

Part II: How to embed economic in social relationships?

From black box to glocalised player? Corporate personality in the twenty-first century and the scope of law's regulatory reach

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Abstract

This article seeks to investigate the evolving notion of corporate personality from the nineteenth century to the present and the scope for the regulatory effect of law thereon especially in terms of the ongoing management of the relationship between the economic and the social spheres. Utilising the work of the economic historian Karl Polanyi on the rise of the self-regulating market in the nineteenth century, it will suggest that the most appropriate image underlying the dominant legal conception of the company in the twentieth century was that of a black box by which the company was largely isolated from its broader social and political environment as a result of the complex interaction of legal and economic discourses surrounding the emergence of a distinct market-based economic sphere. In the light of the current financial crisis, and even more pertinently against the backdrop of the risk of potentially irreversible environmental degradation, many of the fundamentals of the market-based economic paradigm are presently being called into question. Accordingly, it will be argued, drawing upon Polanyi's notion of the double movement read in the light of Ulrich Beck's account of reflexive modernity, that the black box model of the company is increasingly perceived as inappropriate for the twenty-first century and that to attain greater institutional legitimacy there is pressure for the legal conception of corporate personality to be reconfigured as that of a glocalised player open to its environment. The article will conclude by examining the scope of law's regulatory power to construct such a holistic corporate personality capable of commanding such institutional legitimacy, with particular reference to the significance of s. 172 Companies Act 2006.

... the corporation is an institutional reflection of the principles of laissez faire capitalism. Changing it must be understood as part of a larger project of economic change.¹

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1 J Bakan, *The Corporation: The pathological pursuit of profit and power* (London: Constable & Robinson 2004), p. 161. The difficulties inherent in this formulation, given the clear involvement of the state in the incorporation of the corporate entity and the provision of limited liability, will be subject to discussion in the body of this article.

Introduction

Implicit within the theme of socialising economic relations is the notion that the economic and the social occupy separate spaces and, indeed, that the political and ethical spheres also constitute discrete realms within modernity. Whilst this article will argue that the issue is always one of relative autonomy/connectedness between the economic and the social spheres, it will also suggest that law's power to frame issues has been highly influential in constructing a dominant corporate rationality based on a seemingly discrete economic domain. However, as the current financial crisis has demonstrated, when there is a shock to the economic system the seemingly natural boundaries between these spheres become exposed and the different rationalities that govern their operation are opened to general scrutiny and interrogation.² Hence, the ongoing public debate over bankers' remuneration, especially in relation to the "publicly owned" banks, illustrates the fault-line between the "economic sphere", which dictates that pay is determined solely pursuant to the rationality of the market, as against wider societal concerns that there is no equity in a situation where support for the banking sector is socialised but the resultant market remains seemingly largely impervious to wider accountability.³ Although the result of the subsequent formal regulatory analysis of the crisis would appear to be focused principally around a re-assessment of the internal analytical framework of the relevant sphere, as, for example, in the discrediting of the efficient market hypothesis, or the so-called "light touch regulation" model,⁴ it has on occasion touched more fundamentally upon the interrelationship between the different spheres as demonstrated by the chair of the Financial Services Authority Adair Turner's condemnation of "socially useless" banking practices.⁵

However, despite the literally mind-blowing figures involved in governments' support for banks and the financial sector across the globe, it is clear that, as Zygmunt Bauman has put it, "[t]he present 'credit crunch' does not signal the end of capitalism – only the exhaustion of the latest grazing pasture".⁶ Indeed, for many commentators the opportunity for wider reform has already largely been lost with a return to business much as usual with evidence of essentially the same business culture and rationality in operation.⁷ Nevertheless, the crisis has directly highlighted the social dislocation that is capable of emanating from the economic sphere and in this respect it combines with other critical contemporary discourses of capitalism,⁸ particularly surrounding the degradation of the environment by

2 See e.g. generally the essays in R Williams and L Elliot (eds), *Crisis and Recovery: Ethics, economics and justice* (Basingstoke: Palgrave Macmillan 2010) and specifically in business literature M E Porter and M R Kramer, "Creating shared value" (2011) 89 (issue 1/2) *Harvard Business Review* 62.

3 At the time of writing the latest settlement of this issue between the state and the banking sector in the UK is to be found in the disclosure requirements attached to the Project Merlin agreement.

4 See e.g. *The Turner Review: A regulatory response to the global banking crisis* (London: FSA 2009), especially paras 1.4 and 2.7.

5 For a nuanced and wide-ranging debate that included this point, see the roundtable discussion, "How to tame global finance", *Prospect Magazine* (issue 162), 27 August 2009.

6 Z Bauman, *Living on Borrowed Time* (Cambridge: Polity 2010), p. 17.

7 See e.g. "Once-zealous reformers in the grip of a Zen-like trance", *Financial Times*, 19 April 2011, p. 14, and Joseph Stiglitz's, "Afterword" in J Stiglitz, *Freefall: Free markets and the sinking of the global economy* (London: Penguin 2010). The text had originally concluded more optimistically with a chapter entitled, "Towards a new society" which, inter alia, expressly noted the role of economic rationality in reducing the responsibility of market actors, *ibid.* p. 281.

8 See e.g. Stiglitz, *Freefall*, n. 7 above; H-J Chang, *23 Things They Don't Tell You about Capitalism* (London: Allen Lane 2010); and D Harvey, *The Enigma of Capital and the Crises of Capitalism* (London: Profile 2010).

business activity (as all too vividly illustrated by the Deepwater Horizon explosion and oil spillage in the Gulf of Mexico in 2010) given the need for sustainable development.⁹

Taking this contemporary background as a jumping-off point, this article seeks to analyse the rise of a distinctive economic/business space in the context of the development of nineteenth-century capitalism with particular reference to the role and legal conceptualisation of the corporate entity. Utilising Karl Polanyi's analysis in *The Great Transformation* of the rise of the self-regulating market in the nineteenth century and his concepts of embeddedness and the double movement as a meta-framework, this article charts the way in which laissez-faire ideology and judicial formalism combined to generate a legal vision of the company as a black box divorced from its broader social, political and ethical environment. It will argue that the emergence of the limited liability company was of central importance in this story, enabling "the emancipation of business interests from all extant socio-cultural institutions of ethically inspired supervision and control . . . and consequently the immunization of business pursuits against all values other than the maximization of profit"¹⁰ but also ensuring that the regulatory implications of this intervention were largely ideologically suppressed.

By the first decade of the twenty-first century, the result of this governance vacuum, in the intensified market-based environment of a globalised and privatised economic realm,¹¹ had led commentators such as Joel Bakan to characterise the corporation with its market-based rationality as a psychopathic creature, an externalising machine only capable of acting in its own self-interest.¹² In the terms offered by Polanyi's theoretical framework, such aggrandisement on behalf of the economic realm, through the privileging of a self-regulating market rationality, is bound to result in a protective societal countermovement (which Polanyi terms the double movement), especially considering the growing power of the company during the twentieth century. It is suggested that a contemporary way of theorising this point is through the lens offered by way of the notion of reflexive, or second, modernity by which "[t]he continued, technical, economic, political and cultural development of global capitalism has gradually revolutionised its own social foundations".¹³ The ongoing process of "the modernization of modern society"¹⁴ is one that in particular erodes the givenness of the key naturalisations of first modernity such as the differentiation and separation of the political and economic spheres (as well as the commodification of nature) and thereby entails the "necessity of institutionalizing self-consciously fictive boundaries".¹⁵

9 See e.g. J Porritt, *Capitalism As if the World Matters* (London: Earthscan 2005) and T Jackson, *Prosperity without Growth: Economics for a finite planet* (London: Earthscan 2009).

10 Bauman, *Living on Borrowed Time*, n. 6 above, p. 61. For a discussion of the relationship of Bauman and Polanyi's work concerning the corrosive effects of a market society, see E Christodoulidis, "The politics of liquid modernity: Polanyi and Bauman on commodification and fluidity" in J Pribáň (ed.), *Liquid Society and its Law* (Aldershot: Ashgate 2007).

11 S Picciotto, "Liberalization and democratization: the forum and the hearth in the era of cosmopolitan post-industrial capitalism" (2000) 63 *Law & Contemporary Problems* 157.

12 Bakan, *The Corporation*, n. 1 above, especially chs 2 and 3.

13 U Beck, W Boss and C Lau, "The theory of reflexive modernization" (2003) 20 *Theory, Culture & Society* 1, p. 2. See also U Beck, A Giddens and S Lash, *Reflexive Modernization: Politics, tradition and aesthetics in the modern social order* (Cambridge: Polity 1994).

14 Beck et al., "Theory", n. 13 above.

15 Ibid. p. 22.

Companies,¹⁶ as key institutions in the globalised economy, are thus placed under increasing scrutiny and are required to legitimate their business operations not only by the aforementioned redrawing of boundaries (especially concerning the environment) but also by their increasing role as globalised players whereby they are required to negotiate the framing of the economic sphere in the light of the fissures generated by the interpenetration of local and global configurations of cultural, social and political spheres.¹⁷

In this context, it will be argued that s. 172 Companies Act 2006, which concerns the directors' core duty to promote the success of the company, has at the least an important symbolic effect in terms of the *legal* conceptualisation of the company. It does so by *explicitly* recognising for the first time (through the specification of a non-exhaustive list of statutory factors) that the substantive arena of ongoing corporate business activity within the company at board level is one which is *intrinsically* (and not by way of extrinsic independent regulation of the relevant substantive field e.g. health and safety or environmental law) legible to core company law and potentially within its regulatory reach.¹⁸ As such, a legal fissure is generated in the black box of corporate business practice whereby its internal economic rationalities are *formally* placed within a wider framing of a legal landscape which explicitly includes within its contours factors which traditionally would be considered as externalities, such as the environment.

The article will conclude by assessing briefly the scope and practical limitations to the reach of s. 172 Companies Act 2006 and the significance of Polanyi's scholarship on different conceptions of instituting the economic in the light of the opening quote from Bakan.

The Polanyian framework

Karl Polanyi, in his leading work, *The Great Transformation*,¹⁹ sought to chart the development of what he termed the idea of the self-regulating market, enshrining the principles of economic liberalism (viz. free-market exchange motivated by rational self-interest in conditions of scarcity), in the nineteenth century. Unusually, given that it is his most influential book, Polanyi wrote *The Great Transformation* at the beginning of his oeuvre of major works and, as he both hurried to finish it so as to influence the post-Second World War settlement and did not subsequently revisit it, there are inevitably inherent difficulties in the text.²⁰ Nevertheless, Polanyi's basic position is clearly illustrated by the following quote from *The Great Transformation*:

16 The transformation of the concept of the corporation under conditions of reflexive modernisation is explicitly raised as a research question in Beck et al., "Theory", n. 13 above, p. 29.

17 See, generally, R Robertson, "Glocalization: time-space and homogeneity-heterogeneity" in M Featherstone, S Lash and R Robertson (eds), *Global Modernities* (London: Sage 1995) and U Beck, *Power in the Global Age* (Cambridge: Polity 2005). In relation to companies specifically, see B Holzer and M P Sorensen, "Rethinking subpolitics: beyond the 'iron cage' of modern politics?" (2003) 20 *Theory, Culture & Society* 79, pp. 87–91.

18 Admittedly, once a company has become insolvent, insolvency law and especially the largely associated regime for the disqualification of directors have also some purchase here. See, further, T C Halliday and B G Carruthers, "The moral regulation of markets: professions, privatization and the English Insolvency Act 1986" (1996) 21 *Accounting, Organizations and Society* 371.

19 K Polanyi, *The Great Transformation* 2nd edn (Boston: Beacon Press 2001 [1944]).

20 For further discussion, see F Block and M R Somers, "Beyond the economic fallacy: the holistic social science of Karl Polanyi" in T Skocpol (ed), *Vision and Method in Historical Sociology* (Cambridge: CUP 1984); F Block, "Karl Polanyi and the writing of *The Great Transformation*" (2003) 32 *Theory and Society* 275; S Halperin, "Dynamics of conflict and system change: *The Great Transformation* revisited" (2004) 10 *European Journal of International Relations* 263; M Harvey, R Ramlogan and S Randles (eds), *Karl Polanyi: New perspectives on the place of the economy in society* (Manchester: Manchester UP 2007); and G Dale, *Karl Polanyi* (Cambridge: Polity 2010).

A self-regulating market demands nothing less than the institutional separation of society into an economic and a political sphere. Such a dichotomy is, in effect, merely the restatement, from the point of view of society as a whole, of the existence of a self-regulating market. It might be argued that the separateness of the two spheres obtains in every type of society at all times. Such an inference, however, would be based on a fallacy. True, no society can exist without a system of some kind which ensures order in the production and distribution of goods. But that does not imply the existence of separate economic institutions; normally, the economic order is merely a function of the social order . . . Nineteenth-century society, in which economic activity was isolated and imputed to a distinctive economic motive, was a singular departure.²¹

The basis of the self-regulating market lies in the production of commodities, which Polanyi defines as goods produced for sale on a market, whose exchange is determined by the price mechanism. However, for the market to be self-regulating, labour, land and money must also be commodified, but these elements in Polanyi's account are by definition fictitious commodities as they are not produced for sale on a market. Hence, in contrast to the economic liberals, in Polanyi's view, "[t]here was nothing natural about laissez-faire; free markets could never have come into being merely by allowing things to take their course . . . laissez-faire itself was enforced by the state"²² and thus, paradoxically, and in terms with much contemporary resonance in neoliberal discourse, "[t]he road to the free market was opened and kept open by an enormous increase in continuous, centrally organised and controlled interventionism".²³

Indeed, Polanyi's overall aim in writing *The Great Transformation* was to present a critical analysis of economic liberalism and to this end he made his viewpoint clear from the outset:

[o]ur thesis is that the idea of a self-adjusting market implied a stark utopia. Such an institution could not exist for any length of time without annihilating the human and natural substance of society: it would have physically destroyed man and transformed his surroundings into a wilderness.²⁴

In other words, the disembedding of the economy (a phrase that Polanyi does not use extensively in *The Great Transformation* itself) pursuant to the development of the self-regulating market was so threatening to the continued existence of society that:

[f]or a century the dynamics of modern society was governed by a double movement: the market expanded continuously but this movement was met by a countermovement checking the expansion in definite directions. Vital though such a countermovement was for the protection of society, in the last analysis it was incompatible with the self-regulation of the market, and thus with the market system itself.²⁵

As can be seen from the wider Polanyi literature, the above formulations have given rise to some considerable difficulties. One reading of the theoretical arrangement is that the self-regulating market does in fact result in a disembedding of the economy from the social system and that the double movement involves a political response by coalitions in society (notably not class-based in Polanyi's own framework, where, indeed, he also refers

21 Polanyi, *The Great Transformation*, n. 19 above, p.74.

22 Ibid. p. 145.

23 Ibid. p. 146.

24 Ibid. p. 3.

25 Ibid. p. 136.

to market society rather than capitalism) to re-embed economic processes in order to generate stability.²⁶

Alternatively, it is argued that such a reading would involve Polanyi in endorsing the very “economistic fallacy”²⁷ (i.e. that the particular institutional arrangement of economic processes in the nineteenth century based on market exchange was universal, comprising an essentialist natural sphere of activity otherwise autonomous from society) that he seeks to critique in economic liberalism. Accordingly, the embeddedness concept should instead refer to the wider problematic of the “shifting place of the economy in society”²⁸ and the double movement accordingly be configured as “a process of de- and re-regulation, ultimately reflecting a shifting relationship of polity and economy”.²⁹ As a result, “[b]oth the concept and the historical reality of modernity is one of relative differentiation of the economy *within* society”.³⁰

An extended analysis of Polanyi’s theoretical structure in this respect is given by Fred Block,³¹ who argues that during the course of writing *The Great Transformation* Polanyi underwent an epistemological break by which he moved away from his initial Marxist influences and came to reject the very ontological possibility of a self-regulating market operating as a discrete economic realm. This led to contradictions in the text particularly concerning the concept of embeddedness³² for, as Block points out:

[i]t is not logical for Polanyi to claim both that a system of self-regulating markets was impossible and that any effort to constrain or limit market self-regulation was doomed to produce a systemic crisis.³³

Block’s solution to the conundrum is to determine that, although Polanyi was not able to resolve the tension himself, he had in fact discovered the “idea of the always embedded market economy”³⁴ which challenges the concept of “an analytically autonomous economic sphere that has a logic and rationality of its own”³⁵ in favour of an acknowledgment of an always embedded market economy determined pursuant to ongoing constitutive processes deriving from “interaction among self-interested agents, the actions of the state, and forms of social regulation”.³⁶ In Block’s view, as the economic, the political and the social are thus intertwined, there is more scope for effective political engagement

26 See e.g. G Baum, *Karl Polanyi on Ethics and Economics* (Montreal and Kingston: McGill-Queen’s UP 1996), ch. 2 and pp. 50–2; D Harvey, *Spaces of Global Capitalism* (London and New York: Verso 2006), pp. 80–1; and A Buğra and K Ağartan (eds), *Reading Karl Polanyi for the Twenty-First Century: Market economy as a political project* (Basingstoke: Palgrave Macmillan 2007), especially ch. 9.

27 K Polanyi, *The Livelihood of Man*, H W Pearson (ed) (New York: Academic Press 1977), ch. 1.

28 For an elaboration of this argument see, Harvey et al., *Karl Polanyi*, n. 20 above, p. 4.

29 Harvey et al, *Karl Polanyi*, n. 20 above, p. 8.

30 Ibid. pp. 11–12.

31 Block, “Karl Polanyi”, n. 20 above.

32 This concept has led to some difficulties as it is not significantly developed by Polanyi and has been appropriated in a different context by economic sociologists. For a review of the literature, see G Krippner et al., “Polanyi symposium: a conversation on embeddedness” (2004) 2 *Socio-Economic Review* 109; G Krippner and A Alvarez, “Embeddedness and the intellectual projects of economic sociology” (2007) 33 *Annual Review of Sociology* 219; and K Gemici, “Karl Polanyi and the antinomies of embeddedness” (2008) 6 *Socio-Economic Review* 5.

33 Block, “Karl Polanyi”, n. 20 above, p. 287.

34 Ibid. p. 298.

35 Ibid. p. 298.

36 Ibid. p. 300.

to bring economic activity within democratic control and to allow for different societies to adopt different institutional arrangements.³⁷

In sum, Polanyi can be read as either producing an account of the rise of the self-regulating market as a distinctive radically autonomous economic sphere which acknowledges it as such and hence characterises the double movement as an attempt to re-embed it in society, or (as this writer would prefer) as providing a more iterative constitutive notion of the double movement as mediating the relation of the economic within the social and in which the state, in particular, has a central role. Unfortunately, Polanyi did not continue with his analysis of the market economy and its processes after completing *The Great Transformation* but instead moved to the study of archaic societies to examine how economic processes were instituted therein.³⁸ Accordingly, the above fault-line remains unresolved in his work, which nevertheless remains stimulating in interrogating the relationship of the economic and the social, and the market and the state, by breaking down the naturalisation of the economic and the market inherent in economic liberalism and situating them firmly within wider social processes.³⁹

Interestingly, a parallel dichotomy would seem to run through the development of corporate theory whereby there is again an unresolved tension between viewing the company as a creature created and disciplined by laissez-faire or regarding it as a creature of state-sponsored regulatory intervention and at root a political construct with wider social obligations.⁴⁰ Descriptive accounts of the nature of companies would generally associate the former approach with a property/contractual shareholder-focused model of the company and the latter with an entity-based stakeholder-orientated model. However, as David Millon has persuasively demonstrated, there is no necessary normative outcome flowing from the adoption of a particular theory of corporate personality and, indeed, the same theory may in fact be used to support divergent normative prescriptions.⁴¹ Nevertheless, Bakan's quote at the beginning of this article clearly reflects the dominant neoclassical economic approach to the company with its emphasis on the corporate operating rationality reflecting a distinctive market-based rationality.⁴²

37 For an example of such a pluralist approach, albeit on a different theoretical footing, see P A Hall and D Soskice (eds), *Varieties of Capitalism: The institutional foundations of comparative advantage* (Oxford: OUP 2001), ch. 1.

38 See e.g. K Polanyi, C M Arensberg and H W Pearson (eds), *Trade and Market in Early Empires* (New York: Free Press 1957) and Polanyi, *The Livelihood of Man*, n. 27 above. Harry Pearson's introduction to the latter book gives a good overview of Polanyi's theoretical position especially in relation to the formalist/substantivist debate in anthropology generated by his later work.

39 This has directly stimulated a wide range of critical approaches, see e.g. P Bourdieu, *The Social Structures of the Economy* (Cambridge: Polity 2005); S Green, *Good Value: Choosing a better life in business* (London: Penguin Books 2010); R Patel, *The Value of Nothing: How to reshape market society and redefine democracy* (London: Portobello Books 2009) and T Schroyer, *Beyond Western Economics: Remembering other economic cultures* (Abingdon: Routledge 2009).

40 See W T Allen, "Our schizophrenic conception of the business corporation" (1992) 14 *Cardozo Law Review* 261 and D Millon, "Communitarians, contractarians and the crisis in corporate law" (1993) 50 *Washington and Lee Law Review* 1373.

41 E.g. both contractarian and communitarian models are based on a de-reification of the corporate entity, see further D Millon, "The ambiguous significance of corporate personhood" (2001) 2 *Stanford Agora* 39.

42 Herbert Simon critiques both neoclassical and new institutional economic approaches to the firm on the basis of their focus on markets rather than organisations. For Simon, the reality of the latter changes the operating rationality of the firm to reflect primarily organisational goals rather than profit, see further H A Simon, "Organizations and markets" (1991) 5 *Journal of Economic Perspectives* 25.

The limited liability company and the creation of the economic domain

Polanyi makes no substantive reference to the concept of the company (other than to the fact that, by the time of the peak of the first period of globalisation, “around 1914, every part of the globe, all its inhabitants and yet unborn generations, physical persons as well as huge fictitious bodies called corporations, were comprised in [the market society]”)⁴³ or of limited liability in his analysis in *The Great Transformation*. However, the concept of corporate limited liability is one that other theorists have clearly linked to the generation of a distinctive economic domain in the nineteenth century.⁴⁴ In particular, Mary Poovey has explicitly linked the coming of the general availability of limited liability to a purging of the moral or theological components traditionally attaching to the economic domain by way of the removal, facilitated by limited liability, of the link between business failure and personal bankruptcy.⁴⁵ In more concrete terms, Paddy Ireland has analysed the development of limited liability as a political construct designed to further the interests of the *rentier* investor, who by definition is only interested in the economic return attaching to their shareholding and not in exercising a wider governance role in the company.⁴⁶

However, the traditional and dominant *legal* account of the emergence of the limited liability company in the nineteenth century emphasises the inevitability of that outcome due to the need to reach an economically efficient result: a process which the account expressly links with the unfettered freedom of economic action associated with *laissez-faire*.⁴⁷ As Ireland notes:

One of the effects of the dominance of this economically deterministic account, in which corporate law is seen as a simple expression of economic and technological imperatives, is the naturalization and de-politicisation of the corporate form and its key constituent elements: separate corporate personality, limited liability, shareholder primacy and so on. They are, in effect, placed beyond critical examination and evaluation, and a case is implicitly made for their global extension.⁴⁸

In the light of this comment, the way to viewing the abstraction of a distinct economic space free from moral values and subject to its own laws⁴⁹ as a result of *laissez-faire* is thereby opened, at least to retrospective examination, and this has indeed been a

43 Polanyi, *The Great Transformation*, n. 19 above, p. 136.

44 See e.g. M Poovey, *Making a Social Body: British cultural formation 1830–1864* (Chicago and London: University of Chicago Press 1995), especially ch. 1; D Loftus, “Capital and community: limited liability and attempts to democratise the market in mid-nineteenth-century England” (2002) 45 *Victorian Studies* 93; J Taylor, *Creating Capitalism: Joint-stock enterprise in British politics and culture, 1800–1870* (Woodbridge: Boydell Press 2006); P Ireland, “Limited liability, shareholder rights and the problem of corporate irresponsibility” (2010) 34 *Cambridge Journal of Economics* 837; and P Johnson, *Making the Market: Victorian origins of corporate capitalism* (Cambridge: CUP 2010), ch. 5.

45 Poovey, *Making a Social Body*, n. 44 above, p. 23. See also B Hilton, *The Age of Atonement: The influence of Evangelicalism on social and economic thought 1785–1865* (Oxford: Clarendon Press 1986), especially ch. 7; B Weiss, *The Hell of the English: Bankruptcy and the Victorian novel* (London and Toronto: Associated University Presses 1986); and S Wilson, “Law, morality and regulation” (2006) 46 *British Journal of Criminology* 1073.

46 Ireland, “Limited liability”, n. 44 above.

47 B C Hunt, *The Development of the Business Corporation in England 1800–1867* (Cambridge MA: Harvard UP 1936), ch. VI, especially pp. 116–17.

48 Ireland, “Limited liability”, n. 44 above, p. 838 (references omitted). On the universalist implications of the economically deterministic account, see H Hansmann and R R Kraakman, “The end of history for corporate law” (2001) 89 *Georgetown Law Journal* 439 and M Bradley, C A Schipani, A K Sundaram and J P Walsh, “The purposes and accountability of the corporation in contemporary society: corporate governance at a crossroads” (1999) 62 *Law and Contemporary Problems* 9.

49 Loftus, “Capital and Community”, n. 44 above, p. 94.

commonplace stance in UK company law scholarship.⁵⁰ The bigger mystery to something hinging on such an apparently obvious set of state regulatory interventions is how it was the case that contemporaries also used arguments of free trade and laissez-faire not only against limited liability but also in its favour.⁵¹ The Liberal MP Robert Lowe was a prime example, basing his arguments primarily on freedom of contract⁵² and the right of unlimited association (the latter being particularly associated with extending the benefits of investing in companies to the working classes).⁵³ In this context, shareholders were supposed to be politically active in companies, which were meant to be as self-governing little republics,⁵⁴ thereby enabling all to partake in the freedom of the market.⁵⁵

Additionally, drawing upon James Taylor's excellent analysis, it would appear that the commercial crisis of 1847 was generally perceived as having been caused by too great an extension of credit to unlimited companies. In this light, limited liability was thus conceived as making the market-based system more stable by forcing the creditors to conduct due diligence on the relevant company assets to which they alone had recourse in respect of the relevant business debts.⁵⁶ Consequently, some arguments, linking both creditors and shareholders' interests to broader laissez-faire ideals seeking to maximise participation in the market, could be made in the context of limited liability. However, this obviously obscures the clearly necessary legislative intervention required: a fact that supports Polanyi's aforementioned notion that laissez-faire would not arise naturally but had to be constructed by the state.⁵⁷ This paradox has caused considerable analytical confusion and as a matter of common sense it is clearly the case both that limited liability required state intervention and that it in effect ousted the market of classical economics,⁵⁸ but it is submitted that this can be placed within Polanyi's framework and seen as a construction of a distinctive economic rationality based upon the new unhindered economic space thereby created.

The black box: *Salomon*, legal formalism and market discipline

The key UK company law case of *Salomon v Salomon & Co. Ltd*⁵⁹ raised these issues in a clear way. The basic facts were that Mr Salomon transferred his existing business as leather

50 For a trenchant critique of this position, drawing upon the fact that companies rest upon hierarchy rather than markets and are not, in the case of large corporations at least, amenable to market discipline by Adam Smith's "invisible hand", see D Campbell, "Adam Smith, Farrar on company law and the economics of the corporation" (1990) 19 *Anglo-American Law Review* 185 and "Marxism, the market and corporate responsibility: a comment on Paddy Ireland" (2010) 31 *Adelaide Law Review* 229.

51 See Taylor, *Creating Capitalism*, n. 44 above, ch. 4, and S F Copp, "Limited liability and freedom" in S F Copp (ed.), *The Legal Foundations of Free Markets* (London: Institute of Economic Affairs 2008), p. 181.

52 For the influence of freedom of contract on corporate law, including limited liability, see P S Atiyah, *The Rise and Fall of the Freedom of Contract* (Oxford: Clarendon Press 1979), pp. 562–8.

53 See, generally, Loftus, "Capital and community", n. 44 above, p. 93.

54 For a contemporary appeal to reclaim the constitutional aspect of the company, see S Bottomley, *The Constitutional Corporation: Rethinking corporate governance* (Aldershot: Ashgate 2007).

55 See Hunt, *Development of the Business Corporation*, n. 47 above, p. 134.

56 See Taylor, *Creating Capitalism*, n. 44 above, pp. 17, 211.

57 For detailed constructivist accounts, see Taylor, *Creating Capitalism*, n. 44 above, and Johnson, *Making the Market*, n. 44 above.

58 See D Campbell and S Griffin, "Enron and the end of corporate governance" in S Macleod (ed.), *Global Governance and the Quest for Justice vol. II: Corporate governance* (Oxford: Hart 2006) and Porritt, *Capitalism*, n. 9 above, pp. 33–4.

59 *Broderip v Salomon* [1895] 2 Ch 323 (CA), and *A Salomon v A Salomon & Co. Ltd* [1897] AC 22 (HL). As befits the seminal case in UK company law, the literature is vast. For an excellent discussion of the legal significance of the case and historical background to the case respectively, see P Ireland, "The triumph of the company legal form, 1856–1914" and G R Rubin, "Aron Salomon and his circle" both in J Adams (ed.), *Essays for Clive Schmitthoff* (Abingdon: Professional Books 1983). For analysis and critique of the contemporary ramifications

merchant and boot manufacturer into a limited company specifically incorporated for the purpose. In order to meet the statutory requirements for incorporation at the time, which required a minimum of seven shareholders,⁶⁰ Mr Salomon was issued with one share and a further share was issued to each of six other members of his family. As part of the consideration for the business the company subsequently issued 20,000 fully paid shares to Mr Salomon and granted him a debenture. Unfortunately, the business did not prosper and the company was placed into liquidation, at which point it would not have been able to meet its liabilities to the trade creditors if it had paid Mr Salomon pursuant to his debenture.

All the judges in the lower courts were clearly unhappy with the fact that Mr Salomon was utilising a limited liability company structure in order to create, in the common parlance of the time, a “one-man company”. Not only was he thereby avoiding the personal responsibility for the business failure that would have attached to him as a sole trader or partner but he was also able to put himself in a better position than the trade creditors through the priority conferred by his debenture. The terminology used in their judgments reflected their views and clearly harked back to an older tradition of a moral economy where economic activity was freighted with wider moral and social obligation. Hence, in the context of the purpose of the incorporation and transaction as a whole, the company was characterised variously as a device, a fraud, a sham or by Lopes LJ as a “mere *nominis umbra*” or a “myth and a fiction”. Indeed, the judgment of Lopes LJ perhaps best reflects the overall judicial sentiment expressed in the case when he states that, “[t]o legalize such a transaction would be a scandal”⁶¹ and, accordingly, that “[i]t would be lamentable if a scheme like this could not be defeated”.⁶² In the light of this, unsurprisingly, though only by dint of very strained legal reasoning by which at first instance Mr Salomon was determined to be liable to indemnify the company as his legal agent and in the Court of Appeal to indemnify it as his trustee, the lower courts both found in favour of the liquidator.

The House of Lords, however, by contrast specifically affirmed Mr Salomon’s (who was by that time a pauper litigant) good character and unanimously applied a highly formalist approach to the construction of the relevant company law statutes in order to reverse the lower courts and vindicate his actions. As the company had been correctly incorporated there could be no question of any sham or fraud arising through the use of the corporate entity in the circumstances of the case. Hence, so long as the simple formalities required by the statute in order to facilitate incorporation were met, the courts would hitherto have no view, or at best a very limited oversight,⁶³ as to the economic rationalities employed in the use of the corporate form. As Lord Watson and Lord MacNaghten explicitly indicated, it was for the disappointed creditors to look after themselves⁶⁴ (however commercially unrealistic this may be) by undertaking sufficient due diligence, an approach which clearly resonated with the doctrine of freedom of contract.

[n. 59 cont.] of the case, see the essays in R Grantham and C Rickett (eds.), *Corporate Personality in the 20th Century* (Oxford: Hart 1998). See also, generally, (1999) 27 *Federal Law Review: Special Issue on Corporate Law: A Century of Salomon*.

60 Companies Act 1862, s. 6.

61 *Broderip* [1895] 2 Ch 323 at 341.

62 *Broderip* [1895] 2 Ch 323 at 340–1.

63 Through the development of the doctrine of lifting the veil, which remains very restrictively applied in the interests of commercial certainty, see *Adams v Cape Industries plc* [1990] Ch 433 (CA). The doctrine may be regarded as occupying the fault-line determining the relation of the economic sphere and the social sphere and as such raises profound issues which are highly problematic on a substantive basis for regulation by the common law.

64 *Salomon v Salomon* [1897] AC 22 at 40 and 53 respectively.

It is suggested that the combination of judicial formalism and the doctrine of limited liability evidenced in *Salomon* effectively combined to place the company in a position where its economic operating rationality in relation to its ongoing business activity was effectively insulated from wider social considerations and the old moral economy.⁶⁵

The emergent problem of corporate power

Such a vision of the company was, however, forged by the end of the nineteenth century when UK companies were largely still either close companies or family-owned.⁶⁶ During the course of the twentieth century, the size and complexity, as well as the power,⁶⁷ of the corporate enterprise grew both due to the rise of the multinational enterprise⁶⁸ and of the dispersed shareholder company,⁶⁹ each of which became an established feature of the business landscape by the 1960s.

The rise of large dispersed shareholder companies, leading to both the separation of ownership and control between shareholders and managers and the generation of significant corporate power, seemingly occurred much earlier in the United States than in the UK. In their classic work on the company published in 1932, *The Modern Corporation and Private Property*, Adolf Berle and Gardiner Means concluded that “the modern corporation may be regarded as not simply one form of social organization but potentially (if not yet actually) as the dominant institution of the modern world”⁷⁰, which, as such, merited comparison with the state itself. The idea of the large dispersed shareholder company as a traditional private institution owned by its shareholders was equally found wanting as shareholders were, in such circumstances, no more than passive property holders: in reality *rentiers* interested only in the dividend income stream from their investment. Accordingly, in Berle and Means’ ultimate view, the corporation was required to be treated as a political construct and to re-engage in the social sphere in order to act in the interest of all its stakeholders and the community.⁷¹

In an interesting symposium held in 1960, wherein the future of the corporation in 1985 was postulated by the various participants, Berle held to his view that the corporation’s power was to be the central problem and that its activities should be subject to extensive state economic planning, as otherwise (in language highly resonant of that of Polanyi) “the

65 See Johnson, *Making the Market*, n. 44 above, p. 164. For contemporary analysis to this effect, see Bakan, *The Corporation*, n. 1 above, ch. 3, and L E Mitchell, *Corporate Irresponsibility* (New Haven and London: Yale UP 2001), especially ch. 2.

66 See P L Cottrell, *Industrial Finance, 1830–1914* (London and New York: Methuen 1980).

67 For an analysis of corporate power, see e.g. J Parkinson, *Corporate Power and Responsibility* (Oxford: Clarendon Press 1993), ch. 1, and G Wilson, “The significance of corporate collective power to New Labour’s project: market values, corporate regulation and the possibilities for a progressive politics” (2005) 56 *NILQ* 492.

68 See G Jones, *Multinationals and Global Capitalism* (Oxford: OUP 2005), ch. 2, and P T Muchlinski, *Multinational Enterprises and the Law* 2nd edn (Oxford: OUP 2007), pp. 8–25.

69 See B R Cheffins, *Corporate Ownership and Control* (Oxford: OUP 2008). It has been suggested that the separation of ownership and control in the UK can be dated significantly earlier: see L Hannah, “The divorce of ownership from control from 1900 onwards: re-calibrating imagined global trends” (2007) 49 *Business History* 404. The issue is thoroughly debated in Cheffins, *Corporate Ownership and Control*, ch. 7.

70 A A Berle and G C Means, *The Modern Corporation and Private Property* revised edn (New York: Harcourt, Bruce & World Inc. 1968) (original edition New York: Macmillan 1932), p. 313.

71 See, generally, Berle’s “Preface” in Berle and Means, *The Modern Corporation*, n. 70 above; P Ireland, “Back to the future? Adolf Berle, the Law Commission and directors’ duties” (1999) 20 *Company Lawyer* 203, especially p. 209; and, exploring the same theme, D Campbell, “Why regulate the modern corporation? The failure of ‘market failure’” in J McCahery, S Picciotto and C Scott (eds), *Corporate Control and Accountability: Changing structures and the dynamics of regulation* (Oxford: Clarendon Press 1993).

fluctuations of the unplanned system are unbearably inhuman".⁷² In contrast, Friedrich Hayek took a radically different view and saw the basis of the free market as resting upon imposing one specific purpose on corporations: securing the highest return on their capital for their shareholders.⁷³ As history shows, it was Hayek's individualist vision that came into prominence with the proponents of the new neoclassical economic theory of the firm.

For this school of theorists, as Dalia Tsuk has ably demonstrated, *The Modern Corporation and Private Property* was no longer to be configured as a book concerned with corporate power and concomitant responsibility but as a book solely concerned with the separation of ownership and control. Furthermore, by employing microeconomics, even this ceased to be a problem of power, as the workings of the company were reduced to a series of private transactions between the various participants each assumed to be operating in a free market as a self-interested rational profit-maximiser and subject to the overall discipline imposed by the financial markets. Hence, Tsuk concludes that "[i]n their hands . . . [the separation of ownership from control] helped legitimate the idea that market competition and the search for profit were the only means of regulating corporate power".⁷⁴ Thus, for the proponents of the new economic theory of the firm, the company is conceived in very much the terms put forward by Bakan in the quote at the beginning of this article:

The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships . . . it makes little sense to try to distinguish those matters which are "inside" the firm (or any other organization) from those matters "outside" it. There is in a very real sense only a multitude of complex relationships (i.e. contracts) between the legal fiction (the firm) and the owners of labour, material and capital inputs and the consumers of output . . . the "behaviour" of the firm is like the behaviour of a market, i.e. the outcome of a complex equilibrium process.⁷⁵

Whilst the nexus of contracts position has been subject to extensive criticism,⁷⁶ and some subsequent modification, it nevertheless reflects the dominant contemporary model of theorising the company and leaves very little scope for opening the company to non-economic rationalities. As David Millon has noted, the reduction of the company to a legal fiction is "a potentially powerful rhetorical move because it denies that there is anything distinctive out there to regulate. All there are are natural people engaged in their own individualized wealth-maximizing activities."⁷⁷ In such circumstances, it is important to refuse to allow core corporate law to be marginalised by the essentialist naturalised market-based vision presented.⁷⁸

72 A A Berle, "The corporation in a democratic society" in M Anshen and G L Bach (eds), *Management and Corporations 1985: A symposium* (New York: McGraw Hill 1960), p. 82.

73 F A Hayek, "The corporation in a democratic society: in whose interest ought it and will it be run?" in Anshen and Bach (eds), *Management and Corporations*, n. 72 above, p. 100.

74 D Tsuk, "From pluralism to individualism: Berle and Means and 20th century American legal thought" (2005) 30 *Law & Social Inquiry* 179, p. 214. For an extensive analysis of the plurality of readings offered by Berle and Means' seminal text, see W W Bratton and M L Wachter, "Shareholder primacy's corporatist origins: Adolf Berle and *The Modern Corporation*" (2008–2009) 34 *Journal of Corporate Law* 99 and "Tracking Berle's footsteps: the trail of *The Modern Corporation's* last chapter" (2009–2010) 33 *Seattle University Law Review* 849.

75 M C Jensen and W Meckling, "Theory of the firm: managerial behaviour, agency costs and capital structure" (1976) 3 *Journal of Financial Economics* 305, p. 311.

76 See e.g. W W Bratton, "The 'nexus of contracts' corporation: a critical appraisal" (1989) 74 *Cornell Law Review* 407 and P Ireland, "Property and contract in contemporary corporate theory" (2003) 23 *LSJ* 453.

77 D Millon, "Personifying the body corporate" (1995) 2 *Graven Images* 116, p. 123.

78 As Kent Greenfield succinctly puts it, responding to this issue, "[c]orporate law matters": K Greenfield, "Reclaiming corporate law in a new gilded age" (2008) 2 *Harvard Law & Policy Review* 1.

In the UK, the nexus of contracts theory has not had the same impact,⁷⁹ but the corporatist tendency⁸⁰ that was developing prior to the advent of Mrs Thatcher's period in office equally never had a significant impact on the standard *legal* account of the company⁸¹ which, despite its deficiencies, has remained resolutely attached to its nineteenth-century shareholder-orientated contractual model.⁸²

Reflexive modernity and globalised players

As already discussed, the notion of reflexive modernity can be seen as a second phase of modernity that involves a fundamental reassessment of the basic concepts underlying the differentiated social subsystems of first modernity. In particular, for present purposes, Beck et al. highlight:

the political dynamic that is being set in motion by the perception of a global ecological crisis, which includes the acknowledgement of limited resources. These consequences of the instrumental relation to nature are making it more and more difficult to continue conceiving of nature as a neutral and infinite provider of resources. Nature is no longer perceived as an outside that can be adapted to one's purposes, but increasingly as part and parcel of society.⁸³

For transnational corporations, such a re-configuring has an evident potential for impact on their own economic rationalities and business operations. It also has considerable resonance with Polanyi's view as to the results of the attempted commodification of land necessary to enable the self-regulating market and the inevitable societal resistance to such commodification by way of the double movement. Equally, the accelerating pace of technological development is also likely under the conditions of reflexive modernity to generate risks which are not capable of being contained in the sphere of economic or expert rationalities and which will require wider deliberation beyond the company in order to "define them away" in such a manner as to preserve corporate legitimacy.⁸⁴

None of this should underestimate the undoubted power granted to multi-national companies by their ability to withdraw from a particular locale (which is one of the key factors in the undermining of the traditional territorially bound nation state) but, nevertheless, it does emphasise the relative autonomy of the economic sphere and suggests that economic rationality is amenable to wider cultural pressures. In this vein, the somewhat contested concept of globalisation (which can be configured in a largely conflictual homogenising manner by which the global is imposed on the local, or can be regarded in such a way that the two concepts have a mutually constitutive relationship involving

79 Though law and economics inspired approaches have generally become much more influential, see e.g. B R Cheffins, *Company Law: Theory, structure and operation* (Oxford: Clarendon Press 1997).

80 For an overview, see T Hadden, *Company Law and Capitalism* 2nd edn (London: Weidenfeld & Nicolson 1977), especially Part 3.

81 See P Ireland, "Financialization and Corporate Governance" (2008) 60 *NILQ* 1, p. 17.

82 See e.g. M Stokes, "Company law and legal theory" in W Twining (ed.), *Legal Theory and the Common Law* (Oxford: Basil Blackwell 1986) and S Worthington, "Shares and shareholders: property power and entitlement" (2001) 22 *Company Lawyer* 258 (Part 1), 307 (Part 2).

83 Beck et al., "Theory", n. 13 above, p. 7.

84 This has led Michael Power to view organisations as being turned "inside out" by the need for their internal control systems to attain legitimacy, see M Power, *Organized Uncertainty: Designing a world of risk management* (Oxford: OUP 2007), ch. 2. For a good overview of the concept of risk generally, see A Giddens, "Risk and responsibility" (1999) 62 *MLR* 1 and J Black, "The role of risk in regulatory processes" in R Baldwin, M Cave and M Lodge (eds.), *The Oxford Handbook of Regulation* (Oxford: OUP 2010).

elements of both convergence and divergence)⁸⁵ also problematises the conflicting spatial and cultural relationships between multinational companies' many practical sites of operation and sets them against such companies' need for centralised managerial direction.

The black box of the company would thus seem under pressure and in this context it is submitted that s. 172 Companies Act 2006 (comprising a key part of the new statutory statement of directors' duties)⁸⁶ might gain meaningful traction, not through direct substantive regulatory intervention but through an attempt to change the operating culture of business and thereby re-assert the social.

Significance of s. 172 Companies Act 2006

As is well known, the core duty placed upon a company director by s. 172 is to "act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole" having regard to a non-exhaustive list of stipulated matters (including, for example, the long-term consequences of the decision, the impact of the company's operations on the community and environment, and the desirability of the company maintaining a reputation for high standards of business conduct). It is also well known that the section proved to be the most contentious provision in both the Company Law Review (CLR) and debates in Parliament that preceded the enactment of the Companies Act 2006, as it sought to address the central issue of the scope of corporate law in this area by addressing the question as to in whose interests should companies be run. The traditional position of shareholder primacy whereby the directors' duty was to maximise the profit of the company on behalf of the shareholder interest had been the cause of some disquiet due to its perceived sub-optimal consequences in encouraging short-termism and failing to develop the cooperation and trust required of other stakeholders in the company.⁸⁷ A duty of shareholder primacy would clearly also have potential import for any environmentalists who were seeking to develop sustainability agendas within a capitalist framework and, indeed, prior to the enactment of the Companies Act 2006, Jonathon Porritt was quite explicit as to the need to have an appropriately formulated core fiduciary duty in order to render any such agenda feasible.⁸⁸

The CLR examined the underlying issues at length and consulted on the desirability of adopting either a pluralist or an enlightened shareholder value model. The pluralist model, by which all stakeholders would be owed a separate duty by the company, was ultimately rejected largely on grounds that with a multi-fiduciary duty there was no effective benchmark against which directors' decisions could be measured by the courts, thus rendering enforceability problematic. The enlightened shareholder value approach was thus adopted in s. 172 as an inclusive duty to promote the success of the company for the benefit of the members as a

85 Hence the use of the term, "glocalization". For a nuanced discussion, see R Robertson, "Glocalization", n. 17 above, and R Lee and E Stokes, "Environmental governance: reconnecting the global and local" (2009) 36 *Journal of Law and Society* 1.

86 For an overview of the codification of directors' duties, see M Arden, "Regulating the conduct of directors" (2010) 10 *Journal of Corporate Law Studies* 1.

87 For a stimulating series of essays giving an overview of this critique, see G Kelly, D Kelly and A Gamble (eds), *Stakeholder Capitalism* (Basingstoke: Macmillan 1997).

88 See Porritt, *Capitalism*, n. 9 above, pp. 100–5. Porritt's book makes general reference to S Hart, *Capitalism at the Crossroads: The unlimited business opportunities in solving the world's most difficult problems* (New Jersey: Wharton School Publishing 2005).

whole with the intention of fostering long-term co-operative and socially responsible approaches to corporate business activity so far as consistent with that end.⁸⁹

The Minister of State at the time, Margaret Hodge MP, published a set of ministerial statements made on the statutory statement of directors' duties during its journey through Parliament by way of guidance as to the intentions underlying the section. The accompanying introductory commentary by the Minister of State contained the following somewhat remarkable passage:

There are two ways of looking at the statutory statement of directors' duties: on the one hand it simply codifies the existing common law obligations of company directors; on the other – especially in section 172 . . . it marks a radical departure in articulating the connection between what is good for a company and what is good for society at large.⁹⁰

Although this is followed by a heading about continuity, it would seem clear that the minister's aspirations for the provision were captured by the text under the subsequent heading of change:

the new statutory statement captures a cultural change in the way in which companies conduct their business. Pursuing the interests of shareholders and embracing wider responsibilities are complementary purposes, not contradictory ones.⁹¹

As John Parkinson put it in relation to the CLR proposals, there was no intention by the CLR to change the law, but there was an intention to change behaviour by rendering the law more visible.⁹²

Previously, the common law had maintained a rather circumscribed approach which gave little guidance as to the factors governing the operation of directors' discretion within the context of business activity, as can be seen in the classic statement of the duty of loyalty given by Jonathan Parker J in *Regentcrest plc (in liq.) v Cohen*.⁹³

The duty imposed on directors to act bona fide in the interests of the company is a subjective one . . . The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company: still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind.

Although initial indications were seemingly that lawyers were generally neutral as to the potential substantive impact of s. 172,⁹⁴ and there has as yet been no substantive caselaw

89 For extensive references to the company law literature, including the theoretical background and genesis and development of s. 172, see J Parkinson, "Inclusive company law" in J De Lacy (ed.), *The Reform of United Kingdom Company Law* (London: Cavendish Press 2002) and A Keay, "Ascertaining the corporate objective: an entity maximisation and sustainability model" (2008) 71 *MLR* 663 and "The ultimate objective of the company and the enforcement of the entity maximisation and sustainability model" (2010) 10 *Journal of Corporate Law Studies* 35.

90 Department of Trade and Industry (DTI), *Companies Act 2006: Duties of company directors, ministerial statements* (London: DTI June 2007), p. 1.

91 *Ibid.* p. 2.

92 Parkinson, "Inclusive company law", n. 89 above, p. 54.

93 [2001] BCC 494 (HC).

94 A Keay and J Loughrey, "Legal practitioners, enlightened shareholder value and the shaping of corporate governance" (2008) 8 *Journal of Corporate Law Studies* 79.

reported on the point,⁹⁵ it is submitted that the section does indeed mark a “radical departure”. This is on account of the fact that for the first time it renders the economic rationality governing ongoing mainstream business decisions inside the company explicitly legible to the law and thereby breaks down the economic as the exclusive and hitherto largely inscrutable governing logic thereof.⁹⁶ Following the codification of directors’ duties in the Companies Act 2006, it would appear that Lady Justice Arden is also prepared to adopt the radical view in relation to the potential scope and reach of s. 172 as, in terms somewhat reminiscent of Polanyi, she has stated that, “[t]he Companies Act 2006 has struck a new balance between companies and society, and it is hoped that by that new balance companies and society may reconnect”.⁹⁷

The scope of law’s regulatory reach

However, the formal reach of the new duty would still seem to be limited by the fact that it is expressed as a subjective good faith evaluation on the part of the directors and that external disclosure of the relevant information to a wider audience is primarily limited to the requirements of the Business Review⁹⁸ and the UK Corporate Governance Code⁹⁹ (assuming that the company has a premium listing). Furthermore, pursuant to s. 170(1) Companies Act 2006, the duty is explicitly only owed to the company itself, in default rendering the provision principally enforceable by the shareholders (and not any wider stakeholders) pursuant to a derivative action.¹⁰⁰ Traditionally, this has not been a popular mechanism with UK institutional shareholders and, despite fears expressed during the passage of the legislation in Parliament, there is no evidence of a deluge of litigation by activist shareholders as yet.¹⁰¹

Present efforts to develop the new UK Stewardship Code¹⁰² provide a further soft law approach to the issue of institutional shareholder engagement. However, given that the code is voluntary (it is expressly acknowledged that it will not be applicable to institutions whose business model precludes a long-term approach to shareholding) and applies on a comply or explain basis, it is as yet unclear if it will have the capacity to overcome institutional shareholders’ own general market mentality in relation to the exercise of their

95 The area with the most potential for extended judicial consideration at present would seem to be in the context of the new statutory derivative action: see e.g. *Franbar Holdings Ltd v Patel* [2009] BCLC 1 (HC).

96 To this end the ill-fated Operating and Financial Review was an intrinsic and important part of the CLR governance package. Space does not permit a detailed discussion of the role of narrative reporting in the context of the issues discussed in this article (though the author is currently developing further work on this point), but excellent general accounts of the role of narrative reporting may be found in A Johnston, “After the OFR: can UK shareholder value still be enlightened?” (2006) 7 *European Business Organization Law Review* 817 and T Burns and J Paterson, “Gold plating, gold standard or base metal? Making sense of narrative reporting after the repeal of the Operating and Financial Review Regulations” (2007) 18 *ICCLR* 247.

97 Arden, “Conduct of directors”, n. 86 above.

98 Companies Act 2006, s. 417. See further, J Lowry, “The duty of loyalty of company directors: bridging the accountability gap through efficient disclosure” (2009) 68 *CLJ* 607. At the time of writing, the Coalition government is consulting on extending the requirements of narrative corporate reporting: Department for Business, Innovation and Skills (BIS), *The Future of Narrative Reporting: A consultation* (London: BIS August 2010).

99 Financial Reporting Council (FRC), *The UK Corporate Governance Code* (London: FRC June 2010).

100 Companies Act 2006, Part 11. See, generally, A Reisberg, *Derivative Actions and Corporate Governance* (Oxford: OUP 2007) and Keay, “The ultimate objective”, n. 89 above.

101 See Arden, “Conduct of directors”, n. 86 above, pp. 13–14, and BIS, *Evaluation of the Companies Act 2006*, vol. 1 (London: BIS August 2010), p. 162.

102 FRC, *The UK Stewardship Code* (London: FRC July 2010).

governance powers.¹⁰³ In specific terms, this has traditionally been manifested by a tendency for institutions to exit by selling in the market rather than undertaking the necessary research and committing the necessary time to exercise voice through engagement with senior management.¹⁰⁴

Nevertheless, wider enforcement issues aside, the potential effect of the disclosure requirements should not be underestimated as the information required to be divulged will be available to stakeholders generally as well as shareholders¹⁰⁵ and is likely to have traction in a culture where it is difficult to maintain the economic as a separate self-legitimising ground of expertise and activity due to the advent of subpolitics (by which issues are rendered political by reflexive modernity, e.g. the manufactured risk flowing from instrumentalist uses of natural resources, and the site of political activity is displaced from traditional formal political structures) in civil society.¹⁰⁶

Conclusion

Returning to the opening quotation from Bakan, it would seem that the company is, indeed, often regarded as an institutional reflection of laissez-faire both in the US and the UK. By theorising the corporate form in this way companies are “misleadingly conceived of as purely economic beings whose natural state is one free from all political interference”¹⁰⁷ and this encourages the adoption of a particular form of economic rationality. Such a rationality attached to limited liability and the power and reach of a large multinational group generates a “perfect externalizing machine”¹⁰⁸ capable of rendering significant social and environmental damage. It is suggested that Polanyi’s modelling of the rise of the self-regulating market and economic liberalism together with his concept of the double movement (as read in the light of theories of reflexive modernity) can help to reclaim the significance and visibility of the social and political spheres in economic processes.¹⁰⁹ In this context, s. 172 Companies Act 2006 has at least the potential to act as a legally mandated conduit of these broader ideas into the heart of corporate operating rationality and to thereby change the culture of business practice.¹¹⁰

103 For a sceptical view based, inter alia, on the increasing fragmentation of ownership of UK listed equities over the last 20 years, see B R Cheffins, “The Stewardship Code’s Achilles’ heel” (2010) 73 *MLR* 1004. At a deeper theoretical level Cheffins expresses concern that empirically it is far from clear that institutional shareholder involvement generates net benefits, a point which has led other commentators to argue for the elimination of shareholder rights in this context: see further L E Mitchell, “The legitimate rights of public shareholders” (2009) 66 *Washington & Lee Law Review* 1635.

104 The classic work on governance in this broad context is AO Hirschman, *Exit, Voice, and Loyalty: Responses to decline in firms, organizations, and states* (Cambridge, MA: Harvard UP 1970). For a specific application to corporate law, see J Parkinson, “The role of ‘exit’ and ‘voice’ in corporate governance” in S Sheikh and W Rees (eds), *Corporate Governance and Corporate Control* (London: Cavendish 1995).

105 For a far-ranging discussion of the potential and drawbacks of disclosure for developing corporate social responsibility and civil regulation, see J Parkinson, “Disclosure and corporate social and environmental performance: competitiveness and enterprise in a broader social frame” (2003) 3 *Journal of Corporate Law Studies* 3 and “Corporate governance and the regulation of business behaviour” in Macleod, *Global Governance*, n. 58 above.

106 See further U Beck, *The Reinvention of Politics* (Cambridge: Polity 1997), ch. 3, and Holzer and Sorensen, “Rethinking subpolitics”, n. 17 above.

107 Taylor, *Creating Capitalism*, n. 44 above, p.210.

108 Mitchell, *Corporate Irresponsibility*, n. 65 above, ch. 2.

109 For a recent collection of essays on this broad theme inspired by Polanyi’s work see C A Williams and P Zumbansen (eds), *The Embedded Firm* (Cambridge: Cambridge UP 2011).

110 Unfortunately the government’s initial review of the impact of s. 172 found no strong indications as to a change of culture, though it was conceded that it was still early days: see BIS, *Evaluation of the Companies Act 2006*, n. 101 above, p. 162.

