SUSTAINABLE DEVELOPMENT AND BUSINESS

Markus Kallifatides and Lin Lerpold (eds.)

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This book is dedicated to Marie Ehrling for her long commitment to enabling studies of management practice conducted by researchers at the Stockholm School of Economics. Her commitment to research has also greatly contributed to our mission of science-based education and, thus, our students' education. Marie has also acted as an important executive within the sustainability field. She is deeply knowledgeable of the dynamic nature between business and society, encompassing both challenges and opportunities, some of which this book addresses.

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Every year since 1992, the SSE Institute for Research (SIR) has produced an Annual Book.[1] As a sign of the times, this volume marks the third time the book has been written in English rather than in Swedish, for several reasons. Firstly, the Stockholm School of Economics is the workplace of many academics who do not speak, read or write in Swedish, and the invitation to participate in the Annual Book was extended to all academics at the School. Secondly, this year's theme of sustainability is inherently global (as well as local), and we intend for as many people as possible to be reached by our efforts at approaching, and formulating, these questions. We therefore extend our sincere gratitude to Michelle Vessel for her suggestions on how to write in the English language. We also thank Petra Lundin for her graphic design of the book.

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Stockholm, December 2016

Markus Kallifatides and Lin Lerpold

[1] Up until 2009, the Annual Book was produced by Ekonomiska forskningsinstitutet (EFI), the predecessor to SIR.

CHAPTER 6

Neoliberal ‘sustainability’ in the UK

The case of regulating domestic pension funds

MARKUS KALLIFATIDES AND ANNA LARSSON

Introduction

Does the ongoing political and economic crisis pose significant challenges to a neoliberal and financialized world order which both social and natural science have deemed socially and ecologically unsustainable? If so, how? These very broad questions motivate our overall line of inquiry in this chapter. We engage with the critical yet hopeful (dialectic) notion that any discursive practice also harbours its own negativity, hence sowing the seeds of its own transformation. We aspire to point to some of those seeds while acknowledging that they have yet to bear fruit.

Few scholars would challenge the interconnectedness between crises and transformation (Baker and Underhill 2015). This includes the specific topic in focus here: corporate governance regulation (e.g., Sullivan and Conlon 1997). Critical scholars of varying schools of thought have demonstrated at length that the overall response to the recent crisis has been one of re-entrenchment of neoliberal policies privileging the wants of those social groups in control of the means of production, most importantly financial capital (Hay 2011; Horn 2011; Mirowski 2013; Bieling 2013; Krippner 2015; Baker and Underhill 2015; Underhill 2015; Heinrich 2015). Despite widespread claims in party politics and popular debate that the economic crisis of 2008 has been managed (claims documented by, e.g., Hay 2011 and Jessop 2015), European dis-integration, mass unemployment, sovereign debt explosion, continued market volatility, and military conflict certainly call into question the limits of the prevailing political imagination. With an overarching understanding of the dynamic of a financialized neoliberal world order now in transition from one hegemony to another (Arrighi and Silver 2001; van der Zwan 2014) and drawing on recent conceptualizations in ‘cultural political economy’ of economic crisis

(Jessop 2015), we engage with the notion of regulatory and academic discourse as presenting variegated construals of crisis and the sediments left by those semiotic and political processes in a public sphere. We contend, following Jessop (2015: 4), that crises 'generally prompt massive variation in construals, ranging from unjustified panic to stubborn denial, opening space for the (re-) politicization of sedimented discourses and practices'. Our analysis focuses on the level of regulatory discourse about the corporation and its governance in financialization, and specifically on the discursive formation of the role of a particular kind of corporate governor: the domestic pension fund.

Beyond analyses of the corporation itself and its executive functions (e.g., Berle and Means 1932; Lazonick and O'Sullivan 2000; Bratton 2001; Veldman 2013), we point to another core construct in financialized corporate governance: the purely financial investor. Alongside the historical construction of the corporation in its contemporary judicial form, we point to the auxiliary construction of dispersed, collective and indeed oftentimes *forced* financial savers into financial capitalist investors, a process of pivotal importance to the 'reproduction of neoliberal social relations of production' (Harmes 1998: 117) and amounting to 'depoliticization' (Burnham 2001) of financial investment effectively 'turning labour into capital' (McCarthy 2014), producing a situation in which corporate labour re-appears in the public sphere as a transformed class, both as financialized individuals and as customers of financial services provided by institutional investors such as pension funds. The role of the institutional investor in corporate governance is that of an intermediary acting on behalf of investors, rather than being governors proper (cf. Schneider 2000).

We turn first to the academic discourse on corporate governance, and then to public documentation detailing responses to the recent crisis that emerged from the heartland of the financialized neoliberal world economy. As part of a wide-ranging regulatory response (Underhill 2015), the UK Law Commission in 2014 issued its recommendation to Her Majesty's Government on how to revise legislation pertaining to UK investment intermediaries, with an almost exclusive focus on domestic pension schemes. The Law Commission followed through on themes brought onto the national regulatory agenda by the Kay Review (2012). In a manner central to our methodology, we interpret all of these texts as construals of the crisis within the democratic system. (A list of documents studied is found in the appendix.) The purpose of these interpretations is to gauge the likelihood of re-politicising corporate governance, with a particular focus on the construction of investors.

We find that in practice these activities and texts to some (albeit marginal) extent ‘re-politicise’ corporate governance discourse in the sense of open debate in the public sphere (Swanson 2008). With regard to construals of crisis at hand, we find evidence of practical retrenchment of de-politicised corporate governance. However, we also find sediments of a ‘crack’ in the ideational machinery applied, in the form of a clear demarcation between financial and non-financial motives of investment. In particular, there is a categorical opening for UK pension scheme managers to abstain from financial returns with reference to international conventions ratified by the UK on behalf of these same principals. Perhaps without seeking to do so, the UK Law Commission appears to be sowing the seeds of regulating the conditions for corporations in the direction of ’*universal stakeholder value*’ ideology. In such a de-naturalizing or de-essentializing conception, the democratic state begins to resume the role of sovereign, this time as an authoritative representative of dispersed, small-scale investors in globally active corporations, which tasks itself with interpreting their preferences in terms of *trade-offs* between multiple values such as human rights, equality, biodiversity, peace, and material powers of consumption.

We develop the argument in the following sequence. In the next section, we politicise corporate governance research by drawing on theories of financialized capitalism(s) of relevance to understanding national corporate governance regimes. In the third section, we offer an overview of corporate governance practice in the UK, broadly defined as practices of investment and management, after which we turn to (some aspects) of the regulatory response of the UK democracy to the recent economic crisis. In the fourth and final section, we discuss our findings in terms of a dominant neoliberal economic imaginary still pregnant with possibilities to re-politicize corporate governance in a financialized world economy through re-politicization of financial investment and the financial investor.

Corporate governance research in financial capitalism

It has been well documented that corporate governance discourse among the circles of power, particularly in Europe, has shifted from a legitimizing view of the giant corporate firm as a joint social accomplishment *within* the nation state to a view of it as the property of its shareholders and as a liquid form in global financial markets (Aglietta and Rebérioux 2005; Horn 2011). As such, the giant corporation transcends the nation state and becomes a global matter of concern, without being subject to any sovereign power (Bradley et al 1999; Bratton 2001; Veldman 2013). As if it were a universally uncontested concept, which it is not (Mintzberg 1984; Sullivan and Conlon 1997; Turnbull 1997), corporate governance itself, in a widely published tradition of law, political science, and economics, has even been *defined* as a matter of how shareholders obtain maximum financial returns on their investment. This *ideology* of shareholder value implies that the corporate purpose should be to maximize shareholder financial wealth. The *practice* of shareholder value minimally involves aligning corporate strategy and financial reporting to financial market expectations and aligning the interests of executives with those of their principals by rewarding them on the basis of shareholding or share prices (Aglietta and Rebérioux 2005; Froud et al. 2006).

The bulk of research on corporate governance has been depoliticized in a similar manner as that described by Swanson (2008) in regards to 'the economic' in general in the US. The conceptual framework guiding explanations in mainstream corporate governance and research is positivist. The research agenda is primarily set by Chicago economists conceptualizing the research object as the relationship between the shareholder as the principal, and the executive manager as agent (Mirowski and Plehwe 2009; Donaldson 2012). The general research question then is how the actions of agents may be aligned to the preferences of the principal. Most likely due to the American roots of the entire field of inquiry, the preference of the principal is assumed to be maximization of financial returns, while agents are assumed to be deceitful (Turnbull 1997; Lubatkin et al. 2005).

One particularly influential strain of literature is the one centred on the particular discipline of financial economics emphasizing the quality and content of corporate and capital market law, and even the overall character of legal systems, as powerful predictors of firm performance (e.g., La Porta et al. 1997; Shleifer and Vishny 1997). According to an overview by Davis (2005), this neoliberal tradition of 'law and economics' also concludes that politics, rather than law, the legal system, and religious or other 'demographic' variables, determine the overall shape of national corporate governance regimes. These studies in law and economics have therefore moved closer to understanding what political scientists (Roe 2003), economists (Duménil and Lévy

2004), geographers (Harvey 1989), anthropologists (Sklair 2002) and many others focusing on variations of capitalism and democracy have understood for some time. Large corporations, as representatives of a coalition of actors, be it investors, managers, or employees, lobby or ‘capture‘ governments in order to gain advantage in the global marketplace, and this includes lobbying for corporate laws, financial market laws, labour laws, environment laws, etc., that benefit them (Beder 2012).

In short, the law and economics literature slowly discovered its own neoliberal condition of possibility: a political ambition to create and sustain liquid global financial markets. These unrestrained global financial markets were central to the US informal imperialist strategy when it plunged into crisis in 2008 (Brenner 2009; Duménil and Lévy 2011). The crisis has been managed with unprecedented levels of monetary and fiscal stimulus of the US economy, re-doubling the longstanding trajectory of failing to engage in re-distributional politics in America (Krippner 2010, 2012). Thus, all the ingredients of an unstable and inequality-generating global macroeconomic order remain in place.

Roe (2012), perfectly in line with the ‘neoliberal thought collective’ (Mirovski and Plehwe 2009), reiterates his longstanding political theory of comparative corporate governance in which the contest between the ‘haves’ and ‘have-nots’ constitutes one of the ‘fundamental fractures’ of the ‘politics of capitalism’ (*ibid*: 31). Roe acknowledges that the struggle between and within two *classes* constitutes the fundamental explanatory factor of variegated corporate governance institutions. Gourevitch and Shinn (2005) have significantly followed through on Roe’s initiative and developed a comparative overview of corporate governance around the world, arguing for a political theory of corporate governance as a corrective to the ‘demographic’ approaches in the law and economics literature.

These writings from the Right embrace an understanding of empirical facts and correlations that Jessop (2015) on the Left grasps as cultural political economy, albeit without an explanatory understanding of capitalism as a social formation *destined* to undermine itself because of the inability of capital to perpetuate the conditions necessary for its own accumulation and its view of capitalism as a morally indefensible social order. Roe, among others, naturalizes the reified interests of investors and ultimately seeks to prevent internal division among capitalists, or challenges from others (e.g., ‘labour’) that could disrupt global capital flows and profits. Neoliberals acknowledge the need to secure control of the State(s) in order to secure their goals. Neoliberal and Marxist scholars, hence, converge on the explanatory understanding that politics determine corporate governance, while diverging on the normative values of such an approach. While ultimately ignoring 'the origins and nature of systemic change, the realities of political power, and the material causes and consequences of structural crises' (Wood et al. 2014), Roe develops his Schumpeterian argument on the fundamental divisions in contemporary capitalist economies, acknowledging that this struggle also takes place in people's minds, shaping their 'preferences'.

> Only when we understand how preferences for and against capital markets interact with institutions in the political economy will we understand the shape and extent of the capital market. Today's preferences, when effective and dominant in the political arena, can become tomorrow's governing institutions. (Roe 2012: 32)

Jessop (2015) builds on his own contribution to our conceptual apparati for understanding how the manner in which preferences articulated in political arenas become, or most often continue in line with, governing institutions. In crisis, the wide array of worldviews and preferences initially articulated in the immediate response to what appears to many social actors simply as uncanny, are subject to evolutionary political processes of de-selection and retention of ideas on how to regulate the economy.

With this explicitly politicized (Swanson, 2008) embrace of corporate governance theory and research, in the next section we turn to a specific field of corporate governance regulation, namely, corporate governance regulation in the UK broadly, and the regulation of domestic pension funds as corporate governors specifically. Retaining the ambition to politicize theory and research, we inquire into if and how the neoliberal order in the UK has been challenged by immediate crisis and more long-term transitions in this particular national context.

Corporate governance in the UK: Laissez-faire, crisis management and the 'non-financial'

BIRTH OF LAISSEZ-FAIRE AND THE GENTLEMEN'S CLUB

The UK is the birthplace of both industrial capitalism and of the concept of *laissez-faire* in the economic field. The City of London, representing a military and trading empire encompassing the entire globe, established itself in the 19th century as the home of international insurance and merchant banking (Arrighi and Silver 2001). In terms of corporate governance practices, the financial activities of the British aristocracy and the operations of industrial owners were generally treated as 'private' matters only rarely subjected to regulation by the state or the court, according to one particular judge, in order to avoid unwanted 'embarrassment of business men in the conduct of business affairs' (Cheffins 2000: 18). Cheffins (2001) argues that the establishment of liquid financial markets such as the London Stock Exchange from the very outset hinged on the development of extra-legal mechanisms of control. The centrality and reputation of financial intermediaries provided at least a modicum of confidence on the part of prospective investors that whatever stocks and other financial instruments were offered to them were of a certain sufficient level of quality. Although the annals of London's financial markets are not short on fraudulent schemes and scandals in which investors' riches have been plundered, during the 20th century, individual and collective British savings were continuously and increasingly channelled as equity and debt financing to large-scale listed corporations (including financial corporations in banking and insurance) based on 'trust' in the gentlemanly behaviour of powerful market actors. Cheffins' (*ibid.*) pivotal argument is that all major volume increases on London's financial markets *preceded* legislative moves on the part of the UK government in the spirit of *laissez-faire* (Habermas 1962). UK equity markets have gradually been regulated in response to practices in London rather than governmental game planning.

According to Burrell's (2002) survey of the literature, these economic practices travelled across the Atlantic and were subsequently transformed into contemporary US shareholder value ideology and practices of corporate governance, the embedding and disembedding of which has been amply documented. The US version of the corporation with a 'shareholder value' corporate governance model emerged later in the UK. According to business historians (Toms and Wright 2002) and legal scholars (Cheffins 2001), the managerially controlled, publicly traded corporation with dispersed ownership was not firmly established in the UK until the 1970s or 1980s.

UK corporate law has been adamant in its treatment of the corporate objective, at least until the recent crisis. Despite the recurrence of corporate scandals, corporate governance and control in the UK have not been subject to much new legislation, and even less so to political efforts at changing the coordination of the national economy. Pursuant to the Cadbury (1992), Greenbury (1995), Hampel (1998), and Turnbull (1999) reports (Stiles and Taylor 2001: Ch. 1), the City of London and UK corporations were left to their own neoliberal devices (Haxhi, van Ees and Sorge 2013). The UK Companies Act was revised in 2006, reaffirming the primary corporate purpose to be the 'benefit of members' unless otherwise stated in the corporate articles of association. The revised Act includes the much-debated Section 172, which implies that directors should consider the consequences for a range of stakeholders when judging, in good faith, and with requisite skill and care, which decision to make. This does not in any way alter that the overarching aim is to produce 'benefits for members', the nature of which is ultimately decided by shareholders rather than corporate directors or any other stakeholder, including the legislator (UK Companies Act 2006). UK corporate law remains firmly oriented to shareholder value, i.e., to the protection of the interest of the investor, be it as supplier of equity or debt capital. In other words, the UK is a non-sovereign state protecting the private interests of particular citizens rather than subjecting citizens to a sovereign will (see Veldman 2013).

In the global political economy literature, these developments are characterised as a competition between London and New York as global financial centres (Epstein 2005). The reaffirmation of shareholder value corporate law in the UK aimed to secure the attractiveness of UK financial and non-financial corporations as investment objects for global financial capital. London successfully challenged New York in the 1990s and 2000s for the title of the financial capital of the world. The laissez-faire approach to regulation on a range of matters, including accepting off-balance-sheet accounting and over-the-counter trading of increasingly opaque financial products was central to that strategy (Dickens 2005; D'Arista 2005). The 'comply or explain' model of corporate governance regulation was arguably another facet of this historical trajectory (cf. Haxhi, van Ees and Sorge 2013).

When the financial crisis erupted in 2008, it sent the UK into recession. According to Eurostat (2015), GDP per head dropped in 2009 and 2010. In 2013, nominal GDP per head was nearly back to its pre-crisis level and has continued to grow marginally. However, official unemployment stood at 7 per cent and youth unemployment at 20 per cent, while wages and productivity remained stagnant. This 'recovery' in national economic output has come at a great cost to public finances, a result *inter alia* of a series of bailouts of failed financial sector corporations (Underhill 2015). Central government debt (Maastricht definition) rose from the level of 40 per cent of GDP in 2007 to 90 per cent of GDP in 2014 (OECD 2015). In sum, the UK government has been borrowing massively to maintain both the financial sector and living standards, with no plausible model for economic growth in sight (Hay, 2011). At the time of writing, a referendum regarding an exit from the European Union has been held, with a majority voting for 'Brexit', probably a sign that broad layers of the population in the UK are still 'learning into crisis' (Jessop 2015) or suffering from 'pathology' rather than crisis proper (Hay 2011).

DEMOCRATIC RESPONSES TO THE CRISIS

In 2009, the Chairman of the Financial Services Authority, Lord Turner, launched what we perceived as a 'non-pathological' attack on self-regulated financial markets (Turner 2009), followed by Andrew Haldane (2011) at the Bank of England. Turner radically advocated a significant contraction of the financial sector not only in his writings but also in personal appearances in circles of power (Mirowski 2013). In a similarly radical spirit, the UK Ownership Commission (2012) spoke warmly of associational forms other than the listed limited liability corporation. On the other hand, the 'independent' Cox report (2012), commissioned by the British Labour Party, followed the established party line of New Labour to defend London City's interests (Watson, 2013), and described no conflict between the flourishing of London as a global financial centre and UK competitiveness in other economic sectors, despite the continuous decline in sectors outside the financial services industry in the UK economy (OECD 2015: 33). The report describes economic recovery roughly as a matter of resolve.

In 2011, the new UK Conservative government tasked economist John Kay to inquire into the workings of UK equity markets and their role in promoting 'long-term decision-making' and prosperous UK businesses in global markets. The ethos of the Kay Review is captured in the following excerpt:

> The search for trust and respect is not a matter of nostalgia for an earlier era. (...) To observe that not everyone can be trusted, and that there should be serious penalties for breach of trust, is however very different from building a system of financial services law and regulation around the proposition that most people cannot be trusted. There is a real danger that such a system will stimulate the very behaviour it seeks to constrain, as people come to believe that appropriate standards of behaviour are defined by rules rather than by the integrity of the participants. (Kay 2012: 45)

In a spirit similar to that of the Cox report, but substituting 'trust and confidence' for 'resolve', the Kay Review argues for a return to more gentlemanly behaviour on the part of corporate managers and money managers alike. Financial market participants are held to be central in the Kay Review construal of crisis, as they are singled out as particularly significant in the recent economic development. The initial framing of the task of the Kay Review, with a focus on the relative macroeconomic decline of the UK, and with non-financial corporate directors placed centre stage, shifts in the foreword of the final report into the following:

> We must create cultures in which business and finance can work together to create high performing companies and earn returns for savers on a sustainable basis. (Kay Review, Final Report 2012: 5)

Cultural transformation then, not regulation, is the proposed solution. The problem is no longer the decline in the UK economy, but instead how to secure financial returns to savers. In its report on the implementation of the findings from the Kay Review, the government underscores that:

> [...] we see good signs that both UK companies and investors share our commitment to culture change. If we are to ensure equity markets support long-term economic growth, it will be vital that they deliver on this commitment (DBIS 2014: 1)

Despite this overarching conclusion that everyone is 'committed' to cultural transformation, pursuant to the review, the government tasked its Law Commission to inquire into the legal conditions for operations of UK investment intermediaries. Long-term investments and pension schemes are supposed to be run with the long term in mind, and as such they must include judgements of many kinds of 'risks', the Law Commission (2014) argues in line with the Kay review. Current law tasks pension scheme managers (trustees) to make judgements about these risks. In the case of trusts, the making of such judgements is, according to the commission, connected to the 'fiduciary duty' of trustees. In the case of contract-run pension schemes, typically run by insurance companies, the commission recommends the creation of independent investment committees to further re-enforce 'consumer protection'.

In the commission's analysis, significant attention is given to various kinds of 'business risks', such as environmental, social, or governance risks, popularly known as ESG factors. These factors may, and indeed should, be included in the process of making decisions on how to allocate capital, reiterating arguments that have repeatedly been made in UK regulatory discourse (Aguilera et al. 2006). In this analysis, the historical record of returns and the volatility of classes of assets are never an adequate argument for making investment decisions, nor are short-term prognoses of the future. The key message of the commission's recommendation is that existing UK legislation (both statutory and judge-made law) *already* permits a 'long-term' perspective in managing assets within the frame of pension schemes, irrespective of whether these are run in the form of trusts or for-profit companies, or in terms of the defined benefit or defined contribution format. That is, there is no legal obligation to maximize short-term financial returns. However, there *is* a legal obligation to maximize financial returns indefinitely.

The UK Law Commission tackles head-on various non-neoliberal concerns raised by the British public. In line with much academic discourse, such a concern takes the alternative vantage point of a *stakeholder value* view of corporate governance, and implies an alternative position of the investor and of investment. The investor is then regarded as one who invests financial savings in order to maximize some notion of well-being of self or others, and not only financial returns. In the open round of consultations, numerous such concerns were raised by the wider UK public and pertained to quality of life arguments, specific moral concerns regarding particular products, and questions regarding the state of the UK national economy. The commission's response to these concerns was that current UK legislation does not allow much room for manoeuvring on the part of pension scheme managers when it comes to making investment decisions. Decisions, however they are motivated, primarily must not pose 'significant financial detriment' to the scheme (see, for instance, Point 6.46 of the Commission's Report). The quality of life for pensioners in a future United Kingdom, including the state of its economy, or the proliferation of particular products, should not be of concern to pension fund managers/ trustees, despite the fact that it may be of concern to the future retirees. Such is the implication of existing UK law, and the commission recommends it should remain so. In other words, domestic pension funds in the UK must continue to work for 'neoliberal social relations of production' in which the only lawful purpose of domestic pension fund investment is the pursuit of maximum financial return.

THE FINANCIAL AND THE NON-FINANCIAL

However, in its analysis, the UK Law Commission also concludes that non-financial motives for investment, or abstention from investment, *may* be legally permitted under certain circumstances. For instance, Point 6.65 of the Commission's Report highlights the particular example of the UN Convention on Cluster Munitions:

> We accept that investment in cluster bombs is not necessarily illegal. But we think that the fact that there is an international agreement, ratified by the UK, which prohibits cluster bombs gives trustees reason to think that many people would consider them to be wrong. When coupled with letters from members agreeing, and no letters disagreeing, we think that trustees would have good reason to think that they were acting on members' concerns rather than their own. This may be an example where the evidential requirement to show that beneficiaries share the concern may be relatively light. (Point 6.65: 129)

The distinction between financial and non-financial motives for investment was a main topic in the ensuing consultation from the Department for Work and Pensions (DBIS 2015). The London-based lobbying organization International Corporate Governance Network argued against including the distinction in investment regulations arguing that '(f)orcing categorization of these ESG factors into binary "financial"/"non-financial" groupings is not necessarily helpful and can be a source of confusion' (ICGN 2015: 2). In another response to the consultation, Watchman and Wood (2015) point out that all the relevant arguments had been formulated a decade earlier in the Freshfields report (2005) authored by Watchman himself. This response summons the image of the investor as one who invests financial savings only in order to maximize future financial wealth, additionally protected by enlightened investment trustees/managers judging 'long-term' environmental, social, or governance related risks to those future financial returns. Trustees or managers acting on any other (non-financial) grounds would be breaking the law (and contravening morality), since 'it is not for pension fund trustees to play God with the money of investors and beneficiaries' (*ibid*: 2). However, such a god-like position is implicitly allotted to the investor, whose right to invest in anything, anywhere is rendered sacrosanct, and directly allotted to the 'vested interests' in the pension industry:

> The current remuneration system in the City is based on short-term profit taking and the frequent trading of shares. Any attempts to curtail or change this will be fiercely contested by the vested interests. The changes to the law on annuities is evidence that the government recognises that financial institutions do not put the best interests of the ultimate owners of the money above their own search for profits. (Watchman 2005: 8)

Apparently unaware that they have joined ideological hands with the ICGN (i.e., with the 'vested interests'), Watchman and Wood elaborate upon the argument against distinguishing the financial from the non-financial:

> This distinction between financial and non-financial considerations, as stated above, is unhelpful. There are relevant and material considerations and irrelevant and immaterial considerations. How, for example, is a distinction to be made in terms of the sustainability of financial investment between a bank, or a mining, or an oil and gas company which has a poor reputation or brand because of financial mismanagement and a similar type of company which has a poor reputation or brand because of environmentally damaging activities, human rights abuses, or bribing government officials or health authorities?
>
> It is financial impact, such as an inability to obtain exploration licences or finance, not the label attached to the matter which impacts on the financial sustainability of the investment which is relevant. If banks, as many appear to do, pay billions of pounds in fines and other conduct costs they are reducing substantially the profitability of the banks and returns to investors.
>
> Does it really matter in terms of financial loss to a pension fund, rather than how to address the issue, if the source of the loss is fraudulent activities of individual

> bankers, poor governance by bank boards, corrupt practices such as bribery, lack of adequate due diligence, environmental damage leading to unsustainable investment or financing companies which use of slavery or child labour or destroy precious habitats or local industries?
>
> All these matters may go to the bottom line. To describe as non-financial the use of child labour or trading in conflict diamonds or conflict metals is hardly helpful or relevant to investment. (Watchman and Wood 2015: 10)

The response from these individuals may be juxtaposed with the response from the Trades Union Congress, the labour union organization in the UK with the largest membership. In its recorded consultation response, the TUC (2015) first complains:

> We would like to highlight our concern that the TUC was not included in the organisations to whom the consultation was sent. The TUC submitted evidence to both the Kay Review and the Law Commission's Review of Fiduciary Duty, from which this consultation stems. Given that amending the Investment Regulations was a significant part of the Law Commission's recommendations in its final report, it would surely have been logical to have sent this current consultation to all those who responded to the Law Commission's review. (TUC 2015: 1)

The TUC brief response goes on to point to another set of investment principles besides the Stewardship Code, namely the NAPF Principles for Stewardship Best Practice, i.e., investment principles developed by an association of pension funds rather than by associations of their suppliers (asset managers). TUC also points to the possible value of using the conceptual dyad of 'risk' and 'opportunity' to grasp the dual character of ESG factors as both threats and opportunities to corporate strategy. The question of financial and non-financial motives for investment is not touched upon.

After the round of consultations, the entire question of revising regulations on investment principles was bypassed during the autumn of 2015 and closed. The (then new) Conservative government response concludes:

> In the light of this evidence and having considered the responses carefully we think that this is an area where guidance can be more effective than regulatory change, in particular because if it can be kept up to date over time. Taking the above factors into account, we do not propose making any changes to the Investment Regulations at this stage. (DWP, November 2015: 30)

Indeed, the Minister of State for pensions, the Baroness Altmann, emphasises that the government seeks to learn 'about burdens you would like us to consider reducing in order to make life easier for trustees and schemes' (*ibid*: 3).

In the following and final section, we discuss these regulatory responses to the recent crisis as reinforcements and possible openings in corporate governance discourse, with a particular attention to the apparently 'ungentlemanly' recommendation of distinguishing between financial from non-financial motives for investment.

Overall interpretation and discussion: Politicised learning into crisis

In general, the UK Law Commission presents gentlemanly recommendations supporting the neoliberal shareholder value orientation of pension funds as investors in financial markets. It strives to rid a wider audience of any notion that pension scheme managers would be legally required always to try to maximize short-term financial returns. In making these arguments, the commission relies on a 'behavioural finance' analysis of financial markets (e.g., Shleifer 2000) put forth particularly in the Kay review. Markets are described as prone to 'irrational exuberance', 'manias' or 'bubbles', resulting in 'short-term' current market prices, generated by all sorts of 'short-term' activity on the part of managers and investors alike. Financial market prices are therefore considered to be an imperfect benchmark for evaluating the financial performance of long-term investments. All 'risk' is not held to be adequately priced.

The UK policy documents scrutinized in this chapter, however, do not contain any recognition of a contradiction between the quest for financial returns for savers and the flourishing of UK businesses. First, this ignores the fact that the financial returns to savers may be sought anywhere in a world of largely unrestrained capital movement and hence may undermine investment in the UK. Secondly, the contradictory character of the basic argument is further underlined by the fact that global asset holding and global asset management in itself is the major industry in the UK (OECD 2015). This financial sector was the one primarily struck by 'crisis' (as opposed to long-term decline, as is the case with most other sectors of the national economy), as reported for instance in the Kay review itself. Hence, the Kay review starts off as a response to a real economic slowdown in the UK and construes the role of financial intermediaries as problematic in this respect. It does not address that the most evident crisis was in the financial sector. In line with, e.g., Hay's (2011) argument, we contend that such a construal of the crisis does not and cannot offer a plausible growth model for the UK economy. Regarded as a democratic response to the crisis, however, it does bring the matter of the role of financial intermediaries in the UK economy to the foreground. This question was also passed on to the regulatory context of the UK Law Commission. 'The re-politicization of the economic' (Swanson 2008) enters a second phase based on the Kay review's initial construal.

What is simultaneously accomplished is a silencing of the specifics of the current crisis. With brief reference to yet another review, the Walker (2009) analysis of corporate governance in financial companies, and despite the finding of Lord Turner in his review (2009) that corporate governance was not really an important factor in the run-up to the crisis, the collapse of banks, building societies, insurance companies and other forms of financial 'institutions' are attributed to 'short-termism' in corporate governance. This line of argument ignores that the financial system-wide increase of leverage and profitability in an economic upturn, and taxpayer bailouts in the inevitable downturn, has proven to be an extraordinarily profitable, viable and 'long-term' (intended or emergent) strategy on the part of the financial sector to attain what Ellen Meiksins Wood (2002) refers to as 'politically constituted wealth'. Such an understanding of the current crisis entails a view of financial sector actors as self-interested entrepreneurs rather than possessing an altruistic inclination to protect either the company, the customer or the taxpayer. The Kay review itself, along with, for instance, Watchman and Wood's consultation response in fact strongly support this sanguine view of financial sector actors.

Duménil and Lévy (2011) argue that the managerial classes have played a significant role in the social transformations of neoliberalism, functioning as an ally to the capitalist classes proper, and that this alliance was strong particularly in the US, where they played a central role in the establishment of the New Deal, the post-war compromise, 'as well as in the return to financial hegemony in neoliberalism' (*ibid*: 19). In Burrell's (2002) analysis, the UK evidenced a *return* to 'aristocratic' (i.e., financial capitalist) dominance. A reluctance to question the general integrity of financial market participants (primarily asset holders and asset managers, but also various other 'gatekeepers' such as credit rating agencies and investment advisors) underlies the many suggestions proposed by the Kay review to establish new 'comply or explain' codes, this time of institutional investor 'stewardship' of corporations.

Regarding corporate governance, the Kay review and the ensuing Law Commission appear to entail proposals that imply affording greater latitude for directors of UK corporations and asset holders/managers to protect existing corporate control arrangements if they so wish. Regarding the possibility of 'ungentlemanly' shareholder activism, particularly in the form of American takeover attempts, this is in line with the predominant pattern of corporate governance regulation in the UK since the 1950s (Toms and Wright 2002: 98–101). In Roe's terminology, capitalist 'haves' know that unrestrained global capital markets are good for them and bad for the 'have-nots'. The haves then work through any government or regulator available to defend their existing positions of privilege. In line with Duménil and Levy (2011), we argue that the re-negotiation that has taken place in this context is one between two parties to the same neoliberal 'centre-right' class coalition. The transnational capitalist class liaises with senior managerial labour in the financial services industry, but also with another fraction of the 'haves', the most senior managers of UK industrial and trade corporations, which incidentally make up the advisory board of the Kay review. Some privileges to protect senior management positions are afforded to the top layers of the managerial class in order to secure their continuing support for the overall more important agenda of financialized neoliberalism and shareholder value-oriented corporate governance.

In sum, the UK Law Commission work on investment intermediaries reinforces the cornerstone of the neoliberal ideology, namely, that corporate investment *should* be evaluated only in terms of its financial return, actually or potentially paid to shareholders as dividends. The commission clarifies, or more accurately *repeats*, that this relates to the 'long-term' shareholder (financial) value. The rather tricky question of operationalizing this notion of 'long-term' is not addressed at all.

Following Swanson (2008), 'the economic' (in this case, more specifically the investor), may be re-politicised both conceptually and by being regarded as a matter for democratic deliberation. Empirically, we have turned our attention to the open, public and deliberated response to the recent economic crisis (or perhaps only pathology) in the UK. The main story is one of construing the crisis as a result of irrational processes, to be learnt from and prevented from reoccurring by becoming more rational, particularly by establishing better 'culture' of 'trust' and 'stewardship'. We regard this as a continuation of 18th- and 19th-century moralism, so pervasive and significant in UK (industrial) history (e.g., Bendix 1956; Habermas 1962).

The Law Commission, however, also promotes a clear distinction between the 'financial' and the 'non-financial', the very starting point of any (critical) re-politicization of investment. We expected and found the incumbent power brokers of the City to respond vigorously to any such initiative from Her Majesty's Court. Recent politico-economic reality of UK history, marred by 'irreconcilable financial schizophrenia' (Watson 2013: 864) featuring the Bank of England taking much less of a *laissez-faire* position than any major party in Parliament, underscored by our observations here of the responses to the Law Commission's proposals, reinforces our expectation. In the last instance, we propose that the service rendered by a centre of a capitalist accumulation regime is providing a safe haven for capital (Arrighi and Silver 2001; Duménil and Lévy 2004) by avoiding precisely the kind of re-politicization implied above once financial investment has become de-politicised.

Watchman, the senior legal scholar distancing himself from 'Milton Friedman and other America neoliberals in the 1970s' (Watchman and Wood 2015: 6) and the International Corporate Governance Network refuse to acknowledge any notion of contradiction between doing good (saving world from climate change and protecting human rights) and making money. (The clerks at the court may intuit the growing absurdity of such a worldview; perhaps that is why they wrote what they did on cluster bombs.) One possible explanatory understanding would be to regard it as an expression of that particularly British form of 'embarrassment' (Cheffins 2000); in this case, in the face of making money from cluster bomb manufacturing. Watchman and Wood, as we saw above, point to other abominations such as climate change, child labour, accounting fraud, pollution or community destruction. They refuse, however, to acknowledge any connection to the pursuit of financial returns on investment. In fact, they argue that 'science' has already shown that it is in fact lucrative to invest against all those abominations. If that were true, it would of course have happened long ago.

The Law Commission, however, based on its own logic, could have argued that UK pension scheme managers should consult with their beneficiaries and record their written responses before investing in any corporation engaging in practices that are questionable in terms of international conventions such as the United Nations’ Universal Declaration of Human Rights, ratified by the UK in 1998. A more general application of such a principle would make it at least a matter of serious consideration whether to invest in, just to give one prominent example, Apple Inc., dependent for *all* of its profits upon low-paid, or even unpaid, predominantly Chinese labour enjoying very few of their Human Rights (Clelland 2014). Or, it might have argued that, in the long run, these conditions in global production networks pose the risk of ‘significant financial detriment’ for anyone with investments in them. The commission *does not* make that argument, or any other such argument. The heart of the matter is that corporate action now and in the future (business strategies, lobbying, and most formidably, political campaign financing) will in part *determine* the financial (‘material’) relevance of various non-financial factors such as climate change, human rights protection, and the overall ratio of profits to wages in the (world) economy.

Guided by the deeply entrenched notion in comparative corporate governance research that today’s preferences can become the governing institutions of tomorrow, we suggest that were the United Kingdom to go down the path hinted at ever so subtly by its Law Commission, it might once more be the first mover in the *longue durée* of capitalism, in something amounting to a re-politicization of corporate governance through re-politicization of investment and of the investor. This investor is not just any investor; it is ‘labour gone capitalist’ (McCarthy 2014). The UK regulatory attempts further establish ‘the labour gone capitalist’ as a new significant *rentier* central to neoliberalism (Harmes 1998). In Krippner’s (2015) analysis of the post-crisis US economy, she argues that the unwillingness of the state to act as state proper, where policymakers openly address distributional conflict under scarcity, has returned to centre stage in American political life. How would this neoliberal state and its unwillingness to act as state translate to our UK-based regulatory context? The UK Law Commission could be characterised as entering into a distributional tension within the financial system, apparently engaging in strengthening the ‘labour gone capitalist’ shareholder status and the future value of their past earnings. As such, the UK Law Commission continues the depoliticising legacy of the Blair government (Burnham 2001), a generalized unwillingness of the state to act as state proper.

We sympathize with Veldman's contribution to the debate on the 'demise of the state', which offers 'opportunities to rethink the nation state or a supra-national equivalent as a dominant supra-individual political representation, heir to the absolutism of sovereignty and thus, heir to the prerogative of creating, controlling and regulating all legal constructs and their relative positions' (Veldman 2013: 27). We, along with several respondents to the UK Government consultation on the matter (Unison 2015; ClientEarth 2015), point to the continuing possibility of lifting the practically effective ban on UK pension funds acting as representatives of responsible (global) citizens, acknowledging the trade-off between financial return and other non-financial values, with the possibility of pointing to the supra-national authority of international conventions for workable definitions of these non-financial values. Such a manoeuvre would even be reminiscent of the 'extensive cosmopolitan-imperial' UK capitalist world order of the 19th century (Arrighi and Silver 2001), with the exception of its capitalist logic of incessant accumulation.

None of this will happen, of course, unless 'we understand how preferences for and against capital markets interact with institutions in the political economy' (Roe 2012). Here, we have attempted to show that such preferences among scholars and policymakers alike may oftentimes be the result of 'politicised learning that reflects power relations and ideological or social barriers that block active learning' (Jessop 2015: 103), while, at the same time, uncovering and advancing sediments of a reconfigured economic and social imagination. Whereas the 'labour gone capitalist' category has been outmanoeuvred from wielding influence over their own savings and the industrial base on which it depends, UK regulatory activities incorporate the birth of a new category, that of the 'labour rentier citizen' whose – we suggest, fundamentally confused – class interest may still crystallize into one of 'universal stakeholder', perhaps even with an ambition to transform the world, this time for the better and without violence. For now, unsustainable neoliberalism appears to be the path selected by dominant social forces still learning their way into yet another crisis.

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APPENDIX

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