (21 October 2018), www.theglobeandmail.com/business/commentary/article-bc-mlas-should-recognize-benefit-corporation-is-an-american/ (accessed 23 March 2020).

⁵³ The findings of the Company Law Project resonate with those of the Sustainable Companies Project to a large degree, namely that companies to a great extent are permitted to integrate societal concerns (human rights protection and environmental protection, respectively). However, the Company Law Project, based on information from law firms, does tend to reinforce the shareholder primacy myth by using some of its language. John Ruggie, 'Human Rights and Corporate Law: Trends and Observations from a Crossnational Study Conducted by the Special Representative', Addendum to Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31/Add.2 (23 May 2011) www.ohchr.org/Documents/Issues/Business/A-HRC-17-31-Add2.pdf (accessed 23 March 2020).

⁵⁴ To reinforce company law's permission to human-rights friendly business, Principle 3(b) of the UNGPs notes that states, to meet their duty to protect human rights, should 'Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights'.

⁵⁵ Guidelines for multinational enterprises (OECD 2011), www.oecd.org/corporate/mne/ (accessed 30 March 2020).

⁵⁶ The significance of the UNGPs as inspiration for legislative reform should be noted. Beate Sjøfjell and Mark B Taylor, 'Clash of Norms: Shareholder Primacy vs Sustainable Corporate Purpose' (2019) 13 *International and Comparative Corporate Law Journal* 3, 40–66.

⁵⁷ Principle 3(d) of the UNGPs also recommends disclosure, suggesting that states 'encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts'.

⁵⁸ John Elkington, 'Accounting for the Triple Bottom Line' (1998) 2 *Measuring Business Excellence* 18. The inadequacy of the use of the triple bottom line is recognized also by Elkington himself, J Elkington, '25 Years Ago I Coined the Phrase "Triple Bottom Line." Here's Why It's Time to Rethink It', *Harvard Business Review* (25 June 2018), <https://hbr.org/2018/06/25-years-ago-i-coined-the-phrase-triple-bottom-line-heres-why-im-giving-up-on-it> (accessed 18 March 2020).

⁵⁹ This is also what we have seen in the most influential management literature, where discussions of business' contribution to sustainability have a longer history. Sigurd S Vildåsen, Martina Keitsch and Annik Magerholm Fet, 'Clarifying the Epistemology of Corporate Sustainability' (2017) 138 *Ecological Economics* 40.

Multi-jurisdictional comparative analysis has shown that the current reporting regimes are insufficient for a number of reasons, including that through insufficiently stringent rules and a notable lack of enforcement, sustainability reporting tends to be neither relevant nor reliable.⁶⁰ An important contributory factor to this is the chasm between the perceived purpose of the company and duty of the board, on the one hand, and what they are asked to report on, on the other.

We therefore need to find out how to achieve corporate sustainability – how to ensure that business contributes to ‘strong’ or real sustainability.⁶¹ Not doing so is to the detriment of all layers of society, including the issues that the BHR movement has focused on.

Company law is, as we have seen, an area of law that has contributed to the unsustainability we now face. While more robust and appropriate theories of law and of business need to be developed, we cannot wait for this. As a general principle for policy-making, we must act under uncertainty and based on current knowledge, mitigating as best as we can what is obviously detrimental. As I will elaborate below, company law urgently needs to be reformed. This does not mean ignoring the complexity touched upon above, nor pretending that we can capture all of this by reforming company law. What it does entail is discussing reforms of company law, cognisant of the complexity, opacity, uncertainty and turbulence of the landscape in which we are navigating, and doing all we can to encompass as much of this as possible in the proposals for improvement.

IV. COMPANY LAW REFORM AS KEY

A. Pushing Back against Shareholder Primacy

Having identified the failure of company law as being at the heart of the problem, this also points the way to what needs to be changed, and accordingly to the answer of the third question of this article. Based on a decade of multi-jurisdictional comparative research, I argue that reforming company law is key to securing business respect for human rights as an inextricably interconnected element of achieving the transition of business to sustainability.

The detrimental impact of the social norm of shareholder primacy that company law has allowed to dominate can hardly be over-estimated. Taking back the power of company law to define what the purpose of the company is – re-embedding it in society⁶² – and what the duties of the board and by extension management must be, is clearly key to changing how business operates.

A barrier to better regulation of international business through national company law has been a lack of recognition of the significance of company law and the potential of

⁶⁰ See the multi-jurisdictional comparative analysis in Charlotte Villiers and Jukka Mähönen, ‘Accounting, Auditing, and Reporting: Supporting or Obstructing the Sustainable Companies Objective?’ in Sjäffjell and Richardson (eds), note 15, 175. See also Radu Mares, ‘Corporate Transparency Laws: A Hollow Victory?’ (2018) 36 *Netherlands Quarterly of Human Rights* 189.

⁶¹ Bruner and Sjäffjell, note 50.

⁶² As markets must generally be, in Tonia Novits’ words, referring to Polanyi’s rejection of the idea that markets (always) can self-correct: ‘Instead, markets need regulation through a political process, or re-embedding in our complex society’, Novitz, note 20.

company law reform,⁶³ combined with and probably informed by the perception that national law only exceptionally can have ‘extraterritorial’ effects.⁶⁴ However, this underestimates the power of company law, as outlined above.

The idea of reforming company law as a key to securing the contribution of business to sustainability is not new.⁶⁵ In the context of the conclusion of the Sustainable Companies Project (2010–2014),⁶⁶ it was launched as the idea of redefining the purpose of the company and the duties of the board as creating sustainable value within planetary boundaries.⁶⁷ In the Sustainable Market Actors for Responsible Trade Project (SMART) (2016–2020),⁶⁸ the results of the Sustainable Companies Project concerning the detrimental impacts of the dominant shareholder primacy drive have been confirmed and placed in a broader context of a system geared towards short-term profit maximization,⁶⁹ the importance of redefining the purpose of the company and the duties of the board likewise.⁷⁰

I will argue that any law reform that falls short of redefining the purpose of the company and – or as an absolute minimum – the duties of the board, will fail to push sufficiently back against shareholder primacy. In this section, I accordingly turn to the questions that need to be answered for a company law reform to play a meaningful role in protecting human rights as an intrinsic element of securing the contribution of business to sustainability: what is the relationship between human rights and the social foundation of humanity? Is protecting human rights sufficient? How should this be encompassed in a company law reform?

B. Human Rights and the Social Foundation of Humanity

The BHR problem is arguably not only one of business not integrating a respect for human rights in its operations. States are responsible for protecting human rights,

⁶³ For example, Ruggie’s insightful analysis of multinationals discusses only CSR (understood as soft law norms) and global regulation through treaties, mentioning only company law in the latter context of one of many fields of law that would need to be harmonized to be successful with global regulation. Ruggie, *note 7*.

⁶⁴ *Ibid.*

⁶⁵ Discussions of the unsustainability of business and criticism of the prevailing shareholder primacy theory, has long roots, including progressive company law scholarship from the 1990s onwards. Lawrence E Mitchell (ed), *Progressive Corporate Law* (Boulder: Westview Press, 1995); Irene Lynch Fannon, *Working Within Two Kinds of Capitalism* (Oxford: Hart Publishing, 2003); and Kent Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (Chicago: University of Chicago Press, 2008). For more recent contributions, see Lorraine E Talbot ‘Why Shareholders Shouldn’t Vote: A Marxist-Progressive Critique of Shareholder Empowerment’ (2013) 76 *Modern Law Review* 791; Colin Mayer, *Firm Commitment: Why the Corporation Is Failing Us and How to Restore Trust in It* (Oxford: Oxford University Press, 2013); Lynn A Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (San Francisco: Berrett-Koehler Publishers, 2012).

⁶⁶ The Sustainable Companies Project concentrated on the environmental aspects of sustainability, with climate changes as its case in point, www.jus.uio.no/ifp/english/research/projects/sustainable-companies/ (accessed 1 April 2020). Many of the results of the project are applicable and relevant to the social aspects of sustainability.

⁶⁷ Beate Sjøfjell and Jukka Mähönen, ‘Upgrading the Nordic Corporate Governance Model for Sustainable Companies’ (2014) 11 *European Company Law* 58; Beate Sjøfjell, ‘Corporate Governance for Sustainability. The Necessary Reform of EU Company Law’ in Sjøfjell and Wiesbrock (eds), *note 6*, 97.

⁶⁸ The SMART project has had as its aim to identify how market actors can contribute to sustainability, broadly defined as securing the social basis for humanity within planetary boundaries: www.smart.uio.no (accessed 23 March 2020).

⁶⁹ Sjøfjell et al (2018), *note 15*.

⁷⁰ *Ibid.* See also Sjøfjell and Bruner (eds), *note 15*; Andrew Johnston et al, ‘Corporate Governance for Sustainability’ (2019), <https://ssrn.com/abstract=3502101> (accessed 25 March 2020).

including ensuring that businesses over which they have jurisdiction do not abuse human rights.⁷¹ States have clearly not done enough to protect human rights, including mitigating the most detrimental human rights impacts of global business.⁷² As we will see, the limitations of human rights efforts follow the same trajectory as the rise of shareholder primacy, with the same roots. In light of these limitations, the question arises whether promoting business respect for human rights is sufficient to ensure the contribution of business to securing the social foundation for humanity.

Discussing human rights in the context of sustainability, of securing the social foundation of humanity within planetary boundaries, entails ‘questions of justice and inequality relating to global patterns of consumption and production, resource allocation, benefit distribution, and so on’.⁷³ While planetary boundaries is a science-based environmental ceiling, the basis for the social foundation as launched by Kate Raworth, is the political consensus of which aspects were important in the adoption of the SDGs.⁷⁴ As Raworth emphasizes, the minimum requirement intrinsic in securing the social foundation of humanity now and in the future is that of ensuring the realization of basic human rights.⁷⁵ Human rights as set out already in the Universal Declaration of Human Rights of 1948, include the right to life (and thereby to sufficient water, food and medicine); the right to not be held in slavery or servitude; the right to equality and not to be discriminated against; and the right to work and to ‘just and favourable conditions’ of work, including remuneration ensuring for workers and their families ‘an existence worthy of human dignity’.⁷⁶ According to Samuel Moyn, the UN through this milestone document ‘consecrated the democratic welfare state ... It thereby did more than simply enshrine the ideal of *distributive sufficiency* that the declaration explicitly defined in its series of basic entitlements; it also reflected the ambitious political enterprise of *distributive equality*’.⁷⁷

Turning to the UNGPs,⁷⁸ we see that ‘internationally recognized human rights’ as the ‘benchmarks against which other social actors assess the human rights impacts of

⁷¹ Principle 1 of the UNGPs provides: ‘States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.’

⁷² Louis J Kotzé, ‘The Anthropocene, Earth System Vulnerability and Socio-Ecological Injustice in an Age of Human Rights’ (2019) 10 *Journal of Human Rights and the Environment* 62, 73–75.

⁷³ Kotzé and Kim, note 43, 7–8.

⁷⁴ United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1 (25 September 2015), www.undocs.org/A/RES/70/1 (accessed 16 March 2020); Kate Raworth, ‘A Safe and Just Space for Humanity: Can We Live Within the Doughnut’ (2012), <https://www.oxfam.org/en/research/safe-and-just-space-humanity> (accessed 31 March 2020); Leach, Raworth and Rockström, note 17.

⁷⁵ Raworth, *ibid*; United Nations Human Rights Office of the High Commissioner, ‘Human Rights and the 2030 Agenda for Sustainable Development’, www.ohchr.org/en/issues/SDGS/pages/the2030agenda.aspx (accessed 19 March 2020). This article does not give room to develop further the question which this raises, namely, which human rights are perceived as ‘basic’.

⁷⁶ Universal Declaration of Human Rights (UDHR), articles 3 and 25, 4, 2 and 7, and 23, respectively. For an analysis of the SDGs from a human rights perspective, see Lynda M Collins, ‘Sustainable Development Goals and Human Rights: Challenges and Opportunities’ in Duncan French and Louis J Kotzé (eds), *Sustainable Development Goals. Law, Theory and Implementation* (Cheltenham: Edward Elgar 2018) 66.

⁷⁷ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, Massachusetts: The Belknap Press, 2018) 13–14 (emphasis added).

⁷⁸ UNGPs, Principle 12.

business enterprises’,⁷⁹ refer as a minimum to those expressed in the International Bill of Human Rights and in the International Labour Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work. This list will include rights enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights,⁸⁰ and the principles concerning fundamental rights in the eight ILO core conventions.⁸¹

However, socio-economic rights have remained in the shadow of civil and political rights in practice. The emphasis on distributive equality as an intrinsic element of social justice that Moyn emphasized as linked to the post-World War II idea of the welfare state, appears to have been demoted in the parallel development of the ‘neoliberal’ economic paradigm and that of human rights, from the 1970s onwards. At the heart of the former is the Anglo-American, law-and-economics inspired shareholder primacy drive, colonizing company law’s discretionary space for the purpose of the company and the duties of the board. Amongst reasons for why socio-economic rights ‘remained permanently controversial in the quest for sufficiency (and never seemed plausible in the search for class equality)’, Moyn refers to the dominance of the ‘individual’s rights to sacrosanct private property and “free” market relations’.⁸² Although there is no causal relationship between human rights and the neoliberal drive for economic growth and maximization of returns to investors in business,⁸³ in this period ‘[g]reat advances were made when it came to status equality and supranational responsibility, but at the high price of material fairness at every scale, for which human rights law lacked the norms and human rights movements the will to advocate’.⁸⁴

The ‘chief connection between human rights and market fundamentalism’, concludes Moyn, is ‘a missed connection’:⁸⁵

The real trouble about human rights, when historically correlated with market fundamentalism, is not that they promote it but that they are unambitious in theory and ineffectual in practice in the face of market fundamentalism’s success. ... And the critical reason that human rights have been a powerless companion of market fundamentalism is that they simply have nothing to say about material inequality.⁸⁶

⁷⁹ *Ibid*, Principle 12 commentary.

⁸⁰ *Ibid*.

⁸¹ *Ibid*. The eight ILO Conventions are: Convention Nos 87 and 98 on freedom of association and collective bargaining (1948 and 1949); Conventions Nos 29 and 105 on the elimination of all forms of forced and compulsory labour (1930 and 1957); ILO Convention No. 138 on the minimum age for admission to employment (1973); and ILO Conventions Nos 100 and 111 on the elimination of discrimination in respect of employment and occupation (1957 and 1958), and the 1999 ILO Convention No. 182 on the worst forms of child labour. These have been criticized as merely promoting ‘civil and political rights (and even just a selection of these), while moving away from insistence on broader socio-economic entitlements’. Novitz, *note 20*.

⁸² Moyn, *note 17*, 31.

⁸³ Moyn discusses this in light of the ‘striking correspondence’ between ‘neoliberalism’ and human rights in an era in which ‘market fundamentalism made impressive inroads, with inequality exploding in many nations’, while ‘human rights enjoyed increasing prominence ... breaking out into mass visibility in the 1970s ... , and ascending to something like a consensus public philosophy in worldwide ethics in the 1990s’, and answers this in the negative; *ibid*. 174–175.

⁸⁴ *Ibid*, 176.

⁸⁵ *Ibid*, 216.

⁸⁶ *Ibid*.

The science basis for the concept of planetary boundaries must continuously evolve in light of new understanding of what is ‘safe’. In a similar way, attempts at defining and pursuing the social foundation must be rigorously interrogated in light of what is ‘just’, which cannot be exhaustively defined by the SDGs nor by a minimalistic approach to human rights, nor by the UNGPs themselves. Efforts to secure the social foundation should therefore go to what is arguably also the roots of human rights: to ‘human dignity’, as intrinsic to a *just* space for humanity. This entails advancing human welfare, rather than, as the criticism brought forward by Moyn and others indicates, settling for a weak minimum standard. Securing the social foundation for humanity is accordingly a range of interconnected issues. As emphasized by Tonia Novitz, amongst the pivotal aims must also be that of ‘decent work’, advocated in the ILO 2008 Declaration.⁸⁷ This is reiterated and expanded on in the ILO 2019 Global Commission Report,⁸⁸ which resists the ‘commodification of labour by seeking to revitalise the voice of everyone, regardless of the types of work they do or how they are hired’.⁸⁹

There are tensions inherent in global society’s goal of sustainability, including the risk that the most marginalized groups will not be sufficiently included in participatory processes,⁹⁰ notably excluding indigenous peoples.⁹¹ Further and of particular relevance to the role of business, there is the continual undermining of the economic bases for our societies, the increasing inequality between and within countries, and the rise of populism and the risk of societal instability that this entails. Some of the most disturbing trends in major industrialized countries reflect such a lack of social stability, and companies and associated financial markets play a role in this.⁹²

Louis Kotzé, drawing on the work of Martha Fineman, invites us to employ vulnerability as a lens to move beyond the limitations of the current human rights regime and towards a broader context of ‘past, present and future socio-ecological justice’,⁹³ reflecting the interconnectedness of humanity in its socio-ecological systems. An emphasis on vulnerability arguably resonates with the Commentary to Principle 12 of the UNGPs, which emphasizes that business ‘may need to consider

⁸⁷ In a Polanyian analysis, the ILO Declarations may be said to reflect ‘countermovement to market dominance’, i.e., as a part of a ‘continued attempt to navigate (and reconcile insofar as this is ever possible) conflicting market and social pressures’, Novitz, note 20, 1 and 3. See also T Novitz, ‘Engagement with Sustainability at the International Labour Organization and Implications for Worker Voice’, *International Labour Review* (forthcoming).

⁸⁸ An ILO report – ILO Global Commission on the Future of Work, *Work for a Brighter Future* (2019) – repeatedly emphasizes that labour ‘is not a commodity’ with reference to the aim of sustainability and advocating ‘sustainable work’. Novitz, note 20.

⁸⁹ *Ibid*, 33 (in manuscript on file with author).

⁹⁰ Achieving sustainability ‘requires exploration of and debate about which combinations of pathways to pursue at different scales’, and this process ‘will need to be as open and inclusive as possible, giving voice to the knowledge, values and priorities of women and men who are marginalised, so that they are able to challenge powerful groups and interests’. Leach, Raworth and Rockström, note 17, 88.

⁹¹ Ignoring the cultural rights of indigenous peoples is also a long-term criticism against sustainable development. See, e.g., David Weissbrodt and Mary Rumsey (eds), *Vulnerable and Marginalised Groups and Human Rights* (Cheltenham: Edward Elgar, 2011); Collins, note 76; Richard Madden and Clare Coleman, ‘Visibility of Indigenous Peoples in Sustainable Development Indicators’, working paper presented at 16th Conference of the International Association of Official Statisticians (IAOS) OECD Headquarters, Paris (19–21 September 2018), www.oecd.org/iaos2018/programme/IAOS-OECD2018_Madden-Coleman.pdf (accessed 24 March 2020).

⁹² See Sjäffjell and Bruner, note 16.

⁹³ Kotzé, note 72, 81.

additional standards': for example, the human rights of 'specific groups or populations that require particular attention', elaborated on in UN instruments regarding the 'rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families'.⁹⁴ However, employing a vulnerability lens in the Anthropocene entails understanding that we are all vulnerable but not all equally resilient, that vulnerabilities will shift through 'destabilization processes we are witnessing in the Anthropocene and its changing socio-ecological conditions'.⁹⁵ This calls for an analysis that addresses also the 'causally interdependent structural causes of socio-ecological justice globally', and that is 'more inclusive and attentive refusing to shut out complexities and connections that might otherwise go unaccounted for'.⁹⁶

The social inequality within and across countries is fundamental to the turbulence of the complex social-ecological systems of which business is an element. The economic basis of our societies (of our welfare states) is also crucial to securing the social foundation, and this pertains both to the possibility of ensuring 'distributive sufficiency', to the basis of good lives, and to 'distributive equality'. This underlines that a 'safe and just' social foundation for humanity within planetary boundaries is not something that is here now, which we (merely) need to protect. It is something that we must transition towards, with appropriate policy measures informed by interconnected complexities of the social-ecological systems.

As an intrinsic element of the transition must be included participatory aspects of the social foundation,⁹⁷ of workers, regardless of their labour law status, and of affected communities, including indigenous peoples, women, children and migrant workers, and ensuring that all affected are fully involved. At the same time, we must avoid merely replacing the 'shareholder' in shareholder primacy with 'stakeholder'.⁹⁸ While involving affected communities, trade unions and civil society is crucial, a mere canvassing of 'stakeholder interests' and giving priority to the ones that make themselves heard the most is insufficient. The backdrop must always be the interconnected complexities within the relevant social-ecological systems, the vulnerability of the often unrepresented groups (whether invisible workers deep in the global value chains, indigenous communities, or future generations), and the aim of the 'safe and just' space for humanity, now and in the future, within planetary boundaries.

C. Main Elements of the Proposed Reform of Company Law

The challenge is then to encompass as much as possible of this in a company law reform. Just as the dominance of shareholder primacy shows what we must explicitly regulate to push back against, knowledge about the existential risk we all share, our vulnerability as

⁹⁴ UNGPs, Principle 12 Commentary. Also, in cases of armed conflict, the Commentary emphasizes that business should respect the 'standards of international humanitarian law'; *ibid.*

⁹⁵ Kotzé, *note 72*, 77.

⁹⁶ *Ibid.*

⁹⁷ Novitz, *note 87*. Concerning some of the challenges involved, see Ian Scoones, 'The Politics of Sustainability and Development' (2016) 41 *Annual Review of Environment and Resources* 293.

⁹⁸ Thanks to Jukka Mähönen for making this point.

humanity interconnected in complex social-ecological systems, and the systemic reasons for extreme variations in resilience in space and time, indicate what and who we must explicitly regulate to protect.

To transition towards sustainability requires innovate solutions, informed by transdisciplinary and transnational perspectives, in order to achieve a transformation of business. Corporate sustainability requires more than resource-efficiency and recyclability, and a minimalist ‘do no harm’ business respect of human rights. The full life of products, processes and services of business must be designed and carried out with the aim of contributing to staying within planetary boundaries and securing the social basis for people and communities, across global value chains. This includes issues such as paying living wages and not undermining the economic bases of welfare states, whether they are well established or weak.⁹⁹ All of this needs to be included into a company law reform.

In envisaging such a company law reform in the EU, encompassing human rights and the social-ecological basis for sustainability, there are two seemingly unrelated legal principles that can give us guidance. First, the environmental integration rule in Article 11 of the Treaty of the Functioning of the European Union, requiring that environmental protection requirements must be integrated in all policies and activities of the EU with the aim of securing a sustainable development.¹⁰⁰ Second, policy coherence for development (PCD), as an EU legal norm, requires that any area of EU law and policy must not work against developmental policies, with the sustainability aim of ‘leaving no-one behind’.¹⁰¹ As a minimum, a reform must therefore serve to mitigate the environmental harm of business, contributing to transitioning our societies to a *safe* space for humanity, fundamental to the possibilities of securing a *just space*, and serve to protect vulnerable people in low-income countries.

Referring to PCD is not intended to limit this issue of distributive justice, which, as Novitz emphasizes, can be traced back to the 1972 Stockholm Declaration,¹⁰² to what in EU terminology are denoted ‘developing’ and ‘least-developed’ countries. As Novitz points out, ‘contemporary modes of manufacture and service provision, combined with forms of technological change, have led to significant transnational cross-border sites of production and delivery’, which have become increasingly ‘temporary in nature’ also within the EU.¹⁰³ With ecological turbulence leading to an increase in migration, whether to find employment or just to survive, the migrant workers’ particular vulnerability requires recognition.¹⁰⁴ The vulnerability of workers across global value chains is

⁹⁹ Shane Darcy, ‘“The Elephant in the Room”: Corporate Tax Avoidance & Business and Human Rights’ (2017) 2 *Business and Human Rights Journal* 1.

¹⁰⁰ Beate Sjäffell, ‘The Legal Significance of Article 11 TFEU for EU Institutions and Member States’ in Sjäffell and Wiesbrock (eds), note 6, 51–72.

¹⁰¹ Clair Gammage, ‘The EU’s Evolving Commitment to Promoting Sustainability in its External Actions: Policy (In) Coherence for Development?’, SMART working paper (2019) (on file with the author).

¹⁰² Tonia Novitz, ‘Supply Chains and Temporary Migrant Labour: The Relevance of Trade and Sustainability Frameworks’ in Diamond Ashiagbor (ed), *Re-Imagining Labour Law for Development : Informal Work in the Global North and South* (New York: Hart publishing, 2019) 191–211.

¹⁰³ *Ibid.*, 192.

¹⁰⁴ *Ibid.*, 194. See also the example cited of the extensive use of temporary migrant labour in Qatar, with ‘allegations of deaths on site and widespread experience of extreme exhaustion and dehydration’, including various other forms of ‘exploitation and abuse’. *Ibid.*, 197.

exacerbated through ‘business model(s) based on exploitation and abuse of human rights’,¹⁰⁵ and within and beyond Europe, there is a long history of exploitation of indigenous peoples, from colonialization by states to neo-colonization by business.¹⁰⁶

A law reform must find a balance between being principles-based and open and at the same time firm enough, with clear boundaries within which a continuous improvement process can take place, with room for development based on new scientific knowledge as well as best practice evolving amongst businesses. It must attempt to encompass the complexity and opacity of business through locating responsibility for systems of business, including global value chains, within single legal entities of companies. It must go beyond permissiveness to duties and beyond mere reflexive regulation to public enforcement.

As an essential point in pushing against shareholder primacy, we propose in the SMART Project that EU company law should redefine the purpose of the company.¹⁰⁷ We suggest that the purpose should be set as that of creating sustainable value within planetary boundaries, respecting the interests of its investors and other involved and affected parties.¹⁰⁸ This should be the overarching purpose irrespective the sector and line of business. We further suggest that in the articles of association (or equivalent for other types of businesses) a more detailed purpose, specific to the business of the company may be formulated, within the over-arching purpose.

The operationalization of this overarching purpose into redefined duties of the board is crucial. In the SMART Project, we propose to formulate this as duty for the board to ensure that the company fulfils its overarching purpose, respecting the interests of its members, other investors, and other involved and affected parties. This entails the board (i) ensuring that the business model of the company is in line with the purpose and (ii) developing and publishing a strategy that enables the achievement of this purpose throughout the business, integrating it in the internal control and risk management systems. The strategy shall aim to secure that the full life of the products, processes and services of the business operates within planetary boundaries, employing best available knowledge and technology. The strategy shall also serve to promote good governance, decent work and equality, support and protect human rights of its workers and affected communities and people.

Implementing the above recommendation entails, for example, that the board of a company whose business operations is undertaken across corporate groups, technology-based networks or global value chains, must include all of its operations in its strategy and follow-up of the duties. It cannot limit its responsibility to the single legal entity. Such a

¹⁰⁵ International Trade Union Association, ‘New ITUC Report Exposes Hidden Workforce of 116 Million in Global Supply Chains of Fifty Companies’ (18 January 2016), www.ituc-csi.org/new-ituc-report-exposes-hidden (accessed 18 March 2020).

¹⁰⁶ Grant Christensen, ‘What Does it Mean to be Sustainable? Regulating the Relationship between Corporations and Indigenous Peoples’ in Sjøfjell and Bruner (eds), *note 15*, 416–430.

¹⁰⁷ In this article, I concentrate on the company. The SMART proposal encompasses all kinds of undertakings with limited liability, and does not propose a threshold – rather it suggests a scalability of the duties for small- and medium-sized entities.

¹⁰⁸ Beate Sjøfjell et al, ‘Securing the Future of European Business: SMART Reform Proposals’ (SMART report 2020), section 6.2.1, <https://ssrn.com/abstract=3595048> (accessed 17 May 2020).

legislative reform will give more legal certainty both to victims of corporate harm as well as to corporate decision-makers, in light of the international trend of lawsuits both in the area of climate change and of human rights.¹⁰⁹ While the proposed law reform directly concerns European companies, it will, if adopted, impact on business operations also outside of Europe. We propose measures to protect European business in a transition phase, which would have the added advantage of indirectly influencing businesses in third countries: those businesses who work together with European companies in corporate groups, global value chains or networks, and those who wish to have access to European markets.¹¹⁰

As necessary tools, we propose that the board shall ensure that a stringent sustainability assessment is carried out of the business of the company, employing sustainability due diligence across the operations of its business, including workers, affected communities and people, with special emphasis on including vulnerable groups and people, in open, participatory processes. Sustainability due diligence should encompass environmental aspects identified as crucial through the planetary framework as well as social issues, including but not limited to human rights, and economic and governance issues, drawing on the goal of securing the social foundation for humanity discussed above.¹¹¹

The sustainability assessment, including the sustainability due diligence, should be undertaken at a minimum every three years, or more frequently in case of major changes of the business. We propose that the identified negative sustainability impacts should be rectified immediately where possible, and notably when arising out of lack of legal compliance. For all other negative impacts and crucial risks of negative impacts, an ambitious plan for continuous improvement shall be drawn up. This forms the basis for annual reporting. The assessment including the due diligence and the participatory processes should be verified by external experts, while the reporting should be audited.

The reform proposals resonate with the four-step human rights due diligence process of the UNGPs, a process also adopted by the OECD Guidelines.¹¹² This process provides helpful guidance on how sustainability due diligence as a board duty under company law should be undertaken. The difference between due diligence under the UNGPs and in the proposed company law reform is that the latter encompasses a research-based concept of sustainability,¹¹³ which is broader than human rights, into its due diligence requirements. In that sense, it is also more stringent than due diligence under the OECD Guidelines, which, for example, refer more generally to environmental issues without engaging with the planetary boundaries framework. We also propose three years as a minimum interval for sustainability due diligence.

¹⁰⁹ See Mark B Taylor, 'Litigating Sustainability – Towards a Taxonomy of Counter-Corporate Litigation', SMART Working Paper (2020), <https://ssrn.com/abstract=3530768> (accessed 17 May 2020).

¹¹⁰ Sjäffjell et al (2020), note 108, section 6.4.

¹¹¹ See the list of issues to be included in the sustainability due diligence, *ibid.*, section 6.2.1.

¹¹² Mark B Taylor, 'Human Rights Due Diligence in Theory and Practice' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Cheltenham: Edward Elgar, 2020) 87; OECD Due Diligence Guidance for Responsible Business Conduct (OECD 2018), <https://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm> (accessed 23 March 2020).

¹¹³ Defined as securing the social foundation for humanity within planetary boundaries. See Leach, Raworth and Rockström, note 17.

The proposed legislative reform will give a better basis for meaningful reporting, reflecting the duty of the board. Such a reform, which should be complemented by necessary amendments to reporting and accounting rules,¹¹⁴ would serve to realize the potential of the Non-Financial Reporting Directive, and give interested parties relevant and reliable knowledge about the business of companies, something that would also resonate with the aims of the EU's Sustainable Finance Initiative.

As a part of the EU company law reform proposal, we suggest that the European Commission should provide guidance to business for the implementation of the proposed new company law provisions. By drawing up such guidance for carrying out these processes, it will be easier to integrate improved scientific basis and development of best practice than having regularly to instigate further revisions of company law. The Commission guidelines for the Non-Financial Reporting Directive could be merged into this guidance. The guidance should also be revised, for example every three years, through an open participatory process, integrating expertise and affected communities.

Integrating sustainability into core company law gives a better basis, compared with recommended best practices, for public enforcement and for regulating the possibilities for private enforcement by affected parties.¹¹⁵ It is high time that company law takes humanity and the basis of our existence as seriously as it for decades has taken economic interests and financial stability.

V. FROM A CONVERGENCE OF CRISES TO A SUSTAINABLE FUTURE

This article builds on a decade of work identifying the barriers to sustainable business, with the failure of company law at its heart, and sets out the core elements of a proposal for how company law can redeem itself. Obviously, the argument is not that everything can be solved through company law. Indeed, the SMART reform proposals, encompassing a range of ideas about how business, finance and the production and consumption of products can be reformed,¹¹⁶ are just elements of the broader and even more comprehensive reform that needs to be undertaken. However, reforming company law is key to the necessary change.

The comprehensive reform that is needed will require political courage and the support of a number of actors. I strongly believe that this kind of transformative change is now possible. The shift in social norms, to which the UNGPs and the debate concerning BHR have contributed,¹¹⁷ have formed the basis for a new discourse on reforming the regulatory infrastructure of business. While previous attempts at harmonizing EU core company law have failed, there are several drivers for change that give hope: the EU's Sustainable Finance Initiative and the EU's Green Deal,¹¹⁸ the push for mandatory

¹¹⁴ Sjøfjell et al (2020), note 108, sections 6.2.3 and 6.2.4.

¹¹⁵ See further Sjøfjell et al (2020), note 108, section 6.2.5.

¹¹⁶ See smart.uio.no/reform_proposals (accessed 1 April 2020).

¹¹⁷ See Humberto Cantú Rivera, 'National Action Plans on Business and Human Rights: Progress or Mirage?' (2019) 4:2 *Business and Human Rights Journal* 213.

¹¹⁸ European Commission, 'The European Green Deal' (11 December 2019), https://ec.europa.eu/info/files/communication-european-green-deal_en (accessed 24 March 2020).

human rights due diligence,¹¹⁹ national legislative initiatives,¹²⁰ and the emerging recognition of the risk of carrying on with the unsustainability of business as usual.¹²¹

Ultimately, the risk of unsustainable business as usual is existential: if we do not manage to find out how to secure a safe and just space for humanity, we may end up with societal collapse. There are a number of scenarios that can lead to this, including climate change and other environmental degradation, social unrest caused by increasing inequality and systematic violation of human rights, and the corporate undermining of the economic basis of our welfare systems.¹²² There are no such scenarios where stable and good long-term level of returns for investors are likely, which underlines the futility of supporting the shareholder primacy drive. If this is fully recognized, the necessary change will become that much easier to implement.

As I finalize this article towards the end of March 2020, COVID-19 is affecting the whole world, an apparent symptom of the unsustainability of current economic practices.¹²³ It illustrates how interconnected and interdependent the social-ecological systems, of which we all are a part, are. After decades of putting the economy and financial returns first, the coronavirus crisis emphasizes the importance of ensuring that the basic needs of all of humanity are met. Without them, in the long run, the economy will not function. Once we head out of this crisis, much emphasis will be placed on rebooting the economy. It will be crucial to ensure that that happens in ways which support the transition to sustainability. Ensuring business respect for human rights is one aspect of this, but this cannot be pursued separately. Securing human rights is intrinsic to achieving sustainability, and achieving sustainability is necessary to securing human rights.

A global crisis presents a good opportunity to rethink existing systems. We are facing not just one crisis but a convergence of crises, with climate change, biodiversity loss, rising social inequality, corporate human rights abuses, and the increase of the spread of diseases.¹²⁴ Already before the coronavirus crisis, societal perception of what we should expect from business was changing, in pace with the increasing urgency for a fundamental transformation of business, the economy and our societies. In the months and years ahead, we as a global society face the choice between increased populism, nationalism and xenophobia, on the one hand, and emphasizing solidarity and compassion across divides, on the other. If we can understand that we are all interconnected and interdependent elements of the same social-ecological systems, we can more easily take the opportunity to reshape the ways in which we interact, also with and in business. What happens next depends on all of us.

¹¹⁹ The European Commission is currently investigating the possibility of EU-wide mandatory human rights due diligence regulations. L Smit et al, *Study on Due Diligence Requirements Through the Supply Chain* (Luxembourg: Publications Office of the European Union, 2020).

¹²⁰ For France, see Magnier, note 48. See also BHRCC, 'Mandatory Due Diligence', www.business-humanrights.org/en/mandatory-due-diligence (accessed 1 April 2020).

¹²¹ Sjäffjell et al (2020), note 108, section 2.

¹²² World Economic Forum, *Global Risks Report 2019*, www.weforum.org/reports/the-global-risks-report-2019 (accessed 27 March 2020).

¹²³ United Nations Environment Programme, 'Coronavirus Outbreak Highlights Need to Address Threats to Ecosystems and Wildlife' (March 2020), www.unenvironment.org/news-and-stories/story/coronavirus-outbreak-highlights-need-address-threats-ecosystems-and-wildlife (accessed 25 March 2020).

¹²⁴ Katherine F Smith et al, 'Global Rise in Human Infectious Disease Outbreaks' (2014) 11 *Journal of The Royal Society Interface* [online] 20140950.