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Beyond the Shareholder Corporation: Alternative Business Forms and the Contestation of Markets

NINA BOEGER

This article considers various, established and emerging, alternative business forms that differ categorically from the traditional corporation in terms of their governance, objectives and/or ownership structures, including mission-led businesses, social enterprises, cooperatives and co-owned firms. Notwithstanding their considerable diversity, the underpinning pattern of these alternatives points towards a stakeholder model of corporate governance that commits the firm to generating value by maximising the positive impact on its (internal and external) stakeholders while limiting negative impacts, with trade-offs to be carefully balanced against each other. Through these commitments, the firm internalises a process of democratic contestation: a procedure to mediate the different interests of these market actors is incorporated directly into the structure of the firm, through procedural mechanisms embedded within its internal constitution.

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INTRODUCTION

After a decade of economic turbulence following the 2008 global financial crisis, some commentators have begun seriously to question the foundations of international capitalism, and its ability to generate sustainable wealth and prosperity. Proposals of how we might develop alternatives to liberal capitalism or even a ‘post-capitalist’ order are being raised, not only in academia but also more widely within social movements around the world.¹ Within these wider debates, much criticism is directed at the business corporation and its governance.² The financial crisis has, among other things, highlighted the dominance of international corporate power and the shortcomings of existing corporate governance structures to adequately hold such power to account. Corporations with strong policies on corporate social responsibility (CSR) would often argue they are committed to a wider social purpose. But these voluntary CSR commitments, which are usually linked to a business case for improving the company’s performance, do not fundamentally change the character of the corporation. Shareholders’ return on investment, short- or longer term, remains the measure against which the firm is assessed.³

There are, on the other hand, various alternative forms of socially responsible firms that do not revolve mostly around shareholder value. Trading, and generating profit or surplus, is central to their activities (distinguishing them from charitable organisations), but so too is their commitment to a social or environmental mission and/or accountability to different groups of stakeholders and not just to shareholders. What makes these firms categorically different from corporations, even those with comprehensive CSR policies, is the fact that these commitments are not just fixed in voluntary CSR

¹ P. Mason, *PostCapitalism: A Guide to Our Future* (2015).

² N. Boeger and C. Villiers (eds.) *Shaping the Corporate Landscape: Toward Corporate Reform and Enterprise Diversity* (forthcoming).

³ P. Fleming and M.T. Jones, *The End of Corporate Social Responsibility: Crisis and Critique* (2013).

codes but are procedurally and structurally embedded into the firm's constitution and its governance model.

In recent years, more such forms are emerging, often incorporating principles drawn from cooperative and social enterprise models that precede the boom-and-bust years of the highly financialised capitalism of the 1980 and 1990s, into new organisational forms (see also the contributions by Prabhat and by Thorpe in this issue). New forms emerge in response to specific social, economic or environmental concerns, often but not always with a local dimension, and in different socio-economic conditions; a variety of initiatives, ranging from small-scale worker cooperatives in rural Greece,⁴ to employee-owned UK public health spin-outs that often set up as 'community interest companies',⁵ to multi-national 'B Corps' like the ice cream maker *Ben & Jerry's*, that are certified for their social impact.⁶

The concern in this article is not only to convey the diverse character of these alternative business forms, but also, more particularly, to highlight the *common* role that these formats share in capitalistically ordered economies; namely, to enable political contestation of markets, and their limitations. A conventional route for this to happen is through regulatory processes that impose external checks on corporations to ensure that their economic operation aligns with wider concerns in our societies (social and economic equality, fairness, solidarity, a flourishing environment, and so on). Through regulatory intervention, society asserts control over markets and market actors (firms), thus 'embedding' (socialising) their operation by imposing (politically mediated) regulatory limitations on it.

But the rise of alternative business forms points towards an alternative route where the firm itself, and its 'transactional' freedom to operate in the economy,⁷ is being instrumentalised as a means of enabling society to assert control over capitalistically ordered markets. Their operation, and their continuing growth and their diversity, suggests that the firm can be structured as an instrument for embedding alternative forms of organisation into markets, thus tempering their potentially destructive social and environmental effects, and the shortcomings of mainstream corporations.

The discussion of these possibilities, and their challenges, is structured as follows. The first section conceives of our current 'crisis' of capitalism as a call for markets and their limitations to remain politically contested, to ensure that the socially destructive effects of 'free' markets are checked and tempered by regulatory intervention. The second section examines the role of the corporation, and its corporate governance structure centred on shareholder primacy, in relation to this need for market contestation; highlighting that the current structure impedes the social embedding of markets, for a number of reasons. Section three positions this context against existing and emerging forms of alternative business organisations, including mission-led businesses, social enterprises, co-owned and cooperative firms (with an emerging trend towards multi-stakeholder variants of the latter). It engages (briefly) with the promises as well as deep complexities that emerge from these alternative business forms and their diversity. The final section on the other hand considers what it perceives as their underpinning pattern, namely, the outline of a stakeholder governance model of corporate governance that incorporates procedures for balancing various stakeholder interests in the firm, which is thus developed as an instrument for market contestation: rather than relying on external (regulatory) checks

⁴ I. Gidakou, 'Women's Entrepreneurship in Rural Greece' (2015) 10 *International J. of Business and Management* 129.

⁵ K. Hall et al., 'Public, Private or Neither? Analysing the Publicness of Health Care Social Enterprises' (2015) *Public Management Rev.* 1.

⁶ D. Hunter, 'The arrival of B Corps in Britain: Another Milestone towards a More Nuanced Economy?', in *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity*, eds. N. Boeger and C. Villiers (forthcoming).

⁷ B. Morgan and D. Kuch, 'Radical Transactionalism: Legal Consciousness, Diverse Economies and the Sharing Economy' (2015) 42 *J. of Law and Society* 556.

on the firm alone, these private economic choices incorporate internal democratic checks into the business' very governance structure.

THE POLITICAL CONTESTATION OF MARKETS

One way to understand the current crisis of capitalism is through the writings of Karl Polanyi who considered the relationship between markets and society as a dialectic in which society checks the worst excesses of the market.⁸ For him, capitalism is sustainable only so long as the markets that enable it are embedded within human concerns. Their social embeddedness relies on a 'double-movement' between those who seek to liberate markets from regulation and those who wish to protect society from the harmful effects of unregulated markets. Importantly, it is the counter-movement – the call for regulation and social embeddedness – that in Polanyi's view ensures a market economy remains sustainable. Without it, unregulated markets, and especially the destructive social effects of labour commodification, would harm and eventually destroy society and the environment.⁹

Polanyi understood that the countervailing power of society, operating through counter-movements and regulatory intervention as a check on markets, is traditionally channelled through, and shaped in and by, formal political (representative) processes. These processes allow confrontations to be mediated non-violently, and regulations to be formulated enabling members of society to dictate the limitations they consider necessary to impose on capitalism. In this way, market regulation itself becomes a dialectic exercise: a tug-of-war where the economic interests of market actors (businesses, consumers) are pitched against wider societal concerns (such as the protection of the environment, working conditions, public services, gender equality, and so on), and restrictions are imposed on the former to limit harm inflicted on the latter. Polanyi himself suggests that society usually manages to assert itself over the market, to protect human needs and social relations (including between citizens, workers, business partners, friends, relations). The question is whether we can ensure that markets are regulated (socially embedded) without the most severe backlashes; whether we can produce a capitalism that is able to check itself on a continual basis, tempering the socially and environmentally destructive effects of unregulated markets.

The point is not that a specific level of social embeddedness, and blend of regulatory intervention, must be reached for markets to be sustainable. Rather, Polanyi's framework points out the necessity of political contestation, as a reflection of *plural* interests, and differing views, of what is the 'social' in society. The question of which human concerns society considers worthwhile regulating - and, conversely, to what extent it is prepared to give the market free reign – is open to vastly different interpretations. The call for contestation and counter-movements is a call for market regulation to be reflecting their diversity, mediated through political processes (see, similarly, the contributions by Prabhat, and by Parker and Haines, to this issue, expressing concern about who should be included in the regulatory process). His thinking therefore provides a useful starting point for explaining not only why capitalist markets must remain politically contested in order to be sustainable, but also why this contestation ought to remain socially inclusive. Social movements are diverse and, sometimes, in deep contestation with one another.¹⁰ Those with an interest in 'freeing' markets offer a particular blend or version of what is (should be) the 'social' in society, just as those seeking to impose (certain) limitations on markets will promulgate their own, potentially vastly different, version. Some movements organise around 'grand narratives' and ideologies, others narrow, even single-issue, and localised causes. Polanyi's consideration of counter-movements implies a call for deep political contestation, to ensure

⁸ K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2002, first published 1944).

⁹ Polanyi, id., p. 80; F. Block and M.R. Somers, *The Power of Market Fundamentalism: Karl Polanyi's Critique* (2014).

¹⁰ R. Munck, *Globalization and Contestation: The New Great Counter-Movement* (2006), at chapter 2.

the channels of mediation between these different narratives and perspectives are kept open, with a view to socially embedding the market in society.

THE CORPORATION: HOW ORGANISING AROUND SHAREHOLDER VALUE IMPEDES MARKET CONTESTATION

As key market actors, corporations are widely impacted by regulatory interventions in the market, but they are also capable of shaping these interventions and be part of social movements.¹¹ Whether as addressees or indirectly as ‘shapers’ of regulation, corporations traditionally operate to serve the economic interests of those who provide their capital investment, namely, their shareholders or ‘owners’. In legal terms, company directors are placed under an obligation to manage corporations for the benefits (as agents) of their shareholders, their primary objective being to maximise shareholder financial value, whether in the short or longer term. This is reflected in the corporate governance structure of the firm, including provisions on shareholders rights (amongst them, the right to appoint and dismiss the board), on directors’ duties and boardroom composition, the role of independent directors, and reporting and accounting.

The primacy of shareholders, while widely absorbed into company law and corporate governance codes, continues to provoke deep controversy.¹² For some, this model and its underpinning liberal economic theory marks the pinnacle of a long search for optimal efficiency in corporate governance. Others, however, criticise it for its inability to require more corporate responsibility and failure to prevent managerial risk taking and short termism in highly financialised capitalism. Without tracing these conversations in detail,¹³ the purpose of the following brief discussion is to consider the impact this particular corporate structure, and its institutional dominance in our economies, has on how society asserts control over markets and contests their limitations, by means of regulatory intervention.

Shareholder primacy is a principle grounded in economic market logic: the corporation is structurally designed to prioritise the interests of capital on the basis that it renders it a more efficient market actor.¹⁴ The contestation of these interests however happens through external regulatory checks on the corporation (instructively, see Sjøfjell in this issue, discussing the role of the board of directors and proposals for reform). That is, directed regulatory interventions (for example, labour law, environmental regulation, fiscal requirements) impose an external limitation on the corporation, forcing its board, if necessary, to compromise the objective to generate shareholder value in order to accommodate certain wider concerns (of workers, the environment, local communities, and so forth). The intention is in this way to curb the most socially destructive effects that the capitalist interests of the corporation, if left unregulated, would produce (from labour exploitation to environmental degradation or consumerism).

But these external checks on the corporation rely on the capacity of the formal political (representative) process to ensure that the regulatory ‘blend’ imposed on the corporation reflects democratically mediated ideas of the ‘social’ in society; and that these ideas are effectively imposed on corporations by means of external regulatory intervention. The trouble is that, crudely put, this conventional dialectic assumes that regulations impose external accountability on the firm, but says little about how the organisational structure of the corporation might impose itself on (or embed itself

¹¹ S. Wilks, *The Political Power of the Business Corporation* (2013).

¹² L. Stout, ‘The Toxic Effects of Shareholder Primacy’ (2013) 161 *University of Pennsylvania Law School* 2003; L. Talbot, ‘Trying to Change the World with Company Law? Some Problems’ (2016) 36(3) *Legal Studies* 513.

¹³ But see Boeger and Villiers, *op. cit.*, n. 2.

¹⁴ M. Jensen and W. Meckling ‘Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure’ (1976) 3(4) *J. of Financial Economics* 305.

in) the political and democratic processes that shape these regulations. There are three specific concerns we might briefly consider here.

The first is the issue of regulatory avoidance. Company directors will ensure that corporations comply with regulatory constraints to the extent that they consider it in the best interest of the firm and its shareholders not to incur sanctions or fines, or, in the longer term, not to sully the corporation's reputation when this might impact on its future ability to make profits. But their primary response to regulation is usually to seek strategies that minimise the impact of the regulatory intervention on their business model, especially on their financial returns.¹⁵ Shareholder primacy means it is only natural for them to do this: it reinforces the antagonistic relationship between markets and society. In practice, this however turns regulation into a zero-sum game between business and politics. The further the corporation pulls one way, seeking to develop strategies to minimise regulatory impact on shareholder value, the more regulation has to pull back by adjusting its interventions. The effect of this, highly confrontational, play of 'cat and mouse' is that it renders regulatory intervention more resource-intensive but potentially less predictable and effective.

The second and related issue rests in the political influence of corporations, and their ability to shape regulatory interventions either directly (as active corporate lobbyists, or because political actors co-opt them into regulatory processes) or indirectly (as a result of how their economic choices, and especially the threat of relocation, impact on political actors).¹⁶ Lindblom for example has argued at length how governments' 'structural dependency' on corporations as wealth-generating institutions means they will be, implicitly or explicitly, privileged in the political process. These privileges are not always made explicit but they are systemic, in an 'unspoken deference of administrations, legislators and courts to the needs of business'.¹⁷ That is, beyond seeking out privileges actively (most obviously, through corporate lobbying), their accumulated capital and resulting economic power are systemic features in capitalistically ordered economies that enable corporations to gain privileged access to the political process. As a result, their interests have a better chance of finding accommodation in regulatory norms, serving only to increase their economic power and influence which in turn they may deploy to further shape regulations in their (economic) interest. But, compelled by their commitment towards shareholder value, company directors are bound to channel corporate influence in ways that serve the primary interests of their capital investors. The effect is like putting chicken in charge of their pen: regulation is shaped by capitalist interests in the corporation, when it is meant to temper them.

The third issue, again related to the previous one, concerns what we may think of as the 'naturalisation' of the conventional corporate form as a means of economic organising, and its effects. The corporation is, as we have seen above, not a politically neutral organisation. It incorporates certain, substantive and procedural, assumptions relating to its organisational structure, for example, that structural dependence on capital, and economic growth, generates wealth; that prioritising shareholder value leads to economic efficiency; that economic value is best measured by financial return; that competition augments productivity; hierarchy improves effectiveness; and so on (Parker, forthcoming).¹⁸ The issue here is that these should continue to be seen as organisation choices, and their implications as political, rather than it being accepted that the structure of the shareholder corporation has intrinsic advantages for economic organising, or in fact for organising more generally. Yet by implying there is an (economic) necessity to the logic of efficiency that underpins the shareholder primacy model, the (market liberal) economic underpinnings of that model do exactly the latter: by

¹⁵ Corporate Reform Collective, *Fighting Corporate Abuse: Beyond Predatory Capitalism* (2014).

¹⁶ S. Wilks, *The Political Power of the Business Corporation* (2013); J. Ruggie, 'Multinationals as Global Institution: Power, Authority and Relative Autonomy' (2017) *Regulation & Governance* 1 <<http://onlinelibrary.wiley.com/doi/10.1111/rego.12154/abstract>>.

¹⁷ C. Lindblom, *Politics and Markets: The World's Political-Economic Systems* (1977), at 178-9.

¹⁸ M. Parker, 'Epilogue: Necessity Organisation and Politics' in *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity*, eds. N. Boeger and C. Villiers (forthcoming).

defining the issue as a matter of economic market logic they de-politicise (‘naturalise’) the corporate form.¹⁹ It becomes, as Parker puts it, a ‘vehicle for the normalization (or de-politicisation) of certain assumptions’ that characterise its organisation.²⁰

The implications of this are profound, not only in terms of what it means for the diversity of economic organisational forms. Political organising, and the political contestation of markets, relies on many different organisations – including businesses, but also associations, think tanks, clubs, communities, societies, parties, unions, charities, media outlets, public authorities, agencies, and others. These organisations are instruments into which social movements may embed themselves to pursue their interests, promulgate their worldviews and/or gain access to the political and regulatory processes that shape markets and their limits. Making sure that different patterns of organising are available and acceptable is therefore an intrinsic political concern for society, not least because it reflects our capability as humans to shape our organisations and, as Mayer points out, to ‘create concepts and institutions to assist rather than subjugate us’.²¹

So, to summarise the argument thus far. Following Polanyi’s model, we may consider that to ensure their sustainability (and counter their potentially (self-)destructive effects), capitalistically ordered markets rely on societal intervention to ‘re-socialise’ their operation. Usually, this happens in the form of regulatory intervention, mediated through formal political processes. The structure of our conventional corporations – the focus on shareholder primacy – however, disturbs the equilibrium of (market) movement and (social) counter-movement because, broadly speaking, it means company directors will do whatever they can to protect returns on investment, and if necessary use the economic dominance and political power of their organisation to achieve this. This may involve minimising regulatory impact; influencing political processes in favour of their capital investors’ interests; or more generally, nurturing certain assumptions that, because it is the dominant form of economic organising, it is also the optimal form.

From here, the argument proceeds in two steps. The first, set out in the following section, introduces the reader to some encouraging developments that suggest the search for alternative models of the firm has gained some traction, despite the continuing dominance of the stakeholder corporation. The second step, addressed in the final section of the article, provides an interpretation of these developments. It suggests that despite considerable complexity and diversity in their development and organisation, what connects their various features is an emergent alternative model of democratic contestation, where the firm itself is instrumentalised as an organisation to channel the socialisation of markets, and the contestation of their limits.

BEYOND THE SHAREHOLDER CORPORATION: VARIANTS OF ALTERNATIVE BUSINESS

Corporations run to optimise shareholder value prioritise one type of value (financial value) for the benefit of one set of stakeholders (the shareholders), if necessary at the expense of other stakeholders who might contribute to the business (employees), or might be otherwise impacted by it, either directly (consumers, suppliers, local communities) or indirectly (citizens in the welfare state, tax payers, the environment, and so on). Alternative approaches to organising the firm on the other hand might take the reverse premise as a starting point by extending the firm’s commitment to generate value towards a wider group of stakeholders, and taking fuller account of the impact of the business, positively and

¹⁹ Jensen and Meckling, *op. cit.*, n. 14.

²⁰ Parker, *op. cit.*, n. 20.

²¹ C. Mayer, *Firm Commitment: Why the Corporation Is Failing Us and How to Restore Trust in It* (2013), at 255.

negatively, on its stakeholders (a ‘pluralist’ approach).²² There are encouraging signs that, notwithstanding the continuing dominance of the shareholder corporation, more alternative business forms are emerging whose governance aligns more closely with such a wider approach. Often, their individual design depends on localised conditions including entrepreneurial and political culture as well as economic and regulatory context, but there are some broader trends shaping their current development, which the following analysis introduces briefly.

1. *Mission-led business*

One of those is a trend towards more mission-driven, or mission-led, corporate businesses. These firms continue to distribute their profits to their shareholders, but at the same time formulate a long-term commitment to have a positive social impact as a central purpose of their business, and regularly report on their social impact to their stakeholders.²³ Their approach concentrates on finding room within the corporate structure to pursue a broader purpose or mission, for example by adjusting the constitutional object clauses and/or reporting requirements of the firm, in order to account for the overall impact of the business on its stakeholders, both internal to the firm and external. It focuses optimising the commercial flexibility of the firm while incorporating mechanisms that go beyond CSR to take account of those wider stakeholder interests. Importantly, these wider commitments are enshrined in the constitution of the firm – its articles of association and its governance model – rather than a CSR policy document.

That does not make these mechanisms irreversible; corporate constitutions can be changed. Neither does it mean the company will always choose to forgo profits (or their distribution to shareholders) even when doing so might be required to protect certain stakeholder interests. Nor in fact does it guarantee that these wider interests can or will always be enforced or enforceable (see discussion further below). However, it does mean the business is structurally and procedurally committed, for a certain time, even for the foreseeable future, to pursuing a ‘blended’ purpose that prioritises a wider set of interests rather than just shareholder value.²⁴

In practical terms, there are various ways of structuring a mission-led business. In some jurisdictions, tailored corporate formats have been made available, including the benefit corporation or low-profit limited liability company in the US, with variable degrees of success.²⁵ An alternative is for businesses to rely on the flexibility within the mainstream corporate legal format to accommodate stakeholder concerns in their constitutions,²⁶ without in fact having to resort to tailored forms. A third and related, and increasingly popular, option is for firms to become a certified ‘B Corp’. This involves an independent (private) certification process, including an assessment of the business’ governance and overall impact on internal and external stakeholders at least every two years. It also requires the inclusion in its constitutional documents of an objective to have a positive impact on society and the environment, and a declaration that sets out its commitment to its stakeholders and the environment.²⁷

²² See J. Parkinson and G. Kelly, ‘The Conceptual Foundations of the Company: A Pluralist Approach’ (1998) 2 *Company, Financial and Insolvency Law Rev.* 174.

²³ D. Hunter and N. Boeger, ‘What is the Point of Business?’ *University of Bristol Law School Blog*, December 2016 <<https://legalresearch.blogs.bris.ac.uk/2016/12/what-is-the-point-of-business/>>.

²⁴ D. Brakman Reiser, ‘Blended Enterprise and the Dual Mission Dilemma’ (2010) 35 *Vermont Law Rev.* 105.

²⁵ Brakman Reiser, id.; D. Brakman Reiser and S. Dean, *Social Enterprise Law: Trust, Public Benefit and Capital Markets* (2017).

²⁶ B. Sjøfjell, ‘Dismantling the Legal Myth of Shareholder Primacy: The Corporation as a Sustainable Market Actor’ in *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity*, eds. N. Boeger and C. Villiers (forthcoming).

²⁷ D. Hunter, ‘The Arrival of B Corps In Britain: Another Milestone towards a More Nuanced Economy?’ in *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity*, eds. N. Boeger and C. Villiers (forthcoming).

2. Social enterprise

Some firms however choose to go further and commit their commercial operation primarily to a defined social mission, and to principally reinvesting their surplus revenue to advance their mission. Many of these social enterprises direct their mission towards a specific group of stakeholder-beneficiaries (for example, promoting the interests of a local community, supporting an environmental cause, providing affordable housing, improving childcare facilities, furthering the cause of gender equality, and so on). They accept considerably more commercial restrictions in their constitutional structure than mission-led businesses,²⁸ avoid compromising the integrity of their mission, for example to prevent a commercial sale of company assets or the extraction of profits for shareholders.

In principle, these features too may over time be reversed when company owners vote to change the structure of the firm.²⁹ However, in the UK for example, legal formats such as the community interest company (CiC)³⁰ are now available to impose a permanent asset lock on the business, a constitutional device that prevents the distribution of residual assets to members and ensures that the community benefit of any retained surplus, or residual value, cannot be appropriated for the private benefit of its members.³¹ In addition, CiCs that are set up as companies limited by shares are subject to a regulated dividend cap that is calculated chiefly as an aggregate limit on the total dividend declared. The purpose of these provisions is to ensure that profits continue to be principally invested for their stakeholder-beneficiaries, defined as their community benefit in the firm's constitution. They are enacted and enforced by a statutory regime that companies adopt voluntarily but which, once adopted, they may not rescind. But these commercial restrictions make growing and maintaining an economically sustainable business challenging for most social enterprises,³² and there is a slight trend towards greater commercialisation of CiCs. Recent revisions to the CiC statutory framework loosened the original restrictions on dividends and performance-related loans to build in greater flexibility, leading to a slight upward trend in CiCs issuing shares to raise finance.³³

3. Co-ownership and cooperation

A third and alternative trend in economic organising sees more forms of shared ownership incorporated into firms. The diversity of these forms is considerable. At one end of the spectrum, there exists in some jurisdictions a 'significant and growing' trend towards greater employee ownership in firms.³⁴ Commentators, academics and practitioners, increasingly challenge assumptions that employee-owned

²⁸ Social Enterprise UK, *State of Social Enterprise Survey 2015* (2015) <<https://www.socialenterprise.org.uk/Pages/Category/state-of-social-enterprise-reports>>; D. Gregory, 'The Politics, Policy, Popular Perception and Practice of Social Enterprise in the 21st Century' in *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity*, eds. N. Boeger and C. Villiers (forthcoming).

²⁹ S. Lloyd, 'Transcript: Creating the CIC' (2010) 35(1) *Vermont Law Rev.* 31.

³⁰ *Companies (Audit, Investigations and Community Enterprise) Act 2004* (UK) and *Community Interest Company Regulations 2005* (UK) (SI 2005/1788), as amended by the *Community Interest Company (Amendment) Regulations 2009* (UK) (SI 2009/1942) and *Community Interest Companies (Amendment) Regulations 2014* (UK) (SI 2014/2483).

³¹ Office of the Regulatory of Community Interest Companies, *Community Interest Companies Guidance Chapters* (2013, updated 2017) <<https://www.gov.uk/government/publications/community-interest-companies-how-to-form-a-cic>>.

³² Lloyd, op. cit., n. 29; Social Enterprise UK, op. cit., n. 28.

³³ N. Boeger et al., 'Lessons from the Community Interest Company' in *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity*, eds. N. Boeger and C. Villiers (forthcoming).

³⁴ UK Employee Ownership Association, *What Is Employee Ownership?* (2017) <<http://employeeownership.co.uk/what-is-employee-ownership/>>; J.R. Blasi et al., *The Citizen's Share: Reducing Inequality in the 21st Century* (2014).

firms would be ‘less efficient than the [capitalist] alternatives which grow up and survive in a competitive environment’.³⁵ They contend instead that current trends point in the other direction, towards ‘empirical evidence showing these predictions to be entirely false’.³⁶ Employee ownership itself, however, spans a considerable spectrum of options. It includes examples of democratically-owned firms where ‘all of the workers who produce the surplus generated inside the enterprise function collectively to appropriate and distribute it’.³⁷ But it also comprises models that limit the autonomy of employee-shareholders to shape decision-making within the firm because rights (for example, to appoint directors) can be unevenly distributed within the firm or easily reversible at the board’s discretion.³⁸

A further and related development is the resurgence in cooperative ownership of the firm. It is related to the previous, in that many employee-owned businesses are cooperatives,³⁹ although not all coops are employee-owned. More generally, cooperative enterprises are co-owned by those who participate in the business (their members) – they may be employees, or consumers, residents, tenants, a group of artists, taxi drivers, farmers, and so forth. It is a central feature of cooperatives that they are democratically governed by their members, and these commitments are embedded in seven international cooperative principles, to which most coops subscribe. Although their members are traditionally the primary beneficiaries of cooperatives, they have also historically been more strongly orientated towards community values than investor-owned companies.⁴⁰ The cooperative principles expressly integrate a principle on ‘concern for community’, and include a commitment to contribute to the sustainable development of the whole community. Many cooperative models therefore are also mission-led or social enterprises, and boundaries between these labels are further blurred as some ‘social cooperative’ formats commit their enterprise explicitly to a specific social venture.⁴¹ The traditional social roots of the cooperative movement remain influential, though cooperatives have also developed a greater commercial presence, and a distinctly economic role in developing a ‘cooperative economy’.⁴²

4. Multi-stakeholder variants of co-ownership and cooperation

A relatively recent phenomenon is the emergence, and more explicit design, of multi-stakeholder formats for co-ownership and cooperation in the firm, a movement that some have referred to as ‘new cooperativism’.⁴³ The core idea of these initiatives is to impart ‘more emphasis on shared return and solidarity between stakeholders’ and rather less on ‘meeting the needs of a single stakeholder’.⁴⁴ As Ridley-Duff points out, whereas ‘old cooperativism’ confined discussion of a common bond (solidarity) to the social characteristics of a single stakeholder group (for example, workers, consumers, producers),

³⁵ M. Jensen and W. Meckling, ‘Rights and Production Functions: An Application to Labor Managed Firms and Codetermination’ (1979) 32 *J. of Business* 469, at 473.

³⁶ D. Erdal, ‘Recognising Facts in Economic Democracy in *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity*, eds. N. Boeger and C. Villiers (forthcoming); see also Blasi et al., op. cit., n. 34.

³⁷ R. Wolff, *Democracy at Work: A Cure for Capitalism* (2012), at 120.

³⁸ D. Erdal, *Beyond the Corporation: Humanity Working* (2011), at 20; Blasi et al., op. cit., n. 34., pp. 195-223.

³⁹ V. Pérotin, ‘What Do We Really Know About Worker Co-Operatives?’ *Co-Operatives UK*, 2016 <http://www.uk.coop/sites/default/files/uploads/attachments/worker_co-op_report.pdf>.

⁴⁰ R. Ridley-Duff, *The Case for FairShares: A New Model for Social Enterprise Development and the Strengthening of the Social and Solidarity Economy* (2015) <<http://shura.shu.ac.uk/10198/>>.

⁴¹ J. Defourny and M. Nyssens, ‘Social Cooperatives: When Social Enterprises Meet the Co-operative Tradition’ (2013) 2(2) *J. of Entrepreneurial and Organizational Diversity* 11.

⁴² E. Mayo (ed.), *The Co-operative Advantage: Innovation, Co-Operation and Why Sharing Business Ownership Is Good for Britain* (2015).

⁴³ Ridley-Duff, op. cit., n. 40; M. Vieta, ‘The New Cooperativism’ (2010) 4(1) *Affinities: A J. of Radical Theory, Culture, and Action* 1.

⁴⁴ Ridley-Duff, id., pp. 17-9.

new cooperativism assumes that, provided appropriate institutional arrangements are in place, solidarity can be forged between all these stakeholders.⁴⁵ An example of this trend is a set of 'FairShares' model articles of association, devised by Ridley-Duff and others. These offer firms wishing to set up as a limited company, association or society a constitutional template for creating a multi-stakeholder (co-owned and democratically governed) enterprise that issues different *types* of shares to founders, investors, users and workers, with democratically allocated voting rights (one person one vote).⁴⁶ The central idea is to value different forms of investments in the firm, so that 'just as a financial investor gets back both their original capital plus a dividend, so an intellectual (labour) investor gets back both their original capital plus any dividend to which they are entitled'.⁴⁷ The model also commits member-shareholders to sharing any property, including and especially intellectual property, that they generate through their joint enterprise.

Others have described ideas related to new cooperativism as a movement whereby businesses are run by workers *and* communities. Wolff for example considers a democratic model of worker-self-directed firms that involves workers running the firm, and appropriating (and distributing) their collectively generated wealth, 'in conjunction – in a shared democratic decision-making process – with the surrounding communities at the local, regional and national levels'.⁴⁸ Vieta, similarly, describes 'new' cooperative enterprises as related to sustainable development and a wider social mission, more horizontal labour relations and more egalitarian distribution of surplus, as well as an orientation towards the community in which they operate.⁴⁹ Cooperatives UK, the largest cooperative membership association in Britain, provides an even wider definition, describing cooperatives quite simply, and broadly, as 'organisations that give people ownership and control over the things that matter to them'.⁵⁰

Located within the same trend but with a more directed focus is the movement towards platform cooperativism. It positions itself in opposition to capitalistically governed online platforms which, like Uber and Airbnb, describe themselves as part of a 'sharing' economy (on the basis that they facilitate resource 'sharing' or 'pooling') but are investor-owned and run as traditional corporations. The concern is that these are insufficiently transparent and democratic, yet increasingly powerful (see also Prabhat in this issue). Their technologies are, as Schor argues, 'potentially powerful tools for building a social movement [centred] on genuine practices of sharing and cooperation in the production and consumption of goods and services', but 'achieving that potential will require democratizing the ownership and governance of the platforms'.⁵¹ Cooperatively owned platforms, on other hand, are structured as common resources and open to external members;⁵² enabling those who provide and use services mediated by internet platforms to own and control the platforms themselves.⁵³

⁴⁵ R. Ridley-Duff, 'The Internationalisation of the FairShares Model: Where Agency Meets Structure in US and UK Company Law' in N. Boeger and C. Villiers (eds.) *Shaping the Corporate Landscape: Toward Corporate Reform and Enterprise Diversity* (forthcoming); see also M. Lund, *Solidarity as Business Model: A Multi-Stakeholder Co-Operative's Manual* (2012).

⁴⁶ Ridley-Duff, *op. cit.*, n. 40, p. 30.

⁴⁷ Ridley-Duff, *id.*, pp. 37-8.

⁴⁸ Wolff, *op. cit.*, n. 37, p. 120.

⁴⁹ Vieta, *op. cit.*, n. 43.

⁵⁰ Cooperatives UK, *The UK Cooperative Economy 2017* (2017) <<http://reports.uk.coop/economy2017/>> (accessed 28 July 2017)>

⁵¹ J. Schor, 'Debating the Sharing Economy' (2014) *Great Transition Initiative* <http://www.tellus.org/pub/Schor_Debating_the_Sharing_Economy.pdf>, at 1.

⁵² See the development of 'open coops': J. Davies-Coates, 'Open Co-ops: Inspiration, Legal Structure & Tools' *STIR Magazine*, Spring 2014, <<http://www.stirtoaction.com/article/open-co-ops>>.

⁵³ B. Morgan, 'A Thousand Flowers Blooming' *STIR Magazine*, 11 January 2016, <<http://www.stirtoaction.com/blog/a-thousand-flowers-blooming>>.

5. *Promise and complexity*

These are promising trends that suggest possibilities for alternative business forms exist and are further evolving. But they also offer a picture of deep complexity and confusion, not only because they all face practical challenges (for example, how to integrate their social mission and commercial sustainability; or how to balance democratic governance and purposeful management). In addition, their structural diversity, and spontaneous development, have brought a certain lack of cohesion, and uncertainty what their development might mean for the conventional corporate (legal) form.

The growing relevance of ‘mission-led’ corporate businesses for example suggests that the conventional form is far from finished as an instrument for socially responsible economic organisation. It suggests that by creatively engaging with the format and structuring firms around a mission or purpose, socially-minded entrepreneurs will be able to continue to do ‘do well by doing good’ and develop, perhaps, a more responsible form of capitalism. Others however are not so confident and concerned that (some) corporations may turn to the mission-led business label as a ‘brand’ rather than instigating fundamental changes to the corporate culture of their business.⁵⁴ Especially the enforceability of commitments towards wider stakeholders remains a matter of contestation because so far, the only members entitled to legally enforce their rights vis-à-vis the firm under this model, usually remain the shareholders. The B Corp certification process for example currently requires a modification of companies’ constitutional documents to include stakeholders (i.e. interest groups beyond shareholders) in their objectives, but without guaranteeing these stakeholders any form of redress or cause of action.⁵⁵

The emergence of more radical alternatives - multi-stakeholder cooperative firms or social enterprises, with ownership and governance structures fundamentally different to the traditional shareholder cooperation - on the other hand implies that the need, and appetite, for reforming the existing corporate landscape goes deeper. It suggests that ‘post-capitalist’ alternative models of the firm may in fact be necessary to address shortcomings of mainstream corporations today, both on- and offline.⁵⁶ On the other hand, to operate and survive on the market, these alternative forms must often emulate corporate market actors in ways that ensure their business grows and remains competitive.⁵⁷ Balancing financial sustainability and growth (often tied to questions around access to suitable investment markets) on the one hand, and a commitment to the wider concerns of their (multiple) stakeholders on the other hand, is complex and requires robust business governance including the appropriate measures of accounting and means of conflict resolution.⁵⁸ It particularly relies on corporate and cooperative legal forms to be sufficiently sophisticated and flexible to accommodate such complexity.⁵⁹

These are questions, and challenges, these alternative business forms are and will be facing daily. And again, these concerns might also force us to reconsider how such business models will guarantee that their accountability towards their stakeholders is impactful, including effective mechanisms for enforcement. Social impact reporting and accounting provides one tool to improve both transparency and accountability, but only if it requires the business to report the full impact of its activities rather than focus on financial results. Further, to guarantee genuine accountability, Cooper argues, ‘it is not sufficient for accountors to provide transparent and good information quality information to accountees.’ In addition, stakeholders must be able to ‘enter into a discussion with the corporation’s management and other stakeholders’ and, most importantly, through these discussions

⁵⁴ Hunter and Boeger, op. cit., n. 23.

⁵⁵ Hunter and Boeger, id.; Hunter, op. cit., n. 6.

⁵⁶ Vieta, op. cit., n. 43.

⁵⁷ C. Tomlinson, ‘The False Alternative of Co-Operative Choice under Capitalism’ in *People over Capital: The Co-Operative Alternative to Capitalism*, ed. R. Harrison (2013) 202.

⁵⁸ Pérotin, op. cit., n. 39.

⁵⁹ Mayo, op. cit., n. 42.

they must be given the power to ‘influence decisions’.⁶⁰ Without power to change corporate behaviour, accountability (as well as transparency), remains an empty promise.

DEVELOPING THE FIRM AS AN INSTRUMENT OF MARKET CONTESTATION

In sum, what we see in these wider developments is promise, diversity and complexity. As we might expect, these have more or less grown in tandem, but so has the question whether, notwithstanding their considerable structural differences, there is in fact a deeper pattern to these various initiatives of alternative organising. To consider this, we might have to go back a step or two. This article initially argued that the traditional structure of the corporation – the shareholder primacy model of corporate governance – and its political dominance are significant contributing factors to the current crisis of capitalism: to speak in Polanyian terms, it has un-balanced the movement vs. counter-movement dialectic necessary to keep the operation of capitalistically ordered markets sufficiently in check; to ensure they remain socially embedded and thus sustainable. In our search for ways out if this bind – to break the cycle of corporate influence – we might choose on the one hand to engage our public autonomy as citizens to focus on possibilities for strengthening our democratic political processes and improving regulatory procedures (within the nation or at transnational level), to ensure that genuine contestation of the market and its limits can be effective; that society can (re-)assume control where necessary to address and avoid socially destructive effects of unregulated markets (a process explored constructively, for example, in Thorpe's discussion of civic contribution to regulations, in this issue).

But the existence, and emergence, of these alternative enterprise forms suggests a complementary pathway for responding to corporate dominance and the ensuing impact on market contestation. This response relies on individual market actors (entrepreneurs, company directors, workers, communities and so on) using their *private* autonomy - their freedom to participate in the market and be active in the economy - to structure firms in ways that enable market contestation as well as market activity. These are not regulatory or public, but rather ‘transactional’ or private choices,⁶¹ where the structure of the firm is being instrumentalised, however imperfectly, to internalise a process of democratic contestation: a procedure to mediate the interests of various stakeholders (including, where they exist, shareholders); thus determining how far pure market logic and purely economic incentives are pursued, and conversely what limitations are placed on that logic, based on

Leaving aside their practical complexities and structural differences, the structures of all these alternative business forms are somewhere on a trajectory towards stakeholder governance. They point (however partially and imperfectly they might execute it) towards a model of corporate governance that commits the firm to generating value *by maximising the positive impact on its (internal and external) stakeholders while limiting negative impacts, with trade-offs to be carefully balanced against each other*. Conceptually, this is a step change. It follows a more direct democratic model for checking the market, in the sense that it socialises the market continuously at a micro (firm) level, while a representative democratic model does so by relying on regulatory intervention and the macro (political) level. This micro-checking realises the ‘embedded firm’ – the idea that external (political, social, regulatory) pressures on firms shape their governance practices – but by obliging firms to internalise those pressures through their very structure.⁶² The firm, its constitution and its governance model, is

⁶⁰ S. Cooper, ‘Can Reduced Shareholder Power Enable Corporate Stakeholder Accountability? The Case of Triodos Bank’ in N. Boeger and C. Villiers (eds.) *Shaping the Corporate Landscape: Toward Corporate Reform and Enterprise Diversity* (forthcoming).

⁶¹ Morgan and Kuch, op. cit., n. 7.

⁶² C.A. Williams and P. Zumbansen (eds.), *The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* (2011).

instrumentalised to ensure that the socially destructive force of (unregulated) markets, and the economic interests of individual market actors, are kept in check.

The practical implementation of this model requires more than just responding to market signals at the call of a corporate board and its CSR policy. Instead, procedural measures are built into the constitution of the firm to ensure it is committed to account for the impact of its activities on its wider stakeholders, as well as assess trade-offs between them. When such measures are incorporated, holding firms to their commitment towards stakeholders, they render them categorically different from conventional corporations, even those with comprehensive CSR policies. However partially or imperfectly it might be implemented in practice (there is, as we have seen above, no shortage of challenges and complexities), these procedures point towards an emergent stakeholder model of corporate governance that is structurally the reverse of the shareholder primacy model. In the case of mission-led business and social enterprise, these procedures comprise stakeholder engagement by management, adequate reporting procedures and adjustments to the firm's constitutional objects clauses and, if required, an asset-lock and restrictions relating to profit distribution. Co-ownership and cooperative models on the other hand will primarily include mechanisms for sharing property and democratic governance (voting) in the firm. In practice, a mixture of different procedural mechanisms is available and may feature in various alternative business forms.

CONCLUSION

In considering the crisis of capitalism, and the related critique of corporations and their governance, this article has struck a note of cautious optimism. It has highlighted that there exists today a great diversity of formats that enable business enterprises to address concerns beyond maximising profit for shareholders. In fact, such is their diversity that it calls into question any purist claim, that 'doing good' is something that will be left to non-profits while the (only) purpose of business is to 'do well' for its owners or investors.⁶³ So many and so varied are their forms that one of the key challenges today is defining common ground and a common language to develop cross-cutting ideas and concepts that may come to define new, or refine existing, legal and governance structures.⁶⁴ Many other questions persist, from the complexity of organising commercially viable social or mission-led enterprises,⁶⁵ to designing multi-stakeholder enterprises that are truly accountable to stakeholders;⁶⁶ towards again wider questions of what are legitimate 'ends' and 'means', of business.⁶⁷ It is apparent too that given their complexity, the development of successful alternative business forms will depend heavily on the capacity of the political process, and the wider regulatory environment, to facilitate and nurture viable alternatives, even if to do so goes against the grain of corporate economic and political dominance today.⁶⁸ In this, regulatory reform has a central role to play, whether it is by developing new legal formats for businesses, or by addressing wider relevant issues for their development (tax incentives, social investment, planning and property laws to ensure adequate access to land, and so on).⁶⁹

This article has argued that there is promise in these alternatives especially because the underpinning pattern points towards a stakeholder model of corporate governance which differs categorically from the dominant shareholder primacy model. Broadly speaking, it commits the firm to generating value by maximising the positive impact on its internal and external stakeholders while

⁶³ Brakman Reiser, op. cit., n. 22.

⁶⁴ Boeger and Villiers, op. cit., n. 2.

⁶⁵ Brakman Reiser and Dean, op. cit., n. 23.

⁶⁶ Lund, op. cit., n. 45.

⁶⁷ M. Parker et al., 'The Question of Organization: A Manifesto for Alternatives' (2014) 14(4) *Ephemera* 623.

⁶⁸ Mayo, op. cit., n. 39.

⁶⁹ J. Orsi, *Practicing Law in the Sharing Economy: Helping People Build Cooperatives, Social Enterprise, and Local Sustainable Economies* (2012); Brakman Reiser and Dean, op. cit., n. 23.

limiting negative impacts, with trade-offs to be carefully balanced against each other. Through these commitments, the firm internalises a process of democratic contestation: a procedure to mediate the different interests of these market actors is incorporated directly into the structure of the firm, through procedural mechanisms embedded within its internal constitution. However imperfectly or partially any of the existing and emerging alternative forms implement this model, their trajectory points towards stakeholder governance. The more they succeed as viable alternatives to the conventional corporate form, the more they can put the latter's failures into relief, inviting questions about its dominance as the *standard* business form. This might yet lead us to a point where we may begin to have a genuine political discussion about advantages of various business forms, including the corporation as 'only one form of organising amongst many, many others'.⁷⁰

⁷⁰ Parker, *op. cit.*, n. 14, p. 378.