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Miriam T. Rooney

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## BOOK REVIEWS

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SHOULD CHRISTIANS PRESS FOR REVISION OF COMPANY LAWS?

by *Rev. John Francis Maxwell*

40 *University of Detroit Law Journal* 1-165 (1962). \$2.00.

*Reviewed by*

MIRIAM THERESA ROONEY<sup>†</sup>

This analysis of the laws governing the structure of corporations and companies is the most important theoretical study of the legal foundations of capitalism that has appeared since the indispensable Berle and Means volume, *Modern Corporation and Private Property* in 1932. In form it is nothing more nor less than a Memorandum presented to the Company Law Committee, appointed by the House of Commons, Westminster, London, on October 27, 1959, under the chairmanship of the Right Hon. Lord Jenkins. The Committee was charged with the duty of examining the statutes presently in force which regulate business corporations in England, with a view toward their revision if found desirable.

Father Maxwell, a parish priest at St. Aidan's Presbytery in Coulsdon, Surrey, who is Director of the Catholic Social Guild for the Diocese of Southwark, presented the

first draft of this Memorandum to the Jenkins Committee in October 1960. A revised and much enlarged version was submitted in December 1961, and constitutes the text printed here. The views expressed were defended personally by their author before the Committee.

A few mimeographed copies were distributed for comment. One of these was presented to the present reviewer in London in July 1962. Another found its way to William H. Ferry of the Center for the Study of Democratic Institutions in California, and to the Rev. Paul Harbrecht, S.J., S.J.D. (Columbia), author of the distinguished study on *Pension Funds and Economic Power* (1959), who was instrumental in having the Memorandum printed as a unit in one issue of the *University of Detroit Law Journal*. The careful thought thus made available to law review readers cannot fail to have a strong impact on all serious students of capitalism and its effects on the workers of the world.

Organized corporate activity affects al-

<sup>†</sup>Dean and Professor of Law, Seton Hall University School of Law, 1950-1961; presently, Research Professor of Law.

most everybody today, of course, including investors, managers, skilled and unskilled laborers, organized and unorganized, executives, clerical employees, customers, and consumers, in the United States, in England, in the Common Market, and, in fact, everywhere. As a way of life it is most frequently referred to as capitalism, and, although remarkably successful as a means of producing and distributing goods, has been under sharp challenge for more than a century. The unrest among the working people, who constitute a majority of the population, developed into a continuing struggle against its abuses all during the 19th and 20th centuries. Bishop von Ketteler, of Mainz, and Karl Marx were already writing by 1848 on the theoretical aspects of the social and economic problems involved. New Jersey and Delaware early took the initiative in enacting statutes generalizing the forms of corporate organization, which had been devised for special projects in England and her colonies at least two hundred years before. By the 1890's the clash of competing claims to expanding power had reached the point of violence in the Dock Strike in England, and the Homestead Strike in Pennsylvania. Cardinals Manning and Gibbons spoke out in behalf of the workers. Government assistance was called upon, and laws regulating public utilities, and combinations or trusts in restraint of trade, were enacted after extensive discussion and debate. Labor unions became an increasingly important force in social and economic life. The problems engendered reached so far down into the lives of people everywhere that by 1891 Pope Leo XIII had issued probably the most important Encyclical Letter ever written, *On the Condition of the Working Classes*, or *Rerum Novarum*.

The humanitarian claims, as well as the

economic, put forth in the Encyclical, attracted the attention of a few thoughtful lawyers in this country as well as in Europe. Louis Brandeis, an active and able alumnus of Harvard Law School, as early as 1895 revamped a series of lectures he had been invited to give at the Massachusetts Institute of Technology, in such a way as to shift attention from the shareholders toward wider interests.<sup>1</sup> So compelling was the cogency of his arguments that eventually young Harvard Law School graduates in increasing numbers began to draft measures designed to limit excessive claims of corporate power and to serve as the people's attorneys. The Brandeis interest in the Encyclicals of Pope Leo XIII continued throughout his professional life, and Monsignor John A. Ryan of the Catholic University of America recalled in his own memoirs the modest Thanksgiving Day dinners at Justice Brandeis' apartment in Washington where the conversation often was devoted to Pope Leo's views.

By 1931, following the severe sufferings of many after the stock market collapse in 1929, Pope Pius XI issued his Encyclical, *Forty Years After*, reinforcing the Leonine Encyclical of 1891, and clarifying still further the needed adjustments between investors and laborers. The next year, Adolph Berle, Jr., later of the Columbia Law Faculty, whose clergyman father had opened his church auditorium in Boston on several occasions to the Brandeis views, at a time when they were not well received among the intellectuals who owed their income largely to stock-ownership, collaborated with Gardner C. Means in the most searching evalua-

<sup>1</sup> On Brandeis generally, see Rooney, *Law As An Instrument of Social Policy — The Brandeis Theory*, 22 ST. JOHN'S L. REV. 1 (1947).

tion of the structure of corporate enterprise so far made.<sup>2</sup> With the advent of the F. D. Roosevelt "New Deal" policy, beginning in 1933, an almost revolutionary movement in legislative draftsmanship generally followed, in which young lawyers, many of them educated or challenged by those Harvard Law School graduates who reflected the Brandeis influence, compared American and European experiences, and developed a sequence of legal devices which have resulted in a more comfortable existence for the majority.

Meanwhile, legislative developments in the Soviet Socialist Republics were evidenced not only by a series of five-year plans for expanding the productive elements in the economy, but also for legal devices referred to collectively as state trading, whereby the government was utilized not as a means of regulating or limiting excessive economic power but as a substitute for the capitalistic form of ownership of private property. The theoretical and practical effects of the struggle between these two theories and systems will doubtless continue to engage the best minds available for some time to come.

The stark realities of survival have also engendered numerous proposals on international law and economic levels, extending from J. M. Keynes' theories of full employment in 1936,<sup>3</sup> to his recommendations on international banking and credit at the Bretton Woods Conference in 1944. Beginning in 1950, the thinking of Robert Schuman, Jean Monnet, and Henri Spaak, among others, gave rise to the organization of the European Economic Community in such a way that a freer flow of goods and services,

than had been possible previously under the barriers maintained at national borders, could be developed in a practical manner. The various steps which mark the recognition of the humanitarian motives involved in spreading the benefits of economic progress have been extraordinary.

From the economic reconstruction program for post-war Europe, known as the Marshall Plan since 1947, through President Truman's Point Four, in his Inaugural Address of 1950, which became known through United Nations activities under the generic term of Technical Assistance, to the Organization for European Economic Cooperation, and the General Agreement for Tariffs and Trade, a continuing series of legislative measures, drafted by American government lawyers, both in and out of Congress, on permanent or consultative basis, has been spread upon the statute books, after extensive debate, searching hearings, and congressional investigations. The economic and social potentialities of these measures have attracted wide journalistic comment. However, the legal craftsmanship involved has been the concern of comparatively few.

That most governments, no matter how they came into existence, are careful to preserve the forms of law, is taken for granted usually, but rarely thought about. It is seldom recalled, for instance, that notwithstanding excessive use of force in governmental policy, the Hitler government attained its power and objectives according to proper legal form, and that the Soviets have been meticulous in writing out the legal obligations of the people in accordance with the social and economic theories basic to the governmental controls imposed. Law is basic to all human activity, and not merely to the settlement of disputes. Because it is all-pervading, it is the philosophy of law

<sup>2</sup> See also BERLE, *POWER WITHOUT PROPERTY* (1959).

<sup>3</sup> See KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* (1936).

prevailing at any time and in any place which demands analysis, criticism, and evaluation. The legal foundations, and their implications, have been too often overlooked at the same time that the effects are discussed in confusion.

The unique merit of Father Maxwell's Memorandum is found in his grasp of a need and an opportunity. Parliament, in confronting the multiplying problems of world survival on the economic level, had the good sense to call for a fresh look at English company law. In response, a lone voice, in the person of Father Maxwell, had the temerity to speak out that the Popes, for seventy years, have been pointing out an essential economic and social need here, and how it might be met. But he offers no clichés. Rather, he marshals his documents in such a way as to demonstrate, with accelerating emphasis, that the Catholic Bishops all over the world, individually and collectively, in small communities and large, have spoken without ceasing, for half a century now, in support of these Papal recommendations. To the extent that they have been heeded, a "new jurisprudence," acclaimed by the Popes, has begun to spread. Briefly, the position is that all who contribute to the steady increase of production of goods in the world, must share in the benefits of the activity involved. This constitutes the essence of justice. Justice, being the goal of all law, calls for legal means and measures to implement this objective. The actual formulation of the juridical devices necessary is a technical matter, depending upon the skills and judgment of legal practitioners. It is to the lawyers and legislators of England, therefore, that Father Maxwell proposes the revision of company law in such a way that the

workers may more fully share in the benefits of private enterprise, as well as the investors. His proposals are precise and his arguments cogent. His Memorandum must be read carefully and fully — not merely in summary — by labor leaders, financiers, and government lawyers, all over the world, but especially by those wherever capitalism, or the free enterprise system, prevails, under both the common and the civil law systems.

The timeliness of this presentation has subsequently had the cumulative support and added clarifications of the Encyclical, *Mater et Magistra*, of Pope John XXIII, of May 13, 1961. The task is, however, a formidable one. In England, there is but one Parliament to convince. The Commonwealth provides others with comparable problems and outlook. In the United States there are fifty legislatures available for legal experimentation, no federal corporation law having been found constitutionally acceptable or politically desirable by the O'Mahoney Committee and others who have discussed the situation for the Senate. Because the challenge to capitalism does not go away with the passage of time, thoughtful American lawyers, judges, and law professors, especially, will be deeply grateful to Father Maxwell for this extraordinarily valuable analysis of the corporation or company laws presently in force, both in theory and in practice. It shows the application of the philosophical principles of the three great Social Encyclicals to the solution of legal problems in a way not previously done. There is stimulus provided here sufficient to orient experienced jurists toward wider horizons and to arouse the junior bar to high achievement here and now.



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