

# **Business, State and Community : ‘Responsible Risk Takers’,**

## **New Labour and the Governance of Corporate Business**

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*In December 1998, Peter Mandelson M.P., one of the principal architects of the Labour Party’s victory in the May 1997 general election, dramatically resigned as Secretary of State for Trade and Industry. Nevertheless, despite his relatively brief period in that office, Mr. Mandelson left his imprint on policy through the publication in November 1998 of a major white paper, ‘Our Competitive Future : Building the Knowledge Driven Economy’. The white paper sets out the New Labour analysis of the national political economy in a globalised world economy and is very much influenced by Mr. Mandelson’s experience of the entrepreneurial spirit during his fact-finding visit to the United States. This article seeks to chart the relationship between New Labour’s desire to foster the development of the corporate sector within a vibrant entrepreneurial culture and the need to ensure that the integrity of the market is preserved in an arena which is seen as inimicable to strong regulatory intervention by the state. As well as mapping New Labour’s political rhetoric onto contemporary debates in corporate governance, the analysis will involve an examination of the interface between business practice and morality. In particular, the article will focus upon the role of the conception of company directors as ‘responsible risk takers’ and the upon the use of name and shame sanctions in the development of an entrepreneurial culture in which all corporate enterprises are seen as having a legitimate societal ‘licence to operate’.*

### INTRODUCTION

The changes we face in the 21st century economy involve permanent economic revolution: continuous and rapid innovation that compels unprecedented flexibility and adaptability in skills and knowledge. Increasingly every good and every service will be exposed to relentless global competition. And to equip ourselves best to meet and master these challenges , we need a pro-enterprise, pro-opportunity Britain.<sup>1</sup>

This article seeks to examine some of the various dimensions of the governance of corporate business in modern Britain. In order to do this it is proposed to sketch out an overview of New Labour’s approach to the subject as informed by its analysis of the

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wider political economy. It should be noted that the primary objective of the article is to map this political rhetoric on to contemporary debates in corporate law and governance and that space does not, therefore, permit an extensive critical analysis of the many contestable concepts involved therein. The importance of the current political interest in corporate law and governance should not be underestimated. Whilst such interest is hardly novel, the communitarian approach of New Labour has the potential to transcend the Thatcherite neo-liberal dichotomy between the private world of the economic actor and the public world of the societal actor through the creation of new regulatory spaces and community-based discursive processes. It remains to be seen if such spaces or processes will emerge in actuality, as this will depend upon whether New Labour's particular communitarian mix proceeds by dialogue or edict.

There is no shortage of primary source material in relation to United Kingdom company law as there is at present a great deal of interest in the subject in a large part due to the very extensive technical review of the area being undertaken currently by the Department of Trade and Industry. The aim of the review is to evaluate critically and holistically the structural basis of U. K. company law that was laid down in the nineteenth century ( and which has only been revised incrementally during the present century ), so as to address explicitly the regulatory issues arising in the contemporary global economy, and thereby to provide a modern facilitative framework of company law that will be effective in promoting and sustaining an entrepreneurial economy.

The article will, in particular, draw upon the following crucial D.T.I. Consultation Documents that have been issued in the course of the review, namely : *Modern*

*Company Law for a Competitive Economy* ( March 1998 ) and *Modern Company Law for a Competitive Economy : The Strategic Framework* ( February 1999 ).<sup>2</sup> In order to chart the political dimensions of the debate, it is also proposed to centre discussion around three key speeches by the present Secretary of State for Trade and Industry, Stephen Byers M.P., namely the speeches: to the Lord Mayor's Trade and Industry Dinner at the Mansion House ( 2 February 1999 ), which first introduced the concept of the director as a responsible risk taker; to the P.I.R.C. Annual Corporate Governance Conference ( 23 March 1999 ) and at the London Business School ( 21 July 1999 ).<sup>3</sup>

The principal substantive focus of the article will be on the Blair Government's perception of the inherent conceptual tension between the need for the state to promote the entrepreneurial flair required in order for the nation to prosper in the global knowledge economy, and the need to find an effective means of regulating the actors in that marketplace. In order to examine this tension ( which, although to some extent oppositional, is nevertheless not a paradox ) it is necessary to consider the interface of morality with entrepreneurial culture. It will be argued that only by so doing can an appropriate balance between risk taking and fraudulent or immoral business failure be established. This interface thus provides the key to the maintenance of the integrity necessary for the market to function, thereby ensuring both its economic and wider societal legitimacy. The vital importance of cultural attitudes in attaining the optimum form of business governance for the welfare and prosperity of the nation, together with the magnitude of the task in hand and the need to involve all of the members of society in the debate, are clearly demonstrated by Stephen Byers in his speech at the London Business School ( 21 July 1999 ):

Clearly shifting British culture onto a more enterprising and less risk-averse track will take time. But we must all aspire to change the national mood if we are to create an outward looking, confident society, fit to take on the 21st century.

However, as will be demonstrated, New Labour does not perceive itself as having a free hand to engineer the desired broad regulatory framework. For in the globalised economy 'excessive' state regulation by traditional command and control techniques is rendered untenable, as inimicable and burdensome to the vital creative SME sector and due to the possibility of larger companies engaging in forum shopping by way of capital flight by to a more favourable regulatory regime. Given the constraints thus believed to be imposed by the processes of globalisation, at a high level of abstraction the creation of the new governance regime is said, therefore, to require nothing less than, "... a new coalition between Government, business and society."<sup>4</sup>

At a more concrete level the political construction of a market morality depends upon a matrix of factors, one of the most important of which, since the legislative reforms of the Thatcher Government, is the structure of the insolvency regime.<sup>5</sup> In contrast to company law, which is generally permissive and enabling in nature, insolvency law is by its very nature rather more interventionist. Accordingly, the state's interest and role in managing the orderly winding up and dissolution of companies is uncontentious. As such, the insolvency process provides an ideal mechanism for the state to undergird business values through the utilisation of the examples of bad practice thereby gleaned in order to illuminate desirable business behaviour. A model of this practice in operation ( which this article will focus upon by way of example ) is the Blair Government's policy of naming and shaming rogue and phoenix company directors.

Unfortunately, whilst such a governance mechanism is a potentially powerful weapon in the armoury of the modern regulatory state, it is in the present context a policy instrument that requires careful handling. Once more, this difficulty refers back to the pervasive interface of business practice with morality introduced above, as it is also the case that the Government places a high priority on encouraging entrepreneurs in order to boost Britain's international competitiveness, and the stigma attaching to business failure is thought to be a powerful disincentive to such individuals. Indeed, such is the current weight that the Government attaches to the stigma arising from business failure, that the Insolvency Service has been instructed to undertake a review into this subject on behalf of the Department of Trade and Industry and a consultation paper is proposed for winter 1999.

It will be argued that the notion of the director as a 'responsible risk taker' has gained substantial political and commercial currency ( although it should be acknowledged that the concept has yet to receive significant attention from the judiciary or legal profession ) as a way of balancing these opposing objectives, and that the concept also has the potential to unify certain otherwise disparate aspects of company law and insolvency law and public and private company governance.

In conclusion, it will be suggested that some form of value-based signalling in relation to the interface of business practice with morality, is essential to the establishment and continuing development and maintenance of company directors as 'responsible risk takers'. Further, it will be argued that this concept forms a vital element of the wider societal compact that is necessary to foster an entrepreneurial culture in which the full

spectrum of companies, from the owner-managed private limited company to the public company with a full stock exchange listing, are perceived by society as having a legitimate 'licence to operate'.<sup>6</sup>

#### 'NAMING AND SHAMING' AND PHOENIX COMPANY DIRECTORS

On attaining office, the former Minister for Competition and Consumer Affairs, Nigel Griffiths M.P., spearheaded a much publicised campaign against 'phoenix directors' who abuse the privilege of limited liability by trading through successive limited companies which fail, leaving unsatisfied creditors in their wake. This is the general notion of the phoenix situation and the essential complaint is that traders are utilising undercapitalised limited liability companies as a means of insulating themselves from the financial repercussions of repeated business failure. Concern over this type of activity is by no means new and indeed was commented upon extensively in the Cork Report :

“ It has been made evident to us that there is a widespread dissatisfaction at the ease with which a person trading through the medium of one or more companies with limited liability can allow such a company to become insolvent, form a new company, and then carry on trading much as before, leaving behind him a trail of unpaid creditors, and often repeating the process several times. The dissatisfaction is greatest where the director of an insolvent company has set up business again, using a similar name for the new company, and trades with assets purchased at a discount from the liquidator of the old company.”<sup>7</sup>

It should be noted that this oft-quoted paragraph refers not only to the general notion of the phoenix abuse, but also to the more specific and aggravated practice of setting up a new company and trading in the same business with a name similar to that of the

insolvent company. In such a circumstance the controllers of the phoenix company have not only sheltered themselves from the full ramifications of the first business failure by the use of a limited company, but they have also transferred the value of the goodwill attaching to the name of the original business to the new phoenix business thereby seeking to misrepresent the credit status of the new business in the eyes of its potential creditors. The complexity of the underlying policy issues is demonstrated by Parliament's response to the Cork Committee's recommendations, which was to make the use of a similar company name for the phoenix company a criminal offence pursuant to section 216 of the Insolvency Act 1986 and to leave the general phoenix scenario to fall within the factors to be taken into account by the courts in determining whether a director is unfit to act as such, thereby meriting disqualification under the Company Directors Disqualification Act 1986.

The case of J & L Ashworth ( Hardware ) Ltd<sup>8</sup> illustrates a typical use of publicity sanctions as part of the name and shame campaign. The decision is indicative of the wider usage of the phoenix term as the director had been found unfit to be a company director pursuant to section six of the Company Directors disqualification Act 1986 on the basis, *inter alia*, that he had 'caused three companies to commence trading in a business which had failed previously'. Although the companies were all undertaking the same type of business they were not utilising prohibited names, and section 216 of the Insolvency Act was thus irrelevant as the companies were not therefore phoenix companies in the technical sense. To add to the confusion it should be noted that even if a prohibited name had been used there is nevertheless an automatic exemption for the phoenix company directors from the operation of section 216 if full consideration

is given for all the assets ( including any goodwill attaching to the company name ) transferred to the new company !<sup>9</sup>

From the above it can be seen that the phenomenon known as the phoenix company is not only a subject of much complexity, but is also is the subject of much contemporary interest and not simply within the relatively narrow confines of either the legal academy or insolvency practitioner circles. As a consequence of the well publicised name and shame campaign orchestrated by the Department of Trade and Industry the phoenix problem has also been the focus of considerable attention in the political and commercial spheres as part of the Government's campaign to create a actively hostile business environment for rogue directors.<sup>10</sup>

#### GLOBALISATION, THE THIRD WAY AND ECONOMIC GOVERNANCE

Such support for good market practice is unsurprising, as more generally the Government has given a high profile to the vital importance of commercial enterprise to the U.K., with particular reference to the need to be competitive and flexible in a post-Fordist global marketplace with its emphasis on just-in-time delivery; short production runs and product quality.<sup>11</sup> An elaboration of the policy consequences of post-Fordism forms a pervasive theme in the white paper issued by the Department of Trade and Industry, *Our Competitive Future : Building the Knowledge Driven Economy*.<sup>12</sup> Examples of the interrelationship of these points can also be found in many of the speeches of the Prime Minister, Tony Blair M.P.; see for example the speech to the Trades Union Congress ( 9 September 1997 ), where he says of the Third Way :



... it starts from a recognition of certain realities about the modern world:

(1) We live in a global economy, where financial irresponsibility by Governments leads to immediate punishment from the markets

(2) There is a technological revolution transforming the workplace and production

(3) Consumer tastes have become varied, highly demanding, expecting very high standards of quality and service

(4) The future of modern developed nations lies in the knowledge and information economy

So mass production is out. Go-it-alone microeconomics is out. Jobs for life are probably out. Quality is in. Skills are in. Prudent finance is in. We compete in a global economy that is spinning with change.<sup>13</sup>

The import of these ideas has led to the recognition by the Blair Government of various facets of the so-called 'competition state', which in contrast to the welfare state ( which sought to remove certain economic activities from the market ) pursues, as Cerny puts it, " increased marketization in order to make economic activities located within the national territory ... more competitive in international and transnational terms."<sup>14</sup> However, whilst globalisation is generally perceived as a multi-dimensional set of processes capable of both emptying and empowering states, New Labour has been accused of taking a significantly more absolutist 'hyper-globalist' stance. Following this analysis the role of the state is conceived simply in terms of adapting individuals to the economic realities of the global market and Government has little choice other than to adopt a minimal regulatory function consistent with the broad neo-liberal economic paradigm of the 1980's.<sup>15</sup> Indeed, this view has caused one commentator to lament that, "New Labour now accepts that there is simply no alternative to neo-liberalism in an era of heightened capital mobility and financial liberalisation - in short in an era of globalisation."<sup>16</sup>

Accordingly, for New Labour, the new role of Government is to facilitate the development of a 'knowledge driven economy'<sup>17</sup> ( where ideas, know-how and services rather than traditional manufacturing industries are the key to economic success ) populated by "serial entrepreneurs"<sup>18</sup> in order to maintain national prosperity. Indeed, it is in the light of this analysis that New Labour has sought to undertake an ambitious reconfiguration of the relationship between the state, the private sector and the citizen by adopting a broadly communitarian approach to governance, citizenship and regulation.<sup>19</sup> Whilst the precise nature of the project remains vague ( perhaps unsurprisingly given the oft-noted lack of clarity in the concept of community that underpins the broad church of communitarian theories )<sup>20</sup> the most comprehensive political statement to date ( albeit expressed as work in progress ) is to be found in Tony Blair's own work, *The Third Way : New Politics for the New Century* ( 1998 ).<sup>21</sup> Although New Labour's central notion of community is undoubtedly in part indebted to the responsive communitarian movement in the United States<sup>22</sup> it would seem that the distinctive influence of the domestic communitarian heritage and of the Labour Party's own political roots should not be overlooked.<sup>23</sup>

This project,<sup>24</sup> is in the words of the Chancellor of the Exchequer, Gordon Brown M.P., to the News International Conference ( 17 July 1998 ), consciously conceived of as a 'new politics' designed to meet the needs of a, "national politics for the global marketplace".<sup>25</sup> It is interesting to note that the first order analysis in this speech is one of the economic position of the nation in the global economy and that the parameters for both domestic economic action and social policy are treated as being both exclusively established and severely constrained thereby. Criticisms have been

made of the reality of globalisation in reducing the effective powers of action of the nation state and some movement towards greater state regulatory intervention, at least at an international level, seems to have been prompted by the South East Asian financial crisis. A good summary of the position is given in a subsequent speech by Gordon Brown to the Commonwealth Finance Ministers in Ottawa ( 30 September 1998 ) and entitled, 'New Global Structures for a New Global Age'. The new measures proposed to regulate international finance ( with a particular focus upon transparency and stability ) and to provide for a code of good practice on social policy are of especial interest.<sup>26</sup>

Despite these potential international ramifications, the New Labour communitarian project seeks to present a new holistic vision of the individual and society that is very much premised upon the concept of the retrenched state in a globalised economy. The idea has been labelled the 'Third Way'<sup>27</sup> as it attempts to avoid, what are perceived by its advocates as, the pitfalls of both the corporatism of the Old Left and the market-lead neo-liberalism of the New Right.<sup>28</sup> Hence, the new politics is presented rhetorically as a synthesis of ( or, as its progenitors are keen to stress its distinctive nature, at least by way of contrast with ) what have been traditionally viewed as a series of binary oppositions.<sup>29</sup> For example, New Labour speeches are peppered with references to the good society and the good economy; enterprise and fairness; individualism and community, and it is always stressed that there is no inherent tension between the juxtaposed ideas but rather that they are strongly complementary. Rather unsurprisingly, the theory underlying this type of articulation has been subject to vigorous critique, particularly by members of the more traditional Left of the political spectrum such as Stuart Hall, who comments somewhat disparagingly that,

“The ‘Third Way’ speaks as if there are no longer any conflicting interests which cannot be reconciled. It therefore envisages a ‘politics without adversaries’.”<sup>30</sup>

In any event, the new ground that emerges ( or which may be thought to be in the process of emerging as the modernising project is explicitly described as one of ‘permanent revisionism’ ) is of a society of opportunity and responsibility which draws upon, and is informed by, not only traditional socialist ideas of social obligation and solidarity but also the core Thatcherite motifs of economic opportunity and dynamism. And, as the following extract from the speech of Gordon Brown to the News International Conference ( 17 July 1998 ) amply demonstrates, New Labour has not been shy to emphasise the vital importance and desirability of the latter ideas : “ People say that Mrs Thatcher created an enterprising society. I say there is still not enough enterprise and we have to do better. I want Britain to be, in every area, a creative innovative and enterprising economy.”

A prime example of this aim is to be found in ‘Competitiveness UK’, a concept launched by the then President of the Board of Trade, Margaret Beckett M.P., on 4 June 1997. Mrs Beckett went on to outline her vision of U.K. industrial policy in a number of keynote speeches which denoted strong markets, modern companies and an entrepreneurial culture as the three pillars which the state, in partnership with other interested groups, must foster in order to promote a competitive economy.<sup>31</sup> With the development of the idea of the knowledge economy by her successors at the Department of Trade and Industry the recent policy emphasis has moved to capabilities, competition and collaboration.<sup>32</sup>

In particular, as part of a series of policy initiatives centred around ‘Competitiveness UK’, the Blair Government has proved keen both to stress the key role that small and medium sized companies have to play in building an enterprising nation<sup>33</sup> and to undertake a comprehensive review of company law so as to provide a modern framework for a modern economy.<sup>34</sup> These two themes are of some importance in the phoenix company context for such companies are invariably small owner-managed enterprises. Hence, as the Government encourages the growth of this sector,<sup>35</sup> by seeking to foster a culture<sup>36</sup> in which many more individuals view it as natural to aspire to become risk-taking entrepreneurs,<sup>37</sup> the phoenix scenario has the potential to affect fundamentally a very large and growing number of people whether as victims or as perpetrators.<sup>38</sup> It is thus important that the governing legislative provisions should articulate a clear policy which is both accessible and intelligible to this constituency.<sup>39</sup> Such transparency is of especial significance given the severity of the sanctions which apply to infractions of the complex statutory provisions relevant to the phoenix company and this is all the more the case if the Government chooses to maintain a policy of naming and shaming those responsible for such transgressions.<sup>40</sup>

#### THE GOVERNANCE OF CORPORATE BUSINESS : PUBLIC COMPANIES

The Labour Government’s early stress upon naming and shaming phoenix directors is indicative of the fact that the phoenix company problem squarely raises, in terms of both the appropriate regulatory mechanisms and the substantive standards to be employed, the wider issue of the governance of corporate business. Whilst there has been considerable interest in this topic in recent years,<sup>41</sup> the traditional focus in the United Kingdom has been towards a more circumscribed notion of corporate

governance conceived primarily in terms of determining the appropriate relationship between the board of directors and the shareholders<sup>42</sup> of a relatively small number of quoted public limited companies.<sup>43</sup> Given the tremendous power that many of these companies command such a high level of interest is undoubtedly justified and even though this form of corporate governance ( being principally addressed at the accountability of publicly traded companies<sup>44</sup> ) is not directly relevant to the narrow phoenix company issue there are certain aspects of the debate which are illustrative of the current relationship between the state, business sector and wider community towards the governance of business in its broader sense.

In particular, it is acknowledged that the power of publicly traded companies arises not simply from the deficit in the level of accountability to their shareholders but because such companies are also in an increasingly autonomous position vis-à-vis the state due to the opportunities offered by information technology and open capital markets for global re-location.<sup>45</sup> In the light of the latter point it is unsurprising ( especially given the wider political scenario previously outlined ) that the corporate governance discourse has been conducted primarily in the realm of self-regulation in both the domestic<sup>46</sup> and the international sphere.<sup>47</sup> Thus, although there is general agreement that some state intervention is necessary to provide a basic regulatory framework to the market,<sup>48</sup> the broad thrust of the corporate governance proposals is towards the flexibility and dynamism of self-regulation and to an invocation of a neo-liberal minimal state that will not place what are perceived as unnecessary hurdles in the way of wealth creation.<sup>49</sup>

At present it is widely acknowledged that the precise form and scope of the governance mechanisms of any system of self-regulation will need to map the specific culture of the host state<sup>50</sup> and it would seem that there is general acceptance ( at least in the UK business world ) of two core ideas central to the Anglo-American paradigm : that a company's primary mission is to generate returns for the present and future shareholders and that the shareholders' rights are derived squarely from their private property interest in a company.<sup>51</sup> It follows that in one sense the effect of adopting a system of self-regulation in the UK which acknowledges the investors and directors as the principal legitimate actors in the company ( thereby severely de-limiting the role of the state and other stakeholders in the formal governance process ) has been to privilege a 'privatised'<sup>52</sup> view of the publicly traded company.<sup>53</sup> However, simultaneously and paradoxically, due not only to the employment of the twin principles of disclosure and accountability but due also to the desire to pre-empt state intervention,<sup>54</sup> another dimension arising from the use of self-regulation has been the placement of the governance debate firmly within the public sphere.

Clearly the adoption of a 'pluralist model' as opposed to the present 'enlightened shareholder value model' would formally create a focused arena of a distinctive legal nature for public discussion concerning the business practice of company directors.<sup>55</sup> Such an approach would appear to resonate with the influential Royal Society of Arts Inquiry, *Tomorrow's Company* ( 1995 ) which commends corporations to take an inclusive approach to business, emphasising notions of partnership and interconnectedness with other stakeholders, in order to both maintain their 'licence to operate' and maximise their long term sustainable profitability to present and future shareholders.<sup>56</sup> However, although the Department of Trade and Industry review

recognises that the present fiduciary duties require an inclusive approach, it clearly and categorically limits this duty to the latter objective.<sup>57</sup>

In very crude terms the privatised axis is at present thus constituted as the dominant formal mode of discourse and is thus privileged over the public limb of 'inclusiveness' attaching to the notion of the 'licence to operate' which, in a formal legal sense, languishes barely distinguishable within its shadow ( a fact which is undoubtedly exacerbated by the confusion within the enlightened shareholder model between short-termist and inclusive approaches ).<sup>58</sup> However, on this axis it is the pre-emptive principle of self-regulation which ironically has thrown certain substantive business operations open for debate in the civic arena, for it permits and necessitates a discourse concerning the business practice of going concern companies as a means of legitimating and sustaining their societal 'licence to operate'.

A prime example of this shift in the UK, which bears a close affinity to the name and shame campaign over rogue directors, is the ongoing public debate over levels of executive pay.<sup>59</sup> The topic of so-called 'fat cat' salaries, in particular in relation to senior executives of privatised industries such as Cedric Brown, Chairman of British Gas plc, has been constantly in the press in the last decade. Such pressures led to self-regulation through disclosure of information pursuant to the recommendations of an industry group contained in *Directors' Remuneration : Report of a Study Group Chaired by Sir Richard Greenbury* ( 1995 ). However, it would appear that the recommendations contained in The Greenbury Report may not be sufficient to forestall legislative intervention requiring shareholder approval of directors' remuneration levels if, as Stephen Byers put it in his speech to the P.I.R.C. Annual



Corporate Governance Conference ( 23 March 1999 ), “best practice does not succeed in delivering a greater link between pay and performance.” Subsequently, the topic has received an extended analysis in D.T.I. Consultation Document *Directors’ Remuneration* ( July 1999 ), where the Government has indicated its preference for the above measure together with the creation of new procedures to enable shareholders to move a resolution on directors’ remuneration at the annual general meeting of the company.<sup>60</sup>

#### THE GOVERNANCE OF CORPORATE BUSINESS : PRIVATE COMPANIES

By way of contrast, the governance of private companies<sup>61</sup> is a subject which is rarely examined or even directly acknowledged as a field of enquiry in such terms.<sup>62</sup> Indeed, such companies have been traditionally placed for analytical purposes within a much more discrete frame of reference than listed public companies. This strongly private perspective is reinforced by a factual backdrop where there is rarely a separation of ownership and control as, unlike the majority of listed public companies, the owner-managers of a private company will almost invariably own or control the majority, if not all, of the share capital and voting rights of the company. Thus, as the small private company is viewed as being distinctively within the private sphere<sup>63</sup>, the analytical perspective associated with it has largely disregarded any broader civic, ethical or socio-political analysis, at least in relation to the **ongoing** governance of a company’s business. Hence, the widely held view of corporate practitioners is that unanimous shareholder ratification is a near universal panacea at common law for any internal corporate irregularities ( of a civil nature ) arising in a solvent private company. The strong notion of shareholders as the utilisers of their own private

property has undoubtedly been influential to this end, as one commentator has recently put it : “Ownership ... served to legitimate the corporate form itself. So long as it was owned by individuals the economic and political power of the company was both benign and a bulwark against the intrusion of the state.”<sup>64</sup>

Clearly such sentiments were well fitted to the prevailing neo-liberal political and economic culture that characterised the majority of the Thatcherite era and in which the power of the state was in theory to be retrenched in order to allow maximum economic autonomy to individuals.<sup>65</sup> Accordingly, the extensive disquisition on the private limited company ( which itself was strongly associated with this entrepreneurial freedom ) in the last twenty years tends to have been conducted by way of a discussion of the appropriate facilitative structures to be adopted, in terms of de-regulation initiatives and by way of an otherwise relatively discrete and technical legalistic discourse.<sup>66</sup> It is not obvious that this position will change, for whilst the company law review does consider private company governance issues both in the context of the scope of company law and in its own right, the former is considered largely irrelevant ( within the context adopted ) and the latter is primarily conceived in structural and facilitative terms.<sup>67</sup>

However, whatever the formal analytical legal position, as has been frequently noted, the putative corrosive tendency of untrammelled free markets within a desired minimal state has the paradoxical effect of enhancing the need for regulation,<sup>68</sup> whether sponsored by the state or in the form of self-regulation. Further the regulatory processes employed are capable of thereby producing a “complex set of legal fields”<sup>69</sup>

in which it is not always easy to maintain transparency or to co-ordinate overall policy as each of the fields becomes more juridified and path-specific over time.

In particular, a high level of state intervention and regulation is found to be justified on the occasion of business failure ( especially, as is the case for the overwhelming number of private companies, where the peculiar attribute of limited liability is involved ). It is primarily at this stage, since the legislative reforms of the mid-1980 s, that the enclosed world of the private company is torn open and submitted to a retrospective judicial and public scrutiny by way of the insolvency, and where appropriate, disqualification processes. The considerable body of new jurisprudence that has thereby arisen has resulted in a dissonance between the traditional prospective rules of business behaviour required, which, in terms of the standard of skill and care expected of directors, tend to have reflected a laissez faire approach whereby private actors are permitted a wide field of discretion, and the much more interventionist rules reflecting the public interest that are applied ex post facto on business failure.<sup>70</sup>

Hence, although the judicial treatment of issues in respect of this facet of the governance of the private company sector has not traditionally been imbued with a strong prophylactic aspect at common law, it may be argued that such an approach is increasingly to be found, to (mis)use Maine's famous phrase, "hidden in the interstices of procedure" ( or in more modern parlance the designated fields of regulation ) arising on business failure.<sup>71</sup> In fact this outcome is not too surprising given the Thatcher Government's deliberate restructuring of the insolvency regime by licensing its operation to a new professional monopoly of insolvency practitioners and creating new punitive sanctions pursuant to the wrongful trading and disqualification

regimes. Thus, it is undoubtedly the case that these major reforms were initiated in order both to police and to legitimate the market as a social ( rather than simply an economic ) institution.<sup>72</sup>

### GOVERNANCE BY CULTURE

A valuable aspect of New Labour's name and shame campaign therefore lies in its capacity to render explicit in the public domain the prospective dimensions of private company governance, thus facilitating the unification of the rules and values that have grown up ( seemingly with scant reference to each other ) in the two fields of regulation discussed above around the more objective test applied on corporate failure.<sup>73</sup> Further, it is also suggested that the effect of the name and shame policy would be likely to be enhanced if there was a statutory statement of the duty of skill and care clearly setting out the appropriate duty.<sup>74</sup> The duty would require to be stated in sufficiently flexible terms yet nevertheless be sufficiently clear to provide practical guidance. It is suggested that a similar provision to section 214 of the Insolvency Act 1986 ( as interpreted by Knox J in *Re Produce Marketing Consortium Ltd. No 2*<sup>75</sup> ) is desirable. In broad terms, pursuant to this test a director is expected to display the general knowledge, skill and experience that may reasonably be expected of a person performing the same functions as the director in a similar company ( the objective limb ) in addition to applying any specific expertise that he/she may have ( the subjective limb ). It is pleasing to note that this is the option recently recommended by the Law Commissions Report, *Company Directors : Regulating Conflicts of Interests and Formulating a Statement of Duties* .<sup>76</sup>

It is submitted that the transparency generated by these twin policy initiatives would have the benefit of promoting both a more general awareness and a deeper understanding of the responsibilities of a contemporary company director within society and thereby of reducing existing levels of confusion or ignorance on the topic. In addition, a public space would be created in which the appropriate governance principles for corporate business activities could be forged and elucidated.<sup>77</sup> As this task is central to the maintenance of the broad compact between companies, the multifarious corporate actors ( principally comprising of a company's directors, employees, creditors and consumers ) and the wider society, which constitutes the corporate licence to operate there would seem to be no good reason why such a duty of skill and care should not also apply to the directors of publicly traded companies,<sup>78</sup> thus fusing the approach taken to this aspect of the governance of corporate business around this central pillar of ideas.

Such a stance in relation to the duty of skill and care is not one that has recommended itself to the judiciary who have traditionally eschewed any strong standard setting role in order to preserve an appropriate zone of business discretion, see for example the dictum of Lord Wilberforce in *Howard Smith Ltd. v. Ampol Petroleum Ltd.*<sup>79</sup> : “There is no appeal on merits from management decisions to courts of law : nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.” Such a position is surely correct, it is clearly not for the courts to be engaged in the practice of running companies. However, as the recent decisions pursuant to the disqualification legislation indicate the courts are nevertheless clearly engaged in at least setting the bounds of acceptable commercial behaviour.<sup>80</sup>

However, the advent of Peter Mandelson M.P. as the Secretary of State at the Department of Trade and Industry undoubtedly resulted in a further elaboration of the contours of the debate over the governance of corporate business in this respect when he directly raised the importance of societal attitudes and especially chose to stress the need to encourage the entrepreneurial spirit :

We need to examine all our regulatory systems to ensure that they do not needlessly deter our entrepreneurs ... Are we sure that they create confidence in enterprise and commerce ? I don't think we are confident. I think we need fundamentally to re-assess our attitude in Britain to business failure. Rather than condemning it and discouraging anyone from risking failure, we need to encourage entrepreneurs to take further risks in the future.<sup>81</sup>

Such rhetoric has attracted a good deal of criticism due to its open-ended nature and at first blush certainly seems to run against the Department of Trade and Industry's policy of naming and shaming rogue directors who have transgressed the bounds of acceptable commercial behaviour.<sup>82</sup> However, from subsequent events it is clear that the sentiments expressed are part of a considered policy initiative which expressly looks to future law reform to improve corporate rescue procedures and to reduce the stigma of financial failure.<sup>83</sup>

The next Secretary of State at the Department of Trade and Industry, Stephen Byers M.P., has maintained the momentum whilst introducing a new character to replace Mr. Mandelson's 'serial entrepreneur' : the director as a 'responsible risk taker'. It is suggested that this construct offers a rich linguistic resource<sup>84</sup> which may be drawn upon to develop a nuanced view of the company director's role and the pervasive

interface with business practice and morality. Indeed, Stephen Byers has sought to do just this :

To foster a climate of responsible risk taking, we must also tackle head-on the stigma attached to business failure in this country. At present our bankruptcy laws make no distinction between the responsible risk taker and those individuals who deliberately set out to cheat their creditors or abuse the system.<sup>85</sup>

Thus it is clear that for New Labour the notion of the company director as a responsible risk taker is central to the governance of business operations and to the maintenance of the corporate 'licence to operate' in the emerging global knowledge economy of contemporary informational societies.<sup>86</sup> What remain unclear are the institutional structures and processes by which the concept of the responsible risk taker will be fleshed out.

#### GOVERNANCE OF CORPORATE BUSINESS IN THE KNOWLEDGE ECONOMY

Returning to the theme of private limited companies, it is indeed unsurprising that Government thinking should be orientated in the direction discussed above, as the dynamism of the SME sector and its ability to develop the positive aspects of risk<sup>87</sup> are frequently stated by New Labour to be central to the development of the knowledge economy necessary to compete in the global marketplace. Following the New Labour model it would seem that these twin pressures have brought about the need for economic restructuring so as to encourage small adaptive structures working in a bottom-up fashion in order to foster the necessary creativity and flexibility.<sup>88</sup>

Such thinking has led the Future Unit of the Department of Trade and Industry to develop two scenarios ( which although not constituting an official statement of policy nevertheless will form a conscious aspect of Departmental decision making ) for the business world of the knowledge economy : ‘built to last’ and ‘wired world’.<sup>89</sup> The former scenario envisages the dominance of large corporations ( whose financial might will provide secure careers, good research and development facilities, structures to capture know-how and to exploit brands ), whilst the latter more favoured model ( picking up the current trend of business growth in the SME sector ) posits a constellation of trust based networks of SMEs. It is acknowledged that the reality is likely to be an amalgam of the two positions but it is important to note that such an eventuality has significant structural implications, as Castells has put it:

“Under the conditions of fast technological change, networks not firms, have become the actual operating unit. In other words, ... a new organizational form has emerged as characteristic of the informational global economy: the network enterprise.”<sup>90</sup>

In such circumstances it is perhaps not surprising that there is concern that the traditional means of corporate governance ( with their reliance upon the director/shareholder relationship within individual companies ) are proving inadequate and that there is a much greater emphasis upon governance by way of business culture, in terms both of directors’ practice and the relationship between companies and society.

Concomitant upon the above, it is New Labour’s current view that the key to a Government’s success lies not in stakeholding,<sup>91</sup> at least in the monolithic and corporatist manner in which it is generally conceived,<sup>92</sup> but in the more institutionally flexible and politically malleable notion of partnership. As such the stakeholding idea,



which was launched in Tony Blair's Singapore speech ( 8 January 1996 ) as an organising principle of New Labour, has now been supplanted in this respect by the Third Way. Will Hutton gives a spirited defence of stakeholding against the charges set out above and defends the relevance of the concept : "stakeholding represents the political economy that New Labour lacks to support its value and vision of the 'Third Way'".<sup>93</sup> However, whilst Hutton fervently believes that stakeholding constitutes, "the only current, practical way of pursuing progressive politics", he is forced to conclude regretfully that as, "[s]takeholding is one more expression of European social market capitalism; it will only succeed within an overall European framework constructed to defend the European model."<sup>94</sup> As an indigenous idea to the U.K. stakeholding, therefore, seems dead. It seems unlikely that the company law review will mark an explicit re-vitalisation of the concept ( even if it is re-badged as the 'pluralist model' and applied principally in relation to publicly traded companies ) in the U.K. corporate sphere.

By employing the new term 'partnership', New Labour is not, of course, seeking to limit the meaning to the legal definition of the concept but rather to use the word in its wide generic sense.<sup>95</sup> Such partnerships are consciously promoted as a means of delivering goods or services that would be considered too interventionist and expensive for the retrenched modern state alone.<sup>96</sup> However, the reconfiguration of the relationship between the state, business and the wider community that is thereby entailed has had the effect of blurring the traditional boundaries between the public and the private domain, and thereby of public and private law. In particular, there is some concern that the private law of contract is not an adequate vehicle by which to ensure representation of the public interest or to determine accountability.<sup>97</sup> Further,

this is a matter which especially resonates in corporate law where there is a long heritage of suspicion of the private power wielded by corporations and it would seem that the question of corporate legitimacy will again come to the fore as a consequence of the greater concentration of erstwhile public power in ostensibly private entities.<sup>98</sup>

In addition, the broader governance problems raised by the multi-level interpenetrated formal and informal structures arising are notoriously difficult and complex.<sup>99</sup> Further, it would seem that, as public-private partnerships become more widespread, there is a real danger that some of the positive public service values of the traditional public sector will be eroded<sup>100</sup> ( or at the least disappear from sight, which may have a similar effect ). Rather disturbingly, when this factor is combined with a vigorous constellation of SMEs with a high sensitivity ( and doubtless antipathy ) to regulatory intervention,<sup>101</sup> the commercial environment becomes one in which there is a considerable risk of a governance vacuum.

In such a structural context it may be argued that there will be potentially a significant role for what has been termed 'moral intervention'<sup>102</sup> : i.e. the use of publicity sanctions by the state, as part of an orchestrated campaign to reinforce, inform or help determine the social values of market actors, as an alternative or supplementary, and relatively inexpensive, method of governance of the corporate business sector. Once again the notion of the responsible risk taker may be utilised as the attitudinal touchstone by which the delicate balance between innovation and propriety may be drawn.

## CONCLUSION

That the importance of developing an appropriate entrepreneurial culture is central to New Labour's approach to the governance of corporate business is well evidenced by Peter Mandelson's plea for, " ... an enterprise-orientated, risk-taking, failure-tolerant business culture that enables you constantly to innovate and constantly adapt to changing economic conditions ...."<sup>103</sup> However, whilst these facets are deemed essential within the globalised knowledge-driven economy of network enterprises which characterise the Blair Government's political economy, that very same market situation also demands that the actors therein are subject to governance in order to maintain both its own integrity, and the legitimacy of such actors within the context of the wider society. It is suggested that these contradictory requirements are encompassed within the notion of the responsible risk taker and that this concept has the ability to fuse otherwise disparate strands within corporate governance and company and insolvency law.

Further, given New Labour's view of the structural changes wrought by globalising processes and the reconfiguration of the relationship between business, state and community thereby entailed, it is clear that the Government has a preference for self regulation or regulation through culture.<sup>104</sup> Such a device in terms of the governance of company directors may be seen as quite an encroachment into the what liberalism would describe as the private arena of the economic world. This is explicitly recognised by New Labour politicians, so ( for example ) Stephen Byers is quite conscious that in determining the appropriate balance for the responsible risk taker, "we will be talking about the values that go to the very heart of the societies in which we live."<sup>105</sup> This factor has led many commentators to worry about the potentially authoritarian nature of New Labour's communitarianism and, as Ireland succinctly

puts it there would seem to be a real danger that, “[u]nable to regulate the economy, the Party can be expected to regulate people instead.”<sup>106</sup>

Whilst alternative political and regulatory models are available in relation to a more positive and less authoritarian use of name and shame sanctions,<sup>107</sup> it is clearly evident from the example provided by phoenix companies that the mapping of morality and business regulation is in any event by no means straightforward.<sup>108</sup> Nevertheless, in conclusion, it would seem that the responsible risk taker motif does offer a useful starting point for discussion, and that a rigid distinction between the economic, social and political realm is increasingly more untenable : it will be interesting to see how the debate evolves.<sup>109</sup>

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<sup>1</sup> Extract from the speech of the Chancellor of the Exchequer, Gordon Brown M.P., to the Newspaper Conference ( 22 July 1999 ).

<sup>2</sup> Hereafter respectively, ‘Modern Company Law’ and ‘The Strategic Framework Document’.

<sup>3</sup> Hereafter respectively, ‘the Mansion House Speech’; ‘the PIRC Speech’ and ‘the London Business School Speech’.

<sup>4</sup> See the London Business School Speech.

<sup>5</sup> See further T.C. Halliday and B. G. Carruthers, ‘The Moral Regulation of Markets : Professions, Privatization and the English Insolvency Act 1986’ ( 1996 ) 21 *Accounting, Organizations and Society* 371.

<sup>6</sup> See the Royal Society of Arts Report : *Tomorrow’s Company* ( 1995 ).

<sup>7</sup> See *The Report of the Review Committee on Insolvency Law and Practice* ( 1982 ) Cmnd. 8558, para. 1813. The committee was chaired by Sir Kenneth Cork and its recommendations formed the basis of the

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statutory reform of insolvency law in the mid-1980s. The phoenix problem was discussed in chs. 43 and 45 and the structural nature of the problem is clearly identified in para. 1815.

<sup>8</sup> Unreported, for details see DTI press release, 'Griffiths Double-Barrelled Attack on 'Phoenix' Directors' (18 March 1998), which is also available on the internet.

<sup>9</sup> See Insolvency Rules 1986, S.I. No. 1925, r. 4.228.

<sup>10</sup> E.g. see D.T.I. press releases: 'Griffiths Double-Barrelled Attack on 'Phoenix' Directors' (18 March 1998); 'Crackdown on Unfit Directors' (23 July 1998); 'Kim Howells Delivers Warning to Directors' (9 December 1998) and 'Rogue Director 'Hotline' Hits 1,200 Calls' (4 January 1999).

<sup>11</sup> For a more extended discussion of post-Fordism see C. Hay, *The Political Economy of New Labour* (1999), at pp. 28-30 and M. Castells, *The Information Age: Economy, Society and Culture* (rev. ed. 1999) vol. 1, ch.3.

<sup>12</sup> 1998; Cm. 4176, hereafter '*Our Competitive Future*'. For an analysis of some of the broader sociological and political themes arising see S. Lash and J. Urry, *The End of Organized Capitalism* (1987); A. Giddens, *Beyond Left and Right* (1994); M. Castells, *The Information Age: Economy, Society and Culture* (rev. ed. 1999) 3 vols.; P. Hirst, *Associative Democracy: New Forms of Economic and Social Governance* (1994); D. Held, *Models of Democracy* (2nd ed. 1996) Part III and C. Leadbeater, *Living on Thin Air: The New Economy* (1999).

<sup>13</sup> See also particularly the speeches to the T.U.C. (24 May 1999) and to the C.B.I. (27 May 1998).

<sup>14</sup> See further, P. G. Cerny, 'Paradoxes of the Competition State: the Dynamics of Political Globalization' (1997) 32 *Government and Opposition* 251.

<sup>15</sup> See e.g. D. Held, 'Globalisation: The Timid Tendency' *Marxism Today* (1998) 24 and S. Hall, 'The Great Moving Nowhere Show' *id.*, 9. For a nuanced discussion rejecting both the hyper-globalist and the more sceptical European social market conceptions of globalisation see J. Gray, *False Dawn: The Delusions of Global Capitalism* (rev. ed. 1999) ch. 3 and postscript.

<sup>16</sup> C. Hay, *op. cit.* n. 11, at p. 136.

<sup>17</sup> See further T. Blair, *The Third Way: New Politics for the New Century* (1998), at p. 8; C. Leadbeater, *op. cit.* n. 12, and *Our Competitive Future* (with particular reference to the associated analytical report).

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<sup>18</sup> The terminology employed by the then Secretary of State for Trade and Industry, Peter Mandelson M.P., in his speech to the British American Chamber of Commerce in New York ( 13 October 1998 ) ( hereafter ‘the New York Speech’ ). His successor to that office, Stephen Byers, has developed the more balanced term of the ‘responsible risk taker’ : see the Mansion House Speech.

<sup>19</sup> The aspirational aspect of the project is well brought out in *Tomorrow’s Politics : The Third Way and Beyond*, eds. I. Hargreaves & I. Christie ( 1998 ) ch. 1 and M. Harris, ‘New Labour: Government and Opposition’ ( 1999 ) 70 *The Political Quarterly* 52.

<sup>20</sup> For a discussion of the political space thereby created, see S. Driver & L. Martell, ‘New Labour’s Communitarianisms’ ( 1997 ) 17 *Critical Social Policy* 27.

<sup>21</sup> For further early influences on the Blair revolution see W. Hutton, *The State We’re In* ( 1995 ) and *The State to Come* ( 1997 ) and D. Marquand, *The Unprincipled Society* ( 1988 ).

<sup>22</sup> See especially A. Etzioni, *The Spirit of Community* ( 1993 ) and *The New Golden Rule* ( 1996 ).

<sup>23</sup> See respectively, H. Tam, *Communitarianism : A New Agenda for Politics and Citizenship* ( 1998 ) and K. Morgan, “The Historical Roots of New Labour” *History Today* 48 ( 1998 ) issue 10, 15.

<sup>24</sup> For a critical overview of the creation of New Labour and of its current principal policies see S. Driver & L. Martell, *New Labour : Politics After Thatcherism* ( 1998 ); the special November 1998 edition of *Marxism Today* and C. Hay, *op. cit.* n. 11.

<sup>25</sup> For a short summary of the arguments of W. Hutton and P. Hirst on this point, see K. Faulks, *Citizenship in Modern Britain* ( 1998 ), at pp. 180-182. See also L. Weiss, *The Myth of the Powerless State* ( 1998 ).

<sup>26</sup> For the effect of such international action on the powers of the nation state see M. Castells, *op. cit.* n. 12, vol. II, ch. 5, especially at pp. 266-269.

<sup>27</sup> For the most recent pronouncements see the speeches of Tony Blair on the occasion of the Beveridge Lecture ( 18 March 1999 ) and to the T.U.C. Partnership Conference ( 24 May 1999 ). A more sustained analysis is to be found in T. Blair, *op. cit.* n. 17 ; A. Giddens, *The Third Way* ( 1998 ) and *op. cit.* n. 19, eds. I. Hargreaves & I. Christie.

<sup>28</sup> For an analysis of this breakdown of the traditional political spectrum see A. Giddens, *op. cit.* n. 12, Introduction and chs. 1 & 2; H. Tam, *op. cit.* n. 23, ch. 2 and S. Driver & L. Martell, *op. cit.* n. 24, ch. 6. Cf. N. Bobbio, *Left and Right* ( 1996 ) and W. Hutton, *Marxism Today* ( 1998 ) 34 who argue that

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the approach adopted to the notion of equality ( especially in relation to some parity of outcome through redistributive policies rather than simply equality of opportunity ) will always provide a meaningful political differentiation in the use of the terms Left and Right .

<sup>29</sup> For a feminist critique of the dichotomised mode of thinking that pervades contemporary Western liberalism and communitarianism see E. Frazer and N. Lacey, *The Politics of Community* ( 1993 ) ch. 6.

<sup>30</sup> ‘The Great Moving Nowhere Show’ *Marxism Today* ( 1998 ) 9, at p. 10.

<sup>31</sup> E.g. see the speech delivered to the Engineering Council’s Annual Conference ( 30 April 1998 ).

<sup>32</sup> See further *Our Competitive Future* and the Mansion House Speech.

<sup>33</sup> E.g. “ A dynamic SME sector is fundamental to President of the Board of Trade Margaret Beckett’s three pillars of competitiveness - strong markets, modern companies and an enterprising nation. The Government is keen to work in partnership with SMEs in taking forward the Competitiveness UK initiative.” ( extract from the speech of the then Small Firms Minister, Barbara Roche M.P., to the British Chambers of Commerce Conference on 16 June 1998 ). See also the PIRC Speech where small businesses were stated to be “ ... at the heart of job creation and the Government’s drive to promote competitiveness” and the ‘think small first’ principle ( enunciated in The Strategic Framework Document, para. 2.25 ) by which companies legislation would be made ‘SME-centric’ was roundly endorsed.

<sup>34</sup> The framework of the review and its terms of reference are set out in Modern Company Law. See further, The Strategic Framework Document which identifies the needs of small and closely held companies as a key issue within the review ( see para. 2.19 and ch. 5.2 ) and indicates that the phoenix company issue will be pursued in depth in the next phase ( see para. 5.2.12 ).

<sup>35</sup> The latest business statistics indicate that at the beginning of 1998 there were 3.7 million active businesses in the UK ( representing an increase of 1.3 million over the figure for 1980 being the first year for which statistics are available ) : D.T.I. *The Statistical Bulletin: Small and Medium Enterprise Statistics for the UK, 1998* ( July 1998 ). Although over 99 per cent. of businesses are small businesses ( i.e. they have less than 50 employees ) the majority are conducted by sole traders or partnerships rather than through companies.

<sup>36</sup> Institutional manifestations of this desire can be seen in the creation of the Small Business Service, the Better Regulation Taskforce, the Better Payment Practice Group and the Enterprise Zone internet

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information service; the Access Business and Export Explorer initiatives and the development of the Business Link Service. See also the various initiatives set out in the Implementation Plan published by the D.T.I. on 10 March 1999 in relation to the objectives set out in *Our Competitive Future*.

<sup>37</sup> E.g. “... we need a new approach in Britain to risk-taking that will increase the number of entrepreneurs and raise the growth and survival rate of small businesses” : extract from the speech of Gordon Brown at the Mansion House ( 11 June 1998 ). This theme was at the heart of virtually all of Peter Mandelson’s speeches whilst Secretary of State at the D.T.I., but see especially his speech to the CBI Annual Conference ( 2 November 1998 ); and is central to *Our Competitive Future* ( see in particular ch. 2 discussing entrepreneurial culture ) which was itself referred to as “a manifesto for the D.T.I.” in the Mansion House Speech.

<sup>38</sup> At 31 March 1998 there were roughly 1.3 million GB companies registered at Companies House ( of these slightly in excess of 1.275 million were companies limited by shares of which approximately 885,000 had an issued share capital of £100 or less and just over 1 million had an issued share capital of less than £5,000 ) : D.T.I., *Companies in 1997-98* ( October 1998 ).

<sup>39</sup> This is one of the main priorities of Access Business and is also reflected in the D.T.I.’s stated aim that legislation should be ‘drafted in clear, concise and unambiguous language which can be readily understood by those involved in business enterprise’ : Modern Company Law, para. 5.2 (i)(c). The response of the Company Law Committee of the Law Society to the consultation document ( Law Society Memorandum 360 ) expresses the view that such an aim is unrealistic in the legislative context given the complexities inherent in company law and that the transparency function would be better served through the production of explanatory memoranda. This submission is not at odds with the view stated in the main text as the emphasis remains on enabling the persons directly affected to be able to clearly discern the broad policies underlying the legislation. See also the PIRC Speech and The Strategic Framework Document ( para. 2.24 ) on the importance of this point.

<sup>40</sup> For a detailed discussion of the legislative measures pertinent to the phoenix company scenario see G. Wilson, ‘Delinquent Directors and Company Names: the Role of Judicial Policy-Making in the Business Environment’ ( 1996 ) 47 *Northern Ireland Legal Q.* 345.

<sup>41</sup> There is now a considerable body of academic literature, see e.g. J. Parkinson, *Corporate Power and Responsibility* ( 1993 ); J. McCahery *et al.* ( eds.), *Corporate Control and Accountability* ( 1993 ); S.



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Sheikh & W. Rees ( eds. ), *Corporate Governance and Corporate Control* ( 1995 ); K. Keasey *et al.*, *Corporate Governance* ( 1997 ) and J. Charkham & A. Simpson, *Fair Shares : the Future of Shareholder Power and Responsibility* ( 1999 ).

<sup>42</sup> I.e. the problem is analysed as a consequence of the separation between ownership and control : for the classic exposition see A. A. Berle & G. C. Means, *The Modern Corporation and Private Property* ( rev. ed. 1967 ). For a detailed argument that it is misconceived to view shareholders as owners of the public company in any meaningful sense and accordingly that the separation of ownership and control is not the most apposite way to frame the governance debate as it overplays the narrow director/shareholder agency problem whilst underplaying the need for the wider social mechanisms of governance that are concomitant upon a radically reified or organisist view of corporate personality see P. Ireland, 'Company Law and the Myth of Shareholder Ownership' ( 1999 ) 62 *Modern Law Rev.* 32 and J. Kay, *The Business of Economics* ( 1996 ) Part III.

<sup>43</sup> There are in the region of 2,500 companies quoted on the London Stock Exchange : Modern Company Law, para. 2.1.

<sup>44</sup> Though not exclusively so, see further the Report to the O.E.C.D. by the Business Sector Advisory Group on Corporate Governance, *Corporate Governance : Improving Competitiveness and Access to Capital in Global Markets* ( 1998 ) ( hereafter 'the O.E.C.D. Advisory Report' ) ch.1, para. 1.1:14. The same point is made in the preamble to the ultimate report *O.E.C.D. Principles of Corporate Governance* ( 1999 ) ( hereafter 'the O.E.C.D. Report' ) though it is interesting to note that it is somewhat narrower in focus overall and concentrates on governance issues arising from the separation of ownership and control.

<sup>45</sup> The need to attain the appropriate level of regulation so as to remain attractive to indigenous companies and entice inward investment pervades Government thinking in this area : see in particular Modern Company Law, paras. 3.8, 4.4, and especially 4.7 and The Strategic Framework Document, para. 2.11. It should be noted that the autonomy of such companies is contestable as in the eyes of some commentators multinational corporations are just as 'hollowed out' as the state by the pressures of globalisation and consequently whilst it is true that, "[i]n the global free market the instruments of economic life have become dangerously emancipated from social control and political governance",

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such companies are nevertheless themselves operationally constrained by the very same environment : see further J. Gray, *op. cit.* n. 15, at pp. 63, 72-77 and 234.

<sup>46</sup> See especially *The Report of the Committee on the Financial Aspects of Corporate Governance* : Chaired by Sir Adrian Cadbury ( 1992 ); *Directors' Remuneration : Report of a Study Group Chaired by Sir Richard Greenbury* ( 1995 ) ( hereafter 'the Greenbury Report' ); and *Committee on Corporate Governance : Final Report* : Chaired by Sir Ronald Hampel ( 1998 ) ( hereafter 'the Hampel Report' ). The result of all of this activity was the publication of the *Combined Code* ( 1998 ) in June 1998. The Combined Code consists of a set of principles of good governance and a more detailed code of best practice. Quoted companies are not compelled to apply the provisions of the Combined Code but broadly speaking the Listing Rules issued by the London Stock Exchange require any departures to be publicly identified and justified by the relevant company in its Annual Report. For an examination of the effectiveness of such sanctions see A. Belcher, ' Regulation by the Market : The Case of the Cadbury Code and Compliance Statement' [ 1995 ] *Journal of Business Law* 321 and for a critical appraisal of the Combined Code see J. Parkinson & G. Kelly, 'The Combined Code on Corporate Governance' ( 1999 ) 70 *The Political Quarterly* 101.

<sup>47</sup> See further the O.E.C.D. Advisory Report *passim*.

<sup>48</sup> E.g. *id.*, Chairman's introduction, ch. 1, para 1.1:12; T.Blair, *op. cit.* n. 17, at pp. 8-11 and the PIRC Speech. The nature and extent of state involvement in 'free' markets is obviously contentious : for diametrically opposed viewpoints see J. Gray, *op. cit.* n. 15, arguing 'free' markets can only be the product of strong states, and P. Minford, *Market Not Stakes : The Triumph of Capitalism and the Stakeholder Fallacy* ( 1998 ), favouring private ordering within a minimal state.

<sup>49</sup> E.g. see The Strategic Framework Document, paras. 2.21 -2.23. Indeed even within a system of self-regulation such as that which pertains for the governance of quoted companies in the UK concerns have been expressed that too much stress has been given to accountability to the detriment of enterprise see e.g. the Hampel Report, para. 1.1 and H. Short *et al.*, 'Corporate Governance, Accountability and Enterprise' ( 1998 ) 6 *Corporate Governance* 151. More generally the minimisation of structural impediments to economic growth would seem to be one of the intended functions of the new Productivity and Competitiveness Cabinet Committee announced in *Our Competitive Future*, para. 5.5.

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<sup>50</sup> See the preamble to the O.E.C.D. Report and the Hampel Report, para. 1.4. For a comparative survey of the corporate governance systems in five states and the effect of the 'distinctive nature of each country's culture, history and institutions' thereon see J. Charkham, *Keeping Good Company* ( 1995 ) and K. Lannoo, 'A European Perspective on Corporate Governance' ( 1999 ) 37 *Journal of Common Market Studies* 269. An excellent historical comparative survey charting the significance of political culture in constituting corporate governance structures is given in Mark J. Roe, *Strong Managers, Weak Owners : the Political Roots of American Corporate Finance* ( 1994 ). On this theme see also D. A. Skeel Jr., 'An Evolutionary Theory of Corporate Law and Corporate Bankruptcy' ( 1998 ) 51 *Vanderbilt Law Rev.* 1325 who offers a stimulating discussion of the pressures exerted by the local corporate insolvency regime on the form of governance mechanisms adopted in different jurisdictions. The intersection with globalisation at this juncture is perhaps worth noting as the above analysis would suggest that the business elite of the new world order is not, at least yet, operating within a 'hybridised' extra-territorial top culture but remains firmly rooted in praxis by the history and parameters offered by local/regional business culture : cf. Z. Bauman, *Globilization : The Human Consequences* ( 1998 ).

<sup>51</sup> See the Hampel Report, paras. 1.16 -1.18 and, in favour of the two principles generally, A. Alcock, 'Corporate Governance : A Defence of the Status Quo' ( 1995 ) 58 *Modern Law Rev.* 898 and the O.E.C.D. Advisory Report, ch. 2. The role of the institutional shareholder is thus viewed as increasingly central, see e.g. Robert A. G. Monks, *The Emperor's Nightingale* ( 1998 ) who argues that investor activism ( albeit conceived through a new language of sustainability which engages with other stakeholders interests ) forms the principal practical and legitimate axis of corporate governance. For a critique of this viewpoint arguing for the recognition of the corporation, "as a network of social and productive relationships" and "... the replacement of private, shareholder-centred mechanisms by more democratic, social mechanisms of governance..." see P. Ireland, *op. cit.* n. 42, at p. 56 and, in the same vein, J. Maltby & R. Wilkinson, 'Stakeholding and Corporate Governance in the UK' ( 1998 ) 18 *Politics* 197. In any event, the extent to which governance by investor activism can be utilised in structurally and culturally inimicable environments would appear limited even in the case of very sophisticated investor institutions, see further T.J. André, Jr., 'Cultural Hegemony : The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany' ( 1998 ) 73 *Tulane Law Rev.* 69. It is

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interesting to note that the use of adverse publicity is suggested therein as one of the more effective ways in which such investors could influence the governance agenda, *id.*, p. 171.

<sup>52</sup> I.e. in contradistinction to a public or societal contextual perspective. When combined with economic globalisation such a framework has profound implications for the very existence of civil society and democratic structures : see further U. Beck, *Democracy Without Enemies* ( 1998 ) ch. 5 and R. Dahrendorf, 'A Precarious Balance: Economic Opportunity, Civil Society, and Political Liberty' in *The Essential Communitarian Reader*, ed. A. Etzioni ( 1998 ) 73.

<sup>53</sup> Hence, whilst the Hampel Report recognises that good governance requires all the company's constituencies to be taken into account by the board with the objective of enhancing the shareholders' investment ( paras. 1.3, 1.16 & 1.18 ) the point is made most strongly that although the board is responsible for relations with stakeholders it is **accountable** only to shareholders ( para. 1.17 ). A similar position is set out in the O.E.C.D. Report, principles III and V. The Hampel Report states the reason for this distinction to be that if a multi-fiduciary duty was imposed on the board it would be impossible to find an appropriate benchmark against which to evaluate board decisions thereby perversely making directors even less accountable : for a vigorous academic defence of this argument see E. Sternberg, 'The Defects of Stakeholder Theory' ( 1997 ) 5 *Corporate Governance* 3 ( but cf. J. Parkinson, *op. cit.* n. 41, and the essays in L. E. Mitchell (ed.), *Progressive Corporate Law* ( 1995 ) which provide a more positive evaluation of various multi-fiduciary models ). For a concise discussion of a range of governance paradigms in the corporate sphere see D. P. Sullivan & D. E. Conlon, 'Crisis and Transition in Corporate Governance Paradigms : The Role of the Chancery Court of Delaware' ( 1997 ) 31 *Law & Society Rev.* 713, 714-720 and The Strategic Framework Document, ch. 5.1.

<sup>54</sup> See e.g. C. Villiers, 'Self Regulatory Corporate Governance - Final Hope or Last Rites ? ' ( 1998 ) 13 *Scottish Law & Practice Quarterly* 208, especially at pp. 224-225.

<sup>55</sup> These models are discussed as one of the central issues for examination in The Strategic Framework Document, ch. 5.1.

<sup>56</sup> This stance is also well illustrated by the O.E.C.D. Advisory Report ( ch. 7 ) which, whilst explicitly recognising the validity of societal interests and the role of corporate citizenship ( ch. 7.6 ), nevertheless concludes by emphasising the pre-eminence of the shareholders' interests ( para. 143 ).

<sup>57</sup> See The Strategic Framework Document, paras. 5.1.19, 5.1.12 & 5.1.28 respectively.

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<sup>58</sup> *Id.*, paras. 5.1.12 & 5.1.20.

<sup>59</sup> For a substantive discussion of the issues see C. Villiers, 'Executive Pay: Beyond Control?' (1995) 15 *Legal Studies* 260 and B. R. Cheffins, *Company Law : Theory, Structure and Operation* (1997) ch.14. For an example of a name and shame table on the topic, see *The Guardian*, 19 July 1999.

<sup>60</sup> See paras. 7.17 and 7.23 respectively.

<sup>61</sup> Governance here is used in a general regulatory sense.

<sup>62</sup> Section 459 of the Companies Act 1985 provides a potential forum for airing such matters especially as a wide ambit has been given to the concept of unfair prejudice ( particularly through supplementing the company constitution by reference to equitable constraints manifested by a member's legitimate expectations ) by analogy with Lord Wilberforce's reasoning in *Ebrahimi v. Westbourne Galleries Ltd* [ 1973 ] A.C. 360. However, such expectations have been expressly stated to be inapplicable to listed public companies in *Re Astec ( BSR ) plc* [ 1999 ] B.C.C. 59, at p. 87D *per* Jonathan Parker J and recent decisions have been more restrictive in tenor even in the context of quasi-partnership companies, see especially *Re Saul D Harrison & Sons plc* [ 1995 ] 1 B.C.L.C. 14 ( though cf. *Re BSB Holdings Ltd. ( No 2 )* [ 1996 ] 1 B.C.L.C. 155, at p. 243e *per* Arden J ) and *O'Neill v. Phillips* [ 1999 ] B.C.C. 600. In any event, the fact that the section concerns shareholder disagreements has given it a trajectory towards the resolution of specific private disputes with the result that the judges, in sharp contrast to the disqualification cases where the provisions are squarely informed by the public interest, seem to be chary of making generalised statements on governance in this arena e.g. in terms of a director's duty of skill and care the courts have only very cautiously accepted that serious mismanagement might potentially constitute unfair prejudice : see *Re Elgindata Ltd.* [ 1991 ] B.C.L.C. 959 and *Re Macro ( Ipswich ) Ltd.* [ 1994 ] 2 B.C.L.C. 354. See further on the relationship between s. 459 and respectively, corporate governance principles and the common law duty of care and skill, S. Copp & R. Goddard, 'Corporate Governance Principles on Trial' ( 1998 ) 19 *The Company Lawyer* 277 and A. Boyle, ' The Common Law Duty of Care and Enforcement Under s.459' ( 1996 ) 17 *The Company Lawyer* 83.

<sup>63</sup> Whilst this characterisation may be said to be true of company law as a whole it is often argued that corporate law has a strong public law character ( particularly in relation to public companies ), see e.g. K. Greenfield, 'From Rights to Regulation in Corporate Law' in *Perspectives on Company Law* : 2, ed. F. Patfield ( 1997 ) 1. Indeed the overall position of corporate law on the public /private spectrum is

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very complex and multifaceted as well as being historically contingent, see generally Hendrik Hartog, 'Because All the World was Not New York City : Governance, Property Rights, and the State in the Changing Definition of a Corporation, 1730-1860' ( 1979 ) 28 *Buffalo Law Rev.* 91 and D. Sugarman, 'Is Company Law Founded on Contract or Public Regulation ? The Law Commission's Paper on Company Directors' ( 1999 ) 20 *The Company Lawyer* 162. Such complexity is further evidenced by the lack of precise 'fit' with contemporary contractarian and communitarian debates in corporate theory, e.g. see the lengthy argument in P. Cox, 'The Public, The Private and The Corporation' ( 1997 ) 80 *Marquette Law Rev.* 393. See also W. Bratton Jr., 'Public Values, Private Business, and US Corporate Fiduciary Law' in *op. cit.* n. 41, eds. J. McCahery *et al.* 23, who acknowledges the various dimensions at play and therefore posits a mediative role for corporate law as a situs for dialogue between the private internal business values of the corporate actor and wider public community values.

<sup>64</sup> R. Grantham, 'The Doctrinal Basis of the Rights of Company Shareholders' ( 1998 ) 57 *Cambridge Law Journal* 554, at p. 554. Whilst Grantham is at pains to note that, due to the unitary nature of company law at a formal level, his wider argument, that legal doctrine has come to recognise that the shareholders have ceased to have any meaningful ownership claims over the company, technically applies just as much to quasi-partnership companies as to listed companies, he is clearly uncomfortable with this conclusion as matter of substance, *id.*, at pp. 556-7.

<sup>65</sup> For an exposition of this view connecting it with political freedom in a similar manner to Hayek and Friedman, see P. Minford, *op. cit.* n. 48 . For a more critical appraisal see K. Faulks, *op. cit.* n. 25, chs. 4 and 5 and J. Kay, *op. cit.* n. 42, ch. 15.

<sup>66</sup> An excellent review of the literature is given by J. Freedman, 'Small Businesses and the Corporate Form : Burden or Privilege ?' ( 1994 ) 57 *Modern Law Rev.* 555; A. Hicks, 'Corporate Form: Questioning The Unsung Hero' [1997] *Journal of Business Law* 306 and D. Sugarman, 'Reconceptualising Company Law : Reflections Upon the Law Commission's Consultation Paper on Shareholder Remedies ; Part I' ( 1997 ) 18 *The Company Lawyer* 226, at pp. 233-237.

<sup>67</sup> See The Strategic Framework Document, paras. 5.1.48 & 5.2.19 - 5.2.35.

<sup>68</sup> See e.g. D. Sugarman, *op. cit.* n. 66, at pp. 230-231; J. Gray, *op. cit.* n. 15 , ch. 2; J. Braithwaite, *Crime, Shame and Reintegration* ( 1989 ) 171 and M. Power, *The Audit Society* (1997 ), especially ch. 3 : it also leads to deep tensions within the neo-liberal theoretical account, see further A. Giddens, *op.*

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*cit.* n. 12, at pp. 33-41. For a specific application to corporate affairs see S. Wheeler, 'Directors' Disqualification: Insolvency Practitioners and the Decision-Making Process' (1995) 15 *Legal Studies* 283, at pp. 287-290.

<sup>69</sup> D. Sugarman, *op. cit.* n. 66, at p. 233. Whilst this comment was made in the specific context of the financial markets the author thereafter speaks generally of, "the complex dialectic of regulation, deregulation and re-regulation - of private and public law - which has characterised the regulation of companies, both public and private." *id.* (footnote omitted). For an illustration of this dialectic in company law see the detailed legal and economic analysis provided by the Law Commissions in *Company Directors : Regulating Conflicts of Interests and Formulating a Statement of Duties* (1998; Law Com. Consultation Paper No. 153; Scot. Law Com. Discussion Paper No. 105) and D. Sugarman, *op. cit.* n. 63.

<sup>70</sup> See e.g. the contrast between what is expected of a director according to the traditional approach in *Re Brazilian Rubber Plantations & Estates Ltd.* [1910] 1 Ch. 425 and *Re City Equitable Fire Assurance Co. Ltd.* [1925] Ch. 407 and the modern approach which is much more prepared to engage in standard setting as demonstrated in *Re D'Jan of London Ltd.* [1994] 1 B.C.L.C. 561. Whilst all these cases concern business failure, the earlier cases were undoubtedly decided against a background that was succinctly set out by Lord MacNaughten as follows, "I do not think it is desirable for any tribunal to do that which Parliament has abstained from doing - that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs": *Dovey v. Corey* [1901] A.C. 477, at p. 488. This rationale, and the lax prospective trajectory it suggests, were clearly fractured in favour of a more ex post interventionist approach with the enactment of both the wrongful trading provisions contained in section 214 Insolvency Act 1986 and, as Lord Hoffmann noted in *Bishopsgate Investment Management Ltd. v. Maxwell (No 2)* [1994] 1 All ER 261, at p. 264b (C. A.), the Company Directors Disqualification Act 1986. For Lord Hoffmann's reconsidered position of the effect of this legislation upon directors' duties of skill and care see n. 78.

<sup>71</sup> E.g. in the context of the disqualification jurisdiction see the tenor of the judgments in *Re Continental Assurance Co of London plc* [1996] B.C.C. 888; *Re Westmid Packing Services Ltd* [1998] 2 All ER 124 and *Re Barings plc (No 5)* [1999] 1 B.C.L.C. 433.

<sup>72</sup> See further T. C. Halliday & B.C. Carruthers, *op. cit.* n. 5.

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<sup>73</sup> The fiduciary duties of company directors are also, of course, thereby brought into a public regulatory space.

<sup>74</sup> See J. Braithwaite, *op. cit.* n. 68, at p. 79.

<sup>75</sup> [ 1989 ] B.C.L.C. 520.

<sup>76</sup> 1999; Cm. 4436; SE/1999/25 : Part 5. For a succinct critique see Hon. Justice Santow, 'Codification of Directors' Duties' ( 1999 ) 73 *Australian Law J.* 336.

<sup>77</sup> J. Braithwaite, *op. cit.* n. 68, ch. 9.

<sup>78</sup> By way of contrast, the governance dichotomy between private and publicly traded companies evinced by the traditional stance in the UK is well evidenced by Lord Hoffmann's discussion in the Fourth Annual Leonard Sainer Lecture : " ... while the *Brazilian Rubber Plantations* rule is concerned principally with the relationship between the directors and the shareholders, the disqualification rules are concerned with the relationship between the directors and the proprietors of the business on the one side and their creditors on the other." ( 1997 ) 18 *The Company Lawyer* 194, at p. 197.

<sup>79</sup> [ 1974 ] A.C. ( P.C. ) 821, at p. 832 E-F.

<sup>80</sup> See the cases cited in n. 71 , and for the development of this point in relation to the Insolvency Act 1986 and Company Directors Disqualification Act 1986, see T.C. Halliday and B. G. Carruthers, *op. cit.* n. 5.

<sup>81</sup> See the New York Speech. In order to produce the desired change to the agenda the positive aspects of the entrepreneur clearly had to be stressed to the exclusion of the more negative issues connected with the idea : the concept itself perhaps remains underdeveloped, see further n. 83.

<sup>82</sup> E.g. see City Commentary, *The Times*, 16 October 1998. The tone of the D.T.I. press releases in the name and shame campaign certainly changed thereafter so as to stress the positive facets of the company director as an entrepreneur.

<sup>83</sup> E.g. see the subsequent speech to the CBI in London ( 2 November 1998 ); the integrated approach set out in the Chancellor's Pre-Budget Report ( November 1998 ) ch. 3, especially paras. 3.46-3.48 and *Our Competitive Future*, paras. 2.12-2.14. The latter's conception of the entrepreneur is very similar in approach to the O.E.C.D.'s position as set out in *Fostering Entrepreneurship* ( 1998 ); for a stimulating alternative vision that rejects the Cartesian model of the entrepreneur in favour of a practically based dialogical model ( drawn from the later works of Heidegger's philosophy ) whereby individuals use



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their 'history making skills' to transform 'disclosive spaces' see C. Spinoza *et al.*, *Disclosing New Worlds : Entrepreneurship, Democratic Action, and the Cultivation of Solidarity* ( 1997 ), especially ch. 2.

<sup>84</sup> Though one which is also imbued with difficulties given that both risk and responsibility are sometimes rather imponderable concepts in a world of 'manufactured risk', see further A. Giddens, 'Risk and Responsibility' ( 1999 ) 62 *Modern Law Rev.* 1.

<sup>85</sup> Extracted from the Mansion House Speech. See further, 'Fostering Enterprise : the American Experience' the Report of the U.K.-U.S. Conference on Entrepreneurship ( 2 July 1999 ).

<sup>86</sup> On informational societies, see M. Castells, *op. cit.* n. 12, vol. 1, *passim*.

<sup>87</sup> For a broad discussion and the possible origins of the responsible risk taker motif see A. Giddens, *op. cit.* n. 27, especially at pp. 63-64 and 99-100.

<sup>88</sup> Though not so explicitly stated this would seem to be the import of the London Business School Speech. As a matter of broader social theory the fragmentation of civil society evidenced by the proliferation of interest groups is perhaps one of the key elements of Beck's notion of 'individualization' : see U. Beck, *The Risk Society* ( 1992 ) Part II, especially ch. 5. In the political domain further elaboration is given through the concept of 'sub-politics' in the same author's *The Reinvention of Politics* ( 1997 ).

<sup>89</sup> D.T.I. : *Work in the Knowledge-Driven Economy* ( August 1999 ).

<sup>90</sup> M. Castells, *op. cit.* n. 12, vol. 1, ch. 3 at p. 171. See also C. Leadbeater, *op. cit.* n. 12, *passim*.

<sup>91</sup> See further on the diverse notions of stakeholding, G. Kelly *et al.* ( eds. ), *Stakeholder Capitalism* ( 1997 ); S. Driver & L. Martell, *op. cit.* n. 24, at pp. 51-60; W. Hutton, *The Stakeholding Society* (1999 ); J. Kay, *op. cit.* n. 42, Part III; B. Pettet, 'The Stirring of Corporate Social Conscience' ( 1997 ) 50 *Current Legal Problems* 279; P. Ireland, 'Corporate Governance, Stakeholding and the Company : Towards a Less Degenerate Capitalism ?' ( 1996 ) 23 *J.Law and Society* 287 and D. Campbell, 'Towards a Less Irrelevant Socialism : Stakeholding as a 'Reform' of the Capitalist Economy' ( 1997 ) 24 *J. Law and Society* 65.

<sup>92</sup> See C. Leadbeater & G. Mulgan, 'Mistakeholding: Whatever Happened to Labour's Big Idea ?' ( 1996 ).

<sup>93</sup> *Op. cit.* n. 91, at pp. 267-274.

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<sup>94</sup> *Id.*, at p. 274. For European influence in this regard in relation to the governance of companies see S. Wheeler, 'Enterprise and Community : New Directions in Corporate Governance' ( 1997 ) 24 *J. Law and Society* 44 and J. Dine, 'Implementation of European Initiatives in the UK : The Role of Fiduciary Duties' [ 1999 ] *Company Financial and Insolvency Law Rev.* ( forthcoming ).

<sup>95</sup> See e.g. H.M. Treasury press releases 'New Steps to Drive Forward Private Finance Initiatives and Public Private Partnerships' ( 2 February 1999 ) and 'Launch of the I.P.P.R. Commission into Public/Private Partnerships' ( 20 September 1999 ). The partnership concept is all pervasive applying to the private sector alone, its relations to the public sector and its relations to the workforce see respectively *Our Competitive Future*, ch. 3 ( 'Collaborate to Compete' ) and D.T.I. press releases, 'New Focus for the Future of Partnering in Business and Government' ( 25 November 1998 ) and 'New Civil Service Union a Model for Partnership' ( 26 November 1998 ).

<sup>96</sup> See Tony Blair's speech on e-commerce ( 13 September 1999 ) where the modern state's role was expressly stated to be primarily facilitative and the greater use of self-regulation was encouraged.

<sup>97</sup> See e.g. M. Freedland, 'Government by Contract and Public Law' [ 1994 ] *Public Law* 86 and 'Public Law and Private Finance: Placing the Private Finance Initiative in a Public Law Frame' in *Regulation and Deregulation : Policy and Practice in the Utilities and Financial Services Industries*, ed. C. McCrudden ( 1998 ) ch. 8 and P. Craig, 'Public Law and Control Over Private Power' in *The Province of Administrative Law*, ed. M. Taggart ( 1997 ) ch. 10. For a very stimulating discussion of the dynamics of this relationship see D. Oliver, 'The Underlying Values of Public and Private Law' in *id.* ch. 11 and 'Common Values in Public and Private Law and the Public/ Private Divide' [ 1997 ] *Public Law* 630 and G. Teubner, 'After Privatisation ? The Many Autonomies of Private Law' ( 1998 ) 51 *Current Legal Problems* 393. For specific application to corporate law see D. Sugarman, *op. cit.* n. 63.

<sup>98</sup> Such issues have particularly exercised theorists in the U.S., se e.g. J.W. Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970* ( 1970 ) and M. V. Nadel, 'The Hidden Dimension of Public Policy : Private Governments and the Policy-Making Process' ( 1972 ) 1 *Policy Studies J.* 2. See also, A. Fraser, *Reinventing Aristocracy : The Constitutional Reformation of Corporate Governance* ( 1998 ) who argues for a re-politicisation of the corporation through Republican political theory and S. Wheeler, 'Towards A Feminisation of the Corporation ?' ( 1999 ) 52

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*Current Legal Problems* ( forthcoming ) who sketches a theoretical model of the company based upon Aristotelian virtue ethics and an ethic of care as a way of grounding corporate legitimacy.

<sup>99</sup> See generally, J. Braithwaite, 'Accountability and Governance Under the New Regulatory State' ( 1999 ) 58 *Australian J. of Public Administration* 90 and more specifically in the U.K. context, R. A. W. Rhodes, *Understanding Governance* ( 1997 ) chs. 2 & 3 and P. Vincent Jones, 'The Regulation of Contractualisation in Quasi-markets for Public Services' [1999] *Public Law* 304.

<sup>100</sup> This would appear to be the inevitable flip side of seeking to promote enterprise and risk in public services ( as to the latter policy see the speeches of Tony Blair to : the Civil Service Conference in London ( 13 October 1998 ) and the N.C.V.O. Conference in London ( 21 January 1999 )) and led to the O.E.C.D. adopting the Recommendation *Principles for Managing Ethics in the Public Service* on 23 April 1998. For an examination of the sort of difficulties that might arise in the corporate sphere see S. Wheeler, 'Contracting Out in the UK Insolvency Service: the Tale of Performance Indicators and the Last Cowboy' ( 1997 ) 7 *Australian J. of Corporate Law* 227.

<sup>101</sup> See e.g. D.T.I. press release 'Measures to Cut Red Tape and Reduce the Burdens on Business Announced' ( 3 June 1999 ). Better regulation is conceived in both qualitative and quantitative terms and the Government is committed to improve the former and the reduce latter especially as it is explicitly recognised that regulation puts a disproportionate burden on SMEs ( see e.g. the Better Regulation Task Force, *Regulation and Small Firms ( Progress Report )* ( July 1999 ); *Our Competitive Future*, para. 2.28 and D.T.I. consultation document *The Small Business Service* ( June 1999 ) section 4 ). Considerable efforts have been made to this end : e.g. the Regulatory Impact Unit of the Cabinet Office ( advised by the independent Better Regulation Task Force ) has instituted a Better Regulation Guide including not only a statement of general principles but also a Regulatory Impact Assessment process. For a discussion some of the complexities and practical issues involved in regulation generally see J. Kay & J. Vickers, 'Regulatory Reform : An Appraisal' in *The Law of the Business Enterprise*, ed. S. Wheeler ( 1994 ) 419 and C. McCrudden (ed.), *op. cit.* n. 97 .

<sup>102</sup> A term seemingly coined by Mr. E. Mayo, Director of the New Economics Foundation : *The Guardian*, 7 November 1998. On regulation by values rather than rules see J. Kay, *Community Values and the Market Economy* ( 1997 ) ch. 2.

<sup>103</sup> See the New York Speech.

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<sup>104</sup> For an extended analysis of how culture ( backed by sanctions ) can be invoked pursuant to a Republican model of dialogical democracy in order to check the private power of business see J. Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers' ( 1997 ) 47 *University of Toronto Law J.* 305.

<sup>105</sup> Extract from the speech to the U.K.-U.S. Conference on Entrepreneurship ( 2 July 1999 ).

<sup>106</sup> P. Ireland, 'Endarkening the Mind : Roger Scruton and the Power of Law' ( 1997 ) 6 *Social & Legal Studies* 51, at p.73. Similar sentiments are to be found in P. Minford, *op. cit.* n. 48, who refers to, "communitarian thought police" and S. Driver and L. Martell, *op. cit.* n. 24 , at pp. 35 - 44. For some general difficulties see A. Crawford, 'The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda' ( 1996 ) 23 *J. Law and Society* 247.

<sup>107</sup> See J. Braithwaite, *op. cit.* n. 68; M. Castells, *op. cit.* n. 12, vol. 3, at pp. 379-380 and S. Wheeler and G. Wilson, 'Corporate Law Firms and the Spirit of the Community' ( 1998 ) 49 *Northern Ireland Legal Q.* 239, at pp. 216-266.

<sup>108</sup> Often it will be perfectly proper at law for a new company to take up the assets of a failed company even though both companies are controlled by the same individuals and this creates some resentment amongst other members of the business community, see National Audit Office, *Company Director Disqualification - a Follow Up Report*, HC ( 1998-9 ) 424, at paras. 3.35-36.

<sup>109</sup> The recent move by the I.O.D. to obtain professional recognition for company directors by way of the new chartered director status and the focus on substantive business practice in the Turnbull Report : *Internal Control Guidance for Directors on the Combined Code* ( 1999 ) will doubtless provide subject matter and the author agrees with D. Sugarman, *op. cit.* n. 63, at p. 183 that the trajectory of the debate will be towards a model of company law as public regulation.