Where Angels Fear to Tread: How to Make Global Business Responsible

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DAVID KINLEY, JUL 19 2021

'*The* political problem of mankind is to combine three things: economic efficiency, social justice and individual liberty,' wrote John Maynard Keynes in his essay on Liberalism and Labour 95 years ago. Before then, and especially since, we have striven to balance these often awkward and sometimes competing aspirations with varying degrees of commitment and success. It was no accident that Keynes emphasised the singularity of the problem – everything else in the realm of politics either falls within or flows from this trifecta – reflecting the febrile times of the Great Depression on the edge of which Keynes was then writing. Clearly, he mused, the unbridled freedom to make profits does not alone create a sustainable economy, still less build a viable society (Keynes, 1926a).

Progress

Some of the cruellest inequities of Dickensian and robber baron capitalism that still characterised the economy in Keynes' day have since been tackled (endemic child labour and the active subjugation of opportunities for women and racial minorities), if not yet eliminated. And the regulation of corporate affairs by states is now expected, if not always fit for purpose or warmly welcomed by the corporations themselves. Today, few big businesses are unaware of the expectations made of them to be socially responsible and environmentally aware. They must earn their social licence to operate above and beyond their legal licence of incorporation. Or, as the US Business Round Table put it in its historic 2019 Statement, the purpose of a corporation is to "benefit *all* stakeholders – customers, employees, suppliers, communities and shareholders" (a far cry indeed from its ardent insistence 22 years earlier that 'the principal objective of a business enterprise is to generate economic returns for its owners').

No self-respecting multinational company these days can afford *not* to have bold statements of their green credentials and their fealty to human rights (BHRRC) on their corporate website, even if it is not always clear to observers and the corporate boards alike what that actually means in practice. This last point being one reason why the now decade old UN's Guiding Principles on Business and Human Rights have attracted so much corporate support, because they provide some guidance on what that practice might look like.

From this fine rhetoric of these soft laws, some new hard laws have emerged. For example, corporate human rights due diligence statutes in France, The Netherlands and (soon) the EU, as well as modern slavery legislation in the UK and Australia. Other legal avenues for holding corporations to account have also been re-invigorated, such as domestic tort laws (Lindt, 2020), of which the US *Alien Tort Statute* is but one example, which is still – just – hanging in there (Desierto & Song, 2021).

Capitalism, it seems, may be taking seriously its role in solving the Keynesian problem. Corporations paying attention to matters of 'integrity' and 'social responsibility', which leading Harvard corporate lawyer Victor Brudney lamented 40 years ago were then being too readily sacrificed at the altar of 'efficiency'. Perhaps we are witnessing the 'civilising' of globalisation, as I've argued for elsewhere (Kinley, 2009), or we are seeing the saving of capitalism by it being made more 'accountable' to the citizenry, as erstwhile financiers Michael O'Leary and Warren Valdmanis argue (O'Leary & Valdmanis, 2020)?

Regress

Yet corporate carelessness and bastardry still happen. Lucrative export markets in developed states continue to encourage 'race to the bottom' competition between and within developing economies. Eight years after more than 1,100 garment workers died when the Rana Plaza building collapsed in Dhaka, Bangladesh, unsafe workplaces are still claiming lives, with the city's latest atrocity in July 2021 caused by fire and padlocked doorways in a food processing plant employing children as young as 11 years old. The biggest names in the extractives industries continue to fail to learn safety lessons with devastating consequences. Vale has presided over the collapse of two tailings dams in Brazil in the space of four years, killing more than 300 people and precipitating environmental catastrophes (Zimmermann).

Meanwhile, those seeking to expose corporate human rights abuses are subject to physical, financial or legal attacks. The redoubtable Business and Human Rights Resource Centre has tracked more than 3,250 such attacks globally since 2015, including the growing use of corporate-sponsored 'SLAPP' lawsuits seeking to silence whistle-blowers and human rights defenders. And despite business leaders continually telling data collectors BSR and GlobeScan that human rights are their number one priority in terms of sustainability concerns, in practice, their companies are still not walking the talk. Reviewing the annual results of the landmark Corporate Human Rights Benchmark of 200 leading corporations, for example, Robert Eccles bluntly concluded in 2020 that it seems 'human rights really aren't all that important to [them]'.

Reset?

So, the picture is mixed, and we are right to demand more, better and quicker. But it would be a mistake not to acknowledge the profound shifts over the last 30 years in attitudes toward and within corporations as to what capitalism is expected to deliver. Environmental sensibilities are no longer corporate externalities but core business concerns, and while social and human rights concerns are not yet quite so ensconced, they are beating the same path through board room doors. Our perspective therefore on what progress has been made should be generational and not just immediate.

Harbingers of what is to come can be gleaned from potentially ideological tipping points in the contemporary landscape, the significance of which, while yet to be fully understood, is nevertheless palpable. Three emerging trends or initiatives today occupy this category, together giving legitimate reason to believe that some sort of corporate/society reset might be possible.

Caring capitalists

Philanthrocapitalism borne on the backs of eponymous foundations spun off from principal business enterprises has its place within our modern economies, helping to heal the sick (Novo Nordisk and Gates Foundations), care for children (INGKA Foundation), and combat climate change (Bloomberg Philanthropies). Reflecting the conscience of some capitalists to 'give back' such efforts are important and laudable, but they are not capitalism proper being, in effect, post-profit. It is when such concerns form part of a corporation's thinking *pre*-profit that they become truly significant; when *how* you make a profit more than *what* you spend it on constitutes the key question when contemplating a corporation's social or environmental impact.

The mantra of ESG ('Environment, Social and Governance') has gone viral throughout international business. The desire to be seen to care about such matters has been driven by forces coming from a somewhat unlikely source. The finance sector has long been a holdout in terms of understanding or even acknowledging its social and environmental responsibilities, and yet it is from the ranks of major investors, asset holders and wealth managers that calls for ESG consciousness are loudest (Kinley, 2021).

The appetite for sustainability investing has grown exponentially especially, for example, in so-called green and social bonds. ESG investment and advisory services have mushroomed – global management consultancy firm McKinsey's description of its recent acquisitions in the field as 'enabl[ing] us to help clients across all sectors and geographies … to successfully navigate the risks and opportunities presented by the economy-wide transition to a more sustainable future' reflects well this trend.

Perhaps most significantly of all are the assertive stances adopted by investors like BlackRock, the world's largest asset holder. In his celebrated annual letters to CEOs worldwide, Larry Fink, the firm's CEO, has long championed the value of long-term sustainability investment strategies. This stance, he notes in his 2021 letter, is not just environmentally friendly but also financially prudent, as sustainability investment indexes now consistently outperform their parent benchmarks – an outcome he labels as a 'sustainability premium'. BlackRock's latest statement on human rights also hammers home the point that human rights risks are not ephemeral but core – that is to say 'material' – to all corporations today and therefore cannot be ignored. The market takes heed of such proclamations when they are made by a company that commands an investment portfolio valued in excess of $9 trillion.

Tree-hugging judges

Corporate motivations to connect with their socially responsible soul are not always so benign or self-serving. In two recent European court cases, for example, judges have made clear that certain environmental standards of behaviour by corporations are not just optional or desirable, but they are legally enforceable.

The first of these cases involved the right to environmental protection enshrined in the French Constitution. Curious though it may seem to Anglo-Saxon eyes, such rights are found readily in the constitutions and laws of many countries in Europe as well as Africa and South America (Zimmer, 2021). It is in the common law world (with the notable exception of Ireland) and, oddly, also in international human rights law more broadly, that there is general absence of express protection of environmental rights (Rodríguez-Garavito, 2018). Be that as it may, in early 2020 France's highest court, the *Conseil Constitutionnel,* was called upon to decide whether the constitutional command to preserve the environment as 'the common heritage of all mankind,' trumps the equally constitutionally protected right to free commercial enterprise. It does, the court concluded, upholding a statute banning the production, storage and transport of certain agricultural pesticide products.

The second case, this one before a Dutch court, went even further, holding that oil giant Shell (incorporated in the Netherlands) owes a duty of care under Dutch law to take appropriate actions to reduce its greenhouse gas emissions. Adopting a legal approach much more familiar to common law lawyers and judges (namely, tort), the Hague District Court handed down a remarkable judgment in May 2021, arguing that 'on the basis of the relevant facts and circumstances, the best available science on dangerous climate change and how to manage it, and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change … companies must respect human rights.' It added that in this particular case Shell has an obligation to amend its group corporate policy accordingly, including, specifically, to affect a reduction in its group-wide CO2 emissions by net 45% by the end of 2030.

The potential impact of the case can hardly be overestimated. For in its express reliance on the extent of scientific knowledge about the adverse health and environmental impacts of climate change, the court echoes the litany of toxic tort litigation against tobacco and asbestos companies (pioneered in the US and followed in the UK and Australia) that spelled the reordering and near demise of those industries (Rabin, 1992; Carroll et al, 2005). The critical difference here is that the responsibility to prevent known harms caused by CO2 emissions embraces a far wider category of corporations than just oil and gas companies, potentially including any business entity with a significant emissions footprint.

Rendering unto Caesar…

In a geopolitical world still characterised by the centrality of the state, the actions taken by governments to encourage or compel corporations to be socially responsible are of primary importance. Good corporate citizenry driven by 'business case' reasoning (i.e. what is good for the bottom line) or forced upon corporations by vanguard judiciaries are all well and good, but for authoritative leadership in making business truly accountable to the public interest, we should and must look to the states themselves.

States often fail to lead, of course. Either because individually their politics are captured by the economic power of corporations or because together they are unable or unwilling to cooperate and coordinate their actions which in our globalised economy is nearly always fatal. This is why the recent OECD-brokered initiative to establish a global minimum corporate tax is so astounding.

For decades, multinational corporations have been able to minimise their tax liabilities by a combination of transfer pricing (shifting group profits to low or no tax jurisdictions while parking liabilities in high tax states) and extensive use of tax lawyers to exploit as many tax breaks and loopholes as possible. Especially prevalent in the services and technology sectors where products are non-tangible (and therefore easily shifted), the strategic use of tax laws is rife among global businesses. The chorus of discontent in rich as well as poor countries over this state of affairs has, finally, prompted the OECD to take a stand, for whether by way of clever avoidance or illegal evasion, the result sure looks like tax dodging to most regular tax-payers and voters (Kinley, 2018, 156-60).

Following the recent G20 Meeting in Venice, a twin pillar, in-principle agreement has been signed off by a total of 130 countries to set a minimum corporate tax rate for all major multinational corporations, classified as those with annual revenue of more than $890m (estimates suggest there are 8,000 such entities). Set at 15%, the idea is to establish a floor beneath which large corporations cannot lower the tax they must pay *somewhere* (Pillar 2). No longer therefore will corporations be able to shelter their profits in low tax jurisdictions (according to the Tax Foundation, there are currently 35 countries in which the top corporate tax rate is beneath 15%). And nor, under Pillar 1, will the 78 or so largest and most profitable corporations be able entirely to avoid paying tax in states in which they generate profit rather than where they are headquartered (Devereux & Simmler, 2021). Altogether, according to the OECD, these clawbacks could be worth up to an additional $240 billion in tax revenue each year.

Not all countries are keen on the deal. Hungary, Ireland and Estonia, for example, have been great beneficiaries of exceedingly low corporate tax rates and will likely have to be forced to sign up (by the deal-bound countries increasing taxes to the minimum rate specifically for global corporations located in hold-out states). And there remains the daunting task of working out the details of how the tax will be collected and dispersed. But these problems aside, there is no denying the significance of such co-ordinated global intent to hold corporations to account on such a pivotal issue. It will halt the ‘30-year race to the bottom on corporate tax rates’, as US Treasury Secretary Janet Yellen grandiloquently put it.

Silver linings

It is, in truth, still too soon to say whether all these promising signs will deliver significant and long-lasting change to the role of corporations in our societies. They are, after all, silver linings still surrounded by dark clouds. Both the finance and extractive sectors, for example, managed to exempt themselves from the global tax redistribution deal under Pillar 1 mentioned above, despite comprising some of the wealthiest and most profitable enterprises on Earth. Damascene conversion to the environmental cause is by no means universal. Oil behemoth Exxon, backed by its major institutional investors, for instance, have steadfastly resisted for more than 30 years numerous efforts by minority shareholders to change the company’s climate change-denying corporate policies. And in our Financial Services Human Rights Benchmark, Kym Sheehan and I show how understanding of the relevance of human rights throughout banking and financial services companies is still severely hampered by the fact that boards routinely take no heed of human rights risks as opportunities. Finally, for all the consequential symbolism of a new global corporate tax regime, the fact is that the tax revenue benefits will go largely to rich states, and of the 60 or so countries not party to the agreement (and who therefore will receive no additional tax receipts), nearly all are poor and most in need of cooperative measures to staunch the cross-border flows of illicit finance from their public coffers.

In his most famous work, The General Theory, Keynes suggested that a market economy will not reach its full potential of benefiting all of society and not just those with capital until such time as we can get ‘rid of the objectionable features of capitalism’ (Keynes, 1936 [at 221]; Cardim de Carvalho, 2009). The trends discussed in this brief article may not themselves be sufficient in that monumental task, but they are, at least, pointing in the right direction.

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