Corporate Governance and Resentment

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August 27, 2019

This is an early sketch. Please do not quote.

(FROM EGPA PAPER) Introduction

The study of corporate governance begins by convention with how internal relationships, especially (but not only) between managers and investors, relate to decision-making power. The UK’s Financial Reporting Council, repository for the UK Corporate Governance and Stewardship Codes,\(^\text{1}\) introduces its discussion to corporate governance and stewardship telling us that “high quality corporate governance contributes to long-term company performance. The UK has excellent standards of corporate governance, which makes the UK equity market attractive to new investment”.\(^\text{2}\) Reformed in the wake of the Financial Crisis and other events however, the 2018 edition of the Code itself is introduced as borne from the ethos that:


Companies do not exist in isolation. Successful and sustainable businesses underpin our economy and society by providing employment and creating prosperity. To succeed in the long-term, directors and the companies they lead need to build and maintain successful relationships with a wide range of stakeholders. These relationships will be successful and enduring if they are based on respect, trust and mutual benefit. Accordingly, a company’s culture should promote integrity and openness, value diversity and be responsive to the views of shareholders and wider stakeholder.³

“A successful company,” the Code goes on to say, “is led by an effective and entrepreneurial board, whose role is to promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society”.⁴

The German Corporate Governance Code on the other hand “highlights the obligation of the Management and Supervisory Boards to ensure the continued existence of the company and its sustainable value creation in line with the principles of the social market economy (the company’s best interests). These principles not only require compliance with the law, but also ethically sound and responsible behaviour.” The Code goes on to tell us that “institutional investors are of particular importance to companies. They are expected to exercise their ownership rights actively and responsibly, in accordance with transparent principles that also respect the concept of sustainability”⁵ and goes on from there to point to shareholders and the General Meeting as the cornerstone of German corporate governance.

As it is with policy-makers, so it is with textbook authors. Christine Mallin for instance starts her textbook by pointing to investors’ need to ensure they invest based on accurate information. Such information is difficult to verify and that many corporate collapses have taken place without prior indications in corporate reports that anything was wrong. For Mallin, however, “a lack of effective corporate governance meant that such collapses could occur; good corporate governance can help prevent such collapses happening again

³Financial Reporting Council, The UK Corporate Governance Code (n 1) 1.
⁴ibid 4.
and restore investor confidence”.⁶ Bob Tricker takes a broader view, pointing to corporate governance as a matter of internal power first and then of relationships with “the shareholders or members, as well as with the external auditors, regulators, and other legitimate stakeholders”.⁷ Jill Solomon likewise points to governance as a matter of ‘steering’, but setting that steering in the context of relationships with corporate governance’s meaning “ranging from narrow definitions that focus on companies and their shareholders, to broader definitions that include the accountability of companies to many other groups of people, or ‘stakeholders’”.⁸ And so on.

These accounts all share a focus on relationships. Specifically they focus on those relationships that are deemed crucial to the firm’s good operations. While the precise relationships vary, including within the same document, the key point is that corporate governance at heart works outwards from the firm and its board. They are in short accountability relationships, whereby managers give give accounts of their decisions to ‘some forum or other’ and that the members of that forum may ask questions, respond and impose consequences.⁹

Both corporate governance policy and corporate governance as a field of study start in other words from these accountability relationships. In its mainstream, finance-led manifestation, the corporate governance problem relates to control of management of giant public firms whose shareholder populations are vast, diffuse and expensive to coordinate. How is internal power to be rendered accountable, such approaches ask, such that shareholders can have appropriate levels of oversight of their investment? Corporate governance as a solution to this question involves information flowing from accountable boards outwards to investors. Assuming the system works shareholders act as a forum, albeit in an uncoordinated way through the market for shares. They respond to information by exercising their ‘voice’ in corporate strategy, backed up by their market power to ‘exit’ their shareholdings by selling.

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their shares.\textsuperscript{10} The loop is closed if share values drop, the firm is exposed to shareholders and directors lose their jobs.\textsuperscript{11} Alternatively responsive and accountable managers perform well and, motivated by incentive-oriented remuneration, they receive their just rewards. Demand for shares rise, benefiting investors alongside dividends accrued.

In this perspective especially accountability relationships are solidly \textit{private}. They are in essence an internal matter arising from the bargains two factors of production – capital and enterprise – strike in a market for investment. To the extent that corporate governance policy acts in the public interest it pursues that interest by promoting a conducive environment for the relationship between capital and enterprise to the sustained. More public benefits are fundamentally little more than a side-effect of good manager-shareholder relationships. Corporate governance sits firmly in the private sphere. Any social benefits are not corporate governance’s core purpose, no more than a well-regulated rabbit population motivates the fox.

Even much of the broader approaches extend only so far in terms of what counts as, to use Tricker’s words, legitimate stakeholders: namely to suppliers or labour or other inputs. Corporate governance in such views remains a question of the firm’s regulation of itself, with scholarship and debate focused on who ought to have a say over that self-regulation.

In this paper I approach accountability in corporate governance from a different starting point. Instead of asking how relationships might best be managed, accountability in corporate governance ought to be understood in the context of its ‘giant’ target firms\textsuperscript{12} and the environment within which they work. This environment is neither public nor private: it is something else, not quite between the two, but in an arena of global resource management that is both commercial and governmental at the same time.

The state, through law, plays a significant role in sustaining such an environment. In this context, accountability is as much about who is excluded

\textsuperscript{10}On exit and voice, see Albert Hirschman, \textit{Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States} (Harvard University Press 1970).


and in what ways as it about who is included. Corporate governance in other words ought to be understood as a kind of ‘exception’ in law, providing opportunities and insulating corporate organisations from the consequences of their conduct. It ought to be understood in the first instance as a means for regulating resentment – resentment being a relationship – and only then as a mechanisms regulating inside the forum. The study of corporate governance continues to be, as Moore and Petrin put it “essentially an enquiry into the causes and consequences of the allocation of decision-making power within large, socially significant business organisations”.13 But the study of corporate governance ought to be seen as a study in public administration. It relates to the design and sustenance of zones and logics of action and in pursuit of this, in the insulation of corporate organisations from democratic control.

The paper is structured as follows: after a background discussion, I discuss the idea of an ‘exception’ and how it might apply in the context of corporate governance. Then I give an account of giant firms and their unique properties. I go on from there to discuss corporate governance regulation as generally conceived, including recent work on board accountability in corporate governance. I am especially interested here in Marc Moore’s work on relational accountability.14 Finally, fourth, I turn to accountability in corporate governance as sustaining the kind of exceptions that allow giant firms to sustain themselves beyond specific political and social norms. Accountability, importantly, is composed of rituals of internal control that also act – actively act – towards its social opposite.

Spaces of Corporate Governance

In her discussion of export processing, free trade and other special economic zones, Keller Easterling highlights the way that they sit both geographically within and legally beyond sovereign territory. They are more than simple sites for export-oriented production but are set outside the legal norms that

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13Marc T Moore and Martin Petrin, Corporate Governance: Law, Regulation and Theory (Routledge 2017) 4: emphasis in original.
characterise everyday life. “A country may have strict laws,” she writes, “regulating labour, the environment, sanitation, health and safety, or human rights, and it may be a signatory to global compacts. Yet the zone authority frequently has the power, in individual deals, to grant exception from any law”.15 These need not be geographically separate spaces. At times indeed “the national capital and the zone have become the same entity, making the zone itself the seat of governance from which it is selectively exempt”.16

Sitting “outside the juridical order and general rule”17 such zones do not represent the emergency suspension of law as posited by Carl Schmitt but, as Aihwa Ong has it, the selective, purposeful “positive” exception, that “create opportunities, usually for a minority, who enjoy political accommodations and conditions not granted to the rest of the population”.18 Ong’s exception may be a process of inclusion, for her drawing populations into ‘neoliberal’ norms and calculations. More broadly it involves the development of spaces where otherwise ‘ordinary’ norms do not apply. Regarding special economic zones even, this may involve less an unbundling of sovereignty from physical territory as “a flexibility of state practices.” Custom-build geographies are constructed, creating interlocking spaces, each with their own flexibilities, maximising economic advantages for insiders whilst maintaining close state control.19

The rise of the limited liability company has been described in analogous terms. The corporate form is at its heart founded on separate legal personhood and the limitation of shareholder’s liabilities for corporate losses. Companies can sign contracts on their own account, not those of their managers or shareholders. Losses may not ordinarily be recovered from shareholders.20 These are neither natural nor necessary outworkings of industrial capitalism. Instead they involved a major intervention, through law, in the

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15 Keller Easterling, Extrastatecraft : The Power of Infrastructure Space (Verso Books 2014) 34.
16 ibid 51.
17 Aihwa Ong, Neoliberalism as Exception: Mutations in Citizenship and Sovereignty (Duke University Press 2006) 5.
18 See Ong, Neoliberalism as Exception (n 17) 102-4; also Aihwa Ong, “Powers of Sovereignty” (2012) 2012(64) Focaal 24 ⟨http://berghahnjournals.com/view/journals/focaal/2012/64/focaal640103.xml⟩ accessed 9 August 2019.
19 For a good account, see Jean-Philippe Robé, “The Legal Structure of the Firm” (2011) 1(1) Accounting, Economics, and Law 1.
economy’s workings. They reordered the ownership of risk, created a (for some) constructive distance between management, capital and labour, and established financial power within productive processes.\textsuperscript{21} The 19th Century developments behind the company’s origins highlight the degree to which these characteristics were not inevitable.\textsuperscript{22} Limited liability was not being contracted for at any scale: it required law to make it real.

The company was in other words itself a legal exception, a zone of sovereignty over property taking an extraordinary form. Company law originated in regard to quasi-governmental organisations – even of ‘company states’.\textsuperscript{23} When it became more freely available as a business form, it became so under conditions such that “although the huge legal privilege of limited liability had been granted, the exponents of laissez-faire were very unwilling that anything substantial should be conceded in return for it, in the shape of accountability, disclosure provisions or particular governance structures to ensure that companies acted in the public interest”.\textsuperscript{24} Instead of a geographical zone, the company’s separation from the human contributors of capital and enterprise allowed those contributors to accrue value onto themselves but transfer risks and costs to others, with suppliers of labour being the most vulnerable to losses as unsecured creditors.

Over time this ‘exception’ has not only become increasingly available to investors and entrepreneurs: its privileges landed far more in favour of those who operated \textit{at scale} than it did for smaller operators. This in turn has re-configured links between – as Rahmatian has it – property and sovereignty.\textsuperscript{25}


\textsuperscript{24}Gamble and Kelly (n 22) 34.

\textsuperscript{25}Andreas Rahmatian, “Indirect Sovereignty through Property Rights” (2017) 7(2) Notre Dame Journal of International & Comparative Law 58, 85.
The corporate economy is not founded on regulation imposed on already-existing entities: the subjects of regulation were a product of law itself. A transfer of power away from the state to both the internal process of giant corporate entities and to more private arbitration processes, and to ‘private’ commercial law.

This does not necessarily involve a diminution of state power, but the construction of new spaces where specific kinds of opportunities sit and norms apply.

Ong argues for a more expansive sense of the exception, beyond the exception as Schmitt and others proposed. Schmitt’s exception involved the suspension of law by – or revealing – an ultimate authority. Ong’s “positive exception” creates a zone of privilege shorn of the day-to-day force of law. Her discussion of special economic zones in China and other Asian jurisdictions highlights the way that they “carve up their own territory so they can better engage and compete in global markets”, liberalising in one area, maintaining authoritarian structures in others and also leaving space for limited political flexibility under a ‘one country, two systems’ rule. Patently however, the exception as she sees it is not simply territorial: it is not simply a matter of physical space. Or rather, it involves administrative innovations that are then applied to physical space.

Ong’s sense of the exception is interesting in two ways. First, she highlights the ways in which varying the parameters of law, in her case over physical territories, allows for constructive and creative uses of power. State power is enhanced in some areas but set aside or limited where corporate conduct requires it to be so. It points to such spaces as negotiated but also as explicitly designed to vary democratic control. In China that control at times aspired to created a limited level of greater democracy in exceptional territories. In other circumstances, through bilateral treaties, commercial contracts, waiving of unionisation rights etc, such zones aim to set democratic power aside. Second, such exceptions allow states to “respond effectively to the challenges

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26 Rahmatian (n 25).
28 Ong, *Neoliberalism as Exception* (n 17); Ong, “Powers of Sovereignty” (n 19) 19.
29 Ong, *Neoliberalism as Exception* (n 17) 99.
30 How flexible such a system might be is, at the time of writing, being put to the test in Hong Kong.
31 Easterling (n 15) 34.
of global markets"\textsuperscript{32} without fully opening their territories up. As such, they draw global forces into more manageable spaces. It is important to note that this does not imply unilateral state power over such exceptions: they are negotiated and tailored for specific requirements, both of corporations and of states.

Following Ong’s line, we can see the environment within which giant firms operate as such an exception. We can see it as the active construction, not only through the making of law and regulation but through law and regulation’s being put to work, of spaces within which giant firms can pursue their specific activities. These activities are not commercial alone. They are pursued in collaborations and geopolitical contexts etc that set them well outside the ‘merely’ commercial. Their management of contracts and property both exploits the corporate form in ways derived from their scale and\textsuperscript{33} and from their relationships with states.\textsuperscript{34}

They also negotiate law in ‘creative’ ways to the extent that they become as much authors of law as they are its subjects.\textsuperscript{35} All this includes their leveraging different tax costs and regulatory standards worldwide. These differentials and the arbitrage they promote were made in partnership with corporations, not ‘found’. In other areas, corporations brought their influence to bear on trade agreements that tilt competition in consumption markets in their favour to little if any social benefit.\textsuperscript{36}

The exception metaphor continues to work well here because the zones within

\textsuperscript{32}Ong, \textit{Neoliberalism as Exception} (n 17) 98.
\textsuperscript{33}Janet Dine, \textit{The Governance of Corporate Groups} (Cambridge University Press 2000).
\textsuperscript{34}Rahmatian (n 25).
which giant firms work require a suspension of otherwise core market norms. The manner in which the corporate form is used as a distancing device for management of corporate liabilities can only take place in the context of a constructive fiction not only around separate corporate personhood but around what motivates the construction of corporate group structures.\textsuperscript{37} Individual sectors see states and corporations working closely together towards shared ends. Close alignments of geopolitics and commerce around the planning, routing and protection of global oil flows dictate the systemic importance of global oil firms for instance, both on a global scale and as ‘national champions’ aligned with specific states.\textsuperscript{38}

The character of exception may vary between sectors and firms, but certain characteristics are shared. These include insulation from market forces negotiated from corporations’ and states’ shared structural positions; deep collaborative and mutually fruitful networks of state and corporate actors; ‘revolving doors’ for recruitment across corporate, regulatory and political elites;\textsuperscript{39} and social and cultural domination.\textsuperscript{40} These coalesce to generate a sense of ‘being outside and yet belonging’ for giant firms,\textsuperscript{41} albeit instead of a Schmittian sovereign ‘deciding on the exception’, it is a function of the

\textsuperscript{37}On which see Tom Hadden, “Accountable Governance in Corporate Groups: The Interrelationship of Law and Accounting” (2012) 22(2) Australian Accounting Review 117; Dine (n 33).

\textsuperscript{38}James Marriott and Mika Minio-Paluello, \textit{The Oil Road: Journeys from the Caspian Sea to the City of London} (Verso 2012).


\textsuperscript{41}Agamben (n 27) 35.
more complex ‘powers of sovereignty’ contained in corporate capitalism.\footnote{Ong, “Powers of Sovereignty” (n 19)}

**Giant firms and their zones of action**

The exception metaphor highlights the way that law can create and sustain zones of action within which specific activities may take place. We ought to remember however that these activities are not ‘simply’ commercial in the sense of wholly private profit-oriented activities. They involve deep collaborative relationships between state and corporate actors, have significant social impacts and are sustained in the context of and/or require substantial infrastructural innovation.

In this section I give a brief overview of giant firms’ characteristics before moving on to discuss corporate governance itself. Applying the metaphor to corporate governance is helpful because it points to corporate governance’s role in sustaining the environment within which giant firms work. Giant firms are not simply large: they have specific characteristics, albeit varying across sectors, that have a bearing on not only on their impacts where they operate – through resource extraction, financialisation, infrastructure management etc – but through their relationships with law and regulation.

A conventional image of business is that it is defined by market forces. Entrepreneurs sell products into markets at specific prices that cover their costs and leave a surplus. ‘First-movers’ derive special benefits because they can demand advantageous prices for their goods if demand is there. Such advantages don’t last for long. Competitors will likely enter the market if profits are to be made and so drive prices down. Demand and supply will ultimately reach some kind of equilibrium point where producers are willing to sell specific numbers of goods at a price point, matched with a population of consumers willing to pay for the goods at the selling price. If there are more consumers than available goods they will bid prices up and draw new producers into the market. If prices drop below a certain point producers will leave the market and prices approach the equilibrium point again.

This picture, familiar to Smith and Ricardo, does not accurately portray much of the modern economy however. Our economies are dominated by giant firms that do not operate in markets like smaller businesses do. In this
section I discuss their social presence. This makes for a better starting point
in a discussion of corporate governance, even though corporate governance
itself targets their internal structures. A giant firm has two characteristics,
as defined by Colin Crouch. It is, first, “sufficiently dominant within its own
markets to be able to influence the terms of those markets by its own actions,
using its organisational capacity to develop market dominating strategies”.43
It is also transnational in scale. For Crouch this means that they can ‘regime
shop’ and so can “direct their investments to countries where they find the
most favorable rules.” They also operate transnationally in itself, in a space
“where governmental actors are (compared with the national level within
stable nation states) relatively weak, and corporations therefore have more
autonomy”.44

As such these firms, populating the FTSE 100 most capitalised firms on
the London Stock Exchange, are a specific kind of market-maker. Corporate
governance regulation, in the UK and in similar ways in other jurisdictions,45
explicitly targets such firms. Corporate governance is designed around firms
that belong to distinct kinds of commercial activity.

Internally giant firms are often – although not always – characterised by the
‘separation of ownership and control’ to use the term coined by Berle and
Means.46 This means that their shares are owned by a large and diffuse
population of investors but controlled by a cadre of professional managers
who themselves do not possess substantial ‘ownership’ stakes.47 The tens-
ions produced by the distinct interests of shareholders – to generate returns
on their shares – and managers – to accrue benefits to themselves – is seen
as the core problem that corporate governance ought to solve. Introducing
checks and balances into the manager-shareholder relationship, mediated by
an independent board, aims to solve these internal problems by producing
accountability into the manager-shareholder relationship, something that in

43 Crouch, The Strange Non-Death of Neo-Liberalism (n 12) 49; also remarks in Adolf A
44 Crouch, “The Global Firm: The Problem of Giant Firms in Democratic Capitalism”
(n 12) 155-6.
45 See for instance Jean J Du Plessis and others, German Corporate Governance in
46 Adolf A Berle and Gardiner Means, The Modern Corporation and Private Property
(Macmillan 1932).
47 Note, it would be a mistake to say that ownership of shares this is synonymous with
ownership of the business itself. On which for instance see Robé (n 20).
turn promises greater corporate performance, more transparency, more managerial effectiveness, more robust shareholder democracy and the like.48

Such promises are however only part of what corporate governance regulation holds out for itself. Multiple corporate governance reports also provide social grounds for regulating corporate governance: that – by implication – corporate capitalism’s legitimacy is threatened by corporate failings and – explicitly – with more robust and transparent internal controls, that legitimacy can be restored. I return to this below but for the moment this aspect to corporate governance narratives does point to the impact of corporate failings among giant firms. They are not simple business collapses, or even at times simple cases of wrongdoing: they have a twofold impact.

Impact and scale

In the first place, their impact is a function of scale: more people – pensioners, workers, suppliers – are harmed by big corporate collapses and more people both globally and locally suffer the myriad environmental impacts of big corporate activities. Comparatively few businesses are market-makers as described by Crouch but they play a dominant role in 21st Century capitalism. The UK had for example 5.7 million businesses registered at the start of 2017. Of these only 7,500 had 250 or more employees. Despite their representing only 0.1% of the total population of individual businesses, these large firms employed 40% of business workers. With a turnover of £1.9tn they represented 48% of the private economy’s total turnover.49 The subset of that we might class as ‘giant’ firms sit at the largest end of even this subset of the business population. They play a dominant role in the economy. Those few that sit in the FTSE100 represent roughly 80% of the stock market’s capitalisation.

Firms at the small business end of the spectrum are often ‘quasi-partnerships’ with company law giving sole shareholder-manager or similar small enterprises legal form. They are capitalised by banks in the main. Banks routinely


manage risks through loan conditions in the form of personal guarantees that dilute limited liability, at least where finance capital is concerned.\textsuperscript{50} Giant firms operate on the other hand through a multiplicity of corporate vehicles, designed not as ‘wrappers’ for the whole business, but as tools in the management of business functions and processes. Giant firms are especially adept at using corporate vehicles to mitigate tax, tort and other liabilities\textsuperscript{51} and at creating complex ‘vertical’ and ‘horizontal’ integrations through value and supply chains.\textsuperscript{52} So, whereas small business access to limited liability is in fact more restricted than a reading of company law might suggest,\textsuperscript{53} giant firms exploit limited liabilities to a far greater degree.

**Giant firms, exception and the state**

There is a second element to the impact though. Giant firm domination is not solely a matter of employment or turnover and their social power is not simply a function of market reach. They often relate to states in unique ways that go beyond their status as sources of employment, taxation or services. Firms and states interact in conditions of what Braithwaite calls ‘regulatory capitalism’, whereby states and firms relate in mutually beneficial ways. To take one example, such a transactional relationship might involve corporate


\textsuperscript{51}Dine (n 33); Hadden, “Accountable Governance in Corporate Groups” (n 37); Tom Hadden, “Regulation of Corporate Groups in Australia, The” (1992) 15 University of New South Wales Law Journal 61.


\textsuperscript{53}Absent fraud, limited liability is still an advantage for small business owners when it comes to debts owed to tax authorities or suppliers.
actors being co-opted in compliance or tax collection activities.\(^{54}\) In these conditions states’ regulatory capacities interact with firms and a plurality of other sources of governance and “separations of powers within polities have become more varied, with more private-public hybridity.”\(^ {55}\)

Such relationships are more than regulatory however. They involve more than a simple expansion in transactional relationships between firms and states or even an expansion in sources of governance however. Giant firms often exist as a function of spaces carved out, including through statehood. Many inherited their global structures and administrative character directly from states. Others flourish in the spaces managed by ‘hub and spoke’ law-making and regulatory networks. Diffuse though they are these networks are also sources of coercive power for specific states and often facilitate corporate centralisation.

Globalisation is, in other words, not characterised by fragmentation and increasingly diffuse markets, but by the further dominance of specific states and giant firms. The global ‘production structures’ – “the sum of all the arrangements determining what is produced, by whom and for whom, by what method and on what terms”\(^ {56}\) – sit within institution whose logics are as much administrative and politics as they are market-based. Giant firms sit at the heart of these structures alongside specific states. These structures are part of the relationship between such firms and states. Not states in general, but key nodes in global structures.\(^ {57}\) Giant firms are as such less islands of administrative order in a sea of market chaos than they are interlinked parts of an ordered and in part consciously structured network. And while some states dominate, and may even come to ‘weaponise’ their position in economic and financial networks,\(^ {58}\) for the most part they do so

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\(^{55}\) ibid 27.


\(^{58}\) On which see Henry Farrell and Abraham L Newman, “Weaponized Interdependence:
in ways that promote champion firms and sustain the spaces within which those firms function.

Such firms relate to states not so much in conditions of symbiosis than as the fruit of an emerging logic regarding how a society’s resources might be administered. Such logics “provide individuals with vocabularies of motives and with a sense of self. They generate not only that which is valued, but the rules by which it is calibrated and distributed. Institutions set the limits on the very nature of rationality and, by implication, of individuality.”

Giant firms sit perfectly on the boundaries of market, political and administrative institutions, something that their managers and beneficiaries have exploited with great success. It is wrong to situate them in ‘markets’ alone: they are political, bureaucratic and market actors.

In order to think about this, it is worth considering many giant firms’ origins. Some are inheritors of global trading and commercial networks developed under empire. Or they are utilities managing natural monopolies that were bequeathed to them as public infrastructure was privatised. In the case of United Kingdom, public utilities came in a number of flavours depending on how close they were to political control. In most cases they were corporatised – business functions were wrapped in corporate structures and given significant independence as ‘Morrisonian’ companies – prior to privatisation with the moment of privatisation involving a relatively ‘simple’ distribution of shares from the state’s to private hands.

In other cases, for instance in the ex-Soviet Union, agencies were transferred wholesale, leaving them with enormous power and political influence. Some are literally ex-state ministries and agencies that were converted into PLCs.

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No wonder that ostensibly private entities continued to avail of mutually advantageous political relationships.\textsuperscript{61} It would be wrong to say that they are subject to close state control so much as that they and states exist in conditions of \textit{mutual} control. Firms may express these relationships through majority state shareholdings and formal or informal representation on corporate boards. This has at times caused controversy as firms sought to attract capital and reputational advantages through flotations in London or New York.\textsuperscript{62} See for instance the ENRC’s IPO. ENRC, a Khazakh extraction firm with close links to the state and oligarchical control floated on the London Stock Exchange in 2007 and was delisted in 2013, all the while amidst controversy over its structures, political ties and the risks to (and opportunities for) investors inherent in those ties.\textsuperscript{63}

Other utilities have used their natural monopoly advantage to build the capital, expertise, and political relationships required to become global leaders in their specific fields. Their competitive advantage comes not only from scale or ‘value propositions’ (if it does at all). It comes from the political and administrative networks they cultivate: their business is privatisation itself.\textsuperscript{64} Their ‘markets’ are not populated by large numbers of consumers discovering equilibrium prices but by small and tightly-knit networks of technocratic managers and their political clients. Relationships are key.

Other firms, ostensibly less entwined with states, seemingly act as they do in private markets for financial services or as providers of online infrastructures or in retail. Even then they rely on active relationships with law and regulation that are characteristic of giant firms. Very often they generate returns from an ‘active absence’ of law. They actively cultivate and lobby for law-making complexity or ‘deregulation’ that clears the way for their operations.

\textsuperscript{61} Although for some those relationships were far from congenial. On Yukos’s ‘renationalisation’ see Curtis J Milhaupt and Katharina Pistor, \textit{Law & Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World} (University Of Chicago Press 2008) 149ff.


They advocate for regulatory barriers to market entry as part of their actively managing the markets into which they sell their products. Alternatively they carve a space for their activities in part by supplying new opportunities for states to exercise their own powers, perhaps through innovations in surveillance and intelligence or by providing services with ‘commercially sensitive’ contracting that allow states to evade their own rights obligations.

Financial services firms have or instance consolidated into global behemoths in the wake of deregulation. For some giant financial services firms add value for wholesale and retail consumers by matching holders of capital with those seeking investment. For others they extract value by placing themselves between capital owners and those in need of capital, extracting a fee for each transaction from each side. They can only do so in the context of congenial competition, antitrust and consumer law. When market for forces do bite, as happened for instance in the global financial crisis, they exploit political clout and their sheer size to ensure that they are deemed ‘too big to fail’, are insulated from market forces and see their losses nationalised.

New technology companies have also created new markets for search or by developing new spaces for people’s social interactions. Or, as in the case of Apple, they have designed material artefacts that, acting as interfaces for people’s online lives, have played a significant role in generating demand both for online services, for new styles of communication and, in a lucrative loop of demand, for new artefacts aimed at enabling the consumption to take place. American anti-trust regulations especially, directed as they are at prices and efficiencies for consumers, have facilitated growth and consolidation of giant firms with almost complete dominance over social networks and communication online. And while such firms have received a less friendly reception in Europe, they benefit from friendly tax regimes and first-mover advantages. Rather than seeing those first-mover advantages fade as competitors move in, ‘platform’ monopolies exploit network effects to lock their consumers in and either buy competitors out or otherwise deny them space to grow. And they impose financial costs, not on their consumers but on their suppliers, whether through driving down prices or by requiring lock-in.

67 See Srnicek (n 40); Langley and Leyshon (n 40).
Giant firms in general benefit from and are characterized by a close and intricate relationship with the state. Sometimes they access highly lucrative contracts, to be awarded not in open markets, but under conditions of very limited competition. Elsewhere, requirements for stability and the very fact that suppliers are often staffed by ex-public officials means that competition is limited or removed entirely by long-term contracting and a pro-incumbent bias when it comes to renewal. Sometimes their relationship involves a shaping of regulation and non-regulation to their own advantage, although they may come to occupy the spaces created by regulation and non-regulation, rather than simply carving them out through captured law-making. The relationship between corporations and the state is, in short, reciprocal, not conflictual. It is intimate.

While giant firms may not quite have the status of ‘company-states’ of previous globalisations, they are governmental in their profound social impact. Natural monopolies continue to extract monopoly rents from consumers. Financial services firms have been successful first in passing the costs of the financial crisis onto taxpayers and then in hoovering up the fiscal injection that followed, bringing further benefits to themselves and arguably delaying the recovery in the European and American economies, and prolonging the crisis’s impact on those countries’ citizens. And we are only beginning to understand the social and political impact that platform monopolies are having on Western societies.

All of these involve an administrative ordering of societies far beyond the day-to-day administration of commerce. James Scott’s ‘high modernism’ in administrative statehood might not describe the far more limited and less ambitious remits of individual giant firms. Privatised utilities can have profound social effects, including in terms of how people think about say, water as a scarce resource. Financial services firms have successfully recast popular attitudes to debt in the English-speaking north-Atlantic economies, in doing so – and in partnership with regulatory authorities – sustaining

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70 Braithwaite (n 54) Especially ch. 1.

71 Stern (n 23).

growth for a time despite wage suppression for many. Technology firms have reordered people’s conceptions of privacy. They lack the holistic ambitions of high modern states but nonetheless, in bespoke and localised ways are driven by a belief in and optimism about their particular styles of technological knowledge, rational design and social control.  

They exploit very conventional metrics at times, but in expanded ways. Consumption of water requires large-scale and often state-led expansions in metering and billing and the utilisation of accounting concepts in order to create a space for corporate action. And new wholesale and trading markets were constructed, whether in mediating between water supply and, say, energy generation or in wholesale electricity trading. This did not involve complete extension of productive energy into hitherto untouched areas of social life. After all utilities had been around since the start of the 20th Century. What did happen is that production processes were reconfigured over time and to various extents as corporate processes. They became available to corporate management metrics, legible to corporate accounting methodologies, open to innovations in financial trading practices and the like. This in turn facilitated corporate managers and political actors to put ‘market’ and other discourses to work in explaining and justifying the carving of such spaces out for specific firms.

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73 Scott (n 72) 89-90.
Carillion

On January 15th 2018 Carillion, a British construction conglomerate, entered compulsory liquidation. Carillion, which specialised in large-scale state-funded construction and logistics projects was one of a group of giant firms specialising in state infrastructure contracts. Like post-privatisation and post-imperial firms, Carillion was one of a number of giant firms characterised by its acting and interacting as a de facto element in state operations. With its core business was founded on relationships with a state that was itself ideologically committed to contracting its activities and services out, it was a member of a class of giant firms that might be classed as purely neoliberal. Or as one Carillion report put it, the company had as a core strength and so relied on “deep, long term customer relationships, working as a trusted partner with high levels of repeat business”.  

Carillion’s collapse no doubt followed a whole series of bad business judgements. The firm was, as a House of Commons report notes, hiding static revenue behind massive borrowing and financial accounting that was ‘aggressive’ to say the least and its financial reporting was noteworthy by myriad ‘sins of omission’. But there was something else lurking behind this story of bad judgement. Before the firm’s collapse it and its directors were held up as exemplars of good corporate governance. The board and its directors ‘ticked all the good governance boxes’. It was lauded for its management of corporate governance risks. As the firm over-extended itself, underpric-

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ing its contracts and building up debt without increasing asset values, its occupational pension funds fell into a substantial deficit of £990 million, representing a 115% ratio of deficit to corporate capital.°° Most strikingly however, during this time the board changed its bonus structures to prevent clawbacks in the event of corporate failure.°° And dividend payments continued even as the company’s cash ran short, meaning that the company was in fact borrowing money to pay dividends.°° The board protected itself and did not attend to the clear signs of problems on the horizon (and closer than that). But there are other issues at play in Carillion’s collapse too, not least the diligence attention paid to dividend payments even as it drained the firm’s pension fund.

Carillion was a quintessential member of the giant firms focused on infrastructural work contracted out by government. Its commercial operations were founded on relationship-building and collaboration combined with (apparent) expertise in large-scale construction. It would be a mistake to lay the blame for the scandal on privatisation as such, given that states have always retained construction firms to build. The problem was, as Richard Mulgan has said about contracting out, with “difficulties over holding contractors to account, such as how to monitor performance and how to manage the clash between public service values and private profit”.

Carillion’s conduct, as is the case with much of the giant firm conduct described above, was driven in large part by financialisation. That is, Carillion’s core purpose, at least as can be divined from its board’s conduct, was to generate financial returns for capital. By borrowing to pay dividend the board sought to serve financial institutions, in part generating returns for institutional capitalism by neglecting to sustain its pension fund, if not diverting resources from worker-capitalists to financial capitalists, at least favouring one kind of value-creation over another. The ‘necessary social evil’

°°Mor and others (n 78) 19.
°°Ben Chapman, “Carillion Bosses ‘contemptuous’ about Paying into Pension Schemes While Handing out Bumper Dividends, MPS Say” The Independent (19 February 2018); Mor and others (n 78) 16.
as Marc Moore has it,\textsuperscript{86} of generating private value as a means of storing resources for future pension payments is by this account only salient when that value is paid as surplus, not as cost.

The exception metaphor works in general when we think of firms like this operating in spaces that are constructed and administered in collaboration with them and on their behalf. The “political accommodations and conditions”\textsuperscript{87} under which such firms work support collaboration on surveillance, insulation from tort and tax liabilities, or in this case large-scale relationship-driven contracting systems. What role then for corporate governance and especially what role for accountability in corporate governance?

**Corporate governance and exception**

Carillion’s failures were no doubt related to corporate governance in the conventional sense. As such an interpretation is available that simply examines board business judgement and the dysfunctions inherent in their shareholder value pursuits. Accountability also performs a function within corporate governance that helps situate ‘giant firms’ in a zone that allows them to perform **publicly relevant** functions insulated from consequences of their operations. They do this by distinguishing between those whose vulnerabilities demand an account and those whose vulnerabilities, while unfortunate perhaps, do not demand an account. Corporate actors and holders of capital are in fact **insulated from the possibility of democratic control**. Corporate governance is as such not primarily a regulatory intervention aimed at control. It is a form of administration that both sustains and is formative of specific kinds of economic organisations and functions. **Corporate governance is not about control through regulation. It’s about sustainability through insulation.** Such firms as Carillion served to drive down prices for infrastructure spending. Through public-private finance projects they removed spending off government accounts. Their scale and scope allowed them to act aggressively against union memberships.\textsuperscript{88}


\textsuperscript{87}Ong, *Neoliberalism as Exception* (n 17) 101.

Recent scrutiny on board accountability in corporate governance has drilled down on the plurality of accountability mechanisms as a legitimating substrate underpinning managerial power. Underpinning that in turn, the focus has been on the relational character of accountability, on its being driven, not by procedure as such, but by the development and maintenance of dialogue between senior actors and the company’s members: accountability is a matter in this context of ‘normatively cognisable explanations’ by decision makers to ‘decision beneficiaries’.  

For Joan Loughrey and Andrew Keay, accountability mechanisms ought to be understood as operationalised within a four-stage process. Echoing Bovens’s work, the distinguish between boards reporting; explaining and justifying; being scrutised and subject to interrogation; and having consequences imposed.

Key to Loughrey and Keay’s work here is the idea of governance mechanisms (themselves ‘normatively cognisable’) describing and giving form to key organisational relationships. We should also note that, while this conceptual framework does not preclude the relationships being akin to agency relationships, it allows for the possibility of many other kinds of accountability. The forum especially can be more or less formal and can ‘drift’ in its articulating its instructions and interests.

Keay and Loughrey argue ultimately that we need to be vigilant for accountability’s plural character, and to adjust the kinds of mechanisms and imperatives underpinning each of accountability key stages (reporting; explaining; interrogating; delivering consequences). The plural accountability framework they propose

Moore, “The (Neglected) Value of Board Accountability in Corporate Governance” (n 14) 14.


Keay and Loughrey (n 9) 275; also Andrew Keay, Board Accountability in Corporate Governance (Routledge 2015) 995-6; Joan Loughrey, “Breaching the Accountability Firewall: Market Norms and the Reasonable Director” (2014) 37(3) Seattle University Law Review 989.

... should assist in identifying the different accountability mechanisms to which directors may be subject, and thus assist in avoiding the pitfalls of multiple accountability, as well as accountability gaps. Accountability mechanisms can have different functions and these may not be mutually complementary. It can have detrimental as well as beneficial consequences and there may need to be a trade-off between these mechanisms. Because of this, we need to view directors’ accountability in a holistic manner, and not focus only on the effectiveness of one particular mechanism.\(^{93}\)

This perspective makes an important contribution to the relational perspective outlined in the introduction above. That said, while Keay and Loughrey imagine accountability as a quality that can be delivered through putting appropriate mechanisms in place, accountability may be more than about relational engagement. It may be about *disengagement* too. It may be more, that is, than something that can be subject to metrics and *achieved*. It may be that accountability is a quality of governance because it is a quality of inclusion and *exclusion*. Specifically it may be a matter of distinguishing between morally interesting and morally uninteresting vulnerabilities to harm.

Marc Moore’s approach comes closer to this perspective. Moore, who is interested in company law’s public character, takes issue with the idea of accountability discussed above, where there is a necessary and tidy trade-off between effective authority and accountability.\(^ {94}\) Moore writes that

... authority and accountability are not mutually offsetting organisational governance qualities. On the contrary ... they are inherently interdependent phenomena, in the sense that, within complex but freely constituted private organizations – including business corporations – decisional authority is structurally *unsustainable* if not accompanied by effective mechanisms for ensuring

\(^{93}\)Keay and Loughrey (n 9) 279.

the accountability of authority-holders to the recognised beneficiaries of their discretionary decisions.95

Moore’s line, which he uses as the basis of his argument for the regulative role of the state in sustaining corporate executive’s legitimate holding of power over shareholders, is that organizational power cannot be legitimate unless it is accountable power: unless it is oriented towards some principal, and unless that principal is entitled to an account of how that power is being used, and unless they can act in situations where they judge executive action to be counter to their interests.

This approach is interesting because it emphases reciprocal recognition between ‘accountee’ and forum and especially accountability’s role in reassuring all parties regarding their positions, powers and the parameters of their roles. Nonetheless, there is some potential for further understanding of accountability in corporate governance when we start to think of accountability relationships in this way.

Corporate governance’s role in exception is focused on recognition and its opposite. For the bulk of the corporate governance era it has been focused on the capital-enterprise accountability relationship as core. The separation of ownership and control, so the story goes, leaves investors vulnerable to managerial misfeasance and so law articulates a standard that redresses the imbalance by promoting accountable conduct. Much scholarship was devoted to pushing back against this line, arguing for greater ‘stakeholder’ roles in corporate governance, or at least pointing to the weak justifications underpinning the shareholder primacy position.96

The shareholder primacy position was not solely a matter of internal power however. It was a matter of broader social power. The kinds of firms towards which corporate governance regulation aims, especially as they financialised, were growing in their social impact. Corporate governance regulation sought

95Moore, “The (Neglected) Value of Board Accountability in Corporate Governance” (n 14) 11.

in immediate terms to shore up corporate capitalism’s reputation. Beyond that accountable governance was articulated as the optimising of economic efficiencies and, just as important, the maintenance – or restoration – of corporate capitalism’s legitimacy in public eyes. The OECD Principles of Corporate Governance put it very well in saying that “the purpose of corporate governance is to help build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies”. Corporate governance promises minimised extraction of rents and optimised allocations of resources. It underpins corporate capitalism’s emphasis on market norms. Corporations may well be bureaucratic, so the story goes, but reward is linked to pursuit of success in markets, not to managers capturing bureaucratic power.

Such narratives are not rhetorical in some empty sense: they involve key logics being put to work in sustaining corporate capitalism. Nor are they deception. They provide insiders with reasons for the actions that they take. They allow them to perform those actions in public by setting the bounds of legitimate behaviour. Legitimation then is not merely the soliciting of approval (although it might be that) from an outside audience: it projects outwards at watching publics but also reassures those on the inside that their authority is just.

This somewhat parallels Marc Moore’s argument above in regards to accountability’s necessary role in underpinning decisional authority. Where it differs from his perspective is in setting these legitimation practices, not in the firm’s internal relations, but in the political economy of giant firms. Their zones of action, constructed in collaboration with states, are to be insulated from democratic control. This increases the scope of action both for firms and very often for states, but also gives states approaches for relating to globalisation in bounded ways.

It is no coincidence that corporate governance arose in response to scandals as the current financialised corporate capitalism matured. In immediate


terms, in the UK and elsewhere, innovation in corporate governance regulation has been driven by scandal. The Maxwell, Polly Peck, BCCI and other scandals drove corporate governance reform. That reform quickly centered on managing the separation of ownership and control – on internalities – is significant. The solution to social crisis was, it seems, better private control. How this was articulated is interesting.

Endless business collapses have been linked to managers exploiting their positions to hide failures and/or satisfy their greed. In the United States, Enron saw a cadre of senior insiders hiding losses and lining their pockets at investors’ and others’ expense. In the United Kingdom a decade before Enron Robert Maxwell delayed the collapse of his business through fraudulent means while the board stood by. More recently Ireland’s local manifestation of the Global Financial Crisis saw the Anglo Irish Bank drive a property bubble and undergo a spectacular implosion, taking the economy down with it. All these were linked in the public mind and in policymaking circles to inadequate corporate governance. Inadequate checks, it was generally assumed, had allowed freewheeling managers to reap the benefits of massive risk-taking without meaningful board oversight.


101see Thomas Clarke, “Case Study: Robert Maxwell: Master of Corporate Malfeasance” (1993) 1(3) Corporate Governance: An International Review 141; Nicholas Davies, Death of a Tycoon: An Insider’s Account of the Fall of Robert Maxwell (St Martin’s Press 1993).

102see Simon Carswell, Anglo Republic: Inside the Bank That Broke Ireland (Penguin
The Global Financial Crisis has in turn also been put down to unchecked managerial power. The UK’s Walker Review\(^ {103}\) of corporate governance in banks highlighted weak board capacities to scrutinise risk-taking. Investor ‘time horizons’ were deemed to be too short to take a proper interest in firm sustainability. And incentive structures were deemed to encourage risk-taking because managers and others could accrue their often substantial earnings by taking short-term bets on the firm with losses borne by investors (and, again, others) when things went wrong. As a further report had it, senior managers functioned behind an ‘accountability firewall’ given their massive rewards in the good times and their evasion of blame when things went wrong.\(^ {104}\)

If anything corporate governance’s remit has expanded since the Crisis as resentment of corporate conduct has grown. Resentment – the reactive attitudes adopted in the context of ‘offense or injury by the action of another’\(^ {105}\) – focused in large part on remuneration and so on individuals within firms.\(^ {106}\)


That said, systematic concerns were also at the fore, at times in ways that threatened both corporate and state power.  

Conclusion

The financial crisis was both a crisis in the economy and a crisis of legitimacy for the economy. Corporate governance regulation shifted in response. Indeed, while the period saw growing policy-maker scepticism about it as a vehicle for nudging businesses towards a sustainable capitalist model, policymakers continued to return to corporate governance regulation as a solution for legitimacy problems. They sought out new ways to account for public concerns. This was done, however, without disrupting corporate governance’s core precepts and so without fundamentally altering the terms upon which global firms’ operate. Reformed included addressing ‘culture’ and, if not to place workers directly on boards - a democratic step that might have been disruptive – at least the recruitment of ‘advisory’ panels or of an independent director to speak on employees’ behalf.


108See for instance discussions in Parliamentary Commission on Banking Standards, Changing Banking for Good: Volume I (n 104) Ch. 7.


111Financial Reporting Council, The UK Corporate Governance Code (n 1) para. 5.
New elements for corporate governance compliance also include for instance responsibilities to declare policies and procedures for promoting gender equality on the board for instance. Promoters of this policy have in general turned to a business case for gender diversity, namely that more diverse boards with a greater range of voices will enhance firm performance. Diversity is as a result the ‘business of business’ and from there the business of corporate governance regulation.

Whether or not the business case holds true – a matter of some controversy\(^\text{112}\) – we should not focus solely on how corporate governance was proposed as a solution for non-diverse boards. It is also interesting to think about how diversity was regarded as a corporate governance problem. Gender and other diversity questions being incorporated have presaged a broader turn to organisational *culture* as a corporate governance problem. By finding ways to connect identifiable board members to looser and less tangible forces within firms, corporate governance provides a narrative that promises to address the an expanding array of legitimacy concerns. Executive tyranny has expanded first to short-termist conduct reaping substantial private rewards (before passing costs onto the taxpayer) and then to other internal dynamics within firms. All this ***without disrupting the core business models*** under which such firms are governed. Business conduct continues to be a matter for the board. Neither courts nor governments get to tell businesses what to do. And yet everybody is drawn into narratives that proffer to address societal concerns.

In immediate terms, corporate governance’s expanding remit is likely a consequence of the Global Financial Crisis, followed by the Libor scandal\(^\text{113}\). But it also reveals the ***tensions inherent in a private-relationships model for accountability in corporate governance being utilised in the context of giant firms operating in the spaces discussed above***. The same might be said of the financial crisis and the Libor scandal of course. Both events laid out in stark terms the social impact of financial services functions. They also laid out the dysfunctions inherent in the ‘delegated


self-regulation’ to which the financial sector was subject.114 To call this regime ‘decentered,’ as for instance Black115 does, is a misnomer. The sector as it functioned could never be either ‘centered’ within state regulation nor entirely privatised. That is not to say that it sits somewhere halfway between the two. Rather, the regulatory regime set out a space within which very specific functions could be carried out in concert with and in collaboration with the state.

Beyond that, these crises revealed apparent new flavours to classic agency problems, now with a more public bent. Giant firms’ complexities, themselves arranged around corporate ‘group’ structures allowed boards to construct what came to be called an ‘accountability firewall’ between themselves, including their ‘superstar’ CEOs,116 and conduct within the firms they (notionally) governed. Banks’ complex structures and broad scope rendered them not only ‘too complex to manage’ but “obscured senior executives’ understanding of what was really going on in the businesses they were supposedly running”:

When conduct and risk failures came to light, this ignorance allowed many leaders to profess their shock at what had been happening, duck personal accountability and instead blame systems failures or rogue individuals. Many banks had a structure of cross-cutting functions and committees which meant that key decisions and risks were not owned by single executives but were shared, undermining a sense of individual responsibility.117

Such complexity is not restricted to banks. Mining and other extraction

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companies, for instance, use complex group structures involving multiple corporate entities, each of which, in law’s imagination, is an autonomous legal person. This not only ensures that liabilities are kept at arms length from the capital-rich core, but that managers and boards keep their businesses’ less savoury conduct farther from scrutiny than they might otherwise be. This fluidity is exacerbated by the large numbers of smaller firms along supply and value chains that sit within their orbit but with whom they have no ‘ownership’ relation. Toxic waste management can be handed off to partners who are simultaneously distant and close. Price-focused consequences for workers, or for child-labourers are passed along supply chains and thus obscured from view, at least until everyday suffering and exploitation either gives way to outright disaster or comes under scrutiny in home jurisdictions.

Subject to conditions set out in Adams and Others v Cape Industries Plc [1990] Ch 433 (Court of Appeals).


But again, this is not simply ‘agency costs, nationalised,’ although it is that too. The crises arose from the tensions inherent in the spaces within which giant firms operate. The ‘internalities’ that generate such accountability firewalls are inseparable from the spaces that corporate governance regimes help construct. The logics inherent in corporate governance’s narrowed vision are, it transpires, opportunities as well as checks. Just as giant firms’ infrastructural scale are not just facilitated by but are entirely enmeshed in enterprise zones, shipping networks and ‘flexible’ labour-force logistics in some jurisdictions,¹²² so they are not just facilitated by but are enmeshed in corporate governance. Corporate governance does not just denote a framework: it describes aspects of corporate capitalism in practice. It sets out the scope of moral interest within the firm, and of moral disinterest.

¹²² See Easterling (n 15); also the discussion of Foxconn and other firms in Joshua B Freeman, Behemoth: A History of the Factory and the Making of the Modern World (W W Norton & Company 27 March 2018).