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Abstract: The regulation of corporate behavior has persisted in spite of peaks of neo-liberalism in many developed jurisdictions of the world, including the U.K. This paradox is described as "regulatory capitalism" by a number of scholars. Of particular note is the proliferation of corporate regulation to govern "socially responsible" behavior in recent legislative reforms in the EU and U.K. In seeking to answer the broader question of whether corporate regulation indeed effectively governs and moderates corporate behavior, this paper focuses on the nature of corporate regulation. Although different pieces of corporate regulation purport to achieve different objectives and impose different types of obligations, this paper offers an institutional account of corporate regulation, specifically in relation to the U.K.'s regulatory capitalism, as the U.K. is typically held up as having a liberal market economy (which is broadly similar to the U.S.). In this article, I argue that the nature and effectiveness of corporate regulation crucially depends on the nature of regulatory capitalism in the type of economic order under discussion. Hence the study of the U.K.'s economic order and its efforts in introducing corporate regulation to change corporate behavior holds lessons more generally for corporate regulation in economies that share similar features. The examination in this article provides an overarching framework for distilling the achievements and limitations of corporate regulation in such economic contexts.

First, the paper clarifies that regulatory capitalism in the U.K. is characterized by three key tenets that reflect the spirit of the liberal market economy embraced here. Over time, gaps have been revealed in the achievements of these tenets of regulatory capitalism, particularly in relation to social expectations of the regulation of corporate behavior. These gaps have become the subject of debates in the realm of "corporate social responsibility" (CSR), where business, civil society, and the state frame the expectations of corporate behavior in contested ways: in relation to the scope of responsibility, the motivations for corporate behavior, the theoretical premises, and business practices. In the aftermath of the global financial crisis in 2007-2009, we observe increasing legalization in the EU and U.K. of CSR issues, framed in

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"new governance" regulatory techniques. They hold promise for change in corporate conduct through deeper forms of corporate engagement and accountability, but they appear at the same time relatively undemanding and susceptible to cosmetic compliance. By discussing key examples in new corporate regulation reforms in the EU and U.K., we seek to understand why recent corporate regulation reforms seem to offer mixed and, in some cases, relatively limited achievements in governing corporate behavior. We argue that the institutional account of corporate regulation continues to be able to explain regulatory weaknesses and limited achievements, in spite of the deployment of "new governance" regulatory techniques. This is because new governance regulatory techniques are implemented within the ethos of regulatory capitalism which limits their potential to introduce paradigm shifts. However, the limitations of these regulatory reforms highlight more sharply the institutional shifts that are needed in order to connect the efficacy of corporate regulation with meeting social expectations.

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INTRODUCTION

The inquiry in this paper is what corporate regulation has achieved over recent decades and contributes to the discourse on "regulatory effectiveness." One could turn to empirical research, and indeed a recent paper finds that in post-1970 common law countries, corporate regulation is reactive in nature, and has little role to play in moderating future corporate behavior.[1] Despite the overall pessimistic finding, we observe the indefatigable advancement of corporate regulation, from product liability[2] and environmental degradation, [3] to the recent surge in corporate regulation that deals with social responsibility such as human rights, corruption, and stakeholders.[4] Can regulatory effectiveness really be dismissed? We recognize that regulation can be introduced by policy-makers for a variety of reasons including protectionist purposes,[5] but we focus here on the objective of moderating corporate excesses or changing corporate behavior.[6] Even if we think of regulation as susceptible to bureaucratic agendas,[7] or as being reactive or weak, many commentators[8] continue to affirm its importance in meeting public interest objectives, supplying public and collective goods, meeting distributive and welfare objectives, and responding to the needs of society.

The precise weighting of regulatory effectiveness is not what this paper sets out to do; rather, we argue that an ***institutional*** account of corporate regulation is necessary to illuminate the issue of regulatory effectiveness in changing corporate behavior.[9] As Section I will explain, we seek to give an account of how corporate regulation works *as an institution*

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[1] Luzi Hail et al., *Corporate Scandals and Regulation* 1-39 (ECGI Working Paper, 2017), http://ecgi.global/sites/default/files/working_papers/documents/hail-tahoun-wangun pixelated_0.pdf.

[2] Strict liability introduced in product liability regulation has advanced consumer protection to a degree beyond private law rights. *See* John TD Wood, *Consumer Protection: A Case of Successful Regulation*, *in* REGULATORY THEORY 633-51 (Peter Drahos ed., 2017) (citations omitted).

[3] *See* overviews in JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 475-531 (2000); in relation to the U.K., *see* TONY PROSSER, THE REGULATORY ENTERPRISE 223-35 (2010).

[4] *See* Section III.

[5] Examples include the Bubble Act in the 18th century, which had the effect of entrenching the power and monopolies of chartered corporations in the U.K.

[6] *See* Christine Parker & Vibeke Lehmann Nielsen, *Introduction*, *in* EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 1-34 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011).

[7] *See* George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3-21 (1971); *but see* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1-168, (1998).

[8] *See generally* CASS SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE (2014); JOHN BRAITHWAITE, REGULATORY CAPITALISM 1-31 (2008).

[9] Which informs analysis of regulatory effectiveness at more granular levels in relation to distinct pieces of corporate regulation.

of our capitalist tradition, in order to appraise its achievements and limitations. Our institutional account of corporate regulation is able to shed light on a number of more specific and topical issues, particularly the likely "effectiveness" of a new trend in corporate regulation targeted at the social responsibility aspects of corporate behavior,[10] and the achievements and limitations of new regulatory techniques such as new governance [11] that support such regulation. We seek to understand why regulatory innovations such as new governance techniques, which have been developed with much promise in respect of governing corporate behavior, have only been supported by mixed results.

This article defines the scope of "corporate regulation" as law that addresses corporate behavior, not limited to the corporate form or governance. Aguilera et al[12] provide a comprehensive mapping of the drivers for corporate behavioral change at the levels of the individual, the firm or organization, the national or institutional, and the supranational.[13] The range of behavioral drivers include individual ethics, organizational pressures and culture, bottom-up third party pressures and initiatives, incentives and pressures entailing from institutions such as law and regulation, and supranational developments such as international codes and soft law. Hence, corporate regulation is one but an important driver for change in corporate conduct and behavior.[14] Regulation can, through a variety of techniques,[15] incentivize or force changes to corporate conduct

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[10] Discussed in Sections B and C.

[11] *Id*.

[12] Ruth V. Aguilera et al., *Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations*, 32 ACAD. MGMT. REV. 836-863 (2007).

[13] *Id.* at 837.

[14] For an exploration as to why public policy interfaces with corporate social responsibility issues, *see* Jette Knudsen & Dana Brown, *Why Governments Intervene: Exploring Mixed Motives for Public Policies on Corporate Social Responsibility*, 30 PUB. POL'Y & ADMIN. 51-70 (2015); *see also* Reinhard Steurer, *The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe*, 43 POL'Y SCI. 49-72 (2010). On regulation as a tool of choice for public policy, *see* Michael Moran, *The Rise of the Regulatory State*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT 383 (David Coen et al. eds., 2010); *see also* Barak Orbach, *What is Regulation?*, 30 YALE J. ON REG. 1-10 (2012). For an economic explanation for why regulation is a tool of choice for implementing policy, *see* David P. Baron, *Regulation and Legislative Choice*, 19 RAND J. ECON. 467-477 (1988). However, regulation is not the only means in navigating the business-government relationship, as business influences government too in terms of policy, even as governments make choices to govern businesses through various means including hybrid means and tools involving public and private sites of power and capacity. *See* Gregory Schaffer, *Law and Business*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT, *supra*, at 63.

[15] This could be in relation to business activities, objectives, conduct, standards or processes. On the different modes of public policy "partnering" with corporate or other voluntary initiatives in shaping corporate conduct, see overview in Neil Gunningham, *Regulation: From Traditional to Cooperative*, *in* THE OXFORD HANDBOOK OF WHITE

and behavior.[16] The regulatory context is also important for developing "soft law"[17] and initiatives that complement or co-shape one another for the purpose of influencing change in corporate behavior.[18] Indeed the existence

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COLLAR CRIME 503 (Shanna Van Slyke et al. eds., 2016); Laura Albareda et al., *Public Policies on Corporate Social Responsibility: The Role of Governments in Europe*, 74 J. BUS. ETHICS 391-407 (2007).

[16] The importance of regulation as effecting public policy is discussed generally in Neil Gunningham & Robert A. Kagan, *Regulation and Business Behavior*, 27 L. & POL'Y 213-217 (2005); Jenny Fairbrass & Anna Zueva-Owens, *Conceptualising Corporate Social Responsibility: 'Relational Governance' Assessed, Augmented, and Adapted*, 105 J. BUS. ETHICS 321-335 (2012). The effectiveness of regulation as articulating norms reflecting social acceptability, and clarifying corporations' "social license to operate" is discussed in Karin Buhmann, *Public Regulators and CSR: The 'Social Licence to Operate' in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR*, 136 J. BUS. ETHICS 699-714 (2016); Onyeka Osuji, *Fluidity of Regulation-CSR Nexus: The Multinational Corporate Corruption Example*, 103 J. BUS. ETHICS 31-57 (2011); the power of state enforcement that regulation entails is often a powerful incentive for behavioral change, *see* Céline Gainet, *Exploring the Impact of Legal Systems and Financial Structure on Corporate Responsibility*, 95 J. BUS. ETHICS 195-222 (2010). Regulation is often a necessary institutional context for more powerful stakeholder monitoring and civil society engagement with companies, *see* Min Dong Paul Lee, *Configuration of External Influences: The Combined Effects of Institutions and Stakeholders on Corporate Social Responsibility Strategies*, 102 J. BUS. ETHICS 281-296 (2011); Jan Lepoutre et al., *Dealing with Uncertainties When Governing CSR Policies,* 73 J. BUS. ETHICS 391-408 (2007). Although regulation is state-centered, McInerney argues that it remains salient and potent in a globalized world, *see* Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171-200 (2007); commentators also call for more internationally binding laws to curb regulatory arbitrage, *see* Ulrich Mueckenberger & Sarah Jastram, *Transnational Norm-Building Networks and the Legitimacy of Corporate Social Responsibility Standards*, 97 J. BUS. ETHICS 223-239 (2010)). *See also* EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION, *supra* note 6, at 1-34 (discussions generally on rationales for regulation, modes of securing compliance, and limitations). For specific examples of regulatory success, *see* DAVID SCHORR, THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS, AND JUSTICE ON THE AMERICAN FRONTIER 65-103 (2012); Caryl Pfeiffer, *How the Clean Air Interstate Rule Will Affect Investment and Management Decisions in the US Electricity Sector*, *in* STRATEGIES, MARKETS AND GOVERNANCE: EXPLORING COMMERCIAL AND REGULATORY AGENDAS 151–65 (Ralf Boscheck ed., 2008); Ralf Boscheck, *Strategy, Markets and Governance*, *in* STRATEGIES, MARKETS AND GOVERNANCE: EXPLORING COMMERCIAL AND REGULATORY AGENDAS, *supra*, at 3-32 (discusses the legalization of the Kimberley process for certifying that diamonds sourced by MNCs are free from being tainted with exploitation of civil conflict); Ralf Boscheck, *On Governing Natural Resources, in* STRATEGIES, MARKETS AND GOVERNANCE: EXPLORING COMMERCIAL AND REGULATORY AGENDAS, *supra*, at 208–24.

[17] Soft law usually refers to instruments that fall short of the qualities of hard law, this definition will be clarified in the discussion of the relationship between regulation and soft law later in the article.

[18] The complexity of the matrix of various governance initiatives is discussed in Bryan Horrigan, *21st Century Corporate Social Responsibility Trends – An Emerging Comparative Body of Law and Regulation on Corporate Responsibility, Governance, and Sustainability*, 4 MCQUARIE J. BUS. L. 85-122 (2007); Reinhard Steurer, *Disentangling Governance: A Synoptic View of Regulation by Government, Business, and Civil Society*, 46 POL. SCI. 387-

of regulation is often crucial to the success or otherwise of voluntary, third-party or civil society-led initiatives that seek to influence changes in corporate conduct.[19] Hence, by focusing on giving an institutional account of corporate regulation, this article does not marginalize the importance of other types of initiatives. Quite the contrary, it argues that a clear and rich understanding of the institution of corporate regulation is essential to the larger picture of developing and evaluating endeavors by governments, civil society, and business to change corporate behavior.[20]

Section I first explores the development of corporate regulation in the U.K. as an institution of regulatory capitalism. Corporate regulation supports and is integral to the ethos of the capitalist tradition embraced in many jurisdictions in the world.[21] We discuss the key tenets and achievements of regulatory capitalism but also highlight its limitations as crucially defined by our capitalist economic model.

Section II discusses how regulatory limitations have been increasingly exposed and challenged in the social sphere. Socially-organized calls for CSR have become clearer and louder, entailing developments in the voluntary and largely transnational space, in the form of new governance and "soft law." The global financial crisis from 2007 to 2009 brought about a culmination in ideological crises of faith in modern capitalism. We observe in its wake the surfacing of social discontent amidst disruptions to political power. In response, policy-makers globally have introduced an unprecedented surge in the legalization of CSR. Section III analyses this phenomenon and the package of regulatory reforms introduced in the U.K. and EU to shed light on whether such legalization, which incorporates new governance regulatory techniques, indicates paradigm shifts in corporate regulation. We find mixed results and conclude that there is no crucial paradigm shift. However, we explain our findings in Section IV and argue that the mixed achievements in recent corporate regulation reforms are

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410 (2013).

[19] Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More Than Merely Symbolic: The Critical Role of the Legal Environment,* 55 ADMIN. SCI. Q. 361-397 (2010); for how the legal environment supports non-state actors in governance, *see* John L. Campbell, *Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility*, 32 ACAD. MGMT. REV. 946-967 (2007); Ronald Jeurissen, *Institutional Conditions of Corporate Citizenship*, 53 J. BUS. ETHICS 87-96 (2004); and for a specific study of the "responsible care" program's effectiveness against the regulatory context, *see* Stephen Finger & Shanti Gamper-Rabindran, *Does Industry Self-Regulation Reduce Accidents? Responsible Care in the Chemical Sector*, 43 J. REG. ECON. 1-30 (2013) (argues for the necessity of the regulatory context for the success of voluntary compliance programs).

[20] *See also* Jodi Short, *Self-Regulation in the Regulatory Void: "Blue Moon" or "Bad Moon"?*, 649 ANNALS AM. ACAD. POL'Y & SOC. SCI. 22-34 (2013) (argues that the lack of corporate regulation is often a regulatory void and is not substituted by effective means of soft law or self-regulation).

[21] David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANNALS AM. ACAD. POL'Y & SOC. SCI. 12-32 (2005).

affected by old patterns of regulatory weaknesses. These are inherent in the institutional account of corporate regulation. Nevertheless, this institutional account pinpoints the precise limitations of recent corporate regulation reforms and the path to institutional change.

I. CORPORATE REGULATION IN THE U.K. AS A PHENOMENON OF REGULATORY CAPITALISM

A. The Capitalist Order of the Liberal Market Economy and the Nature of Regulatory Capitalism

The capitalist economic model in the U.K. is described as an "Anglo-liberal" economy[22] or as termed by the varieties of capitalism literature, a "liberal market economy."[23] The U.S. also subscribes to a "liberal market economic order."[24] Fundamentally, a capitalist economic order upholds the freedom of exchange expressed in market relations, seen as the essential counterpart to political freedom in democratic states.[25] Markets are regarded as places where individuals seeking to maximize their welfare can make efficient choices based on their individualistic perceptions of opportunity cost.[26] The promotion of free markets can be seen as establishing the necessary conditions for realizing economic freedoms and individual success.[27] The hallmark of the British model is the acceptance of the supremacy of the market in coordinating economic relations whether they are investment, production, distribution or consumption — a phenomenon some call "market fundamentalism." [28] Such market

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[22] COLIN HAY & ANTHONY PAYNE, CIVIC CAPITALISM AT 4 (2015).

[23] Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, *in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1-70 (Peter A Hall & David Soskice eds., 2001). Although this characterization is derived from the perspective of how firms structure their relationships in order to organize economic activity from production to distribution to consumption, and the institutions that support and advance such structuring, the ramifications of the British capitalist order for the nature of corporations and corporate regulation (including corporate law and governance) are especially on point for this article.

[24] *Id.* at 1-34

[25] Martin Wolf, *The Morality of the Market*, 138 FOREIGN POL'Y 46-50 (2003).

[26] PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, MICROECONOMICS 3-24 (19th ed. 2009) (discussing the basic economic concept of opportunity cost that underlies "micro-economic" behavior, and frames a choice in relation to what else is traded off or foregone, i.e., that a choice is made because it is preferred to alternatives). For the basic economic concept of opportunity cost that underlies "micro-economic" behavior, see SAMUELSON & NORDHAUS, supra, at 3-17.

[27] One can reconcile Hayek's libertarian support of the free market with Amartya Sen's argument that political and economic liberties are key institutions, though not exclusively, for the development of real economic well-being for every individual; *see* FRIEDRICH HAYEK, ROAD TO SERFDOM 63-90 (1944); AMARTYA SEN, DEVELOPMENT AS FREEDOM 13-85 (1999).

[28] This similar model is also a hallmark of the US economy; *see* JOSEPH STIGLITZ,

fundamentalism rose to its political peak in the 1980s under the Thatcher governments in the U.K. and the Reagan administration in the U.S.[29] Although markets are not regarded as perfect and the development of law and regulation has played a part in addressing market distortions and failures,[30] the Anglo-American model of capitalism today has continued to reflect many features of market fundamentalism.[31]

The importance of marketization of economic relations has profoundly affected the organization of economic activity in corporations. The corporate sector in Britain was dominated by monopolies established under Royal Charter until the 19th century,[32] and family-owned and closely knit companies until the end of the First World War.[33] The organization of economic activity within a corporate structure was not only an economic phenomenon[34] but had social and political implications.[35] The corporation ushered in an economic society in terms of structuring economic relations[36] and bringing about social changes such as social mobility.[37] From the end of the Second World War, the marketization of the corporation developed incrementally with the rise in the market for corporate control and

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FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY 1-57 (2010); *see also* LEE BOLDEMAN, THE CULT OF THE MARKET: ECONOMIC FUNDAMENTALISM AND ITS DISCONTENTS 1-34 (2007) (discussing how this similar model is also a hallmark of the U.S. economy).

[29] *See* SALLY WHEELER, CORPORATIONS AND THE THIRD WAY 14, 44 (2002) (describing the "New Right").

[30] *See* JOHN MCDERMOTT, CORPORATE SOCIETY 1-2 (1991) (indicating that even where free markets find political support, markets areas where law and regulation are absent does not reflect reality).

[31] *See* HAY & PAYNE, *supra* note 22; *see also* ADAIR TURNER, JUST CAPITAL: THE LIBERAL ECONOMY 364-79 (2001). Although Sally Wheeler argues that the election of the New Labour government in 1997 marked a turning point for Britain's economic model towards centrist politics and a middle way, termed "The Third Way" in conceiving of a more stakeholder-conscious and ethical economic model, hence shaping the social position of the corporation, such change has arguably not taken place under the stewardship of the Labour government 1997-2010 which has since given way to a predominantly Conservative government that supports the liberal market economic model; *see* WHEELER, *supra* note 29, at 29-33

[32] The East India and South Sea Companies were protected by the Bubble Act, which prevented similar enterprises from being incorporated. Only after the repeal of the Bubble Act in 1825 did Britain emerge from its "corporate lag." *See* BRIAN R. CHEFFINS, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESSES TRANSFORMED 175-220 (2010).

[33] *Id.* at 252-381.

[34] *See* Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386-405 (1937).

[35] Discussed in relation to how the Cadburys merged economic enterprise with social provision for their employees; *see* WHEELER, *supra* note 29, at 33.

[36] The corporation is analyzed as a social institution structuring economic relations; *see* MCDERMOTT, *supra* note 30, at 1-2.

[37] *See, e.g.,* SEYMOUR MARTIN LIPSET & REINHARD BENDIX, SOCIAL MOBILITY IN INDUSTRIAL SOCIETY 5-27 (1991).

ownership of shares.[38] The promotion of market fundamentalism peaked with the dismantling of Keynesian economic management policies in the 1980s, as the British state relinquished direct economic agency, privatized nationalized industries,[39] and pursued a policy of enhancing corporate competitiveness. This era marked a decisive shift in the characterization of British corporations as market-based actors, and has had a lasting effect upon corporate behavior. Corporations as market-based actors pursue individualistic and "rational" micro-economic behavior, profoundly changing the way economic relationships are structured within and beyond the corporation,[40] as well as how they perceive their roles in society.[41] Public policy promoted the structuring of economic relations through the market, and market supremacy crucially trumped organized relations between firms and labor, marking the start of the decline of the institution of collective bargaining.[42] Under the economic policies introduced by the Thatcher government in the U.K., government involvement in economic

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[38] CHEFFINS, *supra* note 32, at 252-381 (discussing how mergers and acquisitions activity rose to disrupt close family ownership of companies, and then the growth of the stock market and the willingness on the part of corporations to make public offers, matched by the growth in appetite in the investing community, particularly institutions, resulted in greater dispersion of ownership in British publicly listed companies).

[39] Stephen Young, *The Nature of Privatisation in Britain, 1979–85*, 9 W. EUR. POL. 235-252 (1986); *see* Richard Seymour, *A Short History of Privatisation in the UK: 1979-2012*, GUARDIAN (Mar. 29, 2012), https://www.theguardian.com/commentisfree/2012/mar/29/short-history-of-privatisation.

[40] As market-based actors, corporations may choose to frame their relationships in singularly economic terms. Inherent in attaining efficiency is the freedom to exit a transactional relationship, prizing choice and efficiency over social values such as commitment. *See* ALBERT O. HIRSCHMANN, EXIT, VOICE AND LOYALTY 1-20 (1970) (provides an analytical paradigm for relational ordering). Exit through the market may provide individual relief from discontent but contributes nothing to improvement of the situation whether in firms, organizations, politics or business. Voice is a more painstaking route as effort is made to influence change. Exit, for its short-termist efficiency advantages, is questioned as to its effectiveness in contributing to longer-term political, social or economic ordering.

[41] This is marked by the gradual shift away from socially conscious or "values ethics"-based roles; *see* WHEELER, *supra* note 29, at 1-58 (argues for a return to a "third way" in the characterization of corporate purpose and governance in between the "New Right" policies of the 1980s and 1990s and the discredited socialist policies after the fall of communism in the early 1990s. Such a third way was offered at a time coinciding with the election of a Labour government in the U.K. in 1997 which represented an era of centrist politics). Bratton also argues that corporations moved away from a social welfare role at the same time in the U.S., as Reagan's government ushered in market fundamentalist policies to change an economic landscape marked by disenchantment with the centralized hands of state economic management and the managerial class in corporations. *See* William W. Bratton, *The Separation of Corporate Law from Social Welfare*, 74 WASH. & LEE L. REV. 767-790 (2017).

[42] Richard F. Disney et al., *British Unions in Decline: An Examination of the 1980s Fall in Trade Union Recognition* 403-419 (NBER Working Paper No. w4733, 2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=250345.

activity declined, and the private sector clearly came to the forefront in relation to "rowing" the economy, which refers to the provision of goods and services and the carrying out of technological innovation. Although commentators doubt that the government ever had a very strong hand in economic and industrial policies before,[43] as compared to the growth of the welfare state during that time,[44] the 1980s clearly marked the start of a new form of economic capitalism in Britain.

Paradoxically, it is observed that the state grew concomitantly in terms of its regulatory remit and apparatus.[45] It is a myth that systemic deregulation had taken place. Instead, this is an age of regulatory capitalism, a phenomenon observed not only in the U.K. but globally. [46] Regulatory capitalism may be seen as the balance to market fundamentalism. The role of the state in economic policy is clarified as that of "steering" while the private sector is responsible for rowing.[47] The objectives of regulation are to steer away from the problems that unbridled markets give rise to, such as market failures[48] to provide collective goods.[49] Such moderation nevertheless supports markets so that they can work optimally. The nature of regulation has gradually become infused with economic analysis and market-based concepts.[50]

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[43] Referring to post-war Britain, *see* PETER A. HALL, GOVERNING THE ECONOMY 23-136(1986); R. C. O. Matthews, *Why Has Britain Had Full Employment Since the War?*, 78 ECON. J. 555-569 (1968) (arguing that Britain's fiscal policy did not contribute a significant part to post-war full employment and economic boom, as private sector investment was the most significant factor). This was also not due to particularly robust industrial policy adopted by Britain, as such weaknesses were later discussed in S. N. Broadberry & N. F. R. Crafts, *British Economic Policy and Industrial Performance in the Early Post-War Period*, 38 HIST. BUS. 65, 65 (1996) (argues that post-war economic boom was also not due to particularly robust industrial policy adopted by Britain.

[44] MICHAEL HILL, THE WELFARE STATE IN BRITAIN: A POLITICAL HISTORY SINCE 1945, chapters 2 and 3 (1993).

[45] Michael Moran, *The Rise of the Regulatory State in Britain*, 54 PARLIAMENTARY AFF. 19-34 (2001).

[46] BRAITHWAITE, *supra* note 8, at 1-31 (2008).

[47] "Rowing" depicts the work of actual service provision and technological innovation that is carried out by the private sector as commercial and business activity, while "steering" refers to setting policy in order to influence, govern, or incentivize behavior or output in relation to rowing. *See* Levi-Faur, *supra* note 21, at 15; BRAITHWAITE, *supra* note 46.

[48] I.e., where markets do not produce optimal outcomes due to structural problems such as information asymmetry, oligopolistic structures, etc.; MARTIN CAVE & ROBERT BALDWIN, UNDERSTANDING REGULATION 9-17 (1999); BRONWEN MORGAN & KAREN YEUNG, AN INTRODUCTION TO LAW AND REGULATION 18-25, 47-53 (2007).

[49] Also includes prevention of social harm, where such prevention is more efficient than *ex post* litigation, *see* Edward L. Glaeser & Andrei Schleifer, *The Rise of the Regulatory State*, 41 J. ECON. LITERATURE 401-425 (2003); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357-397 (1983).

[50] The "Law and Economics" school of thought has American origins. *See* Robert van Horn & Philip Mirowski, *The Rise of the Chicago School of Economics and the Birth of Neoliberalism*, *in* THE ROAD FROM MONT PÉLERIN 139-78 (2015). A key British commentator

The economically-driven model of regulation can be seen, for example, in the regulation of utilities[51] which focuses on anti-competitive behavior, and in financial regulation which imposes mandatory disclosure[52] to overcome information asymmetries in the markets for securities and financial products.[53] The growth of many regulatory agencies[54] is premised upon the need to correct failures in markets to support optimal market outcomes. Indeed, in 2004, the U.K. government accepted a set of principles recommended in the Hampton Report,[55] including refraining from regulatory intervention in favor of "economic progress" unless necessary and ensuring the efficiency of regulatory administration and action. This has given rise to governmental commitment to "better" and more efficient evaluation of regulatory policy and design as a whole,[56]

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elucidates how economic analysis and market-based concepts have become integral to regulatory thinking. *See* ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT 1-25 (2004) (elucidates how market concepts feature in legal reasoning in the U.K. context). However, the U.K. and EU employ economic concepts to legal and regulatory policy but are often cognizant too of the limitations of these concepts. *See* ARISTIDES N. HATZIS & NICHOLAS MERCURO, LAW AND ECONOMICS 1-31, 89-120, 203-44 (2015); KATJA LAGENBUCHER, ECONOMIC TRANSPLANTS: ON LAWMAKING FOR CORPORATIONS AND CAPITAL MARKETS 11-40; 64-70 (2017) (an analysis is made of regulatory problems framed in economic terms, solutions sourced in economic models and the imperfections these entail for regulation and judicial decision-making).

[51] John Vickers & George Yarrow, *Regulation of Privatised Firms in Britain*, 32 EUR. ECON. REV. 465 (1988); PROSSER, *supra* note 3, at 176-200; Mark Thatcher, *Institutions, Regulation, and Change: New Regulatory Agencies in the British Privatised Utilities*, 21 W. EUR. POL. 120 (1998).

[52] More to be discussed in relation to securities regulation shortly.

[53] FIN. CONDUCT AUTH., ECONOMICS FOR EFFECTIVE REGULATION: OCCASIONAL PAPER 13, 3-41 (2016), https://www.fca.org.uk/publication/occasional-papers/occassional-paper-13.pdf (the most recent affirmation of an economically-driven approach to financial regulation). See also earlier pronouncements on an economically-driven, risk-based approach when the regulator's predecessor, the Financial Services Authority, was established. JULIA BLACK, THE DEVELOPMENT OF RISK-BASED REGULATION IN FINANCIAL SERVICES: CANADA, THE UK AND AUSTRALIA: A RESEARCH REPORT 1-54 (2004), http://www.lse.ac.uk/law/people/academic-staff/julia-black/Documents/black19.pdf; JOHN ARMOUR ET AL., PRINCIPLES OF FINANCIAL REGULATION 3-21 (2016).

[54] The growth of regulatory agencies has come to be a key observation at a global level for many jurisdictions in the age of regulatory capitalism. *See*, Levi-Faur, *supra* note 21, at 16-19. Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77-101 (1994) (discussing a similar underpinning for European agencies).

[55] PHILIP HAMPTON, HM TREASURY, REDUCING ADMINISTRATIVE BURDENS: EFFECTIVE INSPECTION AND ENFORCEMENT: THE HAMPTON REVIEW – FINAL REPORT 7-8 (2005), http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/bud05hampton_150305_640.pdf.

[56] The Better Regulation Task Force was introduced in 2006, then re-styled as the Better Regulation Commission in 2008-2009 as an independent advisory body to the government promoting rational and efficient design in regulation]. The work of the Better Regulation Commission continues in the Regulatory Policy Committee, which is an advisory and non-departmental government body sponsored by the Department of Business, Industrial Strategy, and Energy. The Committee continues to support the government in cost-benefit analysis and rationalizing regulatory policy and design today. *See The Better Regulation*

which has continued through changes in government.

Although the purposes of regulation are varied, regulatory thinking has predominantly been shaped by economic notions.[57] Policy-making and regulatory technique are infused with "market-based" wisdom, as regulators consider the balance of risk and harm to determine the extent of intervention,[58] the need for regulatory resources to be allocated according to risk-based regulation,[59] and the use of cost-benefit analyses[60] (however imperfectly)[61] to account for regulatory initiatives.

Regulation has also been introduced to govern industries where business activity has resulted in social harms and scandals,[62] producing regulatory regimes that target a mixture of economic and social demands.[63] In sum, regulatory capitalism is heavily infused with the economic intellectual tradition, as economic behavior and its control become

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Commission, Dep't for Bus. Innovation & Skills (archived Mar. 4, 2010), https://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/whatwedo/bre/reviewing-regulation/commission/page44086.html.

[57] *See, e.g.*, FIN. CONDUCT AUTH., *supra* note 53, at 3-41; *see also* LAGENBUCHER, *supra* note 50, 11-40, 64-70.

[58] Jonathan B. Wiener, *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 DUKE J. COMP. & INT'L L. 207-262 (2003); CHRISTOPHER HOOD ET AL., THE GOVERNMENT OF RISK: UNDERSTANDING RISK REGULATION REGIMES , chapters 1 and 2 (2004); SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK 1-30 (2003) (provides a critical approach to the "economic" thinking behind regulatory policy).

[59] BLACK, *supra* note 53, at 1-54.

[60] This is a key remit of the Regulatory Policy Committee. *See also* Julie Froud & Anthony Ogus, *Rational Social Regulation and Compliance Cost Assessment*, 74 PUB. ADMIN. 221, 221-37 (1996); Cass R. Sunstein, *The Cost-Benefit State* 1-43 (Coase-Sandor Institute for Law & Economics, Working Paper No. 39, 1996) (American perspective); and for improvements to such a methodology in order to embrace more holistic and qualitative judgments, *see* Cass R. Sunstein, *The Limits of Quantification*, 102 CAL. L. REV. 1369-1421 (2014); Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323-374 (2001); Eric A. Posner & Cass R. Sunstein, *Essay: Moral Commitments in Cost-Benefit Analysis*, 103 VA. L. REV. 1809-1860 (2017) (supports the underlying rationality in cost-benefit analyses but not a narrow and metricized approach).

[61] Jonathan S. Masur & Eric A. Posner, *Unquantified Benefits and the Problem of Regulation Under Uncertainty*, 102 CORNELL L.R. 87-137 (2016).

[62] BRAITHWAITE, *supra* note 8, at 32-63. Scandals may involve social harms such as BSE (bovine spongiform encephalopathy, or otherwise known as 'mad cow's disease) which culminated in greater food regulation in the U.K., or financial crises, such as those of in the 1970s, that led to the introduction of bank capital adequacy standards which cascaded from the international (Basel Committee of Banking Supervision) to the national. The drivers of regulatory capitalism will be in greater detail discussed shortly in greater detail.

[63] This has been observed by Prosser in relation to the U.K., as well as Braithwaite and Drahos in relation to global business regulation, as both books observe substantial developments in social policy such as in relation to public and employment health and safety, product, and food and drug regulation, as well as environmental regulation in relation to anti-pollution of air and water. *See* PROSSER, *supra* note 3, at 223; BRAITHWAITE & DRAHOS, *supra* note 3, at 475.

increasingly framed as incentive-based.

Although this is not the only paradigm in which regulation is designed and implemented, regulatory capitalism in the U.K. can, on the whole, be regarded as neo-liberal in nature, [64] expressed through policy-making and regulatory initiatives that largely go towards making the marketized economic order work better. Regulatory capitalism calibrates state-business relationships in such a way as to move away from simplistic notions of antagonism or paternalistic oversight, but as a necessary market companion,[65] promoting the fulfilment of economic rowing by business. This position has persisted in the U.K. since the 1980s.[66]

B. The Three Tenets of Corporate Regulation

We argue that corporate regulation in the U.K.'s liberal market economy is underpinned by the ethos in regulatory capitalism, giving rise to three regulatory tenets that reflect this ethos. First, the law for the organization and structuring in corporations, i.e. company law, respects corporations as private economic organizations free to determine their own purposes, and does not intervene into their objectives. [67] Company law preserves or facilitates the economic freedoms of freely associating agents in the model of a corporation as a "contractarian organization" which manages its internal efficiencies and is private in nature.[68] The role of

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[64] *See* Peter Drahos, *Regulatory Capitalism, Globalization and the End of History*, 1 INTELL. PROP. L. & POL'Y J. (SPECIAL ISSUE) 1, 1-23 (2014) (a characterization that several commentators agree with).

[65] BRAITHWAITE, *supra* note 8, at 197.

[66] The New Labour government continued to support "better regulation" so that regulation is effective but also proportionate, cognizant of business criticisms of costly burdens and red tape; *see* PROSSER, *supra* note 3, at 201.

[67] For example, corporate purpose is up to the management and shareholders to decide; the doctrine of ultra vires in company law was decisively abandoned in the reforms made to the Companies Act 2006. This doctrine used to uphold the existence of objects clauses in company constitutions that limited the sphere of corporate activity and could render void third-party contracts entered into pursuant to purposes outside of the objects clauses; *see Ashbury Ry Carriage and Iron Co v. Riche* [1879] LR 7 (HL) 653 (U.K.). The doctrine may be viewed as an obsolete aspect of the "social contract" companies have with society in return for the privilege of incorporation (as a state-granted "franchise" or "concession"). Companies now have unlimited objects by default, (*see* section 21, UK Companies Act 2006), and are thus free to pursue their private economic freedoms, while being accountable primarily to shareholders as to the results of those economic pursuits. Also, much of company law, in terms of internal governance, is enabling in nature, such as the possibility of opting out of the enabling default "constitution" set out in the Model Articles Regulations, and the *Foss v Harbottle* doctrine that looks to shareholders to ratify internal breaches or errors before resorting to derivative actions, now (see s239, UK Companies Act 2006).

[68] Boiling down to a "nexus of contracts" organized within the internal marketized model of the firm. *See* Coase, *supra* note 34, at 386–405; the theory establishes the "quintessentially private and self-ordered nature of a company's management affairs," which should be mainly free from state intervention. *See*, Marc Moore, *Private Ordering and Public Policy: The Paradoxical Foundations of Contractarianism,* 34 OXFORD J. LEGAL

mandatory law is to provide an efficient framework to meet the needs of order, balance, and accountability in the private "administrative" franchise that is the company.[69] Company law[70] essentially constitutes a private framework of governance centered upon management control[71] subject to shareholder primacy.[72] This is consonant with the notions of theoretical efficiency supported by commentators[73] in the economics of organization. The legal preference for shareholder centricity is also a legacy issue in the U.K., as businesses transformed into corporations from the late 19th century, bringing partnership concepts into company law.[74] Company law has been shaped largely by internal efficiency and governance needs,[75] bearing little

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STUD. 693, 697 (2014). This concept means that company law reflects parties' default hypothetical bargains. *See*, William A. Klein, *The Modern Business Organization: Bargaining Under Constraints*, 91 YALE L.J. 1521-1564 (1982); Manuel A. Utset, *Towards a Bargaining Theory of the Firm*, 80 CORNELL L. REV. 540-611 (1995); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 1 (1991).

[69] *See* MARC MOORE, CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE at chapter 2 (2013) (discusses the theoretical lens of institutional analysis in relation to private "administrative" power).

[70] Such as minority shareholder protection in recourse to the derivative claim (s260-263, UK Companies Act 2006); or unfair prejudice petition (s994-996, UK Companies Act 2006), and the codified directors' duties, (s170-177, UK Companies Act 2006).

[71] The Companies (Model Articles) Regulations 2008, SI 2008/3229, Schedule 3.

[72] ANDREW KEAY, SHAREHOLDER PRIMACY IN CORPORATE LAW: CAN IT SURVIVE? SHOULD IT SURVIVE? 1-51 (2009). At the global level, shareholder primacy is argued to be a model of the corporate economy that has brought about the end of history as being an ideological and practical winner; *see* Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439-468 (2000); *see also* Leo Strine Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135-172 (2012).

[73] Investors are characterized as supplying capital in an incomplete contract, not knowing how the corporation would fare, hence they are regarded as "residual claimants" to corporate property if the company indeed goes insolvent, and can then exercise rights of quasi-property, attached to their shares, in the company. *See* Armen A. Alchian & Harold Demsetz, *Production, Information Costs and Economic Organization*, 62 AM. ECON. REV. 777-795 (1972). *See also* Oliver E. Williamson, *Corporate Governance*, 93 YALE L.J. 1197-1230 (1984). Agency economists also see shareholder primacy as the cure to the agency problem of separation of ownership from control. *See*, EASTERBROOK & FISCHEL, *supra* note 68, at 1-3 Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305-360 (1976).

[74] Paddy Ireland, *Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility*, 34 CAMBRIDGE J. ECON. 837-856 (2010). In fact, dispersed ownership only started taking off from the post-War period, hence company law served the needs of closely-held companies where managers were often also shareholders or closely related to other shareholders; CHEFFINS, *supra* note 32, at 221-251

[75] A model argued to be globally superior. *See*, Hansmann & Kraakman, *supra* note 72, at 439 (argues that the shareholder-centric model of corporate governance is regarded as the "end of history for corporate law" as such a model, focused singularly on private economically-driven interests, seemed best-placed to drive economic purpose, productivity, and organization in companies). The private law notions of property and contract underlie

relation to social policy.[76] As the New Labour government put it in relation to reforming company law after it came into power, company law reforms carried out in 2006 were about modernizing the company as a business vehicle that promotes enterprise and the right conditions for investment and employment.[77] Company law supports private organizations and economic endeavors in order to play its part in growing the economy because the company, in the U.K.'s liberal market economy model, is a free agent in the market and not a socially-coordinated instrument or public policy.[78]

Second, a major source of corporate regulation is securities regulation for publicly listed corporations. Such regulation is focused on corporations' responsibilities to the markets that provide them with capital and facilitates market-based discipline carried out by investors. Securities regulation was pioneered in the U.S. as a socio-economic reform,[79] but has since become

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many of the rights and obligations among constituents in company law. *See*, John Armour & Michael J. Whincop, *The Proprietary Foundations of Corporate Law*, 27 OXFORD J. LEGAL STUD. 429-465 (2007).

[76] *See* Benedict Sheehy, *Private and Public Corporate Regulatory Systems: Does CSR Provide a Systemic Alternative to Public Law?*, 17 U.C. DAVIS BUS. L.J. 1-54 (2016) (a critical account of the dis-embedded corporation). *See also* Lyman Johnson, *Corporate Law and the History of Corporate Social Responsibility*, *in* RESEARCH HANDBOOK ON THE HISTORY OF COMPANY AND CORPORATE LAW 570 (Harwell Wells ed., 2017). For an analysis of the general lack of a wider socially-facing dimension in corporate law, *see* Jingchen Zhao, *Promoting More Socially Responsible Corporations Through a Corporate Law Regulatory Framework*, 37 LEGAL STUD. 103-136 (2017). For an examination of the peripheral nature of company law in relation to social policy issues such as climate change in a special volume of the International Comparative Corporate Law Journal, *see* Celia R. Taylor, *United States Company Law as It Impacts Corporate Environmental Behavior, with Emphasis on Climate Change*, 11 INT'L. & COMP. CORP. L.J. 7-10 (2015) (U.S. position); Surya Deva, *Sustainable Business and Australian Corporate Law: An Exploration*, 11 INT'L. & COMP. CORP. L.J. 59-62 (2015) (Australian position). However, the New Labour government did introduce the Corporate Homicide Act 2007 and Bribery Act 2010 which delved into internal governance and behavior within corporations to address social ills, rare phenomena which indicated the early changes to regulatory capitalism, and will be discussed below.

[77] DEP'T TRADE & INDUS., COMPANY LAW REFORM 8–15 (2005), http://webarchive.nationalarchives.gov.uk/20060214052726/http://www.dti.gov.uk/cld/WhitePaper.htm.

[78] Such as in the coordinated market economy which is represented by the German model, a highlight of such model being the adoption of co-determination into corporate governance. *See* Sigurt Vitols, *Varieties of Corporate Governance: Comparing Germany and the UK*, *in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE, *supra* note 23, at 337-60.

[79] Securities regulation was introduced after the Great Depression and represented part of the socio-economic New Deal reforms. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 73-100 (1st ed. 1982). For a discussion about the distributive tenor of the New Deal reforms as a distribution of informational power to the market so that informational power is not concentrated in the hands of small coteries of securities brokers, *see* Emilios Avgouleas, *Market Accountability and Pre- and Post-Trade Transparency: The Case for the Reform of the EU Regulatory Framework: Parts 1 &* 2, 19 COMPANY LAW., 162-170, 202-210 (1998). Securities regulation required mandatory disclosure to be made by issuers of corporate securities, so that "truth" in securities can be brought to light in the

characterized as chiefly economic in nature since the 1980s, as theoretical commentaries on securities regulation revolve around the efficiency of securities markets for securing investor protection.[80] Regulation is primarily framed to support the optimal working of markets and such a basis has also driven the development of EU securities regulation,[81] culminating in major harmonization reforms in the early millennium.[82] These have been transposed in the U.K. The EU saw legal integration in securities regulation as an instrument for capital markets integration,[83] a perspective that continues today.[84]

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market and misspelling can be stamped out. For social policy overtones, *see* Milton H. Cohen, *Truth in Securities Revisited*, 79 HARV. L. REV. 1340-1408 (1966). Securities regulation is policed and enforced by a new Securities and Exchange Commission, representing a new *constitutional* bargain between state, markets, business and citizenry. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421-510 (1987).

[80] Referring to information asymmetry between investors and companies issuing securities. *See* John C. Coffee Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717-753 (1984). Efficient prices in securities markets (including secondary securities markets) reflect corporate performance so that investors can optimally determine the allocation of capital. Hence, it is also necessary to require securities issuers to keep feeding secondary markets with information so that issuers' secondary trading prices reflect all information at any given point in time, thereby enabling investors to make efficient buy, sell, or hold decisions. This is the efficient capital markets hypothesis posited by Eugene Fama, though empirically supported only in its semi-strong form. *See* Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383-417 (1970); Merritt B. Fox et al., *Law, Share Price Accuracy, and Economic Performance: The New Evidence*, 102 MICH. L. REV. 331-353, 355-386 (2003). On theoretical support for the Efficient Capital Markets Hypothesis, *see* Marcel Kahan, *Securities Laws and the Social Costs of "Inaccurate" Stock Prices*, 41 DUKE L.J. 977-1044 (1992); Merritt B. Fox, *Rethinking Disclosure Liability in the Modern Era*, 75 WASH. U. L.Q. 903-918 (1997), all of whom support mandatory continuous disclosure as a key to maintain stock price accuracy according to the semi-strong form of the efficient capital markets hypothesis.

[81] IRIS H-Y CHIU, REGULATORY CONVERGENCE IN EU SECURITIES REGULATION 1-46 (2008).

[82] After the publication of [*Final Report of the Committee of Wise Men on the Regulation of European Securities Markets* (15 Feb 2001), available at http://www.spk.gov.tr/Sayfa/Dosya/114, such as the Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (Prospectus Directive 2003); Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements related to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC OJ 2004 L390/38 (Transparency Directive 2004).

[83] Christian Joerges, *The Law in the Process of Constitutionalising Europe* 3-34 (EUI, Working Paper 2002/4, 2002), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=307720; EILIS FERRAN, BUILDING AN EU SECURITIES MARKET 8-57 (2004).

[84] EURO. COMM'N, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS ACTION PLAN ON BUILDING A CAPITAL MARKETS UNION at paragraphs 1-7 (2015), https://ec.europa.eu/info/business-economy-euro/growth-and-

Securities regulation is purposed towards supporting market-based discipline for publicly listed corporations by their investors, an important tenet in a well-functioning capital market. Investors could exercise their market-based discipline by voting with their feet and supporting a market for corporate control, as a means to change corporate management.[85] They could also choose to be activist and build up stakes in a company in order to exercise voice,[86] a phenomenon termed as the market for corporate influence.[87] The marketization of investment relations between the company and shareholders has become the chief (and private) means for structuring the internal governance relations within the company. Thus, when corporate scandals erupted in the early 1990s in relation to internal fraud and misrepresentations of financial reporting on securities markets,[88] the key cure for such ills was seen to be investor discipline and scrutiny.[89] The U.K. charted a regime of business-led soft law for the corporate governance of listed companies.[90] Best practices in corporate governance are now enshrined within a code[91] that applies on a comply-or-explain basis to publicly traded companies.[92] The corporate governance of these companies is framed as a matter for shareholders to scrutinize and comment

investment/capital-markets-union/capital-markets-union-action-plan_en (lays the foundation for a number of legislative initiatives, including the Prospectus Regulation 2017).

[85] James D. Parrino & Robert S. Harris, *Takeovers, Management Replacement, and Post-Acquisition Operating Performance: Some Evidence from the 1980s*, *in* CORPORATE GOVERNANCE AT THE CROSSROADS 385 (Donald Chew & Stuart Gillan eds., 2005); Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5-50 (1983); Gregg A. Jarrell et al., *The Market for Corporate Control: The Empirical Evidence Since 1980*, 2 J. ECON. PERSP. 49-68 (1988). Much of the literature dates back to the 1980s where takeover activity in the U.S. was roaring.

[86] *See* IRIS H-Y. CHIU, THE FOUNDATIONS AND ANATOMY OF SHAREHOLDER ACTIVISM at chapters 2-5 (2008) (discusses different types of activism).

[87] John Armour & Brian R. Cheffins, *The Rise and Fall (?) of Shareholder Activism by Hedge Funds*, 14 J. ALTERNATIVE INV. 17-27 (2012) (on hedge funds in the market for corporate influence); *see* Paul Rose, *Shareholder Proposals in the Market for Corporate Influence*, 66 FLA L. REV. 2179-2228 (2014) (on shareholder proposals generally as constituting a market for corporate influence).

[88] For discussions about the scandal of the fall of the Polly Peck Group and BCCI in the early 1990s, *see* CHIU, *supra* note 86, at 16-70.

[89] ADRIAN CADBURY, THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE 14-16 (1992).

[90] FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 4-15 (2018), https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf.

[91] *Id.* at 4-15.

[92] Alan Dignam, *Capturing Corporate Governance: The End of the UK Self-Regulating System*, 4 INT'L. J. DISCLOSURE & GOVERNANCE 24-41 (2007). On the efficacy of comply-or-explain, *see* Sridhar Arcot et al., *Corporate Governance in the UK: Is the Comply or Explain Approach Working?*, 30 INT'L REV. L. & ECON. 193-201 (2010); Iain MacNeil & Xiao Li, *Comply or Explain: Market Discipline and Non-Compliance with the Combined Code*, 14 CORP. GOVERNANCE 486-496 (2006).

on,[93] neutralizing the social ramifications of the scandals in question. This tradition has continued despite the findings of the Myners Report in 2001 relating to the relative passivity of institutional investors,[94] and the findings of the Walker Report in 2009[95] discussing institutional investor apathy in relation to the global financial crisis from 2007 to 2009. Business and markets continue to support shareholder centricity in market discipline,[96] a position that policy-makers have been willing to endorse.[97] Investor primacy has brought about a marketized model profoundly shaping the objectives[98] and the nature of the corporation.[99]

Nevertheless, "business regulation" has been developed to affect economic and social policy that impacts business or commercial activities.[100] These are often *externally*[101] addressed to corporations and other economic actors but do not intervene in the private spheres of corporate objectives or governance. The need for business regulation has grown in the era of market fundamentalism. This is because corporations' economic behavior creates externalities, and markets fail to discipline or contain such behavior. For example, market failures such as misselling have led to a burst in global consumer protection regulation.[102] Product safety

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[93] *See* CADBURY, supra note 89, at 48-52(provided the foundation for the first Cadbury Code of Corporate Governance).

[94] PAUL MYNERS, INSTITUTIONAL INVESTMENT IN THE UK: A REVIEW at paragraphs 5.24-5.63 (2001), http://uksif.org/wp-content/uploads/2012/12/MYNERS-P.-2001.-Institutional-Investment-in-the-United-Kingdom-A-Review.pdf.

[95] DAVID WALKER, A REVIEW OF CORPORATE GOVERNANCE IN UK BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS AT PARAGRAPH 5.10 (2009), https://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/walker_review_261109.pdf.

[96] Seen in the bottom-up Institutional Shareholders Committee's first Stewardship Principles that evolved to be adopted as the U.K. Stewardship Code by the Financial Reporting Council.

[97] U.K. Stewardship Code sets out optimal principles for shareholder scrutiny and engagement with companies, *see also* Iris H-Y Chiu, *Turning Institutional Investors into 'Stewards': Exploring the Meaning and Objectives in 'Stewardship'*, 66 CURRENT LEGAL PROBS. 443-481 (2013); Arad Reisberg, *The UK Stewardship Code: On the Road to Nowhere?*, 15 J. CORP. L. STUD. 217-253 (2015).

[98] Shareholder primacy model, *supra* note 75.

[99] *See* Karen Ho, *Corporate Nostalgia? Managerial Capitalism from a Contemporary Perspective*, *in* CORPORATIONS AND CITIZENSHIP 267-88 (Greg Urban ed., 2014) (critical account of the company becoming framed chiefly in terms of a tradeable stock with its commodity price in an investor's portfolio).

[100] Characterized as such in the examination of regulation that has addressed corporate and business behavior at a global level, *see* BRAITHWAITE & DRAHOS, *supra* note 3, at 88-471 discussing specific areas of business regulation that are developed outside of corporate law.

[101] Lyman Johnson, *Law and the History of Corporate Responsibility: Corporate Governance*, 10 U. ST. THOMAS L.J. 974-990 (2013).

[102] Wood, *supra* note 2, at 633-651; Rena Steinzor, *The Truth About Regulation in America*, 5 HARV. L. & POL'Y REV. 323-346 (2011).

has been refined by private law in liability[103] as well as by regulatory standards and enforcement,[104] extending to crucial areas, such as food[105] and drugs,[106] especially in the wake of scandals, such as the BSE scandal[107] and the thalidomide scandal.[108] Consumer protection reforms have been extended to even fundamentalist market including finance.[109] Although social protection against poor commercial practices underlies these regulatory reforms, it is arguable that such business regulation ultimately supports market capitalism as consumer confidence is maintained.[110]

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[103] For a discussion on the interface of tort liability and regulation, *see* Maria Lee, *Safety, Regulation and Tort: Fault in Context*, 74 MOD. L. REV. 555-580 (2011).

[104] The Consumer Protection Act 1987 provides strict liability for certain unsafe and defective products, while the Trade Descriptions Act 1968 regulates misleading representations and mis-selling as a result. There remain criticisms of these regimes, but advances have been achieved in regulation beyond what private law affords in relation to consumer protection. *See* Wood, *supra* note 2, at 633-651. Product standards have also been subject to international trade-led development (*e.g.* the CE (Conformité Européene) mark in Europe) as well as regulatory prescriptions where relevant; *see* BRAITHWAITE & DRAHOS, *supra* note 3, at 475-531.

[105] The Food Standards Agency was established under the Blair government in order to address the previous problem of ministerial capture by business. The Food Standards Agency has developed a consumer-facing profile, but it is equally oriented towards protection as well as promoting consumer choice. It coordinates the implementation of standards from the EU Food Agency as well. *See* PROSSER, *supra* note 3, at 44-65. For a comparison between the American prescriptive regulatory standards in food compared to a less robust European approach relying on third-party standards, *see* Wyn Grant, *Environmental and Food Safety Policy*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT, *supra* note 14, at 663-83.

[106] Largely centralized under the European Medicines Agency which vets and approves medicines, representing a highly regulated form of product regulation in the interests of safety, and a similar approach is taken in the U.S. too; *see* BRAITHWAITE & DRAHOS, *supra* note 3, at 360-396.

[107] Kamal Ahmed et al., *Madness*, GUARDIAN (Oct. 28, 2000), https://www.theguardian.com/uk/2000/oct/29/bse.focus1.

[108] Bara Fintel et al., *The Thalidomide Tragedy: Lessons for Drug Safety and Regulation,* HELIX (Jul. 28, 2009), https://helix.northwestern.edu/article/thalidomide-tragedy-lessons-drug-safety-and-regulation.

[109] The financial market has become a platform for private consumer decisions in managing their own financial needs – an age of financialization, according to many. *See* FINANCIALIZATION AT WORK: KEY TESTS AND COMMENTARY at ch13 (Ismail Erturk et al. eds., 2008). This market is often criticized due to the inability of consumers to understand credence goods and their future performance. *See* Paul Langley, *The Uncertain Subjects of Anglo-American Financialization*, 65 CULTURAL CRITIQUE 67-91 (2007); Ismail Erturk et al., *The Democratization of Finance? Promises, Outcomes and Conditions*, 14 REV. INT'L POL. ECON. 553-575 (2007); Toni Williams, *Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services*, 29 L. & POL'Y 226-256 (2007). Increasing consumer protection is being seen in financial regulation reforms especially after the global financial crisis 2007-2009, which will be discussed below as a key driver for regulatory capitalism entering into the cusp of change. *See*, MADS ANDENAS & IRIS H-Y CHIU, THE FOUNDATIONS AND FUTURE OF FINANCIAL REGULATION at chapter 8 (2014).

[110] Shavell, *supra* note 49.

Further, as the de-socialization of labor-firm relations has taken place in the 1980s under the conservative governments,[111] regulatory policy has become more important in providing the necessary balances to the inequalities in employment relationships which are not corrected by labor markets. The growth of employee protection legislation in anti-discrimination rights, health and safety rights, minimum wage rights, and other contractual rights[112] may to an extent overcome some of the inequality of bargaining power between labor and companies, as collective bargaining has fallen from vogue.[113]

Drahos and Braithwaite[114] also observed the rise in environmental protection legislation particularly in respect to clean air and water, as regulatory capitalism addressed the externalities caused by business activity.[115] These reforms are arguably a mixture of social and economic policy,[116] as corporations are forced to prevent, or pay for social cost and

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[111] Unlike the co-determination system in Germany which embeds industrial relations within the firm, *see* Stephen C. Smith, *On the Economic Rationale for Codetermination Law*, 16 J. ECON. BEHAV. & ORG. 261-281 (1991) There is little socialization of economic relations within the British corporate paradigm. In the key labor-firm relationship, a history of patchwork regulatory intervention moderated this relationship, albeit while steeped in master-servant traditions. *See* Simon F. Deakin, *Legal Origin, Juridical Form and Industrialization in Historical Perspective: The Case of the Employment Contract and the Joint-Stock Company*, 7 SOCIO-ECON. REV. 35-65 (2009). The post-war Labour government capitalized on the strength of the state in governing an economy under rebuilding and paved the way for institutionalized collective bargaining to take place, via the reformed Trade Disputes and Trade Unions Act 1946. The era of the power of the unions possibly came closest to socially reframing labor-firm relations, but the achievements of these decades were truncated by conservative government policies in the 1980s. The Thatcherite perspective was that corporations needed to be saved from being taken hostage by labor relations that jeopardized firms' productivity. The 1980s conservative government policies have recalibrated industrial relations since, preserving the marketized model of the corporation from further paradigmatic disturbances.

[112] *See*, *e.g.*, SIMON FEG ET AL., LABOUR LAW 267-268; 304-414; 601-769; 771-984 (6th ed. 2012).

[113] Disney et al., *supra* note 42, at 403-419.

[114] BRAITHWAITE & DRAHOS, *supra* note 3, at 256-295.

[115] Boscheck, *supra* note 16, at 151-190; SCHORR, *supra* note 16, at 65-103.

[116] The mixed social-economic nature of environmental regulation can be attributed to a mixture of public interest and economic efficiency thinking in regulatory ethos and design, such as the balance between the precautionary principle and cost-benefit analyses in policy generation, the expansive regulatory space for corporations where third party standards, audits and civil society activism co-exist with corporate endeavors and regulatory enforcement, and innovative regulatory measures. For some examples of discussion, *see* Neil Gunningham, *Environment Law, Regulation and Governance: Shifting Architectures*, 21 J. ENVTL. L.J. 179-212 (2009); Neil Gunningham, *The New Collaborative Environmental Governance: The Localization of Regulation*, 36 J.L. & SOC'Y 145-166 (2009); Neil Gunningham & Darren Sinclair, *Smart Regulation*, *in* REGULATORY THEORY, *supra* note 2, at 133; ASEEM PRAKASH & MATTHEW POTOSKI, THE VOLUNTARY ENVIRONMENTALISTS: GREEN CLUBS, ISO 14001, AND VOLUNTARY ENVIRONMENTAL REGULATIONS 81-188 (2006) (on how the voluntary adoption of ISO14000 has helped improve environmental

internalize the social price of their activities, such as carrying out risk management. The dominance of economic thinking in environmental policy can nevertheless be seen in many initiatives, including the carbon emissions trading regulation which adopts a marketized approach to regulate corporate carbon footprint.[117]

Although business regulation intervenes where markets do not work optimally, regulatory policy is highly shaped and influenced by business. In this political economy, corporations act as businesses, collectively, through trade associations[118] and international networks,[119] generating both epistemic authority and lobbying pressure in relation to regulatory policy.[120] Dignam describes corporate law and securities regulation as particularly shaped by a "negotiated" regulatory framework between business and government.[121] The institutional context for corporate regulation is thus very much shaped by the peer level,[122] power and status[123] of business and states *vis a vis* each other.

The private and shareholder-focused nature of company law, investor-focused securities regulation, and the expression of much of social policy through external regulation have become relatively "stable" tenets of corporate regulation. These hallmarks support (a) the neoliberal economic agenda, as states and business maintain a companion relationship of steering and rowing, and (b) the liberal market economy where economic relations are incentive-based and marketized.

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management in corporates).

[117] Discussed critically in Sol Piccioto, *Paradoxes of Regulating Corporate Capitalism: Property Rights and Hyper-Regulation,* 1 OÑATI SOCIO-LEGAL SERIES 1-15 (2011); *see also* Jonas J. Monast et al., *On Morals, Markets, and Climate Change: Exploring Pope Francis' Challenge*, 80 L. & CONTEMP. PROBS. 135-162 (2017).

[118] Sectoral industries organize much lobbying as a form of collective corporate power, see discussion in Peter Gourevitch, *Politics and Corporate Governance: What Explains Policy Outcomes?*, *in* CORPORATIONS AND CITIZENSHIP, *supra* note 99, at 183; Gregory Shaffer, *Law and Business*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT, *supra* note 14, at 63; Katherine E. Smith et al., *Corporate Coalitions and Policy Making in the European Union: How and Why British American Tobacco Promoted ''Better Regulation"*, 40 J. HEALTH, POL'Y, & L. 325-372 (2015).

[119] Pamela Camerra-Rowe & Michelle Egan, *International Regulators and Network Governance*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT, *supra* note 14, at 404.

[120] Gourevitch, *supra* note 118, at 183.

[121] Dignam, *supra* note 92, at 24-41.

[122] CORPORATIONS AND CITIZENSHIP, *supra* note 99 (a volume curated to present the vast social and political power of corporates derived from their economic power).

[123] This is the natural trajectory of successful corporations as engines of production and wealth creation, as Lazonick critically dismisses economists' dream of ideal firm sizes as small in a world of perfect competition, *see* William Lazonick, *The Corporation in Economics, in* THE CORPORATION 64 (Grietje Baars & André Spicer eds., 2017). According to Lazonick's argument, it is a positive and not a negative or transitional phenomenon to behold the growth of significant corporations in scale and power.

C. Deficiencies and Lacunae

In an economic model of market fundamentalism,[124] prices in relevant supply and demand side markets drive corporations' incentive-based behavior. Corporations have become insularly focused on profit-maximization reflected in high securities markets prices, characterized as "individualistic" pursuits.[125] The incentives for corporate behavior tend to cause tensions between the needs of "collective" good or the social dimension.[126] The tradition of regulatory capitalism has, to an extent, addressed corporate conduct that causes direct social harms and market failures, but it tends to uphold a broad scope of economic freedom. Hence, regulatory capitalism is unlikely to address areas where conflicts arise between social expectations and corporations' economic freedoms.

Corporations have marginalized the social and ethical dimensions of corporate behavior that are not reflected in "market value." Boldeman describes corporate behavior that has become "dehumanizing" and "intolerant" of moral or social dimensions.[127] Old-fashioned and holistic notions such as the moderation of "self-interest" by "moral sentiments" of self-restraint,[128] or the perspective that a corporation creating economic wealth should do so as being entrusted by society[129] have become squeezed out by market fundamentalism. Corporate exploits could often be at the expense of collective good or the social dimension, producing "a-social" behavior.[130] Further, Hendry gives an account of how market fundamentalism has made market values central to business operations, and corporations pursuing their business case are merely adhering to the *morality* of self-interest in markets.[131] This conception of morality may be

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[124] There is an interesting empirical finding of the alignment broadly between national culture, such as market fundamentalism, and organizational culture, such as the marketization approaches taken in corporations, *see* GEERT HOFSTEDE ET AL., CULTURES AND ORGANISATIONS 320-28 (2010).

[125] Ho, *supra* note 99; WHEELER, *supra* note 29, at chapter 1 (arguing that such "individualistic" narrative has dominated corporate behavior in the post-2000s. The book critically explores alternative forces to change corporate behavior, such as an awareness of 'collective good', the rise of stakeholder capitalism and ethicality to shape corporate objectives and behavior.

[126] WHEELER, *supra* note 29, at chapter 1.

[127] BOLDEMAN, *supra* note 28, at 280.

[128] Reconciling Adam Smith's grand treatises, *The Wealth of Nations* and *The Theory of Moral Sentiments*, *see* SPENCER J. PACK, CAPITALISM AS A MORAL SYSTEM: ADAM SMITH'S CRITIQUE OF THE FREE MARKET ECONOMY chapter 1 (2010).

[129] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 352 (1991).

[130] Indeed, Bakan's critical account paints corporate behavior as pathologically sociopathic, *see* JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER at chapter 3 (2003).

[131] JOHN HENDRY, BETWEEN ETHICS AND ENTERPRISE: BUSINESS AND MANAGEMENT IN A BIMORAL SOCIETY chapters 1-2 (2004), and Milton Friedman's famous pronouncement that "the social responsibility of business is to increase its profits" is very much reflective of that

contested *vis-a-vis* our human or social conception of morality,[132] giving rise to a "bimoral" space for negotiation by companies. The bifurcation of "business morality" from human or social conceptions,[133] or indeed the marginalization of the latter[134] can serve utilitarian purposes, but create a perverse organizational belief system which would be regarded as morally dysfunctional.[135]

The private nature of corporate objectives is not necessarily compatible with ethical or social dimensions. The disengagement of corporations from society is criticized by many as, at the very least, the privilege of incorporation reflects a certain social contract on the basis of state enfranchisement or 'chartering' of private activity.[136] In the absence of regulatory moderation, corporations *can* adopt a social and bimoral behavior where there is a business case. This tendency is further exacerbated by global trends.

The rise in neo-liberalism and globalization has been taken advantage of by corporations, bringing profound changes to the economic structures of many jurisdictions. International trade and globalization have changed corporate configurations and many take advantage of multi-jurisdictional footprints and loose networks in contracts and organization.[137] Corporate behavior has become less easy for national policy-makers to regulate,[138]

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leaning. *See* Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAGAZINE (Sept. 13, 1970), http://www.umich.edu/~thecore/doc/Friedman.pdf. *See also* Jiwei Ci, *Justice, Freedom, and the Moral Bounds of Capitalism*, 25 SOC. THEORY & PRAC. 409-438 (1999).

[132] *See* Susanna Kim Ripken, *Multiple Personalities Incorporated: Accepting the Multi-Dimensional Personhood of the Modern Corporation* 3-103 (Chapman University Law Research Paper No. 08-296, 2008), http://ssrn.com/abstract=1184322; John Ikerd, *Sustainable Capitalism: A Matter of Ethics and Morality*, 3 PROBS. SUSTAINABLE DEV. 13-22 (2008) (lamenting the inability of economic-driven thinking to incorporate non-monetary or economic values in terms of moral and ethical paradigms).

[133] *But see*, Wim Dubbink & Jeffrey Smith, *A Political Account of Corporate Moral Responsibility,* 14 ETHICAL THEORY & MORAL PRAC. 223-246 (2009).

[134] Jeroen Veldman & Hugh Willmott, *The Corporation in Management Studies*, *in* THE CORPORATION, *supra* note 123, at 197-212.

[135] *See*, *e.g.*, BAKAN, *supra* note 130, at chapter 3.

[136] David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139-158 (2013).

[137] *See* Päivi Oinas, *The Many Boundaries of the Firm*, UNDERSTANDING THE FIRM: SPATIAL AND ORGANIZATIONAL DIMENSIONS 35-60 (Michael Taylor & Päivi Oinas eds., 2006). *See also* SOL PICCIOTTO, REGULATING GLOBAL CORPORATE CAPITALISM 155-206 (2011).

[138] *See*, *e.g.*, William Magnuson, *Unilateral Corporate Regulation*, 17 CHI. J. INT'L L. 521-572 (2016); Peter J. Spiro, *Constraining Global Corporate Power: A Short Introduction*, 46 VAND. J. TRANSNAT'L L. 1101-1118 (2013); Kenneth M. Amaeshi et al., *Corporate Social Responsibility in Supply Chains of Global Brands: A Boundaryless Responsibility? Clarifications, Exceptions and Implications*, 81 J. BUS. ETHICS 223-255 (2008); Jette Steen Knudsen, *The Growth of Private Regulation of Labor Standards in Global Supply Chains: Mission Impossible for Western Small- and Medium-Sized Firms?*,

while the same policy-makers design regulatory regimes to compete in global regulatory competition[139] even if strong and extra-territorial legislation can be affected.[140] There is a lack of international law to govern multinational corporate behavior,[141] and regulatory arbitrage[142] by corporations has flourished in the slow progress towards international harmonization.[143]

Regulatory obligations may be regarded as boundaries for arbitrage, and litigation expenses or regulatory fines as a price for doing business. For example, a profit-chasing culture in many financial firms generated

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117 J. BUS. ETHICS 387-395 (2013); Tim Büthe, *Private Regulation in the Global Economy: A (P)Review*, 12 BUS. & POL. 1-38 (2010).

[139] I.e., being in the market for rules of incorporation and doing business, *see* Colin Crouch, *The Global Firm: The Problem of the Giant Firm in Democratic Capitalism*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT, *supra* note 14, at 148. There is a lack of empirical evidence on whether and to what extent "exit" by corporations cause regulatory competition anxieties for states, as states may respond to a perceived threat whether real or otherwise, *see* Henry Tjiong, *Breaking the Spell of Regulatory Competition: Reframing the Problem of Regulatory Exit*, 66 RABEL J. COMP. & INT'L PRIV. L. 66, 75-76 (2002).

[140] Such as the pre-1980s initiatives in the US, including e.g., the Foreign Corrupt Practices Act 1977 and Alien Tort Claims Act dating to the 18th century, and modern exterritorial environment and other legislation. The effectiveness is discussed in Susan C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745-770 (2011). Magnuson discusses the oft-ignored effectiveness of such unilateral regulation as representing political will and power to control corporate conduct, based on "effects" doctrines and extra-territoriality, *see* Magnuson, *supra* note 138, at 521-572.

[141] Susan C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745-770 (2011).

[142] Regulatory arbitrage often allows corporations to move their externalities to jurisdictions with lowest standards or least susceptible to regulatory or civil enforcement. See on environmental pollution, Harland Prechel & Lu Zheng, *Corporate Characteristics, Political Embeddedness and Environmental Pollution by Large U.S. Corporations*, 90 SOC. FORCES 947-970 (2012); and on civil liability, *see generally*, Robin F. Hansen, *Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill*, 26 BERKELEY J. INT'L L. 410-451 (2008). This is in a large part made possible by the lack of an enterprise liability doctrine in the U.K., which strictly treats each company in a corporate group as its own legal person and it is rare for the corporate personality of a subsidiary to be treated as the parent's or for the corporate group to be treated as having a shared personality. *See Adams v Cape Industries Plc* [1990] 2 WLR 657; *Prest v Petrodel Resources Ltd* [2013] UKSC 34. Further, innovative structuration such as outsourcing and networks have changed multinational operations, allowing them to maintain a powerful global footprint while minimizing obligations to stakeholders, *see* Glenn Morgan, *The Multinational as a Corporate Form: A Critical Contribution from Organization Studies*, THE CORPORATION, *supra* note 123, at 248-56.

[143] Lawrence Tshuma, *Hierarchies and Government Versus Networks and Governance: Competing Regulatory Paradigms in Global Economic Regulation*, 9 SOC. & LEGAL STUD. 115, 142 (2000); Camerra-Rowe & Egan, *supra* note 119, at 404; Tim Büthe & Walter Mattli, *International Standards and Standard Setting Bodies*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT, *supra* note 14, at 440-71.

perverse incentives towards excessive risk-taking,[144] culminating in the global financial crisis 2007-2009, and was also prevalent in the scandal of fictitious bank accounts in Wells Fargo.[145] Many also regard the BP Deepwater Horizon oil spill disaster in 2010 as reflecting failures in organizational culture which prized cost-reduction over human safety.[146]

In an "a-socialized" paradigm, companies can pursue myopic and economically driven relations with their constituents as long as financial efficiency is achieved. If employee-firm relations are insularly treated as economic and marketized, issues such as wage advancement and justice would be contractual bargaining[147] and not framed as issues of "social relations." Further, stakeholders have found it challenging to advance their participation or voice in the corporate law framework underpinned by shareholder primacy. For example, one of the hallmarks of the liberal market economy in the U.K. is an open market for corporate control. The company is free to sell out to takeover offerors that meet with shareholder approval. Even if stakeholders, such as employees and suppliers, are most affected by such decisions, they have no place for strategic participation in such decisions.[148] The dominantly marketized framing for corporate conduct and decisions crowds out perspectives from a social point of view. In accordance with the trends of different labor markets, U.K. companies

[144] Michael A. Santoro & Ronald J. Strauss, WALL STREET VALUES: BUSINESS ETHICS AND THE GLOBAL FINANCIAL CRISIS chapters 1-2 (2012); Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture and Ethics of Financial Risk Taking*, 96 CORNELL L. REV. 1209-1246 (2011); also official reports that lament poor culture at banks in the form of House of Lords and House of Commons, *see* Graeme Baber, *Changing Banking for Good: No More Recklessness Misconduct*, 34 COMP. L. 340-347 (2013); ANTHONY SALZ, THE SALZ REVIEW at paragraphs 8.13-30 (2013) (on Barclay's aggressive trading culture). An overview is provided in IRIS H-Y CHIU, REGULATING FROM THE INSIDE: THE LEGAL FRAMEWORK FOR INTERNAL CONTROL IN BANKS AND FINANCIAL INSTITUTIONS *at chapter 5* (2015).

[145] Kevin McCoy, *Wells Fargo Fined $185M for Fake Accounts; 5,300 Were Fired*, USA TODAY (Sept. 8, 2016), https://www.usatoday.com/story/money/2016/09/08/wells-fargo-fined-185m-over-unauthorized-accounts/90003212/ (on a scandal dating back over 10 years where employees were perversely incentivized to churn out fake bank accounts in order to claim performance-based remuneration).

[146] CTR. FOR PROGRESSIVE REFORM, THE BP CATASTROPHE: WHEN HOBBLED LAW AND HOLLOW REGULATION LEAVE AMERICANS UNPROTECTED 1-24 (2011).

[147] Inequalities of power can affect contractual bargaining, and can result in "vicious spirals" in terms of the position of the disadvantaged party, *see* Michael Galanis, *Vicious Spirals in Corporate Governance: Mandatory Rules for Systemic (Re)Balancing?*, 31 OXFORD J. LEGAL STUD. 327-363 (2011).

[148] For example, the board neutrality rule upheld in the U.K. that prevents directors from defending the bid and to recommend to shareholders only for their exclusive decision what is in the best interests of the company, *Hogg v. Cramphorn Ltd* [1967] Ch 254, and more recently the Kraft takeover of Cadbury Plc in the U.K., *see* discussion in Georgina Tsagas, *A Long-Term Vision for UK Firms? Revisiting the Target Director's Advisory Role Since the Takeover of Cadbury's PLC*, 14 J. CORP. L. STUD. 241-275 (2014).

are free to maintain low wages for medium to low level employees[149] while giving in to inflated executive compensation.[150] A marketized framing of such disparities in reward would not allow U.S. to compare apples to oranges in terms of the different wage markets. However, a social framing of the disparities in reward would raise the query why the corporate-profit pie, which is the product of all workers, should be distributed disproportionately to favor executives and management.

A marketized framing for corporate conduct and decisions can also tolerate certain amoral behavior if private contracts have been entered freely in the market. Sharp commercial practices that do not fall within consumer regulation may be pursued, such as mis selling to commercial albeit less sophisticated parties,[151] or putting suppliers on insecure terms.[152] The case of *Newton-Sealey v. ArmorGroup Services Ltd & Ors*[153] illustrates how corporations can legally structure employment relations in such a way as to minimize risks for them while being disengaged from the needs of personal and social justice. In the case, a retired army officer in the U.K. was recruited to provide risky security services in a post-conflict zone in Iraq. The contract was framed to be between the ArmorGroup's Jersey company and the individual because the Jersey company could exclude liability for negligence in causing personal injury or death. Although the U.K. provides consumer protection law outlawing such exclusion clauses, the individual was subject to less protection under Jersey law, the choice of law made possible for the corporation due to its multi-jurisdictional footprint. The individual who was ultimately injured while on duty could not obtain any compensation from the Jersey or the U.K. parent company. The legitimacy, albeit sharpness of the commercial practice of limiting business risks for the parent company, was upheld because the parent company was free to organize its economic relations and business risks

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[149] Wage stagnation is discussed in INST. FOR PUB. POLICY RESEARCH, COMM'N ON ECON. JUSTICE, TIME FOR CHANGE: A NEW VISION FOR THE BRITISH ECONOMY 13-19 (2017), https://www.ippr.org/files/2017-09/cej-interim-report.pdf.

[150] Reported as early as 2000, *see* Martin J. Conyon & Joachim Schwalbach, *Executive Compensation: Evidence from the UK and Germany*, 33 LONG RANGE PLANNING 504-526 (2000). For modern evidence, *see* Guido Ferrarini et al., *Executive Remuneration in Crisis: A Critical Assessment of Reforms in Europe*, 15 J. CORP. L. STUD. 73-118 (2010).

[151] Such as the selling of interest rate swaps to small businesses by banks, a commercial practice that is heavily criticized but which small businesses nevertheless cannot get redress in court under regulatory or private law, *see Crestsign Ltd v. National Westminster Bank Plc, The Royal Bank of Scotland Plc* [2014] EWHC 3043 (Ch); *Bailey & Anor v. Barclays Bank Plc* [2014] EWHC 2882 (QB).

[152] Christel Lane & Reinhard Bachmann, *The Social Constitution of Trust: Supplier Relations in Britain and Germany*, 17 ORG. STUD. 365-395 (1996); and the American take on the relations between firms and suppliers in a liberal market economy as compared to a stakeholder economy is studied in Susan Helper, *Comparative Supplier Relations in the US and Japanese Auto Industries: An Exit/Voice Approach*, 19 BUS. & ECON. HIST. 153-162, (1990).

[153] *Newton-Sealey v. Armor Group Cos.* [2008] EWHC 233 (QB).

within the available company law framework. The limitation of corporate liability by strategic structuring within corporate groups is often not successfully challenged by tort victims because the U.K. lacks a doctrine of enterprise liability. Although courts have been able to uphold a parent company's duty of care to subsidiary employees directly affected by their policies, when applied to subsidiaries, such a duty of care does not easily arise, and there is no general doctrine of enterprise liability.[154]

Further, by maintaining the insular, private, and business-focused nature of corporate law, the company can remain impervious to distributional issues while governments face limitations in their options for affecting distributional justice. The liberal market economy is a capitalist order apt to produce distributive inequalities.[155] Although such inequalities reflect differences in reward for different forms of enterprise or economic behavior,[156] it is another matter to find tolerable the "politically and socially offensive"[157] levels of inequality that have come about in neo-liberal, financialized economies such as the U.S. and U.K.[158] where the distributional differences between "winners" and "losers"[159] can be phenomenal.[160] For example, companies have financially jeopardized pension schemes to the disadvantage of employees while giving in to market pressures and paying out dividends to shareholders while pension pots are still in deficit. [161] These loci of distributional injustices are now

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[154] *Chandler v Cape plc* [2012] EWCA Civ 525; *Ogale Community & Ors v Royal Dutch Shell Plc & Anor* [2018] EWCA Civ 191.

[155] ROGER BOOTLE, THE TROUBLE WITH MARKETS: SAVING CAPITALISM FROM ITSELF 66-92 (Nicholas Brealey Publishing 2012).

[156] Such as argued in ISRAEL M. KIRZNER, DISCOVERY, CAPITALISM AND DISTRIBUTIVE JUSTICE 95-169 (Peter J. Boettke & Frédéric Sautet eds., 2016).

[157] HAY & PAYNE, *supra* note 22, at 42.

[158] BOOTLE, *supra* note 155, at 66-92; Geoff Mulgan, *The Essence of Capitalism*, *in* THE LOCUST AND THE BEE: PREDATORS AND CREATORS IN CAPITALISM'S FUTURE 28-51 (2013); Greta Krippner, *Accumulation and the Profits of Finance*, *in* FINANCIALIZATION AT WORK, *supra* note 109, at 191–208.

[159] The competitive and non-collaborative ethos in market capitalism is heavily criticized in R. Edward Freeman et al., *Stakeholder Capitalism*, 74 J. BUS. ETHICS 303-314 (2007) (arguing for a more co-operative, long-termism, and gain-sharing form of capitalism).

[160] Prompting economists such as Amartya Sen to articulate the need for economic justice to be prized above the relentless logic of liberal market freedoms. *See*, Amartya Sen, *Markets and Freedoms: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms*, 45 OXFORD ECON. PAPERS 519-541, (1993); Zafar Iqbal et al., *The Current Crisis of Capitalism*, 9 POL'Y PERSP. 65-86 (2012).

[161] The shift from defined benefit occupational pensions to defined contribution which exposes employees to the risks of financial investment over the long-term. *See*, PENSIONS POLICY INST., THE CHANGING LANDSCAPE OF PENSION SCHEMES IN THE PRIVATE SECTOR IN THE UK 17 (2012); John Broadbent et al., *The Shift from Defined Benefit to Defined Contribution Pension Plans – Implications for Asset Allocation and Risk Management*, BIS, Dec. 2006, at 11-21 (providing aggregate observations on Australia, Canada and U.S. and the British Home Stores collapse which exposes the possibility of companies paying inordinate dividends at the expense of huge pension deficits). *See also* HOUSE OF COMMONS

attracting policy attention, as Section II discusses.[162] Market primacy cannot address such inequalities as market prices are often flawed and do not reflect perfectly social cost.[163] In relation to the *Newton-Sealey* case above, the wages paid to the employee arguably do not fully internalize the risks to the individual and his family.

It is arguable that the very social good of having corporate forms organize productive economic activity is itself becoming questionable as corporate and market behavior threaten to erode this. This problem is explored in Kay's 2012 review[164] undertaken for the British government with regard to how long-termism, i.e. the social good of corporate wealth creation for the long-term (for all economic constituents such as savers, employees, etc.) is being undermined by stock market short-termism.[165] As investors "discipline" corporations by exit or voice depending on quarterly corporate performance, corporate strategies become attuned to the short-term and are excessively financially driven, undermining visions and strategic investment for the long term. [166]

The three tenets of corporate regulation are limited in addressing the social disapproval of corporate behavior, as the limits of regulation are most sharply felt where social objectives are in conflict with market-based incentives. By leaving markets to achieve their allocative purposes, governments have a limited arsenal in addressing social inequalities or bimoral (but legal) behavior perpetuated by the corporate sector. Bruner[167] argues that the essentially private, shareholder-centric model of company law is socially accepted in the U.K. as social concerns need not be mediated through corporate law. He points to the existence of the welfare state and

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WORK & PENSIONS & BUS., INNOVATION & SKILLS COMMS., BHS: FIRST REPORT OF THE WORK AND PENSION COMMITTEE AND FOURTH REPORT OF THE BUSINESS, INNOVATION AND SKILLS COMMITTEE OF SESSION 2016-17, 2016, HC 54, at 13 (UK).

[162] DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, CORPORATE GOVERNANCE REFORM: THE GOVERNMENT RESPONSE TO THE GREEN PAPER CONSULTATION, 2007, at 8-52 (looking at pay gaps within corporations). Pensions protection is also being consulted upon, so that pension trustees may be more empowered to give voice to the protection of pension schemes where companies contemplate strategic changes. *See* DEP'T FOR WORK & PENSIONS, GOVERNMENT RESPONSE TO THE CONSULTATION ON PROTECTING DEFINED BENEFIT PENSION SCHEMES – A STRONGER PENSIONS REGULATOR, 2018, at 19-28.

[163] JOHN PLENDER, CAPITALISM: MONEY, MORALS AND MARKETS 277-309 (2015).

[164] JOHN KAY, THE KAY REVIEW OF UK EQUITY MARKETS AND LONG-TERM DECISION MAKING: FINAL REPORT at paragraph 2.16 (2012).

[165] THE ASPEN INST., OVERCOMING SHORT-TERMISM: A CALL FOR A MORE RESPONSIBLE APPROACH TO INVESTMENT AND BUSINESS MANAGEMENT at 2 (2009).

[166] Caitlin Helms et al., *Corporate Short-Termism: Causes and Remedies*, 23 INT'L COMPANY & COM. L. REV. 45-54 (2012); Emeka Duruigbo, *Tackling Shareholder Short-Termism and Managerial Myopia*, 100 KY. L.J. 531-584 (2011). This short-termism, whose flip side is dynamism and innovation is also noted in Vitols,
supra note 78, at 337-60.

[167] Christopher M. Bruner, *Power and Purpose in the 'Anglo-American' Corporation*, 50 VA. J. INT'L L. 579-622 (2010).

social policy regulations in the U.K. as providing adequately for social concerns, therefore leaving free corporate law and governance to serve the needs of the private economic enterprise of the company. The government's ability to use fiscal and welfare state measures[168] has become increasingly limited in the face of the austerity measures imposed after the global financial crisis.[169] The lacunae and deficiencies of corporate regulation are being exposed for not significantly moderating a-social and bimoral behavior on the part of corporations. [170]

Section II turns to the drivers that challenge the stability of regulatory capitalism.

II. REGULATORY CAPITALISM CHALLENGED

In this Section, we argue that two major drivers exert pressure towards shifts in the tenets of regulatory capitalism. First, the rise of a diffuse space for voices (whether of a public/regulatory or social/business nature) that articulate perspectives on CSR, influencing policy and law for corporations. Second, the onset of the global financial crisis 2007-2009 has introduced political disruptions that have had aftershock effects upon corporate regulation and reform.

A. The Rise of Transnational Private Governance, Multi-Stakeholder Initiatives, and New Governance

Civil society forces, such as the rise of non-governmental organizations (NGOs),[171] have assumed an increasingly important voice in pushing for changes in corporate behavior, articulating the need for corporations to assume responsibility commensurate with their social power and footprint[172] and the need for corporations to act as "social citizens"

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[168] Such as the working tax credit which has been introduced under the New Labour government and generally positively evaluated. *See* Mike Brewer et al., *Did Working Families' Tax Credit Work? Analysing the Impact of In-Work Support on Labour Supply and Programme Participation*, INLAND REVENUE, Dec. 2003, at 1.

[169] As national debt was raised to bail-out U.K. banks, the budget deficit became hugely challenging and austerity was introduced. *See* Ashley Seager & Julia Kollewe, *Bank Bail-Out 'Could Send National Debt Soaring By £1.5 Trillion'*, GUARDIAN (Feb. 19, 2009), https://www.theguardian.com/business/2009/feb/19/national-debt-lloyds-hbos.

[170] Grietje Baars, "*Reform or Revolution"? Polanyian Versus Marxian Perspectives on the Regulation of the Economic*, 62 N. IR. LEGAL Q. 415-431 (2011).

[171] Jonathan P. Doh & Terrence R. Guay*, Globalization and Corporate Social Responsibility: How Non-Governmental Organizations Influence Labor and Environmental Codes of Conduct*, 44 MGMT. INT'L REV. 7-29, (2004); Robert J. Bies et al., *Introduction to Special Topic Forum: Corporations as Social Change Agents: Individual, Interpersonal, Institutional, and Environmental Dynamics*, 32 ACAD. MGMT. REV. 788 -793 (2007); Dorothea Baur & Guido Palazzo, *The Moral Legitimacy of NGOs as Partners of Corporations*, 21 BUS. ETHICS Q. 579-604 (2011).

[172] Peter Newell, *Citizenship, Accountability and Community: The Limits of the CSR Agenda*, 81 INT'L AFF. 541-557 (2005); Rogers Tabe Egbe Orock*, Less-Told Stories About*

beyond legal compliance.[173] These voices are especially critical of multinational corporations' exploitation of regulatory arbitrage, benefiting from lightly-regulated jurisdictions, corrupt governments, etc. Even as they introduce investment and economic opportunities, they also exploit resources and externalize social harm.[174] Civil society voices have arisen in gaps in the transnational sphere where there is a lack of global corporate regulation either at an international level or in terms of strong (and often) extra-territorial regulation by nation states.[175]

In this transnational space, a variety of actors offer voice, both critical and constructive, as well as pro-active initiatives to influence corporate behavior. The space was first dominated by states, international organizations, networks of regulators and industry associations,[176] but is increasingly populated by third-party standard-setting bodies, civil society organizations, non-governmental organizations, collectively forming a polycentric space[177] for influence and interactions. Technological

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Corporate Globalization: Transnational Corporations and CSR as the Politics of (Ir)Responsibility in Africa, 37 DIALECTICAL ANTHROPOLOGY 27-50 (2013); David Vogel, *Taming Globalization? Civil Regulation and Corporate Capitalism*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT, *supra* note 14, at 472-94.

[173] ANDREW CRANE ET AL., CORPORATIONS AND CITIZENSHIP: BUSINESS, RESPONSIBILITY AND SOCIETY 1-14 (2008); Jeremy Moon et al., *Corporations and Citizenship in New Institutions of Global Governance*, *in* THE RESPONSIBLE CORPORATION IN A GLOBAL ECONOMY 203-24 (Colin Crouch & Camilla Maclean eds., 2011); Peter Edward & Hugh Willmott, *Corporate Citizenship: Rise or Demise of a Myth?*, 33 ACAD. MGMT. REV. 771, 771-73 (2008).

[174] JANET DINE, *Transnationals Out of Control*, *in* THE GOVERNANCE OF CORPORATE GROUPS 151-75 (2000).

[175] Tshuma, *supra* note 143, at 115, 142.

[176] *See* PICCIOTTO, *supra* note 137, at 9-16, 50-60, 61-107.

[177] See Orly Lobel*, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342-470 (2004); Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 IND. HEALTH L. REV. 139, 170 (2006). Catá Backer refers to the rise of bottom-up voices in the governance space as movement of "social aggregation" or "social constitutionalism," establishing socially-led organizations as having a participative voice and rights in transnational governance. *See* Larry Catá Backer, *Transnational Corporations Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc*., 20 IND. J. GLOBAL LEGAL STUD. 805-879 (2013). A range of polycentric actors and their influences: third-party initiatives that may influence corporate behavioral change include lender governance such as under the Equator Principles athttps://equator-principles.com. *But see* critique in Douglas Sarro, *Do Lenders Make Effective Regulators? An Assessment of the Equator Principles on Project Finance*, 13 GERMAN L.J. 1525-1558, (2012) (relating to lack of monitoring and governance, therefore making lender governance a procedural and superficial phenomenon that lenders can brand themselves by); *see also* Niamh O'Sullivan & Brendan O'Dwyer, *Stakeholder Perspectives on a Financial Sector Legitimation Process: The Case of NGOs and the Equator Principles*, 22 ACCT., AUDITING & ACCOUNTABILITY J. 553-87 (2009); Patrick Haack et al., *Exploring the Constitutive Conditions for a Self-Energizing Effect of CSR Standards: The Case of the 'Equator Principles'* 4-33 (University of Zurich Institute of Organization and Administrative Science IOU Working Paper No. 115, 2010), http://papers.ssrn.com/sol3/papers.cfm?

modernization has played no small part in facilitating the social organization and cooperation for common causes nationally and internationally, due to the fall in the cost of communications. In this space, various initiatives of a voluntary nature have been developed to secure corporate commitment to certain standards or conduct. These initiatives include agenda-setting for policy change; standard-setting for products, services or conduct; labeling of organizations or their output; certification of organizations or their output; auditor organizations; procedural governance; and dialogic mechanisms.[178] As many of the initiatives differ

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abstract_id=1706267. Many programs of third party certification and monitoring such as SA8000, the Ethical Trading Initiative, the Marine and Forest Stewardship Councils initiatives, the ISO14000 for environmental management, etc., have attained credibility due to independent monitoring. *See* Karen Bradshaw Schulz, *New Governance and Industry Culture*, 88 NOTRE DAME L. REV. 2515-2549 (2013); Kees Bastmeijer & Jonathan Verschuuren, *NGO-Business Collaborations and the Law: Sustainability, Limitations of the Law, and the Changing Relationship Between Companies and NGOs*, *in* CORPORATE SOCIAL RESPONSIBILITY, ACCOUNTABILITY AND GOVERNANCE: GLOBAL PERSPECTIVES 314-29 (Istemi Demirag ed., 2005); Dara O'Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 POL'Y STUD. J. 1-29 (2003); David A. Wirth, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields*, 36 B.C. ENVTL. AFF. L. REV. 79-102 (2009); PRAKASH & POTOSKI, *supra* note 116, at 81-188. There is also a critique of inspectors' lack of business experience and susceptibility to be fooled by superficial compliance. *See* Petra Christmann & Glen Taylor, *Firm Self-Regulation Through International Certifiable Standards: Determinants of Symbolic Versus Substantive Implementation*, 37 J. INT'L BUS. STUD. 863-878 (2006). Other voluntary initiatives include industry voluntary standards, which may be credible as being bottom-up and overcome the collective action problem, and that facilitate learning and internalization. *See* Chang-Hsien Tsai & Yen-Nung Wu, *What Conflict Minerals Rules Tell Us About the Legal Transplantation of Corporate Social Responsibility Standards Without the State: From the United Nations to the United States to Taiwan*, 38 NW. J. INT'L L. & BUS. 233-284 (2018) (on the significant acceptance of the Electronic Industry Citizenship Coalition (EICC) industry standards for monitoring conflict minerals sourcing); Bindu Arya & Jane E. Salk, *Cross-Sector Alliance Learning and Effectiveness of Voluntary Codes of Corporate Social Responsibility*, 16 BUS. ETHICS Q. 211-234 (2006). Civil society pressure and engagement is also important on an ad hoc basis. *See* Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability* 1-63 (University of Edinburgh School of Law Working Paper No. 2009/03, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1369305; Vogel, *supra* note 172, at 472-94. *See* David Nerserssian, *Business Lawyers as Worldwide Moral Gatekeepers? Legal Ethics and Human Rights in Global Corporate Practice*, 28 GEO. J. LEGAL ETHICS 1135-1187 (2015) (on external legal counsel who could also act as gatekeepers to change corporate behavior in view of increasing legal risk in relation to the matters of CSR). But the ambivalence of the moral compass of legal advisors is comprehensively canvassed in RICHARD MOORHEAD ET AL., MAPPING THE MORAL COMPASS: THE RELATIONSHIPS BETWEEN IN-HOUSE LAWYERS' ROLE, PROFESSIONAL ORIENTATIONS, TEAM CULTURES, ORGANISATIONAL PRESSURES, ETHICAL INFRASTRUCTURE AND ETHICAL INCLINATION 4-122 (2016) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2784758; David Kershaw & Richard Moorhead, *Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession*, 76 MOD. L. REV. 26-61 (2013).

[178] A typology of these "private governance" initiatives is explored in Tracey M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance*

from traditional regulatory law in terms of the nature of "obligation" imposed, the "precision" of such obligation or the "enforcement" of such obligation,[179] they are characterized as "soft law." A soft law typically mimics but does not fully attain the traditional characteristics of state-based regulation.[180] Many commentators have increasingly called upon the recognition of this body of soft law as "transnational private regulation,"[181] consolidating its "lawness" as a pluralist development in law,[182] so that its causes may be advanced and not obstructed by traditional frames for law and legality.[183]

The polycentric governance space and diverse soft law instruments for securing change in corporate behavior constitute a "transnational" new

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Institutions, 22 DUKE ENVTL. L. & POL'Y F. 67-144 (2011). *See also* Fabrizio Cafaggi & Andrea Renda, *Public and Private Regulation: Mapping the Labyrinth*, 1 DQ 16-29 (2012); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transmittal New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501-578 (2009).

[179] Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421-456 (2000) (in which is offered the paradigm spectrum for characterizing hard or soft law based on the qualities of precision, binding-ness and enforcement). Even if standards may be specific, the lack of enforcement authority or an adjudicatory forum would still likely render such standards as soft law.

[180] Alexia Brunet Marks, *The Right to Regulate*, 38 U. PA. J. INT'L L. 1-69 (2016); Harri Kalim & Tim Staal, *"Softness" in International Instruments: The Case of Transnational Corporations*, 41 SYRACUSE J. INT'L L. & COM. 257-334 (2014).

[181] Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. & SOC'Y 20-49 (2011); Colin Scott et al., *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, 38 J. L. & SOC'Y 1-19 (2011).

[182] This is advanced by a number of commentators who advocate a broad definition of law that is not traditionally constrained and more porous to other disciplines such as sociology, political science, or anthropology in achieving the securing of commitment to behavioral change. The de-legalized framing of such initiatives would further reinforce their lack of effectiveness, and acknowledgement of their function, effect and near-law profile is more constructive towards governance ends. *See* Larry Catá Backer, *Governance Polycentrism – Hierarchy and Order Without Government in Business and Human Rights Regulation* 1-27 (Coalition for Peace and Ethics Working Paper No. 1/1, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2373734; *see also* Larry Catá Backer, *Theorizing Regulatory Governance Within its Ecology: The Structure of Management in an Age of Globalization*, 24 J. CONTEMP. POL. 607-630 (2018); Larry Catá Backer, *A Lex Mercatoria for Corporate Social Responsibility Codes Without the State? A Critique of Legalization Within the State Under the Premises of Globalization*, 24 IND. J. GLOB. LEGAL STUD. 115-145 (2017); Larry Catá Backer, *Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes*, 15 IND. J. GLOB. LEGAL STUD. 101-148 (2008); Neil Walker & Gráinne de Búrca, *Reconceiving Law and New Governance* 2-17 (EUI Working Paper Law No. 2007/10, 2007), http://ssrn.com/abstract=987180; Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNAT'L LEGAL THEORY 141-189 (2010); Peer Zumbansen, Lochner *Disembedded: The Anxieties of Law in a Global Context*, 20 IND. J. GLOB. LEGAL STUD. 29-69 (2013) (citations omitted).

[183] Zumbansen, *supra* note 182, at 141-189; Christine Parker, *The Pluralization of Regulation*, 9 THEORETICAL INQUIRIES L. 349-369 (2008).

governance,[184] which is characterized by diversity, inclusiveness, participation, interrelationships,[185] and the socialization of the corporation within this fabric.[186] Commentators view the development of this space as crucially enrolling the "social" dimension into governance of corporate behavior, so that such governance is not narrowly dominated by government and business.[187] In this manner, firm insularity can be opened up, and corporate accountability may be multi-channeled and widely scoped,[188] instead of narrowly focusing on markets and investors. There is increasingly recognition of the potency of such bottom-up pressures.[189]

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[184] Abbott & Snidal, *supra* note 178, at 501-578.

[185] Neil Gunningham, *Regulatory Reform and Reflexive Regulation: Beyond Command and Control*, *in* REFLEXIVE GOVERNANCE FOR GLOBAL PUBLIC GOODS, 85-104 (Eric Brousseau et al. eds., 2012); and generally new governance techniques, *see* Karin Buhmann, *Reflexive Regulation of CSR to Promote Sustainability: Understanding EU Public-Private Regulation on CSR through the Case of Human Rights*, 8 INT'L & COMP. CORP. L. J. 38-76 (2011); Stavros Gadinis, *Three Pathways to Global Standards: Private, Regulator, and Ministry Networks*, 109 AM. J. INT'L L. 1-57 (2015); Ronen Shamir, *Socially Responsible Private Regulation: World-Culture or World-Capitalism?*, 45 L. & SOC'Y REV. 313-336 (2011).

[186] Heiko Spitzeck, *Organizational Moral Learning: What, If Anything, Do Corporations Learn from NGO Critique?*, 88 J. BUS. ETHICS 157-173 (2009) (on how organizations are compelled to adopt learning in social and not merely individualistically-driven dimensions).

[187] Bettina Lange & Fiona Haines, *Introduction*, *in* REGULATORY TRANSFORMATIONS: RETHINKING ECONOMY-SOCIETY INTERACTIONS 1-30 (Bettina Lange et al. eds., 2015); Alexander Ebner, *The Regulation of Markets: Polanyian Perspectives*, *in* REGULATORY TRANSFORMATIONS: RETHINKING ECONOMY-SOCIETY INTERACTIONS, *supra*, at 31-53. At a broader level, the socialization of the governance sphere is consistent with the holistic nature of markets that Polanyi championed- socially embedded markets instead of markets driven on narrow economic logics devoid of a full sense of humanity in participation.

[188] Andreas Rasche et al., *Complete and Partial Organizing for Corporate Social Responsibility*, 115 J. BUS. ETHICS 651-663 (2013) discusses the changing landscape of "organizing" governance, and Mueckenberger & Jastram, *supra* note 16, at 223-239 (discusses the transnational governance space of networks and coalitions). It is noted that the rise of third party monitors, auditors, etc. from civil society quarters such as NGOs have become a real force in the governance space. *See* Bastmeijer & Verschuuren, *supra* note 177, at 314-29; Henrik Lindholm et al., *Do Code of Conduct Audits Improve Chemical Safety in Garment Factories? Lessons on Corporate Social Responsibility in the Supply Chain from Fair Wear Foundation*, 22 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 283-291 (2016); Gay W. Seidman, *Regulation at Work: Globalization, Labor Rights, and Development*, 79 SOC. RES. 1023-1044 (2012).

[189] Empirical research does document the importance of organized civil society demand, characterized as an institutional factor that drives companies to respond to CSR demands. *See* Laura P. Hartman et al., *The Communication of Corporate Social Responsibility: United States and European Union Multinational Corporations*, 74 J. BUS. ETHICS 373-389 (2007); David Antony Detomasi, *The Political Roots of Corporate Social Responsibility*, 82 J. BUS. ETHICS 807-819 (2008); Ulf Henning Richter, *Drivers of Change: A Multiple-Case Study on the Process of Institutionalization of Corporate Responsibility Among Three Multinational Companies*, 102 J. BUS. ETHICS 261-279 (2011). Even in relation to traditional welfare states that may be on the cusp of change, civil society voices for CSR are getting corporate attention. *See* Hans De Geer et al., *Reconciling CSR with the Role of the Corporation in Welfare States: The Problematic Swedish Example*, 89 J. BUS. ETHICS 269-283 (2009).

Civil society groups have successfully become part of many multi-stakeholder initiatives that shape corporate behavior,[190] albeit in an essentially contested space for governance. These initiatives are important as they bring social dimensions to bear more forcefully than where soft law initiatives are shaped by corporations and industry alone.[191]

Such institutional movements have been keenly noted by business. Concomitantly, businesses have also participated in the conceptualization of CSR in order to frame it towards their interest.[192] This conceptual and intellectual stalemate[193] is reflected in a "governance" or political stalemate,[194] as neither social forces nor businesses have fully captured the

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However, the weakness of civil society in the governance space is discussed in Jon Burchell & Joanne Cook, *Sleeping with the Enemy? Strategic Transformations in Business—NGO Relationships Through Stakeholder Dialogue*, 113 J. BUS. ETHICS 505-518 (2013); Fairbrass & Zueva-Owens, *supra* note 16, at 321-335; and more precisely in Doh & Guay, *supra* note 171, at 7-29. NGOs are not consistently involved in dialogue and change processes and the risks of their marginalization remain strong. Further where civil society actors interact with business, the risk of capture could also make them less effective in championing corporate behavioral change. *See* Peter Utting, *Corporate Responsibility and the Movement of Business*, 15 DEV. PRAC. 375-388 (2005).

[190] An overview of such well-developed multi-stakeholder initiatives can be found in Nancy Vallejo & Pierre Hauselmann, *Governance and Multi-Stakeholder Processes*, INT'L INST. FOR SUSTAINABLE DEV., May 2004, at 3-26. An example that can be looked at is the Kimberley process for certifying conflict-free diamonds. *See* Franziska Bieri & John Boli, *Trading Diamonds Responsibly: Institutional Explanations for Corporate Social Responsibility*, 26 SOC. F. 501-526 (2011). The Forest Stewardship and Marine Stewardship Councils are also regarded as successful multi-stakeholder initiatives, *see* Bastmeijer & Verschuuren, *supra* note 177, at 314-29. The Ethical Trading Initiative has had mixed success although it is proliferated across jurisdictions achieving a form of international governance. *See* Alex Hughes et al., *Organisational Geographies of Corporate Responsibility: A UK-US Comparison of Retailers' Ethical Trading Initiatives*, 7 J. ECON. GEOGRAPHY 491-513 (2007).

[191] For example, the business-led BSCI [Business Social Compliance Initiative] for auditing apparel factories have not detected issues that ultimately led to the Rana Plaza collapse in Bangladesh. Civil society groups call for more multi-stakeholder initiatives to monitor and hold multinationals to account. *See* Dan Viederman, *Supply Chains and Forced Labour After Rana Plaza*, GUARDIAN (Apr. 24, 2014), https://www.theguardian.com/global-development-professionals-network/2013/may/30/rana-plaza-bangladesh-forced-labour-supply-chains; *BSCI 10th Anniversary Shame Over Rana Plaza*, CLEAN CLOTHES CAMPAIGN (June 25, 2013), https://cleanclothes.org/news/2013/06/25/bsci-10th-anniversary-shame-over-rana-plaza.

[192] Krista Bondy et al., *An Institution of Corporate Social Responsibility (CSR) in Multi-National Corporations (MNCs): Form and Implications*, 111 J. BUS. ETHICS 281-299 (2012).

[193] Shallini S. Taneja et al., *Researches in Corporate Social Responsibility: A Review of Shifting Focus, Paradigms, and Methodologies*, 101 J. BUS. ETHICS 343-364 (2011).

[194] Luc Fransen, *Multi-Stakeholder Governance and Voluntary Programme Interactions: Legitimation Politics*
In the Institutional Design of Corporate Social Responsibility, 10 SOCIO-ECON. REV. 163-192 (2012) (discussing how businesses have developed "challenger" business associations-led approaches to rival multi-stakeholder governance initiatives).

definition of CSR.[195] Businesses have sought to characterize CSR as being consistent with the business case, whether financially-defined[196] or wider.[197] Businesses have also framed CSR as a new management and self-regulatory tool[198] that is purportedly more effective[199] or efficient[200] than government

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[195] Taneja et al., *supra* note 193, at 343-364.

[196] These relate to conventional financial performance, *see* Manuel Castelo Branco & Lúcia Lima Rodrigues, *Corporate Social Responsibility and Resource-Based Perspectives*, 69 J. BUS. ETHICS 111-132 (2006); Hoje Jo & Maretno A. Harjoto, *The Causal Effect of Corporate Governance on Corporate Social Responsibility*, 106 J. BUS. ETHICS 53-72 (2012); or more widely to managing risks that may affect such performance such as reputational risks, *see* Lisa Whitehouse, *Corporate Social Responsibility: Views from the Frontline*, 63 J. BUS. ETHICS 279-296, (2006). But the evidence supporting the link between financial performance and corporate social performance is inconclusive. *See* Laura Poddi & Sergio Vergalli, *Does Corporate Social Responsibility Affect the Performance of Firms?* 1-38 (FEEM Working Paper No. 52.2009, 2009), http://ssrn.com/abstract=1444333; Philip L. Baird et al., *Corporate Social and Financial Performance Re-Examined: Industry Effects in a Linear Mixed Model Analysis*, 109 J. BUS. ETHICS 367-388 (2012) (citations omitted); and Henry L. Petersen & Harrie Vredenburg, *Morals or Economics? Institutional Investor Preferences for Corporate Social Responsibility*, 90 J. BUS. ETHICS 1-14, (2009). *See* Maria Ceu Cortez et al., *The Performance of European Socially Responsible Funds*, 87 J. BUS. ETHICS 573-588 (2009) (arguing that European socially screened funds based on stock selection do not perform worse than conventional benchmarks, hence justifying investing in socially responsible funds). However, some studies suggest ambiguous findings where the correlation is indeterminate. *See, e.g.*, Michael L. Barnett & Robert M. Salomon, *Beyond Dichotomy: The Curvilinear Relationship Between Social Responsibility and Financial Performance*, 27 STRATEGIC MGMT. J. 1101-1122 (2006). Other studies find a negative correlation. *See, e.g.*, Stephen Brammer et al*., Corporate Social Performance and Stock Returns: UK Evidence from Disaggregate Measures*, 35 FIN. MGMT. 97-116 (2006); Leonardo Bechetti & Rocco Ciciretti, *Corporate Social Responsibility and Stock Market Performance*, *Applied Financial Economics*, 2009, vol. 19, issue 16, 1283-1293.

[197] Or from a resource-based perspective such as gaining social capital. *See* Dilek Cetindamar & Kristoffer Husoy, *Corporate Social Responsibility Practices and Environmentally Responsible Behavior: The Case of the United Nations Global Compact*, 76 J. BUS. ETHICS 163-176 (2007). This would include gaining consumer loyalty or employee loyalty and productivity. *See* Ron Bird et al., *What Corporate Social Responsibility Activities Are Valued by the Market?*, 76 J. BUS. ETHICS 189-206 (2007); DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 1-15, 46-74 (2005).

[198] Kunal Basu & Guido Palazzo, *Corporate Social Responsibility: A Process Model of Sensemaking*, 33 ACAD. MGMT. REV. 122-136 (2008) (discussing how overall "sense-making" in CSR has turned primarily into management "sense-making"); Marta de la Cuesta González & Carmen Valor Martinez, *Fostering Corporate Social Responsibility Through Public Initiative: From the EU to the Spanish Case*, 55 J. BUS. ETHICS 275-293 (2004) (discussing how CSR is merely managerial and procedural in Spanish companies); and similar findings for Serbian companies, *see* Ivana S. Mijatovic & Dusan Stokic, *The Influence of Internal and External Codes on CSR Practice: The Case of Companies Operating in Serbia,* 94 J. BUS. ETHICS 533-552 (2010).

[199] Tim Baines, *Integration of Corporate Social Responsibility Through International Voluntary Initiatives*, 16 IND. J. GLOBAL LEGAL STUD. 223-248 (2009).

[200] Atle Blomgren, *Is the CSR Craze Good for Society? The Welfare Economic Approach to Corporate Social Responsibility*, 69 REV. SOC. ECON. 495-515 (2011).

regulation, due to the transnational nature of these issues and the disparities in regulatory capacity between states at different points of political and economic development.[201]

In this ideological contest over CSR, we see the intractability of the debates between delineated responsibility and maximal responsibility for corporations,[202] and between regulation and self-regulation,[203] both of which seem to have become a fixture in the political economy of CSR. Commentators remain in an equilibrium of disagreement on the characterization of corporate citizenship,[204] corporate purpose,[205] and the means to change corporate behavior.[206] Such intractability can be illustrated

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[201] Markus Kitzmueller & Jay Shimshack, *Economic Perspectives on Corporate Social Responsibility*, 50 J. ECON. LITERATURE 51-84 (2012).

[202] For commentators supporting a narrow conception of corporate responsibility such as economic responsibility or narrow ranges of stakeholders, *see*, George G. Brenkert, *Private Corporations and Public Welfare*, 6 PUB. AFF. Q. 155-168 (1992); Timothy M. Devinney, *Is the Socially Responsible Corporation a Myth? The Good, the Bad, and the Ugly of Corporate Social Responsibility*, 23 ACAD. MGMT. PERSPECTIVES 44-54 (2009); and those supporting refrain from imposing on corporations' responsibilities that should be administered by states, *see* Klaus M. Leisinger, *The Corporate Social Responsibility of the Pharmaceutical Industry: Idealism without Illusion and Realism without Resignation*, 15 BUS. ETHICS Q. 577-594 (2005); Michael Blowfield & Jedrzej George Frynas, *Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World*, 81 INT'L AFF. 499-513 (2005) (special issue on critical perspectives on CSR). On maximal forms of responsibility, some commentators would, however, go further to incorporate corporate social responsibility in relation to global public goods that states cannot comprehensively provide. *See* Inge Kaul*, Rethinking Public Goods and Global Public* Goods, *in* REFLEXIVE GOVERNANCE FOR GLOBAL PUBLIC GOODS, *supra* note 185, at 37.

[203] Buhmann, *supra* note 185, at 38-76; Gadinis, *supra* note 185, at 1-57. On the need for regulation, *see* Regina Kreide, *The Obligations of Transnational Corporations in the Global Context. Normative Grounds, Real Policy, and Legitimate Governance*, 4 ETHICS & ECON. 1-25 (2006); Robert McCorquodale, *Towards More Effective Legal Implementation of Corporate Accountability for Violations of Human Rights*, 103 PROC. ASIL ANN. MEETING 288-291 (2009); Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25 HUM. RTS. Q. 965-989 (2003), but on the limits of regulation, *see* Gregory A. Daneke, *Regulation and the Sociopathic Firm*, 10 ACAD. MGMT. REV. 15-20 (1985); and on behavioral impediments to self-regulation, *see* Charles R. Greer & H. Kirk Downey, *Industrial Compliance with Social Legislation: Investigations of Decision Rationales*, 7 ACAD. MGMT. REV. 488-498 (1982).

[204] *See* Pierre-Yves Néron & Wayne Norman, *CITIZENSHIP, INC.*: *Do We Really Want Businesses to Be Good Corporate Citizens?*, 18 BUS. ETHICS Q. 2, 2-7 (2008); and responses, *see* Donna J. Wood & Jeanne M. Logsdon, *Business Citizenship as Metaphor and Reality*, 18 BUS. ETHICS Q. 51-94 (2008); Andrew Crane & Dirk Matten, *Incorporating the Corporation in Citizenship: A Response to Néron and Norman*, 18 BUS. ETHICS Q. 27-33, (2008).

[205] Friedman, *supra* note 131, as against David Windsor, *Corporate Social Responsibility: Three Key Approaches*, 43 J. MGMT. STUD. 93-114 (2006); KEAY*, supra* note 72, at 173, 177-83.

[206] This area is canvassed in relation to the importance of regulation and soft law. *See supra,* note 181.

by reference to the development of corporate codes of ethics that seem to respond to and incorporate social demands, yet are self-regulating in nature. Many commentators argue that corporate codes of ethics are not merely based on internal values but recognize and incorporate external standards, such as standards forged by international organizations.[207] Corporate codes of ethics are an embodiment of polycentric governance influences, culminating in soft law instruments that regulate corporations themselves.[208] However, empirical research has persistently found inconsistency in the corporate implementation of and adherence to such codes, reflecting the dilemmas corporations face in their "bimoral" dimensions and their uncertain positioning in relation to social spheres.[209] The intractability in characterizing CSR and its impetus for change could perpetuate decades of debate and discourse without entailing any structural changes to the political economy or nature of regulatory capitalism, and indeed corporate behavior.

The claim to institutional change, though observed, is slow.[210] It is also naïve to think that the polycentric governance space is a harmonious one. The polycentric governance space is ridden with contests in ideology,

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[207] The International Labor Organization's standards on workers' rights are an example. *See* Gunther Teubner, *Corporate Codes in the Varieties of Capitalism: How Their Enforcement Depends on the Differences Among Production Regimes*, 24 IND. J. GLOB. LEGAL STUD. 81-97 (2017); Gunther Teubner & Anna Beckers, *Expanding Constitutionalism*, 20 IND. J. GLOB. LEGAL STUD. 523, 531 (2013); Jan Eijsbouts, *Corporate Codes as Private Co-Regulatory Instruments in Corporate Governance and Responsibility and Their Enforcement*, 24 IND. J. GLOB. LEGAL STUD. 181, 192 (2017); *see also* Teubner, *supra*, at 90-91.

[208] Ans Kolk & Rob van Tulder, *Setting New Global Rules? TNCs and Codes of Conduct*, 14 TRANSNAT'L L. CORP. 1-27, (2005).

[209] Commentators are concerned about the cosmetic nature of CSR codes, as they may not be institutionalized, endorsed by leadership, or internalized by employees, *see* Andrew Brien, *Regulating Virtue: Formulating, Engendering and Enforcing Corporate Ethical* Codes, 15 BUS. & PROF. ETHICS J. 21-52 (1996), and may lack transparency, accountability, and consistency in their application and enforcement. *See* Krista Bondy et al., *Multinational Corporation Codes of Conduct: Governance Tools for Corporate Social Responsibility?*, 16 CORP. GOVERNANCE 294, 302-04 (2008); Scott Killingsworth, *The Privatization of Compliance*, *in* TRANSFORMING COMPLIANCE: EMERGING PARADIGMS FOR BOARDS, MANAGEMENT, COMPLIANCE, AND GOVERNMENT, May 2014, at 33-45; Patrick M. Erwin, *Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance,* 99 J. BUS. ETHICS 535-548 (2011); Lutz Preuss, *Codes of Conduct in Organisational Context: From Cascade to Lattice-Work of Codes*, 94 J. BUS. ETHICS 471-487 (2010). Some commentators argue that such codes are ineffective because of the enforcement deficit is key to the ineffectiveness of such codes, *see* Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711-744 (2009); *but see* ANNA BECKERS, ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES: ON GLOBAL SELF-REGULATION AND NATIONAL PRIVATE LAW at chapter 4 (2015) (arguing such codes should be enforced in private law to connect the public interest of accountability to the effectiveness of corporate self-regulation).

[210] *See* discussion *infra*.

values, power, and methodology. Civil society organizations, non-governmental organizations, and other socially-led groups do not have consonant voices or common agendas with each other or with state-led international organizations[211] and corporate-led industry associations. They also face conflicts of interests themselves.[212] Business, as depicted above, also influences the discourse strongly. There is a lack of clear authoritative or coordinative order in this governance space, and the flourishing of myriad forms of soft law has not always translated into roadmaps for empirical implementation of changes to corporate behavior.

B. Mixed Achievements Observed in the U.K.

The emerging nature of transnational governance has produced incremental institutional shifts. In the U.K., corporations are increasingly attuned to social responsibility concerns, but these are predominantly framed in terms of business risk in relation to reputation and performance.[213] Hence, policymakers introducing company law reforms in 2006 accepted that a director's duty to secure the success of the company for the benefit of shareholders as a whole *includes* a duty to take into account of relevant stakeholder-facing and social responsibility matters.[214] Investors are particularly called upon to consider "environment, social and governance" (ESG) matters, aligning social expectations with their interests.[215] There is pronounced reliance on investor and market discipline for corporations' ESG profiles,[216] but we cannot blithely assume that investors act on behalf of enforcing social expectations or behave as social gatekeepers.[217] The focus on the marketized framing for CSR has the potential to undermine the content of social demand in CSR. The marketized framing also has the effect of confining CSR to voluntary and

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[211] Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706-798 (2010) (discussing how hard and soft law often used to avoid each other's effects, especially by states in negotiating transnational and international governance).

[212] Fabrizio Cafaggi, *The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Gloval Private Regulation*, 36 U. PA. J. INT'L L. 875-938 (2010); Baur & Palazzo, *supra* note 171, at 579-604.

[213] See citations *supra* nn.196 & 197.

[214] Companies Act 2006, c. 2, § 172.

[215] UNEP FIN. INITIATIVE, FIDUCIARY RESPONSIBILITY: LEGAL AND PRACTICAL ASPECTS OF INTEGRATING ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT, July 2009, at 20-22; Benjamin Richardson, *Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?*, 22 BANKING & FIN. L. REV. 145-200 (2007).

[216] Such as UK Stewardship Code 2016, Principle 4.

[217] *See* ROGER BARKER & IRIS H-Y CHIU, CORPORATE GOVERNANCE AND INVESTMENT MANAGEMENT, 61-122 (2017) (citations omitted) (arguing that even socially responsible investors may not take on such roles and activism).

self-regulatory measures, as legalization may be regarded as inappropriate interventions into the "market for virtue."[218]

Policy-makers in the U.K. have been slow to consider regulatory policy in CSR, relying on corporate self-regulation and investor leadership to address corporate behavior. The agnosticism of regulators is arguably an important reason for the slowness of institutional change. However, policy-makers have become interested in the innovative "new governance" methodologies in many soft law initiatives. When warranted, such techniques seem to offer innovative and possible cost-reducing ways of introducing corporate regulation.

New governance methodologies are based on multi-stakeholder governance to change corporate behavior. [219] It is envisaged that the regulated subject, i.e., the corporation, would be subject to regulatory principles that incorporate more procedural flexibility and work with a variety of governance actors including regulators, markets, and stakeholders in securing compliance,[220] potentially overcoming the short-comings of traditional command-and-control regulation. In the U.K., this was accepted by financial regulators (in line with international regulatory developments)[221] in the area of regulating risk management by banks. Further, we also saw this implemented in the Corporate Homicide and Manslaughter Act 2007.

The implementation of such new governance techniques in financial regulation has, however, resulted in spectacular regulatory failure as revealed in the global financial crisis from 2007 to 2009. This is largely because new governance techniques were not implemented in a truly multi-stakeholder fashion, and focused on investors and securities markets as governance actors. These have failed to exercise meaningful discipline,[222] resulting in banks being devolved with self-regulation. Banks manipulated the "flexible" regulatory standards to their advantage and were relatively

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[218] VOGEL, *supra* note 197, at 1-15, 46-74 (2005).

[219] *See* CHRISTINE PARKER, THE OPEN CORPORATION 1-30 (2002); and Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility*?, *in* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 207 (Doreen McBarnet et al. eds., 2007) (arguing for a form of corporate conscience that would be shaped and reinforced by procedural forms of regulation that attempt to change culture and behavior).

[220] The involvement of stakeholders in ensuring corporate compliance is discussed in Gunningham, *Environment Law, Regulation and Governance: Shifting Architectures, supra* note 116, at 179-212; Gunningham, *The New Collaborative Environmental Governance: The Localization of Regulation*, *supra* note 116, at 145-166.

[221] The Basel II Capital Accord of 2006; and discussed in Robert F. Weber, *New Governance, Financial Regulation, and Challenges to Legitimacy: The Example of the Internal Models Approach to Capital Adequacy Regulation*, 62 ADMIN. L. REV. 783-867 (2010).

[222] *See* CHIU, *supra* note 144, at 3-41.

unchecked.[223]

Lackluster implementation of new governance techniques in the U.K. can also be seen in the Corporate Homicide and Manslaughter Act 2007. The Act progressed through a long period of gestation since policy reform recommended by the Law Commission in 1996[224] after a number of large-scale accidents between 1986 and 1989 that caused significant numbers of deaths and injuries.[225] Amidst political challenges to the policy change, the Law Commission's report was not taken up until 2000 after the New Labour government came to power.

The Act was ultimately passed in 2007 to introduce a corporate manslaughter offense for public and private corporate bodies that cause death due to a gross breach of a duty of care to the victims, attributed to the way the organization is managed or organized.[226] The reform overcame the limitations in case law, which premised corporate liability upon an attribution doctrine that certain individuals' minds and wills could be attributed to the corporation.[227] The new regulatory technique seems able to interrogate the inside of the corporation in terms of poor management or organization that results in harmful, externally-facing conduct.[228] This reform arguably connects a corporation's management to the prevention of social harm, introducing a form of disruption to the insular and economically-driven model of the corporation and its governance. [229]

Nevertheless, the adoption of new governance techniques in the Act has not introduced profound changes to corporate behavior. First, the corporation remains free to determine its internal management and systems, and the regulatory regime does not involve multi-stakeholder input or a social dimension to influence corporate behavior on an *ex-ante* basis.

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[223] Cristie Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1-60 (2008).

[224] LAW COMMISSION, LEGISLATING THE CRIMINAL CODE: INVOLUNTARY MANSLAUGHTER (ITEM 11 OF THE SIXTH PROGRAMME OF LAW REFORM: CRIMINAL LAW), 1996, HC 171, at 67-85 (UK).

[225] *Id.* at 4-6.

[226] Corporate Manslaughter and Homicide Act 2007, c. 19, §§ 1-2.

[227] R. v. P & O European Ferries (Dover) Ltd [1991] 93 Cr. App. R. 72 (Eng.); Transco PLC v. Her Majesty's Advocate [2005] S.L.T. 211 (Scot.); *see* C.M.V. Clarkson, *Kicking Corporate Bodies and Damning Their Souls*, 59 MOD. L. REV. 557-630 (1996).

[228] Alice Belcher, *Corporate Killing as a Corporate Governance Issue*, 10 CORP. GOVERNANCE 47-54 (2002); Iris H-Y Chiu & Anna Donovan*, A New Milestone in Corporate Regulation: Procedural Legalisation, Standards of Transnational Corporate Behavior and Lessons from Financial Regulation and Anti-Bribery Regulation*, 17 J. CORP. L. STUD. 427-467 (2017). Although one of the limitations is that individuals in the organization are not indicted under the Act which applies only to corporations. Critique in Frank B. Wright, *Criminal Liability of Directors and Senior Managers for Deaths at Work*, CRIM. L. REV., Dec. 2007, at 949.

[229] McBarnet, *supra* note 177, at 1-63 Cynthia A. Williams, *Corporate Social Responsibility and Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 634 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

Second, the corporation is only called to account for its internal management and systems before the court when indicted for the occurrence of corporate homicide or manslaughter. The judicial interrogation of internal management and systems is *ex-post* in nature and has focused on precise pinpointing of senior management negligence.[230] This narrow approach allows large organizations with diffuse responsibilities to more easily escape from liability under this regime as senior management may not be implicated with precise acts by employees.[231]

The achievements in regulatory policy in addressing the social dimensions of corporate behavior have been relatively incremental before the onset of the global financial crisis 2007-9. The crisis and its aftermath, which we turn to discuss, have provided new opportunities for challenges to the stability of regulatory capitalism, culminating in the recent surge in the legalization of CSR issues discussed in Section III.

C. Regulatory Capitalism Challenged by Global Financial Crisis and its Aftermath

The global financial crisis 2007–2009 saw the near failure of a number of U.S., U.K., and European banks that had taken excessive risks. Many were exposed to liquidity risks resulting from imprudent management,[232] or solvency risks from having complex (and ultimately toxic) securitized assets on their balance sheets.[233] The marketized financial economy promotes herding in good times and excessive withdrawals in bad times,[234] exacerbating stresses already faced by financial firms.[235] As financialization

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[230] R. v. Cotswold Geotechnical Holdings Ltd [2011] EWCA Crim. 1337 (Eng.), (on pinpointing the lack of safety guidelines such as for the depth of pits, causing an engineer to fall to his death in a collapsed pit.

[231] This is seen in the prosecution against an NHS Trust for the death caused by its two anesthetists, whose negligence was not upheld. The court insisted that on the prosecution make their making a case upon precise pinpointing of the level of management and procedures that had failed, and refused to accept that employment of an inadequately qualified person was to be regarded as a failure of management. The prosecution collapsed, *see* R. v. Cornish (Errol) [2016] EWHC 779 (QB) (Eng.).

[232] Such as over-reliance on short-term market funding in the case of Northern Rock in the U.K.

[233] HOWARD DAVIES, THE FINANCIAL CRISIS: WHO IS TO BLAME? at chapter 9 (2010); Gillian Tett, FOOL'S GOLD: HOW UNRESTRAINED GREED CORRUPTED A DREAM, SHATTERED GLOBAL MARKETS AND UNLEASHED A CATASTROPHE 3-26 (2009); ADAIR TURNER, FIN. SERVS. AUTH., THE TURNER REVIEW: A REGULATORY RESPONSE TO THE GLOBAL BANKING CRISIS 21-22 (2009), http://www.ecgi.org/tcgd/2009/FSA_Turner_Report_on_Financial_Crisis_2009.pdf.

[234] Emilios Avgouleas, *The Global Financial Crisis, Behavioral Finance and Financial Regulation: In Search of a New Orthodoxy*, 9 J. CORP. L. STUD. 23, 60 (2009).

[235] *See* Hershey H. Friedman & Linda W. Friedman, *The Global Financial Crisis of 2008: What Went Wrong?*, *in* LESSONS FROM THE FINANCIAL CRISIS: CAUSES, CONSEQUENCES, AND OUR ECONOMIC FUTURE 31 (Robert Kolb ed., 2010); James K. Galbraith, *The Roots of the Crisis and How to Bring it to a Close*, *in* LESSONS FROM THE

brought about a state of private sector dominance in meeting the financial needs of states, business, and households,[236] many states found themselves in a position of having to bail out significant financial institutions to prevent the collapse of domestic financial systems.[237] The crisis led to real economic damage, including home foreclosures and job losses, and adversely affected the fiscal strength of governments, resulting in widespread austerity measures in the EU and U.K., and a loss of welfare.[238] Social confidence in market capitalism in the U.K. has been severely disturbed,[239] as reflected in (a) articulations of the ideological crisis of faith in the U.K.'s capitalist model and (b) political disruptions in the U.K. echoed across many other European countries.

The ideological crisis of faith in market capitalism has been expressed in intellectual calls to challenge the current model of market capitalism, in order to adjust towards an economic model more cognizant of the social needs for justice and stability.[240] This is not necessarily "leftist" talk: these voices reflect a culmination of underlying concerns that have built up for years about the U.K. economy with respect to issues such as widening inequality between the economic elite and ordinary citizenry, [241] the stagnation of wages compared to profits made from financial capital,[242] and

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FINANCIAL CRISIS: CAUSES, CONSEQUENCES, AND OUR ECONOMIC FUTURE, *supra*, at 37.

[236] States rely on financial markets for borrowing, as do businesses and households. *See* Gerald A. Epstein, *Introduction: Financialization and the World Economy*, *in* FINANCIALISATION AND THE WORLD ECONOMY 3 (Gerard A. Epstein ed., 2005).

[237] *See* Rosa María Lastra, *Systemic Risk, SIFIs and Financial Stability*, 6 CAP. MARKETS L.J. 197, 199 (2011); *see also* Iain G. MacNeil & Justin O'Brien, *Introduction: The Future of Financial Regulation*, *in* THE FUTURE OF FINANCIAL REGULATION 1, 2 (Iain G. MacNeil & Justin O'Brien eds., 2010).

[238] *See* Randall Germain, *Financial Order and World Politics: Crisis, Change and Continuity*, 85 INT'L. AFF. 669, 672-74 (2009); Sue Mew, *Contentious Politics: Financial Crisis, Political-Economic Conflict, and Collective Struggles—A Commentary*, 39 SOC. JUST. 99, 100-01 (2013).

[239] *See* John W. Cioffi, *After the Fall: Regulatory Lessons from the Global Financial Crisis*, *in* HANDBOOK ON THE POLITICS OF REGULATION 642, 656-59 (David Levi-Faur ed., 2011).

[240] *See* STIGLITZ, *supra* note 28, at 196-209; Luiz Carlos Bresser-Pereira, *The Global Financial Crisis and a New Capitalism?* 32-36 (Levy Economics Institute of Bard College, Working Paper No. 592, 2010); Kolja Möller, *Struggles for Law: Global Social Rights as an Alternative to Financial Market Capitalism*, *in* THE FINANCIAL CRISIS IN CONSTITUTIONAL PERSPECTIVE: THE DARK SIDE OF FUNCTIONAL DIFFERENTIATION 305, 326-31 (Poul F. Kjaer et al. eds., 2011); Ikerd, *supra* note 132, at 17-22; Iqbal et al., *supra* note 160, at 76-84. An analogous intellectual trend, stakeholder capitalism, is also back in vogue, *see* R. Edward Freeman et al., *supra* note 159, at 311-13.

[241] Such as highly remunerated corporate executives and those profiting from intermediating financial assets.

[242] Ken-Hou Lin & Donald Tomaskovic-Devey, *Financialization and U.S. Income Inequality, 1970–2008*, 118 AM. J. SOC. 1284, 1291-95 (2013); Eckhard Hein, *Finance-Dominated Capitalism and Redistribution of Income: A Kaleckian Perspective* 31-32 (Levy Economics Institute of Bard College, Working Paper No. 746, 2013); Basak Kus,

the marginalization of stakeholders from business and policy.[243] Indeed, the "Occupy" movement worldwide was a reflection of social discontent that arose to challenge the legitimacy of the capitalist model of market fundamentalism that perpetuated social inequalities and divisions.[244] This ideological crisis has not become revolutionary with worldwide crackdown of the Occupy movement.[245] But policy-makers cognizant of the failings of financial markets have sought to appease the public with international resolve to regulate banks and financial institutions much more robustly than before. [246] The determination in the U.S. to bring the Dodd-Frank Act 2010 into force, and the comprehensive program of institutional and regulatory reform in the EU[247] and U.K.[248] have found social resonance. These measures compel regulators to take proactive roles,[249] as well as robust *ex*

Financialisation and Income Inequality in OECD Nations: 1995-2007, 43 ECON. & SOC. REV. 477, 492-93 (2012); Gerard Duménil & Dominique Lévy, *Financialization, Neo-Liberalism and Income Inequality in the USA*, *in* FINANCIALIZATION AT WORK, *supra* note 109, at 225-29.

[243] *E.g.*, INST. FOR PUB. POLICY RESEARCH, COMM'N ON ECON. JUSTICE, *supra* note 149, at 29-39; *see also* Mulgan, *supra* note 158, at 32-51.

[244] ANDENAS & CHIU, *supra* note 109, at 3-15.

[245] 'Occupy Wall Street: 5 years later' (CNN 16 Sep 2016) at https://edition.cnn.com/2016/09/16/us/occupy-wall-street-protest-movements/index.html.

[246] For an in-depth discussion of the EU, U.K. and international political perspectives, *see* THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISIS (Eilis Ferran et al. eds., 2012).

[247] The regulatory reform program is based on protecting financial stability as a social good of newfound importance. Measures include: controlling financial institution risk-taking at the micro and macro levels; bank crisis and resolution measures; increased market transparency and reporting for regulatory surveillance, not just market discipline; greater consumer protection; and intervening into the organizational governance and management of financial institutions, including remuneration controls. These are supported by institutional reform at the EU with agencies tasked with greater rule-making and supervisory powers, and in the U.K. with clear division of responsibilities between the Prudential Regulation and Financial Conduct Authorities and enhanced supervisory and enforcement arsenal. *See* ANDENAS & CHIU, *supra* note 109; THE FUTURE OF FINANCIAL REGULATION, *supra* note 237; CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS (P.M. Vasudev & Susan Watson eds., 2011).

[248] The U.K. transposed most of the EU reforms but added structural reforms to end the "too-big-to-fail" problem. *See* ANDENAS & CHIU, *supra* note 109, at 295-331, and citations therein, for a discussion of the Vickers Report, which preceded the government White Paper and legislation. Further, the U.K. conducted a "social"-level inquiry in the form of the four volumes of reports under the House of Commons and House of Lords Committees to "[C]hang[e] banking for good." *See* PARLIAMENTARY COMM'N ON BANKING STANDARDS, CHANGING BANKING FOR GOOD (2013), https://publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/27.pdf. These inquiries played a significant part in the U.K.'s development and introduction of the senior managers regime, which created a near strict-liability regulatory framework for senior bank officers. *See* Iris H-Y Chiu, *Regulatory Duties for Directors in the Financial Services Sector and Directors' Duties in Company Law: Bifurcation and Interfaces*, 6 J. BUS. L. 465, 474-81 (2016).

[249] S*ee* BANK OF ENG., PRUDENTIAL REGULATION AUTH., THE PRUDENTIAL REGULATION AUTHORITY'S APPROACH TO BANKING SUPERVISION 33-37 (2013), https://www.

post roles,[250] far more than ever before in supervising banks and financial institutions, changing the regulatory paradigms significantly.[251] This shift has not dethroned the private financial sector from continuing to be dominant in mediating worldwide financial needs for states, businesses and households,[252] but a social truce seems to have been attained by the force of regulation asserting a new balance of power and legitimacy in the financialized market economy.[253] Further, large fines imposed upon financial institutions for misconduct,[254] a visible form of legal and social penance, have humbled many banks. The social "magic" of regulation, in terms of its perceived strength and legitimacy,[255] cannot be ignored and

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bankofengland.co.uk/-/media/boe/files/prudential-regulation/approach/banking-approach-2013.pdf?la=en&hash=EE3CF43F507394DA596088664EAAAC5C6128F4F6 (discussing judgement-based supervision).

[250] Credible supervision and enforcement. One important aspect of supervision is stress-testing that puts banks through hypothetical models of stress scenarios in order to evaluate resilience, *see* IRIS CHIU & JOANNA WILSON, BANKING LAW AND REGULATION, CHAPTER 9.F (Oxford: Oxford University Press 2019).

[251] The financial regulatory paradigm has shifted away from market fundamentalism with the advent of macro-prudential regulation, *see* Iris H-Y Chiu, *Macro-Prudential Supervision: Critically Examining the Developments in the UK, EU and Internationally*, 6 L. & FIN. MKT. REV. 184 (2012), toward supervisory measures such as stress-testing, *see* CHIU & WILSON, *supra* note 250, and accompanying text; an explosion of transparency returns, *see* Iris H-Y Chiu, *Corporate Reporting and the Accountability of Banks and Financial Institutions*, *in* THE LAW ON CORPORATE GOVERNANCE IN BANKS 196, 199-215 (Iris H-Y Chiu et al. eds., 2015); and extension of regulatory reform to areas hitherto unregulated or lightly regulated, such as alternative investment funds, *see* ANDENAS & CHIU, *supra* note 109, at 140-90, and aspects of shadow banking, *see* RESEARCH HANDBOOK ON SHADOW BANKING: LEGAL AND REGULATORY ASPECTS, chapters 3-13 provide discussion on different aspects (Iris H-Y Chiu & Iain MacNeil eds., 2017).

[252] *See* Christopher Arup, *The Global Financial Crisis: Learning from Regulatory and Governance Studies*, 32 L. & POL'Y 363, 365-72 (2010); Timothy Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 HARV. L. & POL'Y. REV. 369, 388-93 (2010).

[253] ANDENAS & CHIU, *supra* note 244.

[254] The financial penalties meted out to banks for historical misconduct such as mis-selling and manipulation of the London Inter-Bank Offered Rate have been tremendous in the U.S. as well as U.K. *See* Hannes Köster & Matthias Pelster, *Financial Penalties and Bank Performance*, 79 J. BANKING & FIN. 57, 59 (2017), (detailing 671 penalties imposed following the financial crisis). Köster and Pelster also find, however, that bank performance improves thereafter as investors perceive behavioral problems to be closed upon regulatory punishment. *See id.* at 62-70.

[255] *See* Augusto de la Torre & Alain Ize, *Regulatory Reform: Integrating Paradigms*, 13 INT'L. FIN. 109, 110-12 (2010). Regulation offers appeal in providing a "better" solution when self or light regulation has failed. Rosner and Markowitz discuss how voluntary initiatives undertaken by firms never went far enough in the US to promote occupational health and safety and were ultimately superseded by regulation. *See* Rosner & Markowitz, *supra* note 16, at 29-34. In cases where the social responsibility concerns are severe, such as where commercial activities are carried out in conflict areas experiencing severe human rights breaches, self-regulation by firms may be regarded as insufficient, as there is a lack of public accountability and the level of social protection required may exceed a firm's

plays a part in restoring social confidence. The re-regulatory high in the aftermath of the global financial crisis 2007-2009 is an important driver for the increased legalization of CSR to change corporate behavior,[256] as corporate regulation remains an important socio-political tool.[257] This is a trend not limited to,[258] although pronounced in, the EU[259] and U.K.[260] At an international level, a similar appetite for the legalization of CSR can also be detected. [261] International initiatives are launched against corporate bribery[262] and tax evasion,[263] while non-governmental activists such as in

governance capacity. For example, De Beers developed a system for tracing the source of their diamonds in order to ensure that they were not implicated by conflict diamonds (the Kimberley Process). However, in the face of mounting international pressure and reports of severe human rights breaches regarding the conflict areas in Angola and Sierra Leone, the U.S. ultimately passed the Clean Diamonds Trade Act. The Act outlaws trade in diamonds not certified according to internationally-agreed standards set out in the Kimberley Process. *See* Andrew Bone, *Conflict Diamonds: The De Beers Group and the Kimberley Process*, *in* BUSINESS AND SECURITY: PUBLIC-PRIVATE SECTOR RELATIONSHIPS IN A NEW SECURITY ENVIRONMENT 129, 129-35 (Alyson J.K. Bailes & Isabel 128 Frommelt eds., 2004), https://www.sipri.org/sites/default/files/files/books/SIPRI04BaiFro/SIPRI04BaiFro11.pdf; *see also* Ralf Boscheck, *Strategy, Markets and Governance*, *in* STRATEGIES, MARKETS AND GOVERNANCE: EXPLORING COMMERCIAL AND REGULATORY AGENDAS, *supra* note 16, at 5-6.

[256] Engobo Emeseh et al., *Corporations, CSR and Self Regulation: What Lessons from the Global Financial Crisis?*, 11 GERMAN L.J. 230, 253-59 (2010); Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L. L. 591, 601-08 (2008); Corinne Gendron et al., *Résponsibilité Social et Regulation de l'Entreprise Mondialisée* [*Social Responsibility and the Regulation of the Global Firm*], 59 REL. INDUSTRIELLES 73-100 (2004).

[257] *See* Gunningham, *supra* note 15 and accompanying text; PHILIP RAWLINGS ET AL., QUEEN MARY U. OF LONDON, CTR. FOR COM. L. STUD., REGULATION OF FINANCIAL SERVICES: AIMS AND METHODS 24-29 (2014), http://www.ccls.qmul.ac.uk/media/ccls/docs/research/020-Report.pdf.

[258] For example, the U.S. has also enacted regulatory measures related to corporate social responsibility, such as in relation to conflict minerals. Listed companies are to report on whether they use certain minerals originating from the Democratic Republic of Congo or other conflict-ridden country and the extent of due diligence and monitoring they carry out to ascertain the source of their minerals, *see* SEC. & EXCH. COMM'N, FINAL RULE: CONFLICT MINERALS (2012), https://www.sec.gov/rules/final/2012/34-67716.pdf. The EU counterpart is discussed in Section III, *infra*.

[259] The EU's initiatives for legalization of CSR are discussed in Section III, *infra*.

[260] *See* discussion *infra* Section III.

[261] *See* LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS (Christian Brütsch & Dirk Lehmkuhl eds., 2007). Brütsch and Lehmkuhl's volume shows how legalization is pursued at a transnational level to deal with common global problems in relation to economic activity, such as financial crime and corporate financial reporting.

[262] *See e.g.*, Convention on Combating Bribery of Foreign Public Officials in Int'l. Bus. Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, OECD/LEGAL/0293 (1998), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf; PREVENTING CORPORATE CORRUPTION (Stefano Manacorda et al. eds., 2014).

[263] *See* Org. for Econ. Cooperation & Dev. Council, Standard for Automatic Exchange of Fin. Acct. Info. in Tax Matters, Jul. 15, 2014, C(2014)81/FINAL; *id.* at 10 (detailing that the convention is modeled on the United States' Foreign Account Tax Compliance Act, *see* 26 U.S.C.A §§ 1471–1474 (West) (Current through P.L. 115-281)); *see also* Iris H-Y Chiu,

human rights have pushed these issues to a level of legalization.[264]

In the U.K., the continuing motivation towards legalization of CSR is also attributable to the sharpened political need to respond to social demand. The persistence of critical CSR[265] is not a futile effort, as such voices can stimulate paradigm changes in more destabilizing times. Political sensitivity is sharpened towards social demand as the U.K. continues to experience political disruption that has followed from the global financial crisis. Instability in the consolidation of political power amongst major parties in the U.K. has intruded upon business-government relations, now in a more turbulent phase.

The New Labour government was ousted from power in the 2010 election following political mistakes made by the incumbent government defending the economic status quo.[266] With no party gaining a majority, an

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From Multilateral to Unilateral Lines of Attack: The Sustainability of Offshore Tax Havens and Financial Centres in the International Legal Order, 31 CONN. J. INT'L. L. 163, 172-79 (2016) (discussing the legal endorsement in some EU legislation of the OECD's Model Tax Convention, *see* OECD, Model Tax Convention on Income & on Capital, Jul. 14, 2014, OECD/LEGAL/0407).

[264] See U.N. HUM. RTS. COUNCIL, OFF. OF THE HIGH COMM'R, GUIDING PRINCIPLES FOR BUSINESS AND HUMAN RIGHTS, U.N. Doc. HR/Pub/11/04 (2011), https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf; *see also* Larry Catá Backer, *The Guiding Principles of Business and Human Rights at a Crossroads: The State, the Enterprise, and the Spectre of a Treaty to Bind Them All* 44-49 (Coalition for Peace & Ethics, Working Paper No. 7/1, 2014).

[265] "Critical CSR" refers to academic and intellectual commentary that casts doubt on the sufficiency of business-oriented or managerialized forms of CSR, and which raises critical questions about connecting to corporations' moral agency, real behavioral change, and corporate culture. *See e.g.*, Martin Fougère & Nikodemus Solitander, *Against Corporate Responsibility: Critical Reflections on Thinking, Practice, Content and Consequences*, 16 CORP. SOC. RESP. & ENVTL. MGMT. 217-227 (2009); Mollie Painter-Morland, *Rethinking Responsible Agency in Corporations: Perspectives from Deleuze and Guattari*, 101 J. BUS. ETHICS 83-95 (2011). Other commentators also point out that CSR can be used to resist deeper social embedment of issues within the corporate structure, such as stakeholder voice and involvement, *see* Gregory Jackson & Androniki Apostolakou, *Corporate Social Responsibility in Western Europe: An Institutional Mirror or Substitute?*, 94 J. BUS. ETHICS 371, 387-90 (2010); *but see* Dirk Matten & Jeremy Moon, *"Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility*, 33 ACAD. MGMT. REV. 404-424, (2008) (adopting a more neutral explanation for "explicit" versus "implicit" CSR using the lens of institutional reasons). Further critical CSR could refer to business' attempts to situate the discourse outside of political spheres, thereby disempowering constituents and carrying out a form of neo-colonization of the social discourse, *see* Jean-Pascal Gond, *Reconsidering the Critical Corporate Social Responsibility Perspective Through French Pragmatic Sociology: Subverting Corporate Do-Gooding for the Common Good?, in* THE CORPORATION, *supra* note 123, at 360, 361-68; Steve Tombs, *The Functions and Dysfunctions of Corporate Social Responsibility*, *in* THE CORPORATION, *supra* note 123, at 351-56; Baars, *supra* note 170, at 427-29. The "social citizenship" literature is arguably also critical as it emphasizes the need to re-embed CSR discourse in the political relations between corporations, government and society, *see supra* note 173.

[266] Justin Pritchard, *United Kingdom: The Politics of Government Survival*, *in* FRAMING

unprecedented coalition government was formed in the wake of the election between the Conservatives and Liberal Democrats, which oversaw most of the immediate post-crisis reforms and a period of severe austerity measures. Social sentiment has remained unstable as greater polarization between the political right and left grew,[267] and far-right elements have garnered a louder voice in political representation.[268] The subsequent Conservative-majority governments[269] have been weak and besieged by divisions in social demand and opinions. The U.K. is experiencing a period of political instability as highlighted in the highly divided Brexit referendum in 2016 and its continuing ramifications. Social discontent leading to political disruption is also played out in the U.K.'s European neighbors. Such political disruption is a response to the social fallout from austerity measures,[270] and some of which reflect a social cry for a paradigm shift and change in policy.[271]

In this landscape, holders of political power (potentially transient in these destabilizing times) have turned to regulation[272] to address many aspects of social discontent, especially *vis-a-vis* business. Such socially-facing regulation of business could placate voters, but they inevitably cause a shift in business-government relations. Could the current wave of legalization in CSR matters signal a fundamental institutional shift in the tenets of regulatory capitalism, bridging the economically-driven and market-focused corporation with its ethical and social dimensions? Has the new legalization ultimately "hardened" the soft law of socially-driven initiatives? We analyze the key reforms to critically appraise their achievements and limitations. We suggest marginal shifts have occurred but

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THE GLOBAL ECONOMIC DOWNTURN 99-119 (Paul 't Hart & Karen Tindall eds., 2009).

[267] Such as the election of extreme left Jeremy Corbyn as Labour party leader, while nationalist elements in the Conservative Party became bolder and were instrumental in aligning with far-right political parties supporting the U.K.'s "Brexit" from EU membership. The Conservative government ultimately offered a referendum in May 2016, which resulted in the shocking, narrow majority supporting Brexit. The Liberal Democrats, recognized as a centrist party, were trounced in the 2015 elections, losing over 30 seats in Parliament.

[268] Characterized by the rise of the U.K. Independence Party led for a time by charismatic Nigel Farage.

[269] The Cameron government in 2015 and the May government formed in late 2016 after the Brexit Referendum.

[270] Such as social unrest and protests in Portugal, Greece and Spain, as austerity measures adversely affected social welfare.

[271] The French election in 2016 that saw a completely new party and leader Emmanuel Macron defeat well-established left and right parties; and the rise of far-right politics in Hungary and Poland, and also reflected in the gains made by far right political parties in the German and Austrian elections in 2017. The Spanish Catalan separatist movement, although quashed in mid-2017, also highlighted elements of political volatility in Spain.

[272] Analyzed for e.g. in relation to the EU regulatory machinery as a harmonizing and also politically stabilizing force, *see* Tully Fletcher, *The European Union: From Impotence to Opportunity?*, *in* FRAMING THE GLOBAL ECONOMIC DOWNTURN, *supra* note 266, at 181–200.

new governance techniques employed in regulatory reforms leave flexibility for ambivalent implementation. We account for the underwhelming achievements but show how their limitations have been dependent on the characteristics of the U.K.'s regulatory capitalism. Fundamentally, regulatory capitalism is defined by the capitalist model in which it is implemented.

Section III highlights the precise locations of institutional weaknesses in order to provoke thinking for a change and suggests that regulatory leadership can still play a crucial role in institutional change.

III. POST-CRISIS LEGALIZATION OF CSR

The corporate regulation reforms discussed in this Section could mark a significant institutional shift, as various socially-facing aspects of corporate behavior seem no longer to be left in the realm of soft law and self-regulation, but have found a place in regulatory law. This, however, does not mean that regulatory law embodies the substantive norms of conduct, or implementation and enforcement that reflect the nature of social demand. Crucially, new governance techniques have again been brought in to effect such reforms. On the one hand, new governance techniques embody a new ethos in corporations' governance relationships with stakeholders and not just the regulator/state. The employment of such techniques could mark a shift towards changing the nature of corporate regulation, allowing multi-stakeholderism and more social infusion into corporate regulation. On the other hand, new governance techniques can also empower internal self-regulation by corporations, and are susceptible to devolution to corporates without due monitoring and accountability, as has occurred in the pre-crisis years. We observe that new governance techniques have been employed in two key ways across a number of different regulatory reforms.

One technique extends corporate transparency to socially-facing issues and seems to invigorate securities markets as well as broader society in new roles of governance. We discuss the examples of the EU Non-financial disclosure Directive 2014 and the U.K.'s Modern Slavery Act 2015. The other technique employs the new governance approach of interrogating the inside of a corporation to enhance responsibility for preventing misconduct. These are in relation to conflict minerals due diligence (EU Conflict Minerals Regulation 2017), bribery (Bribery Act 2010), tax evasion (Criminal Finances Act 2017), and the general enhancement of stakeholder voice in corporations (the U.K.'s Business Energy and Industrial Strategy (BEIS) Department's reforms).

The achievements and limitations of recent corporate regulation reforms will be fleshed out by our analysis of the advancements (or otherwise) made by the employment of new governance techniques. New governance *has the potential* to challenge the economic insularity of

corporate governance and objectives, and compel a form of socialization of the corporation. However, the very flexibility and malleability of new governance techniques can be molded to limit their challenge to the tenets of regulatory capitalism. We argue that "strong" forms of implementation of certain corporate regulation reforms *could* be adopted that bring about more profound paradigm shifts corporate regulation in the U.K., but these are ultimately not achieved. Instead, the implementation in the U.K. continues to be shaped by the tenets of regulatory capitalism.

A. Strong versus Weak Forms of New Governance Implementation

Strong forms of implementation of the recent corporate regulation reforms can signal decisive shifts away from the tenets of regulatory capitalism. Such implementation could promote the ethos of new governance techniques in terms of infusing corporate objectives and culture with social and ethical underpinnings, and promoting greater engagement between corporations with stakeholders in various degrees of formalized multi-stakeholder approaches in securing corporate compliance.[273] These shifts would represent the change from the market fundamentalist paradigms of corporate behavior, as actors in governance could be non-market in nature, and social values may be elevated and not marginalized by market values. We regard one or more of the following as representing a marked shift in corporate behavior: re-orienting corporate objectives towards commitment to address the CSR problems, re-orienting internal management and structures towards new ethics for supporting social objectives, re-positioning corporate accountability towards a wide scope of the polycentric sphere, and the adoption of new, collaborative or pluralistic

[273] Multi-stakeholder initiatives can come in a variety of forms and hence impacting on their effectiveness, as participation scope, meaning and intensity of participation, quality of deliberativeness, procedural governance in the multi-stakeholder structure and ultimately, consequentiality can differ vastly among initiatives. These problems are pointed out by Karin Backstränd, *Multi-Stakeholder Partnerships for Sustainable Development: Rethinking Legitimacy, Accountability and Effectiveness*, 16 EUR. ENV'T 290-306 (2006); Luc Fransen & Ans Kolk, *Global Rule-Setting for Business: A Critical Analysis of Multi-Stakeholder Standards*, 14 ORG. 667-684 (2007); Greetje Schouten et al., *On the Deliberative Capacity of Private Multi-Stakeholder Governance: The Roundtables on Responsible Soy and Sustainable Palm Oil*, 83 ECOLOGICAL ECON. 42-50 (2012); O'Rourke, *supra* note 177, at 1-29; but the highlighting of these issues can be a start towards their improvement. Particular issues in relation to certain major multi-stakeholder initiatives are discussed, in relation to the Ethical Trading Initiative, *see* Susanne Schaller, *The Democratic Legitimacy of Private Governance*, INEF REPORT 91/2007, Oct. 2007, at 5-45; in relation to the Forest Stewardship Council, *see* Axel Marx & Dieter Cuypers, *Forest Certification as a Global Environmental Governance Tool: What is the Macro-Effectiveness of the Forest Stewardship Council?*, 4 REG. & GOVERNANCE 408-434 (2010); in relation to the Marine Stewardship Council, *see* Lars H. Galbrundsen, *The Emergence and Effectiveness of the Marine Stewardship Council*, 33 MARINE POL'Y 654-660, (2009). More mature multi-stakeholder initiatives that have achieved some successes in input and output legitimacy in different degrees, is discussed in Vallejo & Hauselmann, *supra* note 190, at 3-26.

techniques of governance *by* the corporation.

On the contrary, weak forms of implementation would likely result in little difference from the tenets of regulatory capitalism. This could mean a continued subscription to the importance of incentives-based behavior and market discipline, and limited or non-adoption of multi-stakeholderism. Further, new governance techniques that interrogate internal management structures, governance or procedures can be devolved to corporations and reduced to proceduralization. Corporations can superficially adopt procedures or manipulate them for instrumental purposes, culminating in a form of "organized hypocrisy"[274] that does not touch corporate culture.[275] It has been observed that the deliberate promotion of multi-stakeholder governance in environmental governance has been unique and successful, a trend not replicated in other areas of CSR. [276] Corporations devolved to interpret new governance reforms may manipulate regulatory freedoms in a calculative manner that does not satisfy social expectations,[277] undermining the ethos of new governance itself. At worst, corporations can even subvert the original cause to change corporate behavior as they can become more politically involved in order to influence policy.[278]

B. Examples

We first discuss the employment of new governance techniques in interrogating internal management and procedures at corporations to combat bribery and tax evasion. Next, we discuss the use of the same techniques, albeit in a more limited way, in addressing supply chain governance by corporations. Third, we turn to reforms based on corporate disclosure of CSR issues. Finally, we discuss the U.K.'s reforms to improve stakeholder engagement with companies.

1. Enhancing Internal Interrogation into Corporations and Changing Corporate Culture?

We first examine the Bribery Act 2010 and Criminal Finances Act

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[274] Dangers are also canvassed in Parker, *supra* note 219, at 207-37; Kimberly Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487-544 (2003); Alwyn Lim & Kiyoteru Tsutsui, *Globalization and Commitment in Corporate Social Responsibility: Cross-National Analyses of Institutional and Political-Economy Effects*, 77 AM. SOC. REV. 69-98 (2012) (on "organized hypocrisy" and ceremonial commitment).

[275] Tombs, *supra* note 265, at 347-59.

[276] Arya & Salk, *supra* note 177, at 211-234.

[277] Discussed in Section II.

[278] Gary Fooks et al., *The Limits of Corporate Social Responsibility: Techniques of Neutralization, Stakeholder Management and Political CSR*, 112 J. BUS. ETHICS 283-299 (2013); Ben Baumberg Geiger & Valentina Cuzzocrea, *Corporate Social Responsibility and Conflicts of Interest in the Alcohol and Gambling Industries: A Post-Political Discourse?*, 68 BRITISH J. SOC. 254-272 (2017).

2017 to assess the U.K.'s legislative efforts intervening into the internal organization of corporations in order to change corporate behavior "from within." Under both pieces of legislation, corporations are obliged to institute reasonable or adequate procedures in order to *prevent* bribery or tax evasion. This form of *ex ante* phrasing is different from *ex post* enforcement against acts of bribery and tax evasion. The obligation to *prevent* emphasizes ongoing efforts and is aimed to change "the way things are done" in the corporation via the introduction of a form of procedural regulation.

The Bribery Act 2010 introduces criminal liability for a corporation that fails to prevent bribery by any person associated with it in order to retain business or gain an advantage for the corporation.[279] The corporation can only avoid liability if it has in place adequate procedures[280] designed to prevent such conduct. Anti-bribery regulation delineates corporations' responsibility to prevent bribery even if they operate in a complex web of external institutional and cultural factors that drive demand-side pressures for corruption.[281] The Criminal Finances Act 2017 introduces for corporations an offense for failure to prevent tax evasion facilitated by a person associated with the corporation, whether such tax evasion is in relation to a liability to pay U.K. or foreign tax.[282] The corporation can only avoid liability if it has put in place prevention procedures that are reasonable to be instituted. It is arguably a bold step for both Acts to impose criminal liability on corporations for "failure to prevent," signaling the need for corporations to proactively look into their internal organizations, procedures, and incentives in order to avoid liability.

In terms of substantive norms, anti-bribery norms have been enhanced in the Bribery Act while anti-tax evasion norms have been incrementally developed in other pieces of legislation.[283] The Bribery Act has adopted an

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[279] Bribery Act 2010, c. 23, § 7 (UK).

[280] MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE 15-20 (2010), https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (provides six broadly framed principles in relation to internal organization, governance and management).

[281] Firms can find demand side pressures difficult to handle if they are reliant on corrupt host country governments e.g. for exporting rights, licenses, public infrastructure, or just the overwhelming cultural or institutional factors in host countries, *see* S. Douglas Beets, *Understanding the Demand-Side Issues of International Corruption*, 57 J. BUS. ETHICS 65-81 (2005); Yanjing Chen et al., *Factors Influencing the Incidence of Bribery Payouts by Firms: A Cross-Country Analysis*, 77 J. BUS. ETHICS 231-244 (2008); Kelly D. Martin et al., *Deciding to Bribe: A Cross-Level Analysis of Firm and Home Country Influences on Bribery Activity*, 50 ACAD. MGMT. J. 1401-1422 (2007); Simon Gächter & Jonathan F. Schulz, *Intrinsic Honesty and the Prevalence of Rule Violations Across Societies*, 531 NATURE 496-499 (2016).

[282] Criminal Finances Act 2017, c. 22, § 45–46 (UK).

[283] The Finance Act 2013 introducing an anti-abuse rule and the EU Tax Avoidance Directive that has been passed in July 2016 but has yet to be implemented in most EU countries, *see* Council Directive 2016/1164, 2016 O.J. (L 193) Arts 4-9, esp. Art 6 (EU).

expansive definition of bribery,[284] avoiding the route taken by the U.S. Foreign Corrupt Practices Act whose exceptions to the definition of bribery reflect the capture of business interests.[285] The Act has arguably achieved an unequivocal pronouncement on the social unacceptability of bribery[286] after a protracted policy process challenged by business resistance.[287] Under the Criminal Finances Act, tax evasion is defined as "cheating the public revenue" or "knowingly engaged in a fraudulent scheme to evade tax"[288] and in relation to foreign taxes, relates to committing a tax evasion offence or breach of duty under foreign law.[289] The illegal tax behavior captured relates to well-established norms of tax evasion behavior such as deceptive under-declaration or falsification of information so that tax liability is assessed incorrectly, but will also include tax avoidance behavior that is established as "abusive." As Wolff points out,[290] there is relatively minimal tax evasion by corporations as such, especially by multinational corporations whose financial transparency is heavily regulated, leaving little room for tax evasion behavior.[291] The increasing social outcry against corporate tax behavior relates to *tax avoidance*[292] or aggressive forms of it,

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[284] Christopher J. Newman & Michael Macaulay, *Placebos or Panaceas: Anglo-New Zealand Experiences of Legislative Approaches to Combatting Bribery*, 77 J. CRIM. L. 482-496 (2013).

[285] Jack G. Kaikati et al., *The Price of International Business Morality: Twenty Years Under the Foreign Corrupt Practices Act*, 26 J. BUS. ETHICS 213-222 (2000).

[286] Laura S. Underkuffler, *Defining Corruption: Implications for Action*, *in* CORRUPTION, GLOBAL SECURITY, AND WORLD ORDER 27-46 (Robert I. Rotberg ed., 2009) (i.e. achieving a moral pronouncement). *See also* Mark S. Schwartz, *"Corporate Efforts to Tackle Corruption: An Impossible Task?" The Contribution of Thomas Dunfee*, 88 J. BUS. ETHICS 823-832 (2009).

[287] The U.K. has since 1999 acquired the obligation to transpose into law the ratification of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1999. The Law Commission proposed to codify and modernise the criminal law against bribery in 1998 following independent Committee recommendations, *see* LAW COMM'N, LEGISLATING THE CRIMINAL CODE: CORRUPTION 118-122 (1998), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc248_Legislating_the_Criminal_Code_Corruption.pdf, but there was no legislative resolve towards the end of the Major government. Indeed, the ultimate enactment of the Bribery Act 2010 reflects protracted and oft-criticized progress. *See* LAW COMM'N, REFORMING BRIBERY at 5-14 (2008), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/04/lc313.pdf. Discussed in Cecily Rose, *The UK Bribery Act 2010 and Accompanying Guidance: Belated Implementation of the OECD Anti-Bribery Convention*, 61 INT'L & COMP. L.Q. 485-499 (2012).

[288] Criminal Finances Act 2017, c. 22, § 45 (UK).

[289] *Id.* at § 46.

[290] Lutz-Christian Wolff, *Offshore Holdings for Global Investments of Multinational Enterprises: Just Evil?*, 6 J. BUS. L. 445-471 (2015).

[291] Joel Slemrod, *Cheating Ourselves: The Economics of Tax Evasion*, 21 J. ECON. PERSP. 25-48 (2007).

[292] See difference between avoidance and evasion explained in Montgomery Agnell, *Tax Evasion and Tax Avoidance*, 38 COLUM. L. REV. 80-97 (1938). Aggressive MNC tax

i.e., legal structures and schemes that may appear to be complex and contrived, in order to minimize a corporation's tax burdens.

Commentators have discussed how globalization and easy access to low tax jurisdictions have greatly facilitated tax avoidance schemes – such as the use of transfer pricing schemes within the same group of companies [293]or the use of offshore companies incorporated in tax havens to hold corporate assets or licenses so that revenues are regarded to be earned offshore and subject to minimal tax. [294] One of the most oft-cited examples is the "double Irish Dutch sandwich" scheme used by Google to avoid paying corporate tax in the U.S.[295] Although the ethicality of paying tax is not an absolute one,[296] and one can take the view that tax laws are rule-based in nature,[297] not representing fundamental norms or values such as the protection of human rights or anti-corruption,[298] the social outcry against aggressive corporate tax avoidance, especially by globally successful companies, is not unfounded. Zucman[299] argues that aggressive corporate tax avoidance has to date deprived most treasuries of 20% of their corporate tax receipts, which form a third of most developed jurisdictions' revenues. Even if the net effect is a 6% loss or so in overall tax receipts by governments, this can impact public services, the deterioration of which is a major source of social discontent. [300] Further, the loss of tax receipts could

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avoidance discussed in Mihir A. Desai & Dhammika Dharmapala, *Corporate Tax Avoidance and High Powered Incentives*, 79 J. FIN. ECON. 145-179 (2006); Carlo Garbarino, *Aggressive Tax Strategies and Corporate Tax Governance: An Institutional Approach*, 8 EUR. COMPANY & FIN. L. REV. 277-304 (2011); Gerrit Lietz, *Tax Avoidance vs. Tax Aggressiveness: A Unifying Conceptual Approach*, (Working Paper, 2013), http://ssrn.com/abstract=2363828; at chapter 2; A COMPARATIVE LOOK AT REGULATION OF CORPORATE TAX AVOIDANCE 1-24 (Karen B. Brown ed., 2012).

[293] Don R. Hansen et al., *Moral Ethics v. Tax Ethics: The Case of Transfer Pricing Among Multinational Corporations*, 9 J. BUS. ETHICS 679-686 (1992).

[294] Steven A. Bank, *The Globalization of Corporate Tax Law Reform*, 40 PEPP. L. REV. 1307-1328 (2013); Wolff, *supra* note 290, at 445-471.

[295] Wolff, *supra* note 290, at 445-471 (for discussion of the Google "double Irish Dutch sandwich" scheme).

[296] As tax rules can be made for bad or corrupt governments, can be oppressive, and may bear no relation to the state's role in provision of public services, *see* Robert W. McGee, *Three Views on the Ethics of Tax Evasion*, 67 J. BUS. ETHICS 15-35 (2006); Slemrod, *supra* note 291, at 25-48. Further, the ethicality of tax rules is also influenced by social culture, *see* Robert W. McGee et al., *A Comparative Study on Perceived Ethics of Tax Evasion: Hong Kong vs the United States*, 77 J. BUS. ETHICS 147-158 (2008) (features a survey of different attitudes of ethicality in different countries). Further, political and social policy can affect the perception of the ethicality of tax, and heavy or "sacrificial" burdens can quickly become unjustified as people consider their moral duty to minimize their tax bill, *see* Steven A. Bank, *When did Tax Avoidance Become Respectable?*, 71 TAX L. REV. 123-177 (2017).

[297] Agnell, *supra* note 292, at 80-97; Wolff, *supra* note 290, at 445-471.

[298] Opined in Wolff, *supra* note 290, at 445-471.

[299] Gabriel Zucman, *Taxing Across Borders: Tracking Personal Wealth and Corporate Profits*, 28 J. ECON. PERSP. 121-148 (2014).

[300] Karen B. Brown, *Comparative Regulation of Corporate Tax Avoidance: An*

mean that governments have to borrow more and spread the cost of borrowing onto ordinary citizens, with the perception of such burdens worsening in times of austerity. Although some have argued that corporations, especially multinational ones, do not benefit much from state provision of services or welfare and hence should not be asked to pay taxes to fund state expenditure,[301] this argument only reflects the insularity of the economically-driven, globalized corporation that has no sense of citizenship or common burden-sharing with its communities.[302] Many commentators see the need for corporations to be responsible in the ethicalities of their tax behaviors, especially in light of their resourcefulness compared to ordinary individuals.[303]

Tax behavior has come under substantive reform since 2013. Until the passage of the Finance Act 2013, there was no "general anti-avoidance rule"[304] in the U.K. In 2013, tax law has been reformed to allow Her Majesty's Revenue and Customs (HMRC) to challenge "tax abuse" arrangements.[305] Where the HMRC is of the view that tax abuse arrangements are in place, it needs to establish their nature by referring to a panel whose advisory opinion is recognized in court.[306] Abusive tax behavior is based on a "double reasonableness" test that no reasonable person would regard the arrangement as a reasonable course of action, except to facilitate tax avoidance.[307] The tax abuse regime applies to specific taxes including corporation tax,[308] and HMRC publishes regularly

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Overview, *in* A COMPARATIVE LOOK AT REGULATION OF CORPORATE TAX AVOIDANCE 1-24 (Karen B. Brown ed., 2012); Hans Gribnau, *Corporate Social Responsibility and Tax Planning: Not by Rules Alone*, 24 SOC. & LEGAL STUD. 225-250 (2015).

[301] Robert W. McGee, *Some Thoughts on the Ethics of Parking Profits Offshore*, 15 J. ACCT., ETHICS & PUB. POL'Y 165-174 (2014).

[302] Hans JLM Gribnau & Ave Geidi-Jallai, *Good Tax Governance: A Matter of Moral Responsibility and Transparency*, 1 NORDIC TAX J. 70-88 (2017). *See also*, Assaf Likhovski, *Training in Citizenship: Tax Compliance and Modernity*, 32 L. & SOC. INQUIRY 665-700 (2007) (arguing that tax compliance is very much seen as part of good citizenship even for individuals).

[303] Slemrod, *supra* note 291; Brown, *supra* note 300, at 25-48.

[304] Sandra Eden, *United Kingdom*, *in* A COMPARATIVE LOOK AT REGULATION OF CORPORATE TAX AVOIDANCE, *supra* note 300, at 1. There are however specific tax avoidance prohibitions in different legislative schemes.

[305] For the General Anti-Abuse Rule, *see* Finance Act 2013, c. 29, §§ 206-15; [and guidance from the HMRC, *General Anti-abuse Rule Guidance* (2018) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695255/gaar_parts_a_b_c_2018.pdf].

[306] Finance Act 2013, c. 29, § 211. The somewhat confused nature of this process is discussed in Judith Freedman, *Creating New UK Institutions for Tax Governance and Policy Making: Progress or Confusion?,* 4 BRITISH TAX REV. 373-381 (2013).

[307] Finance Act 2013, c. 29, § 207(2).

[308] *See* HM REVENUE & CUSTOMS, GENERAL ANTI–ABUSE RULE (GAAR) GUIDANCE, PARTS PP 10-34 (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/605502/gaar-part-d-2017.pdf; HMRC Tax Avoidance Schemes Currently in the Spotlight, https://www.gov.uk/government/collections/tax-avoidance-

specific schemes under the "spotlight" that it would challenge as tax abuse. These tend to be highly specific instances of unacceptable avoidance of tax or claiming of relief. Hence, establishing that any tax avoidance scheme is abusive or evasionist requires the exhaustion of due process and tends to result in findings of a highly specific nature. Although a major step towards a general anti-avoidance rule, some commentators argue that the U.K.'s approach falls slightly short.[309] However, the EU Anti-Avoidance Directive 2016, which has yet to be fully implemented by Member States, clearly combats many instances of corporate tax avoidance and provides a general anti-avoidance rule. The Directive looks set to develop substantive norms in unacceptable tax behavior more widely in an unprecedented manner.[310] Full implementation in the U.K. is however uncertain given Brexit's imminence.[311] In sum, there is a movement towards reforming tax behavior norms but the full extent of these achievements remains to be seen. It is noted that the U.K. has also introduced soft measures to moderate corporations' behavior,[312] flanking the enforcement regime for abuse.

Although key achievements in norm advancement have been attained in anti-bribery and anti-tax evasion, changes in corporate culture need to be achieved by both robust enforcement and *ex ante* corporate internalization. As enforcement is largely *ex post* and specific in nature, the *ex ante* role of an obligation to prevent is important to instill the need for corporate behavioral change. We critically query whether the new governance techniques that impose on firms the "responsibility to prevent" would result

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schemes-currently-in-the-spotlight.

[309] Policy-makers may view the anti-abuse regime as equivalent to a general anti-avoidance rule, especially in light of Art 6, Anti-Tax Avoidance Directive which the U.K. has yet to fully implement. However, a number of commentators note the relatively narrower nature of the anti-abuse regime and are skeptical as to its equivalence to a general anti-avoidance rule. See Andrés Báez Moreno, *A Pan-European GAAR? Some (Un)Expected Consequences of the Proposed EU Tax Avoidance Directive Combined with the Dzodzi Line of Cases*, 143 BRITISH TAX REV. (2016); Anzhela Cédelle, *The EU Anti-Tax Avoidance Directive: A UK Perspective*, 490 BRITISH TAX REV. (2016).

[310] Art 6.

[311] Anzhela Cédelle, 'The EU Anti-Tax Avoidance Directive: A UK Perspective' (2016) British Tax Review 490. But the article notes that the U.K. supported the Directive ultimately as implementation by the entire EU would ensure that there is no competitive disadvantage.

[312] The HMRC has introduced an obligation for tax professionals to make disclosure of tax avoidance schemes in order to obtain 'clearance' for their use, or otherwise. There are relatively steep continuing penalties for failure to disclose, and scheme transparency has improved. Without a general anti-avoidance rule, the Revenue may have limited room in disallowing schemes of creative compliance, but transparency regarding innovation in schemes could provide intelligence for policy design to combat undesirable tax behavior. Further specific sectors have been targeted where aggressive tax avoidance has been carried out; for example, HMRC has bound the U.K. banking sector to a code of ethics to moderate aggressive tax avoidance behavior. 'U.K. tax authorities warn banks against aggressive avoidance', *Financial Times* (London, 20 Oct 2017) at https://www.ft.com/content/bcf2082e-b418-11e7-a398-73d59db9e399.

in mere devolution to corporations to institute internal procedures that are opaque to stakeholder and public accountability. This could undermine the ethos and potential of new governance techniques, rendering the obligation to "prevent" merely rhetoric, as the only meaningful source of pressure for behavioral change would be *ex post* enforcement, which can be more sporadic in nature.

First, we observe that the obligation to institute procedures under both Acts would be in accordance with broad guidelines issued by the relevant government departments. The Ministry of Justice has issued procedural guidance: six broad principles to supplement the Bribery Act.[313] A similar approach of Ministerial guidance is adopted in relation to the Criminal Finances Act. As such guidances outline broad principles, it may be argued that corporations can use these as bases for designing tailor-made changes to corporate operations or procedures, reflecting changes in corporate culture and objectives. However, procedural or organizational reforms penetrate at different levels and need not show fundamental change. The resolve to change could reflect the corporation's incentives to manage the commercial impact and cost-effectiveness of compliance, or could reflect a more normative embrace of social and public interest expectations. The premise for change affects the design of procedures including reforming leadership commitment, key business and operations processes, risk management, and internal control. [314] Procedural changes can also be less penetrative and more superficial, if designed merely to minimize legal risk while avoiding significant changes to the way business is carried out. Procedural changes can be task-oriented such as multiplying documented channels,[315] and one could remain skeptical as to real engagement with

[313] Ministry of Justice, *The Bribery Act 2010 Guidance* at https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf. The Australian position is to require corporate procedures to adhere to an Australian process standard but this is also rather widely worded, see Marta Muñoz de Morales, 'Corporate Responsibility and Compliance Programs in Australia' in Stefano Manacorda et al. at ch20.

[314] Angela Gorta, *Research: A Tool for Building Corruption Resistance* in Peter Larmour and Nick Wolanin, *CORRUPTION AND ANTI-CORRUPTION* (Canberra: ANU Press 2013) at ch3; Catherine Boardman and Vicki Klum, '*Building Organisational Integrity* in Peter Larmour and Nick Wolanin, CORRUPTION AND ANTI-CORRUPTION (Canberra: ANU Press 2013) at ch. 5; David Hess, *Catalyzing Corporate Commitment to Combating Corruption* 88 JOURNAL OF BUSINESS ETHICS 781 (2009).

[315] Discussed in terms of internal guidance, reporting and discipline, training and monitoring, and audit Massimo Mantovani, *The Private Sector Role in the Fight Against Corruption*, Stefano Giavazzi, *The ABC Model: The General Framework for an Anti-Bribery Compliance Program*, *The ABC Program: An Anti-Bribery Compliance Program Recommended to Corporations Operating in a Multinational Environment*, Adán Nieto Martín and Marta Muñoz de Morales, *Compliance Programmes and Criminal Law Responses*, VT Fan, *An Analysis of Institutional Guidance and Case Law in the USA* and Marta Muñoz de Morales, *Corporate Responsibility and Compliance Programs in Canada* in Stefano Manacorda et al, PREVENTING CORPORATE CORRUPTION (Springer 2014) at chs 3, 7, 8, 17, 18 and 21 respectively. The predominance of contributions in this volume focusing

ethics, values,[316] or organizational culture.[317] Worse, it is queried if broadly-framed guidances would be able to combat creative compliance[318] where governance structures can be used to further illicit behavior while appearing compliant. It is queried whether corporations can now legitimately disengage corporate tax planning (or avoidance) from the specific problem of evasion, and direct prevention procedures only narrowly to prevent tax evasion. In this case, corporate tax planning can be validly and separately carried on as a business-based and not as a compliance-based activity.

The Acts seem to have devolved to corporations to determine their internal organization and reform of procedures, as corporations are only required to introduce procedures where "reasonable" and remain the judges of "reasonable" on an *ex ante* basis (although they have the burden to prove that their determination was correct). Although the Acts employ new governance techniques, the essential new governance ethos of enrolling multi-stakeholder input and scrutiny is not implemented. [319] Leaving corporations to implement their new compliance may render such post-crisis new governance techniques susceptible to the pre-crisis problems discussed in Section II. LeBaron and Rühmkorf[320] in an empirical study of the Bribery Act 2010's implementation found that many corporations have visibly changed their internal procedures as well as the terms and manners in which they conduct external relationships. These findings show that the potential criminal liability that can entail from the Act has compelled an extent of disruptive change from the "inside." However, as this study did not engage interviews or qualitative findings of that nature, it does not shed light on whether procedural changes in written policies have deeply penetrated corporate culture and ethics.

The U.K.'s Serious Fraud Office's (SFO) enforcement of the Bribery

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on procedural aspects also shows the largely managerialist or procedural manner of corporate implementation of responsibility for preventing bribery.

[316] Francesco Centonze, *Public–Private Partnerships and Agency Problems: The Use of Incentives in Strategies to Combat Corruption* in Stefano Manacorda et al, PREVENTING CORPORATE CORRUPTION (Springer 2014) at ch4.

[317] Johann Graf-Lambsdorff, *The Organization of Anti-Corruption: Getting Incentives Right* in Robert I Rotberg (ed), CORRUPTION, GLOBAL SECURITY, AND WORLD ORDER (NY: Brookings Institution Press 2009); Jeff Everett, Dean Neu and Abu Shiraz Rahaman, *The Global Fight against Corruption: A Foucaultian, Virtues-Ethics Framing* 65 JOURNAL OF BUSINESS ETHICS 1 (2006).

[318] Doreen McBarnet, *After Enron Will 'Whiter Than White Collar Crime' Still Wash*?, 46 THE BRITISH JOURNAL OF CRIMINOLOGY 1091 (2006).

[319] Dimitri Vlassis, *An Anticorruption Ethics and Compliance Program for Business: A Practical Guide* in Stefano Manacorda et al (eds), PREVENTING CORPORATE CORRUPTION at ch12 (Springer 2014) (opining that corporations can look at standards or guidance produced by independent third parties in order to connect corporate compliance with externally-facing awareness, such as UNCAC's standards.).

[320] Genevieve LeBaron and Andreas Rühmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance,* 8 GLOBAL POLICY 15 (2017).

Act against Rolls Royce PLC in 2017 also sheds light on the extent to which new governance regulatory techniques have really changed the nature of corporate regulation. In order to avoid prosecution for bribery carried out in China, Indonesia, and a number of other countries, Rolls Royce agreed to appoint Lord Gold to monitor its internal procedural reform to *prevent* bribery in the future. Such monitoring and review is reported periodically to the SFO.[321] We argue that the deferred prosecution agreement shows a preference for devolution to corporations to institute appropriate procedures, subject to a privatized form of monitoring by an expert. There seems no attempt made at employing more inclusive forms of multi-stakeholder governance to monitor changes at Rolls Royce.

Privatized implementation of corporate compliance can result in "legal endogeneity,"[322] the self-legitimating effect of corporations' implementation of their own procedures and systems, resulting in *de facto* self-regulation. Under such an approach, the methods corporations use to deal with their ethical and compliance dilemmas remain opaque. In the wider context of global competition and temptations from tax havens or the difficult contexts of doing business where demand-side pressures for corruption abound in foreign jurisdictions,[323] ethical dilemmas abound[324] and there is social interest in ensuring that corporate decisions do not compromise social objectives.[325] The new governance approach in the Bribery Act as enforced by the SFO has framed the governance space as revolving around the regulator and regulated, leaving little space for public and stakeholder scrutiny. We critically question why multi-stakeholder

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[321] *Deferred Prosecution Agreement with Rolls Royce,* SFO, (Jan 17, 2017) https://www.sfo.gov.uk/cases/rolls-royce-plc/.

[322] *Seven dead in Potters Bar train crash*, BBCNews, (May 10, 2002) http://news.bbc.co.uk/1/hi/england/1979677.stm.

[323] Firms that are mobile, less reliant on host country government privileges or regulation and have stable and established sales/market share are likely more resistant to demand-side pressures, *see* Yanjing Chen, Mahmut Yaşar and Roderick M. Rejesus, *Factors Influencing the Incidence of Bribery Payouts by Firms: A Cross-Country Analysis,* 77 JOURNAL OF BUSINESS ETHICS 231 (2008).

[324] The 'bimoral' tensions in corporate corruption can be distilled in AW Cragg, *Business, Globalization, and the Logic and Ethics of Corruption*, 53 INTERNATIONAL JOURNAL 643 (1998).

[325] Indeed corporations complying with one aspect of social responsibility or liability could be 'irresponsible' in other areas and there are no means to critically hold such behavior to account under law or by society. 'Responsibility' can be atomistic and meaningless when taking into account of holistic behavior, *see* Susan Ariel Aaronson, "*Minding Our Business": What the United States Government Has Done and Can Do to Ensure That U.S. Multinationals Act Responsibly in Foreign Markets*,59 JOURNAL OF BUSINESS ETHICS 175 (2005); Vanessa M. Strike, Jijun Gao and Pratima Bansal, *Being Good While Being Bad: Social Responsibility and the International Diversification of US Firms,* 37 JOURNAL OF INTERNATIONAL BUSINESS STUDIES 850 (2006); Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility* 38 LAW AND SOCIETY REVIEW 635 (2004).

governance is not attempted. For example, Transparency International has developed a checklist that systematically directs companies to establish policies and management processes that would meet the broadly worded procedural requirements in the Bribery Act and MOJ Guidance. [326] Such a player could usefully act as part of an independent monitoring group for deferred prosecution arrangements.[327] Multi-stakeholder governance may be resisted by business on the basis of commercial sensitivity, but obligations of confidentiality and other safeguards can be imposed.[328]

It may, however, be argued that multi-stakeholder governance is not the only means of securing corporate behavioral change. There is a strong movement in the U.K. towards securing corporate culture and behavior change in the banking sector after the global financial crisis 2007-9,[329] and

[326] Transparency International's work in this area is chiefly referred to, *see generally* https://www.transparency.org/impact/.

[327] We acknowledge that multi-stakeholder governance in 'enforcement' is the most rare form of involvement for stakeholders even in the landscape of the variety of multi-stakeholder initiatives. Input and discussion is far more common while the more sensitive areas of review and monitoring are rarer, than except for established certification-type multi-stakeholder initiatives such as the Forest Stewardship, Marine Stewardship Councils and Ethical or Fair Trading initiatives. *See* Luc Fransen and Ans Kolk, *Global Rule-Setting for Business: A Critical Analysis of Multi-Stakeholder Standards,* 14 ORGANISATION 667-684 (2007).

[328] Although confidentiality in multistakeholder governance is criticized by the Open Democracy group, *see* Harry Gleckman, *Multi-stakeholder Governance* (Jan. 19, 2016) https://www.opendemocracy.net/harris-gleckman/multi-stakeholder-governance-corporate-push-for-new-global-governance. (explaining that there needs to be a balance between the sensitivities of policy formation and the needs for public accountability.).

[329] In the UK, cultural change was a strong social demand reflected in the parliamentarians' 2013 report, House of Lords and House of Commons, *Changing Banking for Good* (2013) Vols I and II at http://www.parliament.uk/documents/banking-commission/banking-final-report-volume-i.pdf and https://www.parliament.uk/documents/banking-commission/banking-final-report-vol-ii.pdf which culminated in the introduction of the 'senior managers regime' for the banking and financial sector. *See* PRA and FCA, *Strengthening Accountability in Banking: A New Regulatory Framework* (July 2014); PRA, *Strengthening individual accountability in banking and insurance – responses to CP14/14 and CP26/14* (Mar. 23, 2015); FCA, Approach to Non-Executive Directors in Banking and Solvency II Firms & Application of the Presumption of Responsibility to Senior Managers in Banking Firms' (Feb. 23, 2015); PRA, *Strengthening Individual Accountability in Banking and Insurance: Amendments and Optimisations* – PS12/17 (May 12, 2017). This law reform allows regulators to map senior responsibilities in all financial institutions, hold senior management to their prescribed responsibilities and a Code of Conduct (based on principles of integrity, care, control and due accountability) and render them personally liable for falling below standards. Senior managers and financial firms are also responsible for certifying and holding a significant scope of employees (performing certain prescribed functions below senior management) to a Code of Conduct. A senior person who has responsibility over an area in which a regulatory contravention has occurred may be personally liable in regulatory enforcement if the regulator proves that the senior person did not take such steps as a person in the senior manager's position could reasonably be expected to take to avoid the contravention occurring, S66A(5) and 66B(5) of the Financial Services and Markets Act 2000 amended by the Financial Services (Banking Reform) Act

these efforts are very much aimed at empowering regulators against the regulated, not co-opting a wider scope of governance capacity. Regulatory enforcement and scrutiny can prevent legal endogeneity. However, the opacity in the regulator-regulated relationship can make regulatory efficacy an inscrutable matter, including obscuring any dangerous elements of regulatory capture or sympathy[330] for the industry. For example, Wells[331] has criticized the Serious Fraud Office in its forbearance from enforcement where it felt constrained by fears that sanctions would damage the firm's viability.[332] Further, the unique approach in financial regulation can partially be explained by the technical (and quantitative) nature of regulatory obligations[333] imposed, which stakeholders may find hard to scrutinise. We argue that where social objectives underpin corporate regulation such as in anti-bribery, multi-stakeholder governance,[334] such as enrolling a panel of third-party bodies for engagement, feedback or even inspections, should be considered, as such can powerfully influence corporate consciousness and culture.[335]

2013 and subsequently by the Bank of England and Financial Services Act 2016. Second, if the regulator is of the view that a senior manager has contravened a conduct rule, enforcement may be taken in respect of the senior manager that can culminate in personal fines and/or disqualification. Discussion of enforcement can be found in Iris H-Y Chiu, *Regulatory Duties for Directors in the Financial Services Sector and Directors' Duties in Company Law- Bifurcation and Interfaces,* JOURNAL OF BUSINESS LAW 465 (2016). https://www.sweetandmaxwell.co.uk/catalogue/productdetails.aspx?productid=30791434

Further, regulatory interventions have been made to prescribe corporate governance and internal control organisation at most financial institutions in order to overhaul their risk and control cultures. Basel Committee, *Guidelines: Corporate Governance Principles for Banks* (July 2015); EBA and ESMA, *Guidelines on Internal Governance under Directive 2013/36/EU* (Sept. 26, 2017) which applies to banks and investment firms as mirror corporate governance provisions are found in the CRD IV and MiFID 2014. PRA Rulebook, *Compliance, Internal Audit, General Organisational Requirements*; FCA Handbook, SYSC 3, 4, 6 and 7. *See* discussion in Iris H-Y Chiu, REGULATING (FROM) THE INSIDE: THE LEGAL FRAMEWORK FOR INTERNAL CONTROL AT BANKS AND FINANCIAL INSTITUTIONS (Oxford: Hart 2015). The salience of culture to the regulatory agenda is affirmed in Andrew Bailey, *Culture in financial services – a regulator's perspective* (Speech at Cityweek 2016 Conference, May 9, 2016) http://www.bankofengland.co.uk/publications/Pages/speeches/2016/901.aspx.

[330] *See e.g.,* Daniel C. Hardy, *Regulatory Capture in Banking* (IMF Working Paper 2006) at http://ssrn.com/abstract=892925.

[331] Celia Wells, *Who's Afraid of the Bribery Act 2010?* JOURNAL OF BUSINESS LAW 420 (2012) on the lenient enforcement against Innospec and BAE Systems plc.

[332] Such as the enforcement against Innospec discussed above.

[333] Such as microprudential regulation which is of a highly technical nature, *see generally* Simon Gleeson, INTERNATIONAL REGULATION OF BANKING: CAPITAL AND RISK REQUIREMENTS (Oxford: OUP 2012).

[334] Discussed earlier on in Section II as part of the rise of transnational polycentric private governance.

[335] We see increasingly corporate responsiveness to shape ethical cultures in response to social and relational demands, as the concept of corporate culture moves away from being performance-focused *see* John Kotter and James Heskett, CORPORATE CULTURE AND

2. Addressing Supply Chain Governance in Legislation

Globalization and international trade have liberalized opportunities for the worldwide sourcing, production, and distribution of goods and services, but has also brought about opportunities for questionable means of economic exploitation of resources and labor. [336] Global sourcing can lead to fueling regional conflicts over control of resources like oil and minerals, and exploitation of human beings in search of economic opportunities,[337] such as human trafficking and abject labor conditions.[338] Whether or not corporations are directly complicit in armed gangs' evil exploits, they have been able to take advantage of cost advantages by outsourcing and procuring on the basis of their global buying power.[339] The abuses in such exploitation have been brought to light by the determined efforts of civil and non-governmental organizations, highlighting the pernicious effects of corporate indifference to the sufferings and negative externalities in their supply chains.

U.K. and EU legislation have now started to address different issues in the supply chain, after decades of voluntary and soft law initiatives in the transnational polycentric sphere. These are in relation to the importation of conflict minerals,[340] human trafficking and modern slavery[341] (U.K.) and

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PERFORMANCE (NY: Free Press rep, 2011, from 1991); Kim S. Cameron and Robert E. Quinn, DIAGNOSING AND CHANGING ORGANIZATIONAL CULTURE: BASED ON THE COMPETING VALUES FRAMEWORK (Chicester: John Wiley & Sons 2011); or efficiency-driven, *see* Donald C. Langevoort, *Opening the Black Box of "Corporate Culture in Law and Economics",* 162 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS (2006); Eric van den Steen, *On the Origin of Shared Belief (and Corporate Culture)* 41 RAND JOURNAL OF ECONOMICS, 617, 617–648 (2010); Rafael Rob and Peter Zemsky, *Social Capital, Corporate Culture, and Incentive Intensity*, 33 RAND J. OF ECONOMICS 243 (2002) (to being more socially/relationally-focused). *See* Marvin T. Brown, Corporate Integrity (Cambridge: Cambridge University Press 2012) at chs 1, 2, 3 and 7; Peter Rea, Alan Kolp, Wendy Ritz and Michelle D. Steward, *Corporate Ethics Can't Be Reduced to Compliance*, HARV. BUS. REV. (April 29, 2016); Christopher McLaverty and Annie McKee, *What You Can Do to Improve Ethics at Your Company*, HARV. BUS. REV. (Dec. 29, 2016); Rosa Chun, *What Aristotle Can Teach Firms About CSR*, HARV. BUS. REV. (Sept. 12, 2016).

[336] Kate Manzo, *Modern Slavery, Global Capitalism & Deproletarianisation in West Africa*, 32 REVIEW OF AFRICAN POLITICAL ECONOMY 521 (2005); Kevin Bales, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY (California: Berkeley University Press, 1999).

[337] Chandran Nair, *The Developed World Is Missing the Point About Modern Slavery*, Time.com (June 20 ,2016) http://time.com/4374377/slavery-developed-developing-world-index-slave-labor/; Kevin Bales, *Expendable People: Slavery in the Age of Globalization,* 53 JOURNAL OF INTERNATIONAL AFFAIRS 461 (2000).

[338] Galit A Sarfarty, *Shining Light on Global Supply Chains*, 56 HARVARD INTERNATIONAL LAW JOURNAL 419 (2015).

[339] Jennifer Bair, *The Corporation and the Global Value Chain,* THE CORPORATION (Cambridge: Cambridge University Press 2017).

[340] The EU Conflict Minerals Regulation 2017.

[341] Modern Slavery Act 2015.

more generally, the protection of human rights.[342]

New governance techniques are employed in regulatory reforms, but they largely devolve supply chain governance to corporations themselves. To different extents in the Conflict Minerals Regulation 2017, the U.K. Modern Slavery Act 2015, and the non-financial disclosure of human rights impact under the EU Non-Financial Disclosure Directive 2014, corporations are expected to manage their supply chains based on their implementations of "due diligence." Other than the Conflict Minerals Regulation, which imposes direct due diligence obligations, the regulatory obligations in the Modern Slavery Act and EU Non-Financial Disclosure Directive are disclosure-based, requiring companies to disclose procedural aspects of supply chain governance.

First, it is noted that regulation has avoided articulating particular substantive norms, such as liability for sourcing conflict minerals or liability for using trafficked labor or modern slaves in the supply chain. This is because the regulatory reforms avoid introducing "outcomes" to be attained in terms of the social changes that are desired. Introducing bans for conflict minerals or substantive norms of such a nature may result in an indiscriminate blow to legitimate economic activity in developing regions; therefore, the introduction of blanket prohibitions should be avoided for unintended consequences.[343] Under the Modern Slavery Act, it is a criminal offense for anyone to hold or require the performance of slave or compulsory labor,[344] or to carry out or be complicit in human trafficking.[345] Unless a corporation is engaged in the practice of holding employees to egregious slave-like conditions, such as the abusive and illegal employment practices at large U.K. sports retailer Sports Direct which became the subject of a Parliament Inquiry,[346] the criminal offense is unlikely to attach to a multinational corporation on the basis of practices occurring in its

[342] UN Guiding Principles for Business and Human Rights (2011) which is to be implemented by countries in terms of state responsibility for protecting human rights and corporate responsibility for preventing and remedying relevant abuses. The EU Non-financial Disclosure Directive 2014 dealing with the company's footprint in these matters, and only indirectly to its supply chain as a result of the policies it pursues.

[343] Jeff Schwartz, *The Conflict Minerals Experiment,* 6 HARV. BUS. L. REV. 129 (2016); Katarzyna Kryczka, Sarah Beckers and Tineke Lambooy, *The Importance of Due Diligence Practices for the Future of Business Practices in Fragile States*, 9 EUROPEAN COMPANY LAW 125 (2012).

[344] The nature of such compulsion is widely defined to take into account the individual's circumstances so that not only threats of physical violence would count S1, Modern Slavery Act 2015.

[345] Sections 2-4, Modern Slavery Act 2015.

[346] House of Commons Business Innovation and Skills Committee, *Employment Practices at Sports Direct* (July 2016) https://www.publications.parliament.uk/pa/cm201617/cmselect/cmbis/219/219.pdf?utm_source=219&utm_medium=module&utm_campaign=modulereports highlighting breaches of minimum wage regulation, employment law, and abusive practices.

supply chain. There is little prospect of attaching criminal liability to corporations for their supply chain practices, or the availability of tort class actions by victims of modern slavery in supply chains against the foreign multinational.[347] It may be argued that corporations maintain different levels of leveraging power over their supply chains[348] and an excessively high level of responsibility may be impracticable, and may indeed damage commercial relations and international trade. It seems that soft law and transnational governance has achieved far more in terms of introducing outcomes-based norms, such as the Ethical Trading Initiative.[349] For example, the Responsible Business Alliance's code of conduct for the electronics and toys industry sets out extensive norms in terms of achieving humane working and employment conditions within the supply chain.[350] Compared to norm advancement in anti-bribery and tax evasion, it is questioned why similar norms to prevent the outcomes of suffering for individuals, or at least a form of joint or contributory liability for supply chain misconduct are not instituted. Such norm changes would have profound implications, especially in terms of imposing enterprise liability for multinational corporations and changing how they would manage legal risk.[351]

In terms of the strength in regulating procedures within the firm, the Conflict Minerals Regulation[352] regime seems most demanding in compliance. Detailed due diligence obligations are imposed on importers of tin, tungsten, tantalum and gold, and they also need to obtain third-party

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[347] There is no doctrine of enterprise liability in the UK *see generally Adams v. Cape Industries plc* 1990] Ch 433; *Prest v. Petrodel Resources Ltd* [2013] UKSC 34 especially Lord Sumption's judgement with whom two lawlords agree.

[348] Jennifer Bair, *The Corporation and the Global Value Chain*, THE CORPORATION (Cambridge: Cambridge University Press 2017) (explaining how some corporations may be in a better position to do this than others); *see also* Erika R. George and Scarlett R. Smith, *In Good Company: How Corporate Social Responsibility Can Protect Rights and Aid Efforts to End Child Sex Trafficking and Modern Slavery*, 46 INT. L. AND POLITICS 55 (2013). *But see* Wen-Lin Li, *Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example,* 57 AM. J. OF COMP. L. 711 (2009) for more nuanced and critical discussion on the motivations and effectiveness of such 'legal transplantation' of codes across supply chains.

[349] A multi-stakeholder initiative setting out substantive outcomes-based norms such as humane labour conditions and fair employment practices, *see* https://www.ethicaltrade.org/, although its achievements have been incremental. *See also* Susanne Schaller, T*he Democratic Legitimacy of Private Governance : An Analysis of the Ethical Trading Initiative* http://edoc.vifapol.de/opus/volltexte/2011/3476/pdf/report91.pdf (2007).

[350] The Electronic Industry Citizenship Coalition Code of Conduct at http://www.responsiblebusiness.org/media/docs/EICCCodeofConduct5_1_English.pdf.

[351] *See infra* Section IV.

[352] Regulation (EU) 2017/821 of the European Parliament and of the Council of May 17, 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

certification of such compliance. Such due diligence and certification must be publicly disclosed on a yearly basis.[353] The nature of the obligations is highly procedural and prescribed, although the procedures conform to the internationally agreed OECD Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected and High-Risk Areas 2009. However, these obligations are imposed on a narrow group of direct importers of the minerals into the EU.[354] If EU corporations produce output with these minerals which are sourced at some stage outside of the EU, they are not obliged to comply with the Regulation's requirements.[355] Presumably, they may need to report the human rights impact of their activity and their relevant due diligence under the Non-financial Reporting Directive.

The mandatory due diligence obligations under the Conflict Minerals Regulation, third-party auditing, and public disclosure go further than the disclosure-based and devolved implementation under the Modern Slavery Act and the EU Non-financial Disclosure Directive relating to human rights in the supply chain, to be discussed below. It is questioned why the discrepancy in approach. Nevertheless, in the absence of substantive norms that change corporate objectives or conduct, can the fulfilment of due diligence improve corporations' ethical considerations of being good citizens in difficult, conflict-ridden, and fragile jurisdictions? It is questioned why a more precise substantive norm to require sourcing from conflict-free smelters cannot be legalized.[356] Would such a norm not have greater impact upon the ordering of economic relations in fragile jurisdictions? The due diligence obligations in terms of tracing sources and undertaking risk management and mitigation are still devolved to corporations as a form of contractual management within its supply chain.[357] In analyzing the American counterpart to the Conflict Minerals Regulation,[358] commentators observe the practices of weak and cosmetic

[353] Art. 3-7.

[354] Art. 3-7, *see* Elif Härkönen, *Conflict Minerals in the Corporate Supply Chain, forthcoming*, 29 European Bus. L. Rev. 691- 727(2018) (discussing the scope of coverage of the EU Regulation as affecting about 150,000-200,000 businesses although 880,000 businesses or so that use conflict minerals at some stage would not be covered.).

[355] This is unlike the case in the US which requires corporations that use conflict minerals in a key part of its production to disclose its sourcing diligence, see Dodd-Frank Act 2010 and Conflict Minerals Rule, 17 C.F.R. §§ 240–49. *See also* SEC Factsheet, https://www.sec.gov/opa/Article/2012-2012-163htm---related-materials.html.

[356] Jeff Schwartz, *The Conflict Minerals Experiment,* 6 HARV. BUS. L. REV. 129 (2016).

[357] That said, the EU is developing subsidiary legislation to recognize formally third party due diligence schemes. This could go some way in instituting multi-stakeholder governance in this area which can promote business-society engagement and accountability and could in time bring about stronger substantive norms.

[358] Which imposes a disclosure obligation on corporations of their steps in due diligence if conflict minerals from covered countries are used in the production of an essential functionality of their products.

due diligence procedures and a general corporate indifference to their sourcing and impact on fragile jurisdictions.[359] In the absence of stronger substantive norms of outcomes or conduct, corporations' socially-facing motivations may conflict with their calculative and bimoral tensions.[360] These underlie the main hazards in devolving to corporations management of the socially-facing issues in the commercial context of their supply-chain relations.

There is scope, however, for the third-party certification mechanism to work as a form of gate-keeping under the Conflict Minerals Regulation. The third-party certification has the potential to hold corporations accountable for their due diligence so that superficial compliance is avoided. Such certification can count towards highlighting the efforts taken by corporations to avoid sourcing for conflict minerals, thereby adding implicit pressure for behavioral change.[361] There are existing players in the industry for such certification services, such as the Conflict-free Smelter Programme, which can be expected to gain more formal recognition in engaging with mineral importers. It is important that certification should not merely be technical in nature and should take into account of the social justice footprint of conflict regions and the minerals trade. As the regulation comes into force in 2021, the developments under this regulation should be watched for the impact on real social outcomes and how business-society relations co-evolve.

In respect to the regulatory obligation of disclosure under the Modern Slavery Act and EU Non-Financial Disclosure Directive relating to human rights in supply chains, corporations are subject to a principally devolved and non-standardized implementation of due diligence.

Under the Modern Slavery Act, section 54 requires certain commercial organizations[362] to make annual mandatory disclosures of a "slavery and human trafficking statement" ("the Statement") in order to provide transparency on the steps that the corporation has taken to ensure that its

[359] The US disclosure regime has been empirically found to be rather ineffectual, producing reports that are not very informative and that do not show deep engagement with the ethicality of preventing conflict mineral sourcing. Many companies avoid cost by superficially polling suppliers and are content to be rather indifferent in their ignorance of ultimate supply sources, *see* Christiana Ochoa & Patrick J. Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation,* 3 GOETTINGEN J. OF INT.L L. 129 (2011); Jeff Schwartz, *The Conflict Minerals Experiment*, 6 HARV. BUS. L. REV. 129 (2016).

[360] Katarzyna Kryczka, Sarah Beckers and Tineke Lambooy, *The Importance of Due Diligence Practices for the Future of Business Practices in Fragile States*, 9 EUROPEAN COMPANY L. 125 (2012).

[361] However, it may be argued that consumer pressure too must be consistent or else the message to corporations may be muted.

[362] Having a turnover over £36 million net of taxes, as prescribed by section 2, The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015.

business and supply chain are free from slavery and human trafficking.[363] The Statement is to be made publicly available on the corporation's website. It is unlikely that section 54 would be interpreted as imposing a positive obligation of due diligence. Corporations' disclosure obligations are to account for their own satisfaction that they have prevented the occurrence of modern slavery in their supply chains. Further, the mandatory statement avoids being too prescriptive as it refers to a non-exhaustive list of matters for reporting and companies do not have to include all of them.[364]

The Home Office's practical guidance for compliance with reporting under the act emphasizes that the Statement should encapsulate the steps taken by the company to prevent slavery and human trafficking in its business and supply chain, and that it should be in plain English, succinct, and readily accessible. As procedural steps in the above list are optional and not mandatory, it is unlikely that the Act imposes procedural obligations. Corporations are in fact devolved to implement appropriate procedures for their own satisfaction of compliance.

The EU Non-Financial Disclosure Directive 2014 requires large undertakings that are public-interest entities (exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year) to include in the management report a ***non-financial statement***, where such information forms part of company policies to the extent necessary for an understanding of the undertaking's ***development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption, and bribery matters.*** Many of the matters in the list relate to the corporation's own practices, but it is arguable that in relation to human rights, the corporation's role in its supply chain is implicated.

The non-financial statement should include the list of matters below, many of which are procedural in nature:

> (a) a brief description of the group's business model;
>
> (b) a description of the policies pursued by the group in relation to [the social responsibility] matters [mentioned above], including due diligence processes implemented;
>
> (c) the outcome of those policies;
>
> (d) the principal risks related to those matters linked to the group's

[363] Modern Slavery Act 2015, § 54.

[364] The Ministry's Practical Guidance has clarified the list above as being not compulsory, *see* Home Office, *Transparency in Supply Chains etc: A practical guide* (2015) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf.

> operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the group manages those risks;
>
> (e) non-financial key performance indicators relevant to the particular business.[365]

This is transposed in the U.K., which now requires the directors' Strategic Report, i.e. the narrative report produced by the Board, to include a non-financial information statement that contains the above information.[366] It is arguable that the list above, which is mandatory and not optional, introduces an indirect form of procedural obligation for corporations in relation to instituting effective due diligence procedures and measuring social performance.[367] This could be a stronger form of supply chain governance, compelling real changes in corporations' relationships with their suppliers, and brings the regulatory regime closer to the prescriptive one under the Conflict Minerals Regulation. However, we see no clear tendency towards treating the mandatory non-financial statement as a form of indirect procedural regulation. This is because the Commission Communication and the U.K. transposition frame the non-financial statement firmly within the familiar tenets of regulatory capitalism, relying on investors' heightened consciousness[368] for ESG (environmental, social and governance) issues to result in market discipline, a point we return to shortly.

The regulatory techniques above focus on preliminary endeavors such as overcoming information asymmetry, and emphasizes a predominantly contractual form of management that is private to corporations and their suppliers. Such regulatory endeavors pale somewhat against initiatives in the transnational governance sphere, which has developed multi-stakeholder standards and methodology for due diligence, such as third-party auditing or certification. Some examples are SHIFT-Mazars assurance

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[365] Art. 19a.

[366] Section 414CA, inserted into the Companies Act 2006 via the via the Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016 (S.I. 2016/1245).

[367] Iris H-Y Chiu, *Unpacking the Reforms in Europe and UK Relating to Mandatory Disclosure in Corporate Social Responsibility: Instituting a Hybrid Governance Model to Change Corporate Behavior?*, 5 EUROPEAN COMPANY L. 193 (2017).

[368] Such heightened consciousness can be as a result of policy-makers' nudging towards optimal and socially useful shareholder behavior, in 'shareholder stewardship' as in the UK, *see* Iris H-Y Chiu, *Turning Institutional Investors into "Stewards"- Exploring the Meaning and Objectives in "Stewardship*" (2013) 66 Current Legal Problems 443-481; or financially-driven motivations such as the pursuit of investment performance, see Alexander Boersch, *Doing Good by Investing Well? Pension Funds and Socially Responsible Investment: Results of an Expert Survey* (January 2010) Allianz Global Investors International Pension Paper No 1/2010 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1607730.

standard for human rights management[369] and the SA8000 certification standard for fair treatment of workers in workplaces.[370] Such voluntary initiatives seem to have provided clearer and more precise articulation of standards in supply chain governance, such as in the Clean Clothes Model Code of Conduct.[371] Regulation has clearly avoided hardening substantive norms of social justice, and implements a regime to devolve to corporations the implementation of appropriate processes. Chuang also points out possible retardation in the development of social justice norms more generally in relation to labor practices and wage justice.[372] Other than the OECD guidance for due diligence that has been hardened in the Conflict Minerals Regulation, no soft law initiative has attained a harder form of recognition. Legalization may even bring about an arguably regressive position as corporations are chiefly devolved with supply chain governance and subject to weak forms of discipline.

Indeed, the Practical Guidance from the Home Office for the Modern Slavery Act clearly states that mandatory disclosure is not tantamount to a warranty by the corporation that such crimes do not occur. This in effect sums up the limitations of the disclosure regulation - in the absence of norms that deal with conduct or connects more clearly with outcomes, such regulatory endeavors bear, at best, a weak connection to the issues of social justice sought to be addressed. Disclosure-regulation is means-based without definite pursuits of outcomes in relation to social goals such as the protection of human rights.[373] It is highly questionable if procedural compliance proxies for the attainment of satisfactory corporate behavior.

Procedural obligations such as due diligence would go as far as

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[369] SHIFT-Mazars, *UNGP Reporting Framework Assurance Guidance* and *UNGP Reporting Framework Assurance Guidance Indicators,* https://www.ungpreporting.org/wp-content/uploads/UNGPRF_AssuranceGuidance.pdf and https://www.ungpreporting.org/wp-content/uploads/UNGPRF_AssuranceGuidance_Indicators.pdf.

[370] *See* Social Accountability International http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1689.

[371] Which has been introduced since 1998, *see* Clean Clothes Campaign https://cleanclothes.org/resources/publications/clean-clothes-campaign-model-code-of-conduct/view.

[372] Although this framing establishes a moral basis for clear decrying against modern slavery, it may sideline issues such as labour rights and migrant justice, *see* Janie A Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AMER. J. OF INT. L. 609 (2014). *See also* Johannes Koettl, *Human Trafficking, Modern Day Slavery and Economic Exploitation* World Bank Discussion Paper 49802 (May 2009) http://documents.worldbank.org/curated/en/208471468174880847/pdf/498020NWP0SP0d10Box341969B01PUBLIC1.pdf. (highlighting the thin line of difference between non-consensual and consensual forms of exploitation where the exploited party has little choice)

[373] Ozlem Arikan, Julianne Reinecke, Crawford Spence and Kevin Morrell, *Signposts or Weathervanes? The Curious Case of Corporate Social Responsibility and Conflict Minerals*, https://ssrn.com/abstract=3032498 (2015) (pointing out that legalisation of CSR reforms do not address the underlying contested issues of the nature and scope of corporate responsibility).

improving informational awareness and possibly shapes an organizational response. [374] However, how corporations deal with the informational awareness or its impact is devolved to them. It is then up to their perception of incentives that may motivate any significant conduct change. Both the Modern Slavery Act and disclosure regime under the EU Directive involve significant devolved implementation by corporations, primarily accountable to the markets, and without a mandatory third-party certification or assurance. [375] Devolved implementation fails to address any bimoral conflicts, opposing incentives and corporate culture that persist in corporations. Devolved implementation could even provide a regressive form of behavior, legitimating corporate-centered implementation to the exclusion of multi-stakeholder governance.

A brief survey[376] conducted of a small sample of Modern Slavery Statements in the first year of compliance shows that corporations disclose the existence of their internal codes of ethics or conduct and assert that they implement due diligence and other procedures developed by themselves in order to comply with the disclosure requirements under the Act. The corporations surveyed co-opt no multi-stakeholder guidance or partnership in fighting modern slavery. Disclosure obligations seem to exert little impact upon corporate procedures and behavior, as observed by a couple of commentators.[377]

Although the EU Non-Financial Directive also facilitates devolved implementation, there seems to be more efforts to nudge companies into adopting multi-stakeholder developed procedures for due diligence and managing the supply chain. The European Commission has developed non-binding guidelines for supply chain due diligence for three sectors: oil and gas, information technology and communications, and recruitment agencies, a product of multi-stakeholder governance.[378] A comprehensive empirical study of the production of narrative reporting in the strategic reports by U.K. listed companies finds generally good quality disclosure, with the exception of human rights reporting.[379] Such a finding highlights

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[374] Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 NW. J. OF INT. L. AND BUS. 87 (2014).

[375] Shuangge Wen, *The Cogs and Wheels of Reflexive Law ± Business Disclosure under the Modern Slavery Act* 43 J. OF L. AND SOCIETY 327 (2016).

[376] Iris H-Y Chiu, *Unpacking the Reforms in Europe and UK Relating to Mandatory Disclosure in Corporate Social Responsibility: Instituting a Hybrid Governance Model to Change Corporate Behavior*?, 5 EUROPEAN COMPANY L. 193 (2017).

[377] Genevieve LeBaron and Andreas Rühmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, 8 GLOBAL POLICY 15 (2017).

[378] Together Against Trafficking in Human Beings, https://ec.europa.eu/anti-trafficking/publications/european-commission-sector-guides-implementing-un-guiding-principles-business-and-human_en.

[379] Irene-Marie Esser, Iain MacNeil and Katarzyna Chalaczkiewicz-Ladna, *Engaging Stakeholders in Corporate Decision-Making through Strategic Reporting: An Empirical*

corporations' continued struggles within their supply chain. A model of governance centered on mandatory disclosure does not necessarily connect with concrete steps forward for strategic or behavioral change, but it remains to be seen if the nudge efforts led by the Commission may bear fruit.[380] This is, however, an incremental process, and guidelines for multi-stakeholder governance have only been developed for three sectors.

In sum, the new governance technique of interrogating corporate due diligence and other procedures is arguably weak, as it essentially devolves to the corporation managing its socially-facing goals within a commercial contractual context. This devolution tends to obscure the bimoral dilemmas corporations face, which is not made accountable through rather skeletal disclosure obligations. Further, the disclosure obligations are purposed towards letting markets and stakeholders judge the matter, so corporations' accountability may be framed more narrowly and privately rather than being shaped by public interest orientations.

In relation to the Modern Slavery Statement, although it is of a primarily social orientation and not purposed as securities market disclosure, civil society scrutiny may be limited. This is because the Statement is required to be concise, and the devolved implementation to corporations of their procedures may render such implementation essentially inscrutable by stakeholders. Civil society also has no standing for enforcement, as the Home Office is primarily responsible for enforcement. We are skeptical as to the potency of regulatory enforcement as the Home Office is tasked with more pressing social and crime enforcement responsibilities. It is possible that such enforcement could be carried out as part of a criminal enforcement action against a company for engaging in modern slavery, but we do not see the Home Office as an ongoing supervisor of companies' procedural systems and governance, or perhaps as a watchman for corporate behavioral change.

In relation to the EU Directive, we are skeptical that investors' governance would become a force for corporate behavioral change towards meeting social demands and expectations. We now turn to the limitations of CSR transparency that has been framed within the paradigms of securities market disclosure.

3. Corporate Transparency in relation to Social Responsibility Matters

Corporate transparency in CSR matters has always been regarded as a key means to advance corporate engagement with social responsibility. The

Study of FTSE 100 Companies https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049203 (2017).

[380] The EU's recommended multi-stakeholder frameworks are arguably not a strong version of nudge, which is often implemented as 'default unless opt out'. There is room to consider if such stronger 'nudge' is needed, such as to presume adequate disclosure made upon the basis of adoption of those frameworks. *See generally* CASS R. SUNSTEIN AND RICHARD THALER, *Nudge* (Penguin, 2009).

processes of preparing for disclosure could make companies more self-aware and responsive to social demand and reputational needs.[381] Such disclosure is also essential for overcoming information asymmetries with stakeholders, civil society, and securities markets.[382] Voluntary reporting in CSR has been on the rise as companies perceive reputational benefits and the need to be responsive to investors who care about ESG.[383] With the growth of the market for voluntary reporting, is there a need for mandatory disclosure? The EU Non-Financial Disclosure Directive is situated in an ambivalent place - it seems to introduce mandatory disclosure in order to improve the accountability of corporate social responsibility relevant to non-investor stakeholders, such as consumers. [384] On that basis, mandatory disclosure may be explained as necessary in order to overcome the self-selecting biases of companies, and to represent a shift away from investor-centric disclosure. This distinguishes the EU Directive's mandatory non-financial information statement from other shareholder-centric financial and non-financial reporting, which has been introduced in the U.K. since 2006.[385]

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[381] Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 NW. J. OF INT. L. AND BUS. 87 (2014).

[382] John Parkinson, *Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame*, 3 J. CORP. L. STUD. 3 (2003); Christiana Ochoa & Patrick J. Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 GOETTINGEN J. OF INT. L. 129 (2011); Björn Fasterling, *Development of Norms Through Compliance Disclosure*, 106 J. OF BUS. ETHICS 73 (2012) (doubting that compelling disclosure causes companies to change from within.

[383] *See* Iris H-Y Chiu, *Standardization in Corporate Social Responsibility Reporting and a Universalist Concept of CSR?: A Path Paved with Good Intentions*, 22 FL. J. OF INT. L. 361 (2011).

[384] Preamble 3 to the EU Non-financial Disclosure Directive 2014.

[385] The UK has since 2006 required the directors' business review, a narrative report, to contain information on how environment and stakeholder issues relate to business performance *i.e.,* the superseded section 417 of the UK Companies Act that deals with directors' business reviews- containing social responsibility matters framed as being useful for investors to understand the risks and performance of the company. The former section 417, Companies Act 2006 has since been superseded by section414A, the Strategic Report, discussed in Iris H-Y Chiu, *Reviving Shareholder Stewardship: Critically Examining the Impact of Corporate Transparency Reforms in the UK*, 38 DEL. J. OF CORP. L. 983 (2014). The EU has to date extensively harmonised corporate reporting requirements including financial and narrative reporting, see Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC. The narrative reporting requirements relate to qualitatively explaining business performance and risks, see Arts 19-20, Directive 2013/34/EU above. Narrative reporting in the EU and UK has, until the transformational reform introduced in the EU Non-financial Disclosure Directive 2014, been focused on shareholder-centric needs in relation to evaluating financial performance and viability. *See* Iris H-Y Chiu, *The Paradigms for Mandatory Non-Financial Disclosure: A Conceptual Analysis- Parts 1 and*

The EU Directive has, on face, introduced mandatory disclosure of a range of social responsibility matters *viz* "[an] undertaking's ***development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters.***" This prescribed list can be perceived as a way of making the disclosure standardized and comparable. Commentators have, however, observed that no definite ends are articulated with respect to mandatory social disclosure[386] (i.e. there is no explicit elevation of stakeholders in terms of corporate accountability to them, nor is there articulation of particular social goals that corporate transparency is to facilitate). Without a clear alternative basis upon which mandatory disclosure is to be implemented, such mandatory disclosure has to be placed upon its default position, i.e. serving investor-centric purposes in securities markets.

The U.K. transposition of the EU Directive subsumes the non-financial statement within the existing paradigms of corporate transparency and securities regulation. This approach limits the extent to which the mandatory disclosure reforms are fundamentally different in nature from the tradition of investor-centric securities regulation. Section 414CA of the Companies Act 2006 situates the non-financial statement within the directors' Strategic Report, a narrative report that is centered upon explaining financial performance and business risks to investors.[387] This is not inconsistent with the Directive's requirement that the non-financial statement be included in the management report,[388] perhaps highlighting the Directive's ambivalent nature regarding the orientation of the statement. The Financial Reporting Council in the U.K. has further clarified that the non-financial statement, like the rest of the Strategic Report, should be guided by the standard of materiality,[389] which frames the nature of disclosure according to what may be material to a reasonable investor. Although this is again not inconsistent with the Commission Communication that provides guidelines for implementation,[390] the

2,' 27 COMPANY LAWYER 259; 291 (2006). On the shareholder-centric focus of the section 417 directors' report, *see* Ian Havercroft and Arad Reisberg, *Directors' Duties Under the UK Companies Act 2006 and the Impact of the Company's Operations on the Environment* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1274567 (2010); Andrew Keay, *Section 172(1) of the Companies Act 2006: An Interpretation and Assessment*, 28 COMPANY LAWYER 106 (2007).

[386] Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 NW. J. OF INT. L. AND BUS. 87 (2014); Barnali Choudhury, *Social Disclosure*, 13 BERK. BUS. L. J. 183 (2015).

[387] The nature of the Strategic Report is discussed in Iris H-Y Chiu, *Reviving Shareholder Stewardship: Critically Examining the Impact of Corporate Transparency Reforms in the UK*, 38 DEL. J. OF CORP. L. 983 (2014).

[388] Art. 19a.

[389] Financial Reporting Council, *Guidance on the Strategic Report* (July 2018)

[390] Section 3.1, Communication from the Commission — Guidelines on non-financial

Communication explicitly confirms the stakeholder-orientation of the statement.[391] One may, however, treat the Communication as having ambivalent premises, endorsing shareholder centricity on the one hand by referring to standards of materiality, balance and fairness from the perspective of investors' interest, while also referring to corporate responsibility conventions and the importance of stakeholders to the statement.[392] The approach taken by the U.K. in implementing the disclosure obligation more clearly limits the social orientation of the matters to be reported, and reframes their salience to be investor and market-centric.

Disclosure regulation is often described as "sunlight," being the "best disinfectant" for behavior that may otherwise be hidden and shielded. However, it is also a regulatory tool of minimum intrusion as it merely compels information to be released so that the market can decide and effect necessary economic discipline.[393] There is even some investor interest in the financial implications of a corporation's compliance with the Modern Slavery Act.[394] In relation to socially responsible behavior, the mandatory disclosure tool suffers from several limitations. One is that mandatory disclosure is addressed to securities markets and investors, and reliance is therefore placed on investors to introduce discipline for change in corporate behavior. Investors are highly diverse, and even if some groups may monitor such disclosure and assess their relevance to their investment decisions,[395] other groups may be indifferent.[396] This results in mixed

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reporting (methodology for reporting non-financial information) (2017) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705(01).

[391] Section 3.5, Communication from the Commission — Guidelines on non-financial reporting (methodology for reporting non-financial information) (2017) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705(01).

[392] *Id*. Further, Impact Assessment for this reform was assessed largely in terms of benefits to investors, *see* Martin Petrin, *Regulatory Analysis in Corporate Law*, 79 MOD. L. REV. 537 (2016).

[393] Alan C. Page and R.B. Ferguson, INVESTOR PROTECTION, at 59-77 (Cambridge: Cambridge University Press 1992).

[394] Paul D. Cousins et al., *The Shareholder Wealth Effects of Modern Slavery Reporting Requirements* (2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995175.

[395] Such as investors that are 'socially responsible funds' mandated to factor in social performance, *see*, Roger M. Barker and Iris H-Y Chiu, CORPORATE GOVERNANCE AND INVESTMENT MANAGEMENT, ch. 2.F (Cheltenham: Edward Elgar 2017) and citations therein. It can be argued that many institutional investors have signed up to the UNPRI principles for investment that include monitoring 'environmental, social and governance' (ESG) matters and hence they would integrate these in their investment monitoring and decisions, Generation Foundation, UNEP and UNPRI, *Fiduciary Duty for the 21st Century: Statement on Investor Obligations and Duties* (June 2016) at https://www.unpri.org/download_report/19422. Or that investors may be motivated to monitor ESG matters because they believe in the link to business case, although *see supra* 196 (Marc Orlitzky, *Links Between Corporate Social Responsibility and Corporate Financial Performance: Theoretical and Empirical Determinants*, *in* Corporate Social Responsibility Volume 2 41 (José Allouche ed., 2006); Laura Poddi & Sergio Vergalli, *Does Corporate Social Responsibility Affect the*

signals and may be overall ineffective in terms of sending a market message to corporations. Second, it is not certain what "market discipline" is intended to be motivated by mandatory disclosure of this nature. This is because investors only play a very limited role in challenging companies in matters relating to social responsibility.[397] If "market discipline" comes in the form of "exit," this form of economic discipline merely drives corporate behavior in relation to managing their social responsibility profile for the business case.[398] Empirical research has found that social responsibility reports focused on the business case tends towards being narrow and individualistic, so the investor-centric orientation endorsed in law may not be consonant with meeting social expectations.[399]

We should not assume that a financially-driven and marketized framework for discipline and enforcement would clearly reshape incentives and behavioral tendencies on the part of corporations towards socially optimal objectives. Further, the reframing of the importance of CSR issues as financially-driven may encourage only an instrumental perception of their importance. [400] Incentive-based, instrumental behavior can trump normative premises[401] and the legalization in the EU Directive could produce the counter-intuitive effect of undermining the social-ness of the CSR norms that corporations should reckon with. However, the opposite can also be true. The infusion of the salience of CSR norms into investment marketplaces incrementally introduces re-orientation of market perceptions with social ones,[402] producing an integrative effect which is holistic and can

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Performance of Firms? (FEEM Working Paper No. 52.2009, 2009), http://ssrn.com/abstract=1444333) shows empirical research on such a link is inconclusive.

[396] Alan Lewis and Carmen Juravle, *Morals, Markets and Sustainable Investments: A Qualitative Study of 'Champions,'* 93 J. OF BU. ETHICS 483 (2010), discussing their findings among qualitative surveys carried out on 'champions' for ESG investing in the mainstream sector.

[397] *See* Roger M. Barker and Iris H-Y Chiu, CORPORATE GOVERNANCE AND INVESTMENT MANAGEMENT, ch. 2-3 (Cheltenham: Edward Elgar 2017).

[398] Martin Fougère and Nikodemus Solitander, *Against Corporate Responsibility: Critical Reflections on Thinking, Practice, Content and Consequences*, 16 CORPORATE SOCIAL RESPONSIBILITY AND ENVIRON. MGMT., 217 (2009).

[399] Stefan Tengblad and Claes Ohlsson, *The Framing of Corporate Social Responsibility and the Globalization of National Business Systems: A Longitudinal Case Study*, 93 J.L OF BUS. ETHICS 653 (2010).

[400] *See* Iris H-Y Chiu, *The Paradigms for Mandatory Non-Financial Disclosure: A Conceptual Analysis- Parts 1- 2,* 259 COMPANY LAWYER 291 (2006).

[401] Jiwei Ci, *Justice, Freedom, and the Moral Bounds of Capitalism*, 25 SOCIAL THEORY AND PRACTICE 409 (1999.

[402] *See* Karl Polyani, THE GREAT TRANSFORMATION (Beacon Press, 2nd ed, 2002, original 1944); Gareth Dale, KARL POLANYI: THE LIMITS OF THE MARKET (Polity Press, 2010); Carlo Trigilia, ECONOMIC SOCIOLOGY (Oxford: Blackwell 2002) at chapter 1, discussing Polyani's social embeddedness of markets, *see* Fred Block and Margaret F. Sommers, *Beyond the Economistic Fallacy: The Holistic Social Science of Karl Polanyi*, VISION AND METHOD IN HISTORICAL SOCIOLOGY (Cambridge: Cambridge University Press 1984). But note critique that the vague concept of embeddedness provides no guidance for calculations needed for

overcome the myopic and calculative culture of modern institutional investment. This, however, requires more significant institutional change, which Strine[403] doubts would happen due to the entrenched patterns of corporate law and the nature of modern institutional investment.[404] The U.K. transposition of the ambivalent premises in the EU Directive has avoided paradigm change, although some see the usefulness of generally overcoming information asymmetries for the purposes of informing civil society or stakeholder activism.[405]

4. U.K. Reforms towards Stakeholder Inclusiveness in Corporate Governance

The complaint so far of a lack of paradigm change is based on observations of the corporate-centric and market-centric premises and implementation of recent corporate regulation reforms, signaling no significant shift from the tenets of regulatory capitalism. There is, however, emerging corporate law reform in the U.K. that holds promise for more fundamental change, as the government is preparing to implement more formalized stakeholder engagement with corporations. This reform holds promise as it places the polycentric governance space around corporations on firmer footing, and marks a shift away from the a-socialized corporation that pursues shareholder primacy and wealth maximization in a myopic manner. If polycentric governance for corporations can be implemented "strongly," this has potential to overcome some of the critique raised earlier in relation to the recent reforms. Polycentric governance can become a dominant framework in corporate governance that mitigates the weaknesses in firm-centric implementation or market-centric disclosure pointed out in relation to the reforms discussed above.

Reforms towards stakeholder inclusiveness are one of the first initiatives led by the May government after it came to power in July 2016 to reform corporate governance. The Department of Business, Energy and Industrial Strategy has embarked on legislative and soft law reforms that purport to recalibrate stakeholders' relations with the corporate sector in

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economic behavior, *see* Kurtuluş Gemici, *Karl Polanyi and the Antinomies of Embeddedness* 6 SOCIAL ECON. REV. 5 (2008).

[403] Leo Strine Jr., *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behavior* at http://ssrn.com/abstract=1024506 (2007).

[404] *See*, Roger Barker and Iris H-Y Chiu, CORPORATE GOVERNANCE AND INVESTMENT MANAGEMENT, ch. 1-3 (Cheltenham: Edward Elgar, 2017).

[405] Nadia B. Ahmad, *Meta-Regulation for Environmental Monitoring and Corporate Sustainability Reporting*, *CORPORATE RESPONSIBILITY AND SUSTAINABLE DEVELOPMENT: EXPLORING THE NEXUS OF PRIVATE AND PUBLIC INTERESTS* (Oxford: Routledge 2015) ; Cynthia A. Williams, *Engage, Embed, and Embellish: Theory versus Practice in the Corporate Social Responsibility Movement*. 31 J. CORP. L. 1 (2005).

stakeholder favor.[406] It may, however, be criticized that most reforms are in soft law[407] and the legislative initiatives only enhance shareholders' roles. The cynical view is that the reforms resist institutional change by giving stakeholders illusory and non-consequential "improvements." In the alternative, we may view the confused premises of these reforms as representing a genuine struggle towards institutional change.

First, employees are the only group of stakeholders given more voice in strategic decision-making at companies. This is to be achieved in one of three ways: nominating a non-executive director dedicated to employee issues, nominating an employee-director, or setting up an employee advisory council to feed input to the Board. The Financial Reporting Council proposes changes to the U.K. Corporate Governance Code that require Boards to demonstrate engagement with stakeholders, and in particular to consider the above options in engaging with employees as "normally" expected arrangements.[408] Code standards are nevertheless subject to "comply-or-explain" by listed companies.[409] It can be argued that the use of market-focused soft law to enhance employees' stakeholder rights within corporate governance falls short of moving away from the a-socialization of corporations cocooned in the shareholder primacy model. The Code is market-focused and is a means for shareholders to hold companies' corporate governance to account. Shareholders could agree to companies deviating from these measures if they accept companies' explanations.[410]

Next, directors are to report on how they have engaged with stakeholder-focused considerations in narrative reporting.[411] The disclosure requirements are, however, constrained by the nature of the directors' duty

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[406] Department for Business, Energy and Industrial Strategy, *Corporate Governance Reform: The Government's Response* (August 2017) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640631/corporate-governance-reform-government-response.pdf

[407] As part of the Corporate Governance Code or as industry guidelines, not in company law as such.

[408] FRC, *Proposed Revisions to UK Corporate Governance Code* (Dec. 2017) https://www.frc.org.uk/getattachment/bff48ee6-4fce-4593-9768-77914dbf0b86/Proposed-Revisions-to-the-UK-Corporate-Governance-Code-Appendix-A-Dec-2017.pdf.

[409] Which means that companies should comply with the standards or else explain deviations and shareholders would have the opportunity to evaluate their satisfaction or otherwise with such explanations.

[410] It has been argued that shareholders tend to hold companies to 'compliance' as compliance represents a shorthand for best practices and shareholders may be too indifferent to evaluate companies' explanations in detail. *See* Marc Moore, *Whispering Sweet Nothings: The Limitations of Informal Conformance in UK Corporate Governance*, 9 J. OF CORP. L. STUDIES 77 (2009).

[411] FRC, *Proposed Revisions to UK Corporate Governance Code* (Dec. 2017) https://www.frc.org.uk/getattachment/bff48ee6-4fce-4593-9768-77914dbf0b86/Proposed-Revisions-to-the-UK-Corporate-Governance-Code-Appendix-A-Dec-2017.pdf. This is now enacted in § 414CZA, Companies Act 2006.

in section 172 of the Companies Act,[412] which hold directors to account to shareholders for how they "promote the long-term success of the company." This directors' report is primarily intended for shareholders' evaluation. It remains uncertain how the continued maintenance of the shareholder primacy focus in such stakeholder-related reporting would advance corporate consciousness of stakeholder inclusiveness. There would also be development of stakeholder engagement best practices in the form of soft law led by professional and industry associations.[413] It is uncertain to what extent these would include stakeholder input. One of the associations involved in developing this soft law is the Investment Association representing investors. Can such leadership advance stakeholder engagement with companies on stakeholders' terms?

Finally, companies are to disclose the pay ratios of their U.K. employees.[414] This seems, on face, to meet the social demand for scrutinizing the gulf of inequalities in reward that have developed in the U.K.'s corporate sector. However, such disclosure is primarily targeted at shareholders who would scrutinize this as a part of their role in approving directors' remuneration packages. Stakeholders seem disengaged from this issue,[415] which ought to be of social orientation and importance.

As soft law, not legalization, has been employed as the premise for stakeholders to be "relationized" within corporate governance, the continued dominance of the shareholder primacy framework can undermine real advancement of stakeholders' and CSR causes. However, the institutional stature of soft law cannot be totally underestimated. Although based in soft law, it can be argued that employee stakeholdership *must* be realized, and it is only the form of such realization that is left to companies'

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[412] *See* §172, Companies Act 2006 explicitly provides that directors' duties are to promote the long-term success of the company for the benefit of the members as a whole. This has come to be coined as 'enlightened shareholder value', a long-termist and more inclusive perspective for corporate performance, but revolving around shareholders. But most commentators are of the view that the focus on 'shareholder value' will unlikely introduce any revolutionary move in directors' conduct towards stakeholders; *see e.g.,* Paul Davies, *Enlightened Shareholder Value and the New Responsibilities of Directors*, (2005) http://law.unimelb.edu.au/__data/assets/pdf_file/0014/1710014/94-Enlightened_Shareholder_Value_and_the_New_Responsibilities_of_Directors1.pdf; *see also* Richard Williams, *Enlightened Shareholder Value in UK Company Law,* 35 UNSW L. J. 360 (2012); Andrew Keay, *Section 172(1) of the Companies Act 2006: an Interpretation and Assessment*, 28 COMPANY LAWYER 106 (2007); Elaine Lynch, *Section 172: A Ground-Breaking Reform of Director's Duties, or the Emperor's New Clothes?,* COMPANY LAWYER 196 (2012).

[413] Institute of Chartered Secretaries and Administrators: The Governance Institute and the Investment Association.

[414] Companies Act 2006 ¶ 19A.

[415] Department for Business, Energy and Industrial Strategy, *Corporate Governance Reform: The Government's Response* (Aug.2017) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640631/corporate-governance-reform-government-response.pdf, showing investor scepticism for the usefulness of such reporting, and the lack of stakeholder engagement in responding to this measure.

discretion. Further it can be argued that the collaborative model for developing other stakeholder engagement mechanisms accepts a polycentric principle for developing governance. This makes it less easy to exclude civil society and other stakeholder groups that are not specifically named in the reform document. Even if the confused and contesting premises between shareholder-centric and stakeholder theories of the corporation are not reconciled overtly[416] in these reforms, these developments mark a not insignificant shift from the tenets of regulatory capitalism. Space is formally opened up for stakeholders and civil society to exert pressure and efforts to 're-socialize' the corporation, and the state has finally taken on a more coordinating role to facilitate this potential. Nevertheless, the implementation of stakeholder engagement reforms runs the risk of being merely proceduralized. Commentators have highlighted how stakeholder engagement can be carried out in superficial and limited ways and do not fundamentally affect business strategy or corporate culture.[417] It remains uncertain if implementation of such reforms would be devolved largely to the corporation. Further, the domination of investor-centric input into the development of best practices for stakeholder engagement can affect the social utility of these engagement mechanisms.

The above survey of recent corporate regulation reforms paints a mixed picture of what has been achieved in legalizing various aspects of CSR. We observe some but not tremendous achievements in advancing social norms in relation to corporate objectives or conduct. We observe a significant employment of new governance techniques in compelling corporations to institute procedures to address CSR matters, but procedural regulation is largely devolved to corporations and do not involve the new governance ethos of multi-stakeholder governance. Supply chain governance in particular, in its devolved nature, is framed within a commercial contractual context, and is likely to be dominated by commercial and market forces. Finally, we are skeptical that corporate transparency empowers multi-stakeholder governance and brings about significant impact upon corporate ethical consciousness because such transparency is either limited or directed at securities markets whose economic discipline, if it exists, is not necessarily aligned with social expectations.

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[416] Discussed in Ozlem Arikan, Julianne Reinecke, Crawford Spence and Kevin Morrell, *Signposts or Weathervanes? The Curious Case of Corporate Social Responsibility and Conflict Minerals* (2015) https://ssrn.com/abstract=3032498.

[417] Jean-Pascal Gond, *Reconsidering the Critical Corporate Social Responsibility Perspective through French Pragmatic Sociology: Subverting Corporate Do-Gooding for the Common Good*', THE CORPORATION, ch. 23 (Cambridge: CUP 2017) (opining that stakeholder dialogue is usually 'unilateral communications' from the corporation); Krista Bondy, Jeremy Moon and Dirk Matten, *An Institution of Corporate Social Responsibility (CSR) in Multi-National Corporations (MNCs): Form and Implications*, 111 J. OF BUS. ETHICS 281 (2012).

The table below indicates achievements in each regulatory reform that may portend of an institutional shift, mapped against limitations that show adherence to the institutional tenets of regulatory capitalism.

	Indicators of Institutional Change	**Indicators of Institutional Adherence**
Conflict Minerals Regulation	1. Prescriptive procedures 2. Compulsory third-party monitoring and potential for development of formally recognized multi-stakeholder governance	1. No overt articulation of social objectives
Bribery Act 2010	1. Articulation of the obligation to prevent bribery	1. Devolution to corporations to design systems and procedures 2. Lacks reference to coordinating multi-stakeholder governance
Criminal Finances Act 2017	1. Articulation of the obligation to prevent tax evasion 2. Supported by impending overhaul of tax behavioral norms	1. Devolution to corporations to design systems and procedures 2. Lacks reference to coordinating multi-stakeholder governance
BEIS Corporate Governance Reforms 2017-18	1. Coordination of stakeholder engagement in companies especially with employees	1. Directors' report on stakeholder engagement framed towards investors' interests 2. Use of soft law in coordinating stakeholder engagement, not giving a position in corporate law

		3. Potential devolution to corporations to design engagement mechanisms
EU Non-financial Disclosure Directive 2014 transposed in U.K. Companies Act	1. Implied requirement for institution of corporate procedures and systems for wide range of CSR issues 2. Nudge towards multi-stakeholder governance for procedural implementation (EU)	1. Maintenance of investor-centric premise for mandatory disclosure 2. No legal footing for coordination with multi-stakeholder governance
Modern Slavery Act 2015	1. Mandatory disclosure framed towards socially-facing law enforcement, not securities markets	1. Lacks articulation of obligation to prevent human trafficking/modern slavery 2. Devolution to corporations to design systems and procedures 3. Lacks reference to coordinating multi-stakeholder governance

In the next Section, we account for why regulatory reforms in legalizing aspects of CSR are underwhelming and the implications of addressing the precise locations of weakness.

IV. WHY LEGALIZATION OF CSR IS UNDERWHELMING AND CONCLUDING THOUGHTS

Calleiss and Renner argue that[418] soft law hardens when its function arrives at a state of "stabilization of normative expectations." We may blithely expect the legalization of aspects of CSR to reflect "mature"

[418] Gralf-Peter Calliess & Moritz Renner, *From Soft Law to Hard Code: The Juridification of Global Governance*, 22 RATIO JURIS 260 (2007).

moments of recognition for certain aspects of CSR as public goods; the "stabilization" of certain socially-facing norms of conduct for corporations; and for corporate accountability to be provided in innovative ways, including the engagement of multi-stakeholder governance.[419] Although the flexibility of soft law is often positively regarded, Short argues that "falling back" on self or soft regulation is often a manifestation of a regulatory "void" – the lack of resolve to address problems.[420] Commentators support the formalization of public policy in CSR, such as into regulation, as one or more of the following benefits can be attained:

(a) leadership in setting public interest objectives;[421]

(b) the orchestration of governance capacity on the part of both public and private actors by assigning regulatory responsibilities, coordinating a systematic and coherent framework supported by regulatory intervention to moderate imbalances in power and influence;[422]

(c) support for the implementation of changes by private actors. These include corporations and third party organisations that may propose governance frameworks for corporations. Such support allows regulators to co-opt private sector parties into co-regulation;[423] and

(d) the provision or coordination of enforcement capacity in different

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[419] Reinhard Steurer, *The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe*, 43 POLICY SCI. 49 (2010); Jette Knudsen, *Bringing the State Back in? US and UK Government Regulation of Corporate Social Responsibility (CSR) in International Business* (2014) http://ssrn.com/abstract=2541002; Natasha Tusikov, *Transnational Non-State Regulatory Regimes*, REGULATORY THEORY (Canberra: ANU Press 2017). A comparative study on different extents of CSR publicisation and legalisation can be found in Laura Albareda, Josep M. Lozano and Tamyko Ysa, *Public Policies on Corporate Social Responsibility: The Role of Governments in Europe*, 74 J. OF BUS. ETHICS 391 (2007).

[420] Jodi Short, *Self-Regulation in the Regulatory Void: "Blue Moon" or "Bad Moon"?*, 649 THE ANNALS OF THE AM. ACADEMY OF POLITICAL AND SOCIAL SCI. 22 (2013); Atle Blomgren, *Is the CSR Craze Good for Society? The Welfare Economic Approach to Corporate Social Responsibility,* 69 REV. OF SOCIAL ECON. 495 (2011) (arguing that rarely would public goods be best provided by private providers).

[421] Colin Scott, *The Regulatory State and Beyond*', REGULATORY THEORY, ch. 16 (Canberra:ANU Press 2017); Benedict Sheehy, *Private and Public Corporate Regulatory Systems: Does CSR Provide a Systemic Alternative to Public Law*, 17 UC DAVIS BUS. L. J. 1 (2016); Robert MacQuordale, *Towards More Effective Legal Implementation of Corporate Accountability for Violations of Human Rights*, 103 PROCEEDINGS OF THE ANNUAL MEETING (AMER. SOCIETY OF INT. L.) 288 (2009).

[422] Kenneth W. Abbott; Duncan Snidal, *Strengthening International Regulation through Transmittal New*
Governance: Overcoming the Orchestration Deficit, 42 VAND. J. TRANSNAT'L L. 501 (2009).

[423] Colin Scott, *Beyond Taxonomies of Private Authority in Transnational Regulation*, 13 GERMAN L.J. 1329 (2012); Neil Gunningham, *Regulation: From Traditional to Cooperative*, OXFORD HANDBOOK OF WHITE COLLAR CRIME (Oxford: OUP 2016); Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J. OF L. AND SOCIETY 20 (2011).

> and multi-faceted ways in order to secure corporate compliance and behavioral change.[424]

However, if we measure the achievements of the corporate regulation reforms discussed in Section III against the expectations stipulated above, the achievements seem underwhelming.

First, the Table in Section III shows that the articulation of substantive obligations is limited, and has only been more clearly achieved in anti-bribery and anti-tax evasion. In the absence of clearer and stronger normative premises, task-based and procedural requirements may produce compliance of an underwhelming quality, as corporations can revert to their own centricity and market-facing priorities in order to determine their implementation. It remains questionable if there is clear engagement with ethics, social expectations, and corporate culture.

The lack of genuine social advancement in some CSR areas may be attributed to the still-contested nature of these issues in the polycentric transnational sphere.[425] The "hardening" or "legalization" of substantive norms is limited in two ways. One is that substantive norms that are legalized reflect already-achieved consensus in international governmental organizations, advancing nothing much that is novel. The due diligence obligations in conflict minerals and anti-bribery as well as the fight against tax evasion using offshore havens have all been developed extensively over decades under the OECD.[426] In particular, it may also be noteworthy that norm advancement in anti-bribery and tax evasion were achieved due to economic interests at play. A number of commentators discuss how U.S. business economic interests were key to the U.S. government's adopting the Foreign Corrupt Practices Act 1977 and its sustained championing for international convergence, which was finally achieved in the late 1990s at the OECD.[427] Further, it has also been suggested that anti-tax evasion

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[424] Yishai Blank; Issi Rosen-Zvi, *The Persistence of the Public/Private Divide in Environmental Regulation*, 15 THEORETICAL INQ. L. 199 (2014); Kevin T. Jackson, *The Normative Logic of Global Economic Governance: In Pursuit of Non-Instrumental Justification for the Rule of Law and Human Rights*, 22 MINN. J. INT'L L. 71 (2013);

[425] *See supra* Section II.

[426] OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas established since 2011; the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions since 1997, and in relation to tax evasion and avoidance, the OCED has since 1993 began work on mooting a Model Tax Convention for multilateral adoption, and since 1998 began work on combatting harmful tax competition from tax havens *see e.g., Harmful Tax Competition* (1998) http://www.oecd.org/tax/transparency/44430243.pdf. It continues to address tax reporting and tax avoidance schemes such as transfer pricing and base erosion.

[427] Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 PENN STATE INT. L. REV. 207 (1996); Kenneth W. Abbott, *Rule-making in the WTO-Lessons from Bribery and Corruption,* 4 J. OF INT. ECON. L. 275 (2001); Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From The Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the*

norms have been advanced in the U.K. after the global financial crisis largely due to the government's interests in shoring up its fiscal weaknesses after bailing out large banks in the crisis.[428] The alignment of economic interests and political strength are key to policy choice changes and norm advancement, and such are still relatively lacking in relation to supply chain responsibility, as the implications for multinational corporations would be an undesirable convergence in enterprise liability and an expansion of their legal risks. [429] Hence, in relation to corporations' *responsibility* to prevent human rights violations or manage supply chain misconduct, norms are much more contested in terms of the scope of corporate responsibility in a network of commercial relations.

We also see the lack of advancement in regulatory commitment to norms of social justice as being due to the lack of multi-stakeholder governance or a Habermasian[430] discourse in the polycentric space regarding the future of our capitalism model[431] and institutions. Although

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U.N. Convention Against Corruption, 23 INDIANA INT. AND COMP. L. REV. 1 (2013) (commenting that the variety of norms both economic and social supporting anti-bribery and corruption. But the dominance of economic interests preceded the development of more social and developmental objectives. *See* locus classicus, SUSAN ROSE-ACKERMAN, *Corruption: A Study In Political Economy* (Academic Press 1997) which focuses on the incentives for and distortions caused by corruption and argues that anti-corruption strategies must deal with those in order to achieve efficiency for both the public and private sectors.

[428] Iris H-Y Chiu, *From Multilateral to Unilateral Lines of Attack: The Sustainability of Offshore Tax Havens and Financial Centres in the International Legal Order*, 31 CONNECTICUT J. OF INT. L. 177 (2016).

[429] MNCs have been able to structure risky activities in subsidiaries in order to protect parent companies from liability. In the UK this is helped by the persistent refusal of UK courts to allow enterprise liability by applying the 'lifting of the corporate veil', *see Adams v Cape Industries plc* [1990] Ch 433; *Prest v Petrodel Resources Ltd* [2013] UKSC 34 especially Lord Sumption's judgement with whom two lawlords agree. If certain transnational norms such as protection of human rights or responsibility for supply chain practices become legalised, MNCs' legal risk is likely amplified and current practices of risk management would cease to be effective.

[430] *See generally* JÜRGEN HABERMAS, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass: MIT Press, 1996) (arguing that theories of law and democracy are built upon a theory of discourse, communication and deliberation in the manner espoused in earlier works); JÜRGEN HABERMAS, *Communication and the Evolution of Society* (Beacon Press, 1979) (developing a theory of communication in society that is premised on language, seeking the technical qualities of language that can achieve universal conditions for understanding); JÜRGEN HABERMAS, *Moral Consciousness And Communicative Action* (MIT Press, 1990) (espouses the discourse theory of ethics where ethical values in shared social understandings are developed by communication in the manner espoused in earlier works); JÜRGEN HABERMAS, *The Theory of Communicative Action, Vol. 2: Lifeworld and System: A Critique of Functionalist Reason* (Boston: Beacon Press, 1985) (sketching out a social system whereby social order and integration is maintained by shared understandings and values developed through communication, developed from his earlier work above).

[431] Concerns with the problems of a liberal market economy model of capitalism have been articulated even before the global financial crisis 2007-9 in ADAIR TURNER, *Just*

we see new governance techniques employed to an unprecedented extent in terms of interrogating the inside organization and procedures of corporations, much of regulatory implementation results in devolution to the corporation or scrutiny by securities markets. Corporations would manage their supply chain governance as an extension to their contractual governance, and it is queried if the continued dominance of the commercial context would bring any fundamental change to the corporations' incentive-based behavior. There is still too much deference to the corporation and its self-regulating capacity, and misplaced reliance on capital markets to develop an aligned "market for virtue." The continued failure of regulatory incorporation of the new governance ethos of polycentricism could be a key impediment to institutional shift. Except for the mandatory requirement of third-party auditing under the Conflict Minerals Regulation, there is no implicit nudge towards co-opting multi-stakeholder governance in other regulatory reforms discussed.

The lack of advancement in promoting the ethos of multi-stakeholder governance can be fundamentally attributed to the incompatibility of such governance with the capitalist institution of the U.K.'s liberal market economy. This capitalist model eschews the notion of regulators taking a lead in coordinating polycentric governance. Orchestrating such coordination may be seen to be intervening with the freedoms of constituents who should be allowed to express their discipline in the open "market for virtue." Although the "market for virtue" as a liberal notion is open to all who supply and demand, the market commercializes virtue, the very problem that CSR protagonists wish to address. Moreover, the market for virtue is not a level playing field. Voices derived from capital, i.e., investors' voices, are accorded with more legitimacy in the current paradigm of regulatory capitalism, and civil society voices can be marginalized, enjoying no real freedom of exercising discipline. It may be necessary for states and regulators to coordinate stakeholder and civil society involvement more explicitly[432] in order to (a) signal the public interest orientation of CSR issues (and not merely their commercial or market relevance) and (b) compensate for stakeholders' and civil society's relatively disadvantaged positions in exercising governance.[433] Pluralistic and inclusive frameworks can be key to fostering discourses that may give

Capitalism (Pan., 2002) advocating that capitalism needs to develop a 'human face' and be more socially cognisant for it to survive and thrive.

[432] Neil Gunningham, *The New Collaborative Environmental Governance: The Localization of Regulation*, 36 J. OF L.A ND SOC'Y 145 (2009)..

[433] These groups do not have *institutional* status within law or politics to influence policy and business behavior as such, and their capabilities can be better enhanced. In this respect the European Commission's development of sectoral human rights due diligence guidelines with multi-stakeholder input is commendable but only starts a slow process of 'nudge' for corporate adoption.

rise to substantive changes in values, norms or goals.[434]

Legalization has also avoided hardening or recognizing civil society initiatives that attempt to connect social dimensions with corporate procedures, affirming the primacy of the corporation in deciding its implementation. This has the tendency to allow corporations to default to their incentive-based behavior in designing their implementation. As discussed above, despite the achievements in transnational governance[435] in relation to substantive standards of conduct, auditing, or certification initiatives, the regulatory reforms discussed above have avoided recognizing these developments. The avoidance of elevating or giving recognition to social initiatives may again be attributed to the U.K.'s preference for market fundamentalism, allowing corporations to choose among the plethora of initiatives out there, as if the transnational governance space is a market for implementation designs. One commentator opines that more advancement in CSR causes can possibly be achieved if regulators are involved in facilitating the coordination and convergence of multiple initiatives and standards.[436]

In the U.K., the stakeholder-focused reforms in soft law that are afoot in corporate governance hold some promise for introducing a formal multi-stakeholder governance space surrounding corporations. This reform may be important for future advancement of CSR causes. Employees are to be formally organized in order to input voice into corporate governance, and research has shown that they are able to advance labor justice and human rights issues.[437] Other stakeholder engagement mechanisms are to be developed in soft law, and such mechanisms can also form the basis for developing multi-stakeholder governance over CSR issues. However, there are a few caveats in viewing such stakeholder inclusiveness reforms as being equivalent to the coordination of polycentric/multi-stakeholder governance in CSR issues. Stakeholder engagement mechanisms are likely focused on each group's *interests* and may not be focused on particular CSR issues. Such engagement mechanisms may be seen as private dialogues and communications, and do not revolve around public interest or the provision of public goods. In the absence of the "public" coordinating hand, the dynamics and coordination within such mechanisms would merely be private interactions, and governance potential or capacity may

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[434] Björn Fasterling, *Development of Norms Through Compliance Disclosure,* 106 J. OF BUS. ETHICS 73 (2012).

[435] Such as the SHIFT-Mazars' initiatives on business and human rights reporting and assurance highlighted earlier. *See* Larry Catá Backer, *The Guiding Principles of Business and Human Rights at a Crossroads: The State, the Enterprise, and the Spectre of a Treaty to Bind Them All*, http://ssrn.com/abstract=2462844 (2014).

[436] Jeff Schwartz, *The Conflict Minerals Experimen*t, 6 HARV. BUS. L. REV. 129(2016).

[437] Ruth V. Aguilera, Deborah E. Rupp, Cynthia A. Williams and Jyoti Ganapathi, *Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations*, 32 THE ACADEMY OF MGMT. REV. 836 (2007).

not be activated or galvanized. Much more refinement and formalization of stakeholder inclusiveness mechanisms, purposed towards specific CSR issues, would need to be considered.

It may be argued that civil society groups should also improve their transparency, social accountability, representativeness and legitimacy in order to become truly credible actors in the multi-stakeholder governance space. These issues are acknowledged by many,[438] but the imperfections of such groups can be worked upon. Civil society groups may be comparably lacking in capacity, resources, and sophistication *vis-a-vis* corporations and their industry associations.[439] Indeed, states and regulators should engage with civil society groups more and look into capacity-building in terms of their research and informational strengths. Such imperfections cannot amount to good reason for their marginalization.

Corporate regulation reforms in legalizing aspects of CSR seemed to hold promise in changing the nature of corporate regulation. We acknowledge the incremental achievements but remain underwhelmed. We account for the limitations in recent regulatory reforms by highlighting their institutional adherence. The institutional account of recent corporate regulation reforms within the paradigm of regulatory capitalism explains the limited achievements in the implementation of new governance and the purported legalization of CSR. This institutional account nevertheless pinpoints precise locations of impediments to institutional change, so as to inspire resolve to face the heavier lifting ahead.

[438] Dorothea Baur and Guido Palazzo, *The Moral Legitimacy of NGOs as Partners of Corporations*, 21 BUS. ETHICS QUARTERLY 579 (2011); Colin Scott, *Beyond Taxonomies of Private Authority in Transnational Regulation*, 13 GERMAN L.J. 1329 (2012); Deirdre Curtin and Linda Senden, *Public Accountability of Transnational Private Regulation: Chimera or Reality?*, 38 J. OF L. AND SOC'Y 163 (2011).

[439] Jon Burchell and Joanne Cook, *Sleeping with the Enemy? Strategic Transformations in Business—NGO Relationships Through Stakeholder Dialogue*, 113 J. OF BUS. ETHICS 505 (2013); Jonathan P. Doh and Terrence R. Guay, *Globalization and Corporate Social Responsibility: How Non-Governmental Organizations Influence Labor and Environmental Codes of Conduct*, 44 MGMT. INT. REV. 7 (2004).