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Redefining Corporate Purpose: The Need To Recognise Membership Through Work

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The members of the Steering Group present this Working Paper in their personal capacities and the views expressed do not necessarily reflect those of any organisation with which they are associated.

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Executive Summary

Catholic Social Thought leads to the moral claim that workers enjoy a natural right of membership of the company or group that employs them, as natural as their right to own their own bodies. Legal recognition of this natural right would permit companies to adopt a corporate purpose beyond the pursuit of shareholder value, which is unlikely otherwise to take place.

Directors are required to promote the success (not simply the profits) of the company for the benefit of its members (not simply its shareholders). Automatic worker membership would empower directors to pursue the success of the enterprise in which long-term shareholders and workers have a common interest.

Nevertheless such recognition would not be sufficient without some transfer of sovereignty over takeover decisions from shareholders to directors and workers. Directors would need to be free to pursue the success of the enterprise without the threat of hostile takeover. Furthermore, since an enterprise may be worth more to shareholders dead than alive, the consent of workers would be needed to takeovers recommended by directors.

A company has no natural right to the privileges of a human person. Limited liability was intended to protect people from ruin, not to permit the shirking of responsibilities to stakeholders. Parent companies should be held liable for the obligations of their subsidiaries.

A change in the understanding of the nature of property in companies is needed. These proposals do not represent a revolution but a feasible and incremental move towards, in the words of Winston Churchill, “Finance less proud and Industry more content”.

Introduction

The high-point of the stakeholder movement in British business is probably represented by the reform of the Companies Act in 2006, and the failure of that reform to deliver much of anything may explain the subsequent decline in interest. (Longley, 2014)

There is a certain irony that the enactment of the new UK Companies Act in 2006, following an exhaustive review of company law initiated by the Blair Government in 1997, was immediately followed by the financial crash of 2007/8. The new Companies Act embodied a concept of shareholder primacy which many scholars of law and economics regarded as the ‘end of history’ in company law; the modern listed plc was claimed to represent simply the most efficient form for the conduct of large scale business.

Since 2008, a number of initiatives have been working behind the scenes on the question of the purpose of business beyond short-term shareholder value. These include *The Purpose of the Corporation Project* (www.purposeofcorporation.org), *The Purposeful Company* (2016) and *Tomorrow’s Company* (Goyder and FitzJohn-Sykes, 2016). There is also *A Blueprint for Better Business*, originally an initiative of Cardinal Nichols, the Roman Catholic Archbishop of Westminster, in response to requests from leaders of major companies. Now an independent charity, *Blueprint* encourages businesses to operate ‘true to a purpose that serves society, respects the dignity of people and so generates a fair return for responsible investors’ (Blueprint, 2015).

The declared position of *Blueprint* is that company law is permissive and allows companies to pursue such a purpose; in particular, there is no legal duty to maximise shareholder value, enlightened or otherwise. This paper will argue that, while that view may be strictly correct, it neglects the economic pressures on companies and the role of financial markets.

The purpose of this working paper is to develop further the perspective of Catholic Social Thought so as to lead to specific proposals for legislative reform, for consideration and debate. This is by no means a comprehensive research paper and it omits reference to many

other arguments on a long-debated topic. The idea here is simply to formulate a coherent and distinctive position in order to provoke discussion with expert interested parties.

Section 1 considers the current legal position in the UK, with particular reference to section 172 of the Companies Act 2006.

Section 2 introduces the formal contribution of Catholic Social Teaching to the matter. From this emerges the concept of the business as a human community in which workers have an inalienable right of membership.

Section 3 builds on the previous sections by identifying the necessary changes in company law to distinguish the company from the business it conducts and to include qualifying workers as members of the company that employs them.

Section 4 considers further legal changes necessary to tilt the balance away from the short-term interests of shareholders and enable directors to pursue the long-term success of the business of the human community they serve.

Section 5 offers some overall conclusions about the prospects for reform.

1: The current UK legal framework

Section 172 (1) of the Companies Act 2006 ('CA 2006') imposes a duty on a director to “act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to” various matters including the interests of stakeholders in the company’s business (i.e. employees, counter-parties, the community and the natural environment) and the maintenance of high standards of business conduct.

This is a duty to the company alone, which can be claimed only by the company itself or by one of its members on behalf of the company as a derivative claim (s. 260 CA 2006). The stakeholders cannot bring such a claim except in the capacity of a member. A derivative claim must pass the test that the claim itself satisfies s. 172, i.e. that it is likely to promote the success of the company for the benefit of the members – not the benefit of the stakeholders.

Keay (2012) regards s. 172 (1) as enshrining in law the principles of shareholder primacy and enlightened shareholder value: ‘enlightened’, because of the duty to have regard to stakeholder interests. As Longley (2014) notes, the duty to have regard is a duty to think about, not a duty to promote. The significance of the extra words ‘(amongst other matters)’ is that the list of stakeholder interests is not exhaustive of the things a director should pay attention to. The director is obliged to think about anything that might impede the success of the company for the benefit of its members. There is no suggestion that there might be other, unlisted, interests that the director should seek to promote.

The correct reading of s. 172 appears to be that it provides for the punishment of a reckless disregard of the interests of the stakeholders (and any other matter) that has damaged, or may in prospect damage, the company. Reckless disregard means an unthinking and wilful failure to take into account. Various interesting questions arise:

- does this introduce a concept similar to that of ‘wrongful trading’ in relation to the interests of creditors? Wrongful trading is continuing to trade after the directors realise, or should have realised, that there is no prospect of avoiding insolvent liquidation, except insofar as continuing to trade will reduce the loss to creditors. Could it be ‘wrong’ under s. 172 to trade without regard to the damage inflicted on stakeholders? Yet ultimately the relevant damage is to the success of the company for the benefit of the members. S. 172 permits a director, knowingly and deliberately, to inflict damage on stakeholders provided that this course of action benefits the shareholders, over the long term and without damage to the company’s reputation.
- does the duty under s. 172 extend beyond the strict legal rights of stakeholders? Even if the words after ‘the success of the company for the benefit of its members as a whole’ were omitted, the directors would still have a duty (under the law, and not simply to the company) to respect the strict legal rights of third parties. It is normally in the interests of a company to avoid litigation by its stakeholders. So does s. 172 add anything beyond a duty to ensure legal compliance in relation to stakeholders?
- half the matters to be taken into account (subsections (1) (a), (e) and (f) – long term success, reputation and equity between members) have nothing to do with stakeholders. In all cases, the criterion of success is the benefit to members as a whole. In particular, long-term success and reputation are the key channels through which good treatment of stakeholders may benefit the members, beyond the extent to which virtue is its own reward (e.g. treating employees well improves productivity). How are stakeholders here treated as anything other than instrumental?

The most positive interpretation that can be placed on s. 172 is that its requirement to think about consequences, encouraged by the s. 417 requirement for the directors to report publicly in a Business Review how this has been done, will lead directors and management to choose, from among the various available courses of action of equal net benefit to the company, those which are preferable from the stakeholder perspective. A similar argument has been accepted by the courts in the case of ethical investment, where trustees may take into account the preferences of beneficiaries provided these do not adversely affect the

expected financial return. Nevertheless directors remain free, having considered their options, to act against the interests of particular stakeholders, or stakeholders in general, if they judge this to be for the benefit of shareholders.

This view of s. 172 may strike some as hard line. The law is certainly different in the United States. It is also true that the courts are unlikely to over-rule directors in a matter of judgement as to what constitutes the success of the company. Yet this interpretation of s. 172 in terms of enlightened shareholder value seems in line with the present culture of the UK listed public company, its investors and their advisors.

A Blueprint for Better Business goes with the grain of s. 172 and does not challenge shareholder primacy. The case for an explicit corporate purpose, from this perspective, is that it makes good business sense. This may indeed normally be so, except that sometimes the interests of the shareholders do not coincide with those of the company's business, if that is understood as a productive human community at the service of society. The next section considers the nature and implications of that understanding of the business as a community.

2: The contribution of Catholic Social Thought

Claims for the legitimacy of shareholder primacy are based on a mixture of arguments from economic efficiency and the historical development of the company from a business partnership. The efficiency arguments include: risk-bearing incentives, such that entrepreneurs and venture capital investors will not establish businesses without the prospect of capital gain, which in turn depends upon the capitalisation of prospective profits in the secondary market or by a trade sale; governance costs, such that shareholder control avoids conflicts of interest and provides the most efficient governance of business, exceptions such as professional firms and consumer co-operatives proving the rule; and the principal-agent problem, such that financial markets hold rent-seeking management to account through the market for corporate control. All three economic arguments have been heavily contested elsewhere and will not be rehearsed here.

The historical argument is of some interest in the present context. To the extent that a company is a form of business partnership it can be understood as a human association and shareholders treated as owners in a similar, natural fashion. However Ireland et al. (1987) dates the change to the modern conception of a company to the late 1850s, noting in particular the change in the way in which companies were formed between the 1856 and 1862 Companies Acts. The 1856 Act had stated that ‘seven or more persons may form *themselves into* an incorporated company’ (emphasis added). The company *was* its members. By contrast the 1862 Act provided simply that ‘seven persons may form an incorporated company’. Ireland shows that this change in wording was deliberate and carried with it the modern conception of the company as a body with an existence independent of its members.

The company would now be ‘seen as a thing made by, but not of, people, the incorporated company was depersonalised and thus “completely separated” from its members’ (Ireland et al., 1987). This has been taken to its *reductio absurdum* in the present CA 2006: ‘A company is formed under this Act by *one* or more persons— (a) subscribing their names to a

memorandum of *association ...*' (emphasis added). Once the company is recognised as a wholly separate entity, and not simply a partnership empowered to hold property and sue under a single name, it can be argued that the company represents a form of social property in which many parties have a stake (Deakin, 2012).

Catholic Social Thought (CST) represents another path again. Originating with the encyclical *Rerum Novarum* 'on the condition of the working classes' of Pope Leo XIII (1891), Catholic teaching on the nature of human work developed over a period of a century, receiving its most detailed exposition to date in the encyclicals of John Paul II, *Laborem Exercens* 'on human work' (1981, 'LE') and *Centesimus Annus* 'on the centenary of *Rerum Novarum*' (1991, 'CA'). At its core is the concept of the dignity of the human person and the distinction between the subjective and objective aspects of work.

A person is always the subject, the active agent, in any form of work, whatever objective form work may take, from that of the independent artisan or farmer to the scientist working in a university. While technological progress has radically changed the objective nature of work over the last few centuries, its subjective character is permanent. Furthermore, large-scale production involves a community of persons acting together so that the individual's work cannot be separated from their participation in that community. An important nuance is that the emphasis on work creates a qualitative distinction between those directly engaged in production, whether directly through their own labour or indirectly through the labour embodied in the means of production whose use they provide, and other stakeholders with whom the productive community interacts.

Although the emphasis on labour is similar to Marxist analysis, and this has been taken much further by the field of liberation theology, CST repudiates the concept of class struggle, while acknowledging the potential for real conflict between the interests of labour and capital. There is agreement that wage labour creates a problem of alienation, yet the wholesale transfer of ownership from private individuals to the state objectively fails to overcome this. Alienation can be overcome only through individual persons sensing that they are working for themselves, even as part of a common enterprise. Private ownership of the means of production is the default, unless the case can be made for socialisation in the

interests of the common good; this is the meaning of the principle of subsidiarity in this context. Furthermore private ownership is subject to a social mortgage: the underlying principle is that material goods are private by use but public by intention. The goods of this world are intended for the benefit of all, yet that benefit is usually best achieved through personal responsibility, initiative and enterprise.

The commitment to private enterprise appears politically rather conservative and has been so interpreted by economic theologians following Michael Novak (1991). Yet CST resists a simple affirmation of capitalism:

If by 'capitalism' is meant an economic system which recognizes the fundamental and positive role of business, the market, private property and the resulting responsibility for the means of production, as well as free human creativity in the economic sector, then the answer is certainly in the affirmative, even though it would perhaps be more appropriate to speak of a 'business economy', 'market economy' or simply 'free economy'. But if by 'capitalism' is meant a system in which freedom in the economic sector is not circumscribed within a strong juridical framework which places it at the service of human freedom in its totality, and which sees it as a particular aspect of that freedom, the core of which is ethical and religious, then the reply is certainly negative. [CA 42]

In the context of the ownership of enterprise, this distinction is spelled out even more explicitly and with great moral force:

In the Church's teaching, ownership has never been understood in a way that could constitute grounds for social conflict in labour ... property is acquired first of all through work in order that it may serve work. This concerns in a special way ownership of the means of production. Isolating these means as a separate property in order to set it up in the form of 'capital' in opposition to 'labour' - and even to practise exploitation of labour - is contrary to the very nature of these means and their possession. They cannot be possessed against labour, they cannot even be possessed for possession's sake, because the only legitimate title to their possession - whether in the form of private ownership or in the form of public or collective ownership - is that they should serve labour, and thus, by serving labour, that they should make possible the achievement of the first principle of this order, namely, the universal destination of goods and the right to common use of them. [LE 14]

From this point of view the position of 'rigid' capitalism continues to remain unacceptable, namely the position that defends the exclusive right to private ownership of the means of production as an

untouchable 'dogma' of economic life. The principle of respect for work demands that this right should undergo a constructive revision, both in theory and in practice. [LE 14]

*In fact, the purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a **community of persons** who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society. [CA 35, original emphasis]*

A business cannot be considered only as a 'society of capital goods'; it is also a 'society of persons' in which people participate in different ways and with specific responsibilities, whether they supply the necessary capital for the company's activities or take part in such activities through their labour. [CA 43]

Ownership of the means of production, whether in industry or agriculture, is just and legitimate if it serves useful work. It becomes illegitimate, however, when it is not utilized or when it serves to impede the work of others, in an effort to gain a profit which is not the result of the overall expansion of work and the wealth of society, but rather is the result of curbing them or of illicit exploitation, speculation or the breaking of solidarity among working people. Ownership of this kind has no justification, and represents an abuse in the sight of God and man. [CA 43]

The final paragraph could hardly be expressed in stronger terms. The challenge is to translate these abstract moral principles into policies and legislation that command democratic support. One view is that this is a mandate for the extension of co-operative and community ownership, particularly in the form of worker co-operatives along the lines of the well-known Mondragon group, which was founded explicitly on principles of CST. Furthermore it makes a strong case, prima facie, for an end to demutualisation and for legal, fiscal and regulatory measures in the other direction, to encourage conversion from PLC to co-operatives and other forms of mutual, and to smaller-scale private, family-owned, companies. Yet such more demanding, though more satisfactory, forms of human association cannot be imposed, however much they are to be welcomed, and they do not present a feasible response to the question of the nature of the ownership and purpose of the large corporations that dominate the economy and are unlikely ever to adopt an explicit social purpose.

The way forward proposed here is to recognise the distinction between the company, which is a legal construct, and its business or businesses, which are communities of persons. By working as part of such a community, a person becomes intrinsically a member of that community, if not immediately then at least over a reasonably short time; work and membership cannot be separated. To deny that link is to promote another form of alienation. The corollary is that workers possess an inalienable right of membership of the community in which they participate through their labour. This right should be seen as natural, just as over the last two millennia it has come to be recognised that people enjoy natural and inalienable rights of property in their own bodies. In prohibiting enforced slavery, modern societies have also prohibited voluntary slavery. A person may not sell themselves even if it is to their economic advantage. Similarly it should not be acceptable for people to be deprived of their right of membership of their productive community even under the most advantageous employment contract. The next section considers what it would mean in legislative terms to recognise in company law the natural membership of workers in their productive community.

3: Recognising membership in a community of enterprise

The full text of section 172 (1) of CA 2006 reads:

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

If employees were to be treated automatically as members of the company, the section might be read as requiring directors to promote, rather than simply think about, the interests of employees. We consider how this can be done further below. The only ambiguity is over the meaning of the phrase 'the success of the company'.

The Company Law Review (CLR, 1999, chapter 5), which led to the CA 2006, tends to use the words 'enterprise' and 'company' interchangeably. Lord Denning held that the duty of directors "was to do their best to promote its business and to act with complete good faith towards it" in a context where the interests of the controlling shareholders conflicted with those of the company's business and minority shareholders. The CLR recognised that the interests of shareholders and employees would clash in the case of the closure of a plant and wrote "An appeal to the 'interests of the company' will not resolve the issue, unless it is first decided whether 'the company' is to be equated with its shareholders alone (enlightened shareholder value), or the shareholders plus other participants (pluralism)"

(CLR, 1999, p. 39). Yet in the following paragraphs the CLR argues for legislation – that clearly issued in s. 172 – “to ensure that directors recognise their obligation to have regard to the need, where appropriate, to build long-term and trusting relationships with employees, suppliers, customers and others, as appropriate, in order to secure the success of the *enterprise* over time” (CLR, 1999, pp. 41–42, emphasis added). For the CLR the enterprise is not bounded by the limits of the actual business of a particular company at any time but includes the business of any potential acquiring company, which may find it profitable to make

cost savings in the form of redundancies, or plant closures, and may involve the transfer of corporate headquarters. Such changes may also be very unwelcome to the directors of the target company in question. Under the present law and practice directors are prevented by the ‘proper purpose’ principle, and, in the case of takeover offers for public companies resident in the UK, by the City Code on Takeovers and Mergers, from exercising their powers in a way which frustrates the bid. (CLR, 1999, p. 47)

The CLR is thus enabled to interpret the success of the enterprise solely in terms of shareholder value. Having adopted that criterion, there is no difference between, on the one hand, merging the target enterprise into a larger continuing enterprise and, on the other, closing the target enterprise, transferring its sales, brand value and other assets elsewhere or simply eliminating the competition; provided that the share price is acceptable to the shareholders in either case.

There is an important distinction between a business, trade or profession (the ‘enterprise’) and the person (including a company) that conducts it. A company can conduct a number of different businesses and a business can be conducted by an individual or unincorporated partnership. This distinction is fully recognised, capable of legal definition and of considerable importance in tax law. The interests of employees and long-term shareholders in the success of a particular enterprise are for the most part aligned, in a manner that does not necessarily apply to other stakeholders, with whom there is greater scope for conflicts of interest. Both employees and long-term shareholders can profit from the success of the enterprise without doing so at the expense of the other. The conflict arises if the enterprise

is not successful or one group seeks to gain at the other's expense. Workers cannot legitimately expect shareholders to fund continuing losses. Shareholders cannot legitimately expect workers to accept (at least, without substantial compensation) the loss of their livelihoods from a viable enterprise, which is worth more to the shareholders dead than alive.

The recognition of workers as members of the company is therefore a necessary condition for the sustainability of adopting a corporate purpose beyond enlightened shareholder value. At one level this is relatively straightforward. Legislation could provide that qualifying employees are members of the company which employs them, and of any parent company and its parent, all the way up to the ultimate holding company. In itself this provision would provide no rights to vote or participate in management or profits, yet this would be the first step in recognising the natural right of membership of workers in their community of enterprise. In the context of s. 172 and the purpose of business, such deemed membership would require the directors to pursue the benefit of workers as part of 'members as a whole' and 'acting fairly as between members of the company' – which broadly means not pursuing the benefit of either group at the expense of the other. Membership would also provide the platform for a derivative claim so that workers, probably with the help of a trades union, could challenge the directors' interpretation or performance of their duties.

There would be considerable work for the Parliamentary draftsmen in defining a qualifying employee. No definition would be perfect yet the problem is surely not insurmountable for practical purposes. Account would need to be taken of length of service and hours of work (a short qualifying period and minimum hours seem reasonable) and in particular of indirect employment, which has become very significant through the use of various forms of service company and contractor to reduce the obligations to workers. The tax authorities have become very adept in distinguishing employment from self-employment, so that tax legislation provides useful precedents. The key element is the identification of who ultimately benefits from and controls an individual's working time.

The question of purpose cannot be separated from the market for corporate control, which will be part of the subject of the next section. It is possible that remedies in that area would

in themselves be sufficient to overcome the ambiguity of s. 172 and allow the ‘success of the company’ to be interpreted by the courts as ‘the success of the business enterprise carried on by the company’. Alternatively the six extra words (or better wording, to similar effect) might be inserted into the primary legislation.

Even if directors were enabled to see their duty in terms of the success of the business enterprise, rather than shareholder value alone, the meaning of success would remain undefined. There remains a case for a statement of the purpose of the business against which success might be judged. The question is whether this statement of purpose should have legal force, in the same way as the Objects clause of a memorandum of association. The requirement of an objects clause was abolished by CA 2006 as redundant in the light of previous changes in the law to place a company’s capacity beyond challenge as *ultra vires*. Such clauses had become compendious with a view to covering every imaginable contingency. It is likely that the re-introduction of such a requirement, albeit for different reasons, would run into the same problem. Furthermore precedent suggests that the courts are reluctant to challenge judgements made by directors about the conduct of a business, however defined. It must also be acknowledged that the creation of deemed employee membership would not directly address the possibility of a conflict between the interests of the enterprise (encompassing those of both long-term shareholders and workers) and those of non-member stakeholders. On balance, therefore, a statement of purpose would be better left to the discretion of the directors, while noting that it might be expected that an enterprise should be able to articulate how it contributes to the common good.

4: Further implications for legal reform

The CLR recognised that “one of the most important influences on the behaviour of directors and members is the market in corporate control” (CLR, 1999, p. 34). This strictly economic rather than legal factor cannot be neglected when considering director’s duties and corporate purpose. The surest way for directors to lose their office and any employment is in consequence of a hostile takeover. Personal interest aside, the UK legal framework and the culture and practice of the City prohibits directors from blocking a hostile bid by one of the many devices common in the US, and regards as absolute the sovereignty of shareholders over the disposal of their property, namely the shares in a company, subject only to a limited understanding of the public interest in terms of national security and competition policy. It is only to be expected that the interests of shareholders will rank paramount in the minds of directors as they consider s.172. This factor has become ever stronger as technology has made equity markets more and more liquid, shareholding periods shorter and shorter, and hedge funds more and more powerful. The share register can change dramatically within days of the initial offer and become dominated by those with a purely short-term financial interest.

This dogma of the absolute property rights of shareholders must be regarded as radically incompatible with Catholic Social Thought since it takes no account of the community of persons engaged in the business enterprise. As indicated above, CST holds that ‘capital’ should not be set up in opposition to ‘labour’; capital cannot be possessed against labour or possessed for its own sake; the legitimacy of private ownership of the means of production is contingent on their being put at the service of labour. No legitimate decision can be made which considers only the interests of shareholders.

There is no prospect of a sustainable commitment by a public company to a corporate purpose other than enlightened shareholder value (and perhaps not even enlightened, as

many critics point out) without the prohibition of the hostile takeover.¹ This is another precondition of change, alongside the recognition of qualifying employees as members. For directors to be able to pursue the success of the actual enterprise for which they are responsible, as opposed to the interests of shareholders, they must have the discretion to make an impartial judgement in the terms of s. 172. Thus any takeover offer should, at the very least, require the approval of the board of directors.

From the perspective of the community of persons, even the prohibition of the hostile takeover is not sufficient. Boards may recommend a takeover as in the interests of shareholders without outside pressure and even if this is not in the interests of the company's continuing business enterprise. This implies that the minimal rights of the employee member, in addition to being considered a member for the purposes of s. 172, should include the approval of any takeover recommended by the Board.² Such approval should be sought in the form of a majority vote by ballot, in a similar fashion to a shareholder resolution.³

There are many occasions when workers will approve a takeover, even if this involves redundancies for some or all of them. A struggling business has few options and its workers usually understand this better than anyone. A merger with a larger business may make strategic sense. They may even approve the closure of a viable enterprise when an offer is too good to refuse, provided that an appropriate share of the benefit flows to them.

This last option should strictly not be recommended by the directors as it deprives future generations of the opportunity to participate in the enterprise, in the same way that

¹ This may not be so much a question of a prohibition as of a removal of the duties imposed by the Takeover Code in its present form. The Code might be limited to the conduct of recommended takeovers (i.e. recommended by the Board) including the requirement for employee consent here proposed.

² This would also require amendment of s. 168 CA 2006 accordingly to limit the exclusive right of shareholders to remove directors. Each proposal in this report will no doubt require detailed consequential amendments.

³ The question of meetings of employee members is considered further below.

demutualisation removes the opportunity to participate in a more socially-oriented enterprise. In practice, without an external public interest test, it would be hard to prohibit a takeover approved by both shareholders and workers, if only because there would be no change in legal form as in the case of demutualisation.

With the market in corporate control limited in the above fashion, there is some chance of the emergence of a different understanding of corporate purpose. While the above conditions are necessary and sufficient, further measures are desirable. First of all, the advocates of the market in corporate control (CLR, 1999, p. 45) will argue that without the discipline of the threat of hostile takeover, boards of directors become, in practice, unaccountable. It is certainly true that alternative channels for corporate governance would need strengthening and developing, including both the engagement of long-term shareholders and the representation of workers. An ultimate goal would be the introduction of co-determination on the German model, including genuine worker participation and board representation. All this would require a gradual and incremental change of UK industrial culture and practice.⁴

Secondly, there is a strong case for making parent companies liable for the obligations of their subsidiaries. Limited liability was originally introduced (in 1855 in the UK) at least nominally to protect personal shareholders from ruin as a result of unforeseen circumstances and thereby encourage enterprise despite its inevitable risks.⁵ Once again the moral conception of the company as a community of human persons is helpful; the personality of a corporation is a purely legal construct and there is no inherent reason to accord to a corporation the privilege that one may allow to a human being.

⁴ The argument of this paper is for the minimum recognition of the natural right of employee membership necessary to enable directors to pursue wider corporate purpose. In itself this leaves many important issues unaddressed. A powerful case can be made for going much further in terms of worker participation in corporate governance and management. This would involve the solution of a number of complex issues, including the reconciliation of one vote per employee with one vote per share, perhaps through separate meetings as with different classes of share. The German system appears to be a useful template.

⁵ Ireland (2010) argues that historically this was about protecting not so much the entrepreneur as the rentier.

The case against parent company limited liability follows from its strategic use to shirk financial responsibility to stakeholders. In terms of s. 172, this affects the meaning of ‘success’ of the enterprise to the extent that the risks are passed, without informed consent, to other stakeholders, including not only employees of subsidiaries but also suppliers, customers, local communities and the natural environment.⁶ To the extent that this measure led to the breakup of some groups, this might also be welcome. Where mergers have been based solely on financial and market power, rather than the intrinsic benefits of economies of scale in production, the loss of parent company limited liability might bring about a better match between the scale of the legal form and the underlying community of persons. There may even be a case for re-introducing a stronger public interest test, to allow the Competition and Markets Authority to block mergers with no demonstrable benefit in terms of production and its community of enterprise.

A stronger measure still would be to remove limited liability from any company member of another company. The practical case for this would be that parent company liability might be avoidable by complex legal schemes (similar to those that preceded the original introduction of limited liability) and the moral case is that a company should always be a community of natural persons. One implication of this would likely be the disintermediation of many financial vehicles, which might be desirable. Nevertheless, in practical terms, this measure might be more disruptive than necessary to secure wider corporate purpose.

The requirement for employee consent to takeovers would need careful definition, because of the mismatch between the scale of the relevant community of persons and of the company or companies of which employees would be deemed members. The requirement might properly not apply to very small owner-managed companies. Questions would arise in large groups comprised of many companies, each of which in turn may run several

⁶ A Bill to require parent companies to demonstrate due diligence in relation to human rights and the environment throughout their supply chain was approved by the National Assembly of France in March 2015. The UK Gangmasters (Licensing) Act 2004 also extends responsibility and liability in a similar fashion. Although different (and less far-reaching) in mechanism, these initiatives emphasise that limited liability is a privilege not a right.

businesses. Although it would be straightforward to deal with an offer for the group as a whole, it can be argued that the employees of a particular company or business within a company that is to be sold, should be the relevant voting group and not the employees of the group as a whole. These finer points would need to be worked through in expert forums.

5: Prospects for reform

On a previous occasion when the interests of property were asserted over and against those of labour, Winston Churchill wrote — two months before returning Britain to the Gold Standard in 1925 — that he would rather see “Finance less proud and Industry more content”. While the proposals in this paper will appear too radical to some and too conservative to others, the argument is that they represent a feasible incremental route towards a more inclusive capitalism. Undoubtedly they represent a shift in the balance of power away from Finance, towards Industry.

Their foundation is the concept of the community of persons, which in turn is rooted in a Catholic understanding of the nature and dignity of human work. Participation in a community through labour creates a natural right of membership. Only with the recognition that incorporation should represent ‘a society of persons’ rather than ‘a society of capital-goods’ is it possible for mainstream companies to sustain a notion of corporate purpose other than enlightened shareholder value. This requires legal measures to recognise the natural right of membership through labour as well as the distinction between the working community engaged in enterprise and the legal construction through which the means of production are owned. Furthermore the questions of corporate purpose and success cannot be divorced from the market in corporate control and the strategic use of limited liability to avoid responsibility to stakeholders, making necessary secondary measures beyond the reform of the Companies Act alone.

There is a parallel between the natural right of membership in a community of enterprise and the natural right of property in one’s own body. The parallel extends to the history of reform; it took many centuries for the moral case against slavery to be recognised, in the face of deeply embedded custom and practice and of powerful vested interests. Yet in the end it came to be understood that slavery did not serve the common good and the world is a better place without it. Wage labour is a comparatively recent phenomenon. Only since the Industrial Revolution from about 1750 has wage labour come to dominate the mode of

production. Its moral legitimacy has been contested from the outset, most powerfully in the work of Karl Marx, yet with profound and ultimately misguided geo-political consequences as a result of his commitment to dialectical materialism. Catholic Social Thought, while dating back to the time of Marx, is a relative newcomer to public debate but provides a distinctive set of insights that help to address the conflict between capital and labour without promoting class struggle. This paper is a contribution to the attempt to translate those insights into practical policy.

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