

PROGRESSIVE TRAJECTORY OF COMPANY LAW TO EMPLOYEES' INTERESTS UNDER THE NEW ECONOMY: AN ANALYSIS OF UK AND CHINESE COMPANY LAW

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Abstract

The new knowledge-based economy is also known as “the information economy,” “the second industrial revolution” or “the post-industrial society.” It finally arrived in the twenty-first century after being heralded for a long time. The new economy focuses on talent, knowledge, and information. It is based on mobile services, such as email, the internet, and intranets, which make new dot com companies more competitive in this new economy. This economy is global, and it will steadily increase the globalization of businesses. The basic issue concerning corporate governance in the new economy is whether corporate directors should view themselves solely as the stewards of their investors’ capital, and so aim to maximize shareholder value, or whether they should view themselves as the custodians of their companies’ human capital, and thus concentrate more on protecting the interests and developing the knowledge and skills of their employees. In the new economy, people play an increasingly significant role in corporate governance in the midst of the

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transformation from an industrialized to an information-oriented society. This article discusses the importance of employees in terms of their role as one of the primary stakeholders in a company, in order to consider why human capital has become centralized, and the nature and scope of legal rules and mechanisms that should be adopted regarding human capital, using the legislative experiences of the UK and China as two case studies.

Keywords: *new economy, stakeholder theory, human capital, employees, company law*

It is not the strongest of the species that survive, nor the most intelligent, but the ones most responsive to change.

– Charles Darwin

INTRODUCTION

Despite conflicting views about their impacts, increasing globalization and the development of information technology over the last two decades are changing every single aspect of the way we work, and particularly the ways in which economies develop.¹ Compared to conventional methods of production, production in the modern economy is more likely to be in an intangible form, based on the exploitation of ideas rather than material things. This is the so-called weightless economy, which is seen as a significant change in light of the new technology and the knowledge explosion that has taken place since the 1990s. In addition, technological development has brought about a higher sustained level of productivity growth, allowing faster economic growth with lower inflation.² Therefore, many academics and practitioners use the term “new economy” to

¹ Catherine L. Fisk, *Knowledge Work: New Metaphors for the New Economy*, 80 CHI. KENT. L. REV. 839, 839–40 (2005); HM TREASURY, A STRONG AND STRENGTHENING ECONOMY: INVESTING IN BRITAIN’S FUTURE, ECONOMIC AND FISCAL STRATEGY REPORT AND FINANCIAL STATEMENT AND BUDGET REPORT, HC 968, at 2 (2006).

² Robert L. Formaini & Thomas F. Siems, *New Economy Myths and Reality*, 3 FED. RES. BANK DALL. S. W. ECON. 4 (May/June, 2003).

describe the economy of the world from the 1990s onwards, especially with reference to developed countries.³

With society becoming progressively more knowledge-based and information-based, employees are increasingly being considered as assets of a company and one of the company's biggest overheads.⁴ In knowledge-based industries, employees, as providers of human capital, have become the key to business success, since such companies are heavily dependent on their employees' knowledge, expertise and active involvement in order to outperform other companies.

From a European perspective, the importance of placing human capital investment at the forefront of policies to promote economic growth and social cohesion was explicitly outlined in the Lisbon Summit of the European Council in March 2000, and has been repeatedly emphasized ever since as a key strategy to turn the European Union (EU) into the most competitive and dynamic knowledge-based economy in the world.⁵ Scholars have identified measures that increase the quantity and quality of the stock of human capital as important aspects of any growth-promoting policy package.⁶ As employees have acquired their new status as resources for corporate investment, the protection of employees' interests becomes increasingly important.

In terms of corporate governance and company law, considering the interests of the company's employees has long been required in the decision-making of a company's management. The current debate has advanced our thinking about the effective and appropriate governance of the modern corporation, the nature of business ethics or corporate social responsibility, and the extent to which these progressive thoughts should be imposed through duties upon companies or practiced by employers through their business

³ For examples, see David J. Teece, *Capturing Value from Knowledge Assets: The New Economy, Markets for Know-How, and Intangible Assets*, 40 CAL. MGMT. REV. 55 (1998); Christian Lyhne Ibsen & Kathleen Thelen, *Diverging Solidarity Labor Strategies in the New Knowledge Economy*, 69 WORLD POL. 409 (2017); FISK, *supra* note 1.

⁴ GILES PROCTOR & LILIAN MILES, CORPORATE GOVERNANCE 56 (2002).

⁵ European Commission Directorate-General for Employment and Social Affairs Unit A.1, *Human Capital in a Global and Knowledge-based Economy: Final Report*, at IV (May, 2002).

⁶ *Id.* at 11.

judgements.⁷ The discussion of the importance to be given to employees' interests has become a part of the ongoing process of company law reform. We have witnessed cases in which the interests of employees in developing countries were harmed by the misconducts of multinational enterprises.⁸ The British Home Stores (BHS) scandal in the UK that put employees' pensions at risk, for example, reminds us of the significance of employee protection in public companies.⁹

Inevitably, this creates questions about the transportability of "best practices" of corporate governance, particularly in Anglo-American shareholder-oriented countries where employees' interests have not traditionally been the central managerial concerns. Therefore, changes to the world economy have created a need to address the new demands of companies, employees and society, and to fundamental re-think principles of company law and policy. A

⁷ See, e.g., Sally Wheeler, *Labor and the Corporation*, 6 J. CORP. L. STUD. 361, 388–96 (2006); for discussions on the other side of the debate, see Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> [<https://perma.cc/83SP-RHTD>].

⁸ See *Connelly v. RTZ Corp. plc* [1997] UKHL 30, [1999] CLC 533 (Eng.) (recognizing rights of an employee to bring employment claims before the British courts on grounds of substantial justice, despite forum non conveniens applicability); *Lubbe v. Cape Plc. and Related Appeals* [2000] 1 WLR 1545 (Eng.), <http://www.bailii.org/uk/cases/UKHL/2000/41.html> [<https://perma.cc/33C7-CFST>] (regarding plea of forum non conveniens as not sustainable on the ground that the case may be tried more suitably in favor of employees and victims in other forums); *Newton-Sealey v. Armorgroup Services Ltd.* [2008] EWHC 233 (QB) (Eng.), <https://www.casemine.com/judgement/uk/5a8ff74060d03e7f57eaa691#> [<https://perma.cc/Y6UB-8E8Z>] (attributing duty of care liability to several corporations part of a corporate group); *Chandler v. Cape* [2012] 1 WLR 3111 (Eng.), <https://www.casemine.com/judgement/uk/5a8ff71960d03e7f57ea77ca> [<https://perma.cc/HW86-HHHH>] (establishing responsibility of a parent company for the health and safety of its subsidiary company's employees); *Okpabi and others v. Royal Dutch Shell Plc and another* [2018] EWCA 191 (Eng.).

⁹ See Paddy Ireland, *From Lonrho to BHS: The Changing Character of Corporate Governance in Contemporary Capitalism*, 29 KING'S L.J. 3, 5–6 (2018) (discussing the ethic deprivation in modern-day capitalism); see also FINANCIAL REPORTING COUNCIL, *WATES CORPORATE GOVERNANCE PRINCIPLES FOR LARGE PRIVATE COMPANIES*, 2018 (Eng.) (introducing corporate governance standards for large private companies based on their economic and social significance and comparable risks to a wide a range of stakeholders).

number of questions therefore arise: If human capital is so important in the new economy, what are the necessary measures for protecting the interests of employees with their new status as human capital, in order to promote the competence of the company? Does the adoption of the stakeholder approach the right way to make corporate directors more responsive to employees' interests? What are the mechanisms available in the domain of company law, and are they effective in promoting employees' interests?

The Article starts with an introduction to the concept of the new economy and an analysis of the relationships between the new economy, corporate governance, and human capital. Second, the Article discusses the interests of employees in the new economy, especially with regard to their position as primary stakeholders who have a crucial and indispensable responsibility in promoting the success of the company. Following that discussion, arguments are presented regarding the protection of employees' interests through a heightened duty supported by information disclosure in the Enlightened Shareholder Value (ESV) model in the UK company law, and the more diverse board structure supported by soft law¹⁰ approaches embedded in Chinese Company law.

THE NEW ECONOMY, STAKEHOLDERS' INTERESTS, AND HUMAN CAPITAL

Initially appearing in *Time* in 1983,¹¹ the term "new economy" has been widely employed in a large amount of literature, although there is no agreed definition of the term.¹² However, a common feature shared by all academics in their use of the concept is the emphasis on the significance of information. Generally speaking, the

¹⁰ "Soft law" is defined by OECD as "co-operation based on instruments that are not legally binding, or whose binding force is somewhat 'weaker' than that of traditional law, such as codes of conduct, guidelines, roadmaps, peer reviews." OECD, *SOFT LAW*, <https://www.oecd.org/gov/regulatory-policy/irc10.htm> [https://perma.cc/9S6J-XHV3] (last visited June 30, 2020).

¹¹ See Charles P. Alexander, *The New Economy*, *TIME* (May 30, 1983) <http://content.time.com/time/subscriber/article/0,33009,926013-1,00.html> [https://perma.cc/5CXZ-B8TX].

¹² Jack E. Triplett, *Economic Statistics, the New Economy, and the Productivity Slowdown*, 34 *BUS. ECON.* 13, 13–5 (1999).

new economy has been defined by economists in both broad and narrow perspectives. In the broad perspective, some scholars traced this concept to the 1991 economic expansion in the US, which is characterized by strong growth in real gross domestic product (GDP) and per capita GDP, higher rates of investment, as well as low inflation and unemployment.¹³ Gavyn et al. redefined the notion as a “new paradigm” with driving forces including technical progress, globalisation, product market structure modifications, and labour market structure modifications.¹⁴ Three basic characteristics of the new economy can be derived from the foregoing: first, there is a strong GDP growth; second, there is a drop in unemployment and inflation; and most importantly, there is a trend towards long-term wealth creation, which mainly results from the significant technological innovations from the mid-1990s onwards.¹⁵

As for the narrow perspective, the term “new economy” incorporates the development of information technology and the internet, together with their impact on the economy. Gordon understands the term as an equivalent to an acceleration in the rate of technical advances in information technology (IT). However, he does not take into account its contribution prior to 1995 when he defines the new economy as encompassing the mid-1990s acceleration in the rate of price decline in computer hardware, the corollary of an acceleration of exponential growth rate of computer power, and the wildfire speed of development of the Internet.¹⁶ Similarly, Bosworth and Triplett focus on the role of IT as an accelerator of the economy’s rate of output and productivity growth when they claim that the new economy embraces IT developments, namely computers, peripherals, computer software, communications, and related equipment.¹⁷

¹³ Barbara M. Fraumeni & Steven J. Landefeld, *Measuring the New Economy*, 81(3) SURV. CURRENT BUS. 23, 23–25 (2001).

¹⁴ Nicola Jentzsch, *The New Economy Debate in the U.S.: A Review of Literature* in PERSPECTIVES ON ECONOMIC GROWTH 80, 84 (L.A. Finley ed., 2006) (quoting Gavyn Davies, Martin Brookes & Neil Williams, *Technology, the Internet and the New Global Economy*, in GOLDMAN SACHS GLOB. ECON. PAPER NO: 39 (2002)).

¹⁵ See generally Nicola Jentzsch, *The New Economy Debate in the US: A Review of Literature* (John F. Kennedy Inst. for N. Am. Studies, Section of Econ., Working Paper No. 125, 2001) (introducing different definitions of the New Economy).

¹⁶ Robert J. Gordon, *Does the New Economy Measure up to the Great Inventions of the Past?*, 14 J. ECON. PERSP. 49 (2000).

¹⁷ Barry P. Bosworth & Jack E. Triplett, *What’s New About the New Economy? IT, Economic Growth and Productivity*, BROOKINGS INST. 1, 1–3 (Dec. 12, 2000),

The next question concerns with what makes the new economy new. Atkinson and Court argue that compared to the traditional economy, the new economy is “a knowledge and idea-based economy where the keys to wealth and job creation are the extent to which ideas, innovation, and technology are embedded in all sectors of the economy.”¹⁸ Along with notable improvements in technology, production, and trading patterns across the world, companies increasingly face competition on an international level. The rule of the game in this type of competition is that the fast eats the slow. Dot com companies and network companies constitute new organisational forms of corporations, with flexible, devolved, and interconnected subsystems. The key drivers in supporting enterprise are people and their knowledge and capabilities.¹⁹ The success of a company is measured by the market price of the entire company, which is influenced by elements like share price, reputation of the company, value of the trademark, and so on. Leadership is always based on a shared power structure, with employee empowerment and self-leadership. Employees are regarded as an investment of the company. In contrast, in the old economy, the preconditions for states’ economic success included issues such as low costs; abundant, basically skilled labor; and good transportation and other physical infrastructure.²⁰ In this system, the key driver to the growth of an enterprise is capital.²¹ The rule of the game for this type of competition is that the big eats the small; the success of the company is measured by profit; and the leadership of the company is purely vertical. The employees are seen as expenses of the company.

<https://www.brookings.edu/wp-content/uploads/2016/06/20001020.pdf>
[<https://perma.cc/6S7P-R64Z>].

¹⁸ ROBERT D. ATKINSON, RANDOLPH H. COURT & JOSEPH M. WARD, THE STATE NEW ECONOMY INDEX REPORT: BENCHMARKING ECONOMIC TRANSFORMATION IN THE STATES 5 (Jul. 1999), <http://www2.itif.org/1999-state-new-economy-index.pdf> [<https://perma.cc/G55G-XRKB>].

¹⁹ For more discussions on knowledge-based economy, see Richard G. Harris, *The Knowledge - based Economy: Intellectual Origins and New Economic Perspectives* 3 INT’L J. MGMT REV. 21, 21 (2002).

²⁰ ATKINSON ET AL, *supra* note 18, at 6.

²¹ PETER J. VAN BAALEN & LARS T. MORATIS, MANAGEMENT EDUCATION IN THE NETWORK ECONOMY: ITS CONTEXT, CONTENT, AND ORGANIZATION 33 (2001).

The New Economy and Corporate Governance

Continuing changes in the business world, including the widespread employment of new technologies, the globalization of the economy and society, and increasing competition in both the public and private sectors, have all had a great impact on the transformation of organizations' internal structures, strategies and management approaches.²²

Before discussing employees as a primary stakeholder in a company, it is worthwhile to briefly discuss the notion of a "stakeholder." The term first appeared in management literature in an internal memorandum at the Stanford Research Institute in 1963.²³ The use of "stakeholder" to refer to a variety of constituencies who participate in a business has been commonly accepted since the 1980s, after the publication of Freeman's *Strategic Management*, a landmark book in business literature.²⁴ In that book, the concept of stakeholders is defined as "those groups without whose support the organization would cease to exist", originally including shareowners, employees, customers, lenders and society.²⁵ The most famous and frequently cited definition is given in an essay by Evan and Freeman, where stakeholders are described as "those groups who have a stake in or claim on the firm."²⁶ According to the relationship between their interests and the company, stakeholders can be divided into primary stakeholders and secondary stakeholders. They can be also divided into internal and external stakeholders, depending on whether they are members of the company.

As a key stakeholder group, employees have an interest in the company since it provides their livelihood, and at some point in the future after they retire, employees may also benefit financially from

²² Gillian Shapiro, *Employee Involvement: Opening the Diversity Pandora's Box?*, 29 PERSONNEL REV. 304 (2000) (exploring the impact of employee diversity on efficient business management).

²³ Elaine Sternberg, *The Defects of Stakeholder Theory*, 5 SCHOLARLY RES. & THEORY PAPERS 3 (1997).

²⁴ R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* (1984) (exploring various management and stakeholder strategies on corporations).

²⁵ *Id.* at 31–32.

²⁶ William Evan & R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation in An Introduction to BUSINESS ETHICS* 254, 255 (George D. Chrystides, John H. Kaler eds., 1993).

the company's pension scheme.²⁷ In return, employees can enhance the innovation and sustainable development of their company by providing their own expertise and experiences. They are the ones who invent and produce products, deliver their professional services to the company, create its profits, and represent it to the external world.²⁸ Employees tend to have a strong and interdependent relationship with the company they work for. On the one hand, employees are concerned with the company's important strategies, such as working conditions, pension schemes and so on. By virtue of their length of service and the relative inflexibility of their bond with the company, for example, their livelihood which is dependent on their employment, employees strive to secure their interests within the company.²⁹ On the other hand, the company's development, especially the implementation of long-term strategies, largely depends on its employees' recognition and performance of corporate strategic plans and employees' participation³⁰ in the corporate governance.

Traditionally, under the shareholder value principle which dominates in the UK, the role played by employees in corporate governance has not been as active as that of their counterparts in countries in Continental Europe. It has been found that the main methods of communication between UK management teams and their employees were one-way—for instance, staff newsletters, notice boards and emails³¹—in which employees functioned as inactive receivers rather than dynamic involvers. The unions who represent the employees have suffered an overall decline in membership,³² and

²⁷ CHRISTINE MALLIN, *CORPORATE GOVERNANCE* 70–71 (4th ed. 2013).

²⁸ Janet Williamson, *A Trade Union Congress Perspective on the Company Law Review and Corporate Governance Reform since 1997*, 41 *BRITISH J. INDUS. REL.* 511, 514 (2003) (examining Corporate Governance reforms and their impact on employee and stockholder relationships).

²⁹ Company law requires directors to take account of employees' interests in matters affecting the company. However, there is no enforcement mechanism for employees to use when directors fail to take account of their employees' interests. *See* Companies Act 1985, §§ 309, 719 (UK). *See also* Insolvency Act 1986, §187 (UK).

³⁰ *See* Henry Hansmann, *Worker Participation and Corporate Governance*, 43 *U. TORONTO L. J.* 589,

³¹ PROCTOR & MILES, *supra* note 4, at 56.

³² Based on the figures to date, memberships fell from 8,939,000 in 1989 to 7,321,000 between 1999 and 2000. Figures based on data collected by

their influence on the management and governance of companies has been seriously undermined.³³

Since the 1990s, however, with society becoming progressively more knowledge and information-based, employees are increasingly being considered as assets of the company. As one of the company's biggest overheads in terms of cost,³⁴ the success of the business cannot be achieved if excellent, highly educated people are not attracted to work there. In knowledge-based industries—for instance, the software and pharmaceutical industries—employees have become the key to success because companies are so heavily dependent on their employees' knowledge, expertise and active involvement in order to outperform other companies. Employees in these industries are generally regarded as non-substitutable, since they are often specialists in certain areas. Due to the company's reliance on their expertise, they are very difficult to replace.

Even in the case of substitutable employees, their interests cannot be ignored. Some employee organisations, by using methods such as strikes, can easily put companies into difficulties. Given the employees' increasing significance in corporate development, it has even been suggested by stakeholder proponents that employees and shareholders should both be recognised as residual claimants of the company.³⁵ If the preferential consideration of shareholders' interests can be justified by the claim that they bear the greatest risk relative to other stakeholders, there is a similar justification for treating the employees' interest in the same manner. Employees always find it difficult to obtain a similar job after losing their employment when a company becomes insolvent. Employees also bear the risks of loss of income, skills, confidence and health, perhaps on a permanent basis.³⁶ Compared to the risks borne by shareholders,

Employment Market Analysis and Research (EMAR) for the Office of National Statistics,

<https://webarchive.nationalarchives.gov.uk/20111108174522/http://www.dius.gov.uk/policies/employment-matters/research> [<https://perma.cc/MF74-CKEZ>].

³³ PROCTOR & MILES, *supra* note 4, at 58.

³⁴ PROCTOR & MILES, *supra* note 4, at 56.

³⁵ Margaret M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century*, in THEORIES OF CORPORATE GOVERNANCE: THE PHILOSOPHICAL FOUNDATIONS OF CORPORATE GOVERNANCE 183 (Thomas Clarke ed., 2004).

³⁶ WILLIAMSON, *supra* note 28, at 511, 513 (examining Corporate Governance reforms and their impact on employee and stockholder relationships).

who can and do diversify their risks by holding a portfolio of shares, the risks borne by employees seem disproportionately high. Therefore, how to modify the traditional shareholder-oriented scheme to protect employees' interest has become an essential issue.

Employee' Interests under the Paradigm of the New Economy

In the new Economy, employees can not only accelerate the pace of innovation through their expertise, but also affect the pace at which new products gain widespread use and produce significant sales.³⁷ Managing employees in this context has special challenges. As argued by Grant, "if knowledge is the pre-eminent productive resource and most knowledge is created by and stored within individuals, then employees are the primary stakeholders. The principal management challenge . . . is establishing mechanisms by which cooperating individuals can co-ordinate their activities in order to integrate their knowledge into productive activities."³⁸

In the new economy, more extensive education and training are expected from potential employees, to allow the new technologies of the company to be developed and adapted. It is also expected that directors should accumulate adequate human capital for research and development, in order to ensure long lasting property of the company.³⁹ Therefore, the dominant role of employees in the new knowledge-based economy promotes a pragmatic consideration of stakeholder interests in shareholder-oriented jurisdictions, in order to realise the long-term interests of the company. A basic question therefore arises for corporate governance: Should corporate directors view themselves solely as stewards of their investors' capital and aim to maximise value for shareholders, or should they view themselves instead as custodians of their company's "human capital" and thus concentrate on protecting the interests and developing the knowledge and skills of their employees?⁴⁰

³⁷ FORMAINI & SIEMS, *supra* note 2, at 1, 2.

³⁸ Robert M. Grant, *The Knowledge-Based View of the Firm: Implications for Management Practice*, 30 LONG RANGE PLANNING 450, 452 (1997).

³⁹ JEFFREY H. GREENHAUS & GERARD A. CALLANAN, *ENCYCLOPEDIA OF CAREER DEVELOPMENT* 360 (2006).

⁴⁰ Joichi Aoi, *To Whom Does the Company Belong? A New Management Mission for the Information Age*, in *STUDIES IN INTERNATIONAL CORPORATE FINANCE AND GOVERNANCE SYSTEMS: A COMPARISON OF THE U.S., JAPAN, & EUROPE* 244, 246 (Donald H. Chew ed., 1997).

Investment in human capital contributes significantly to productivity growth, especially for high technology science-based companies. It is estimated that human capital accounted for 22% of the observed productivity growth in the period from 1969 to 1990, and 45% of the productivity differential with the sample average in 1990.⁴¹ Employees, as providers of human capital, play a key role in fostering innovation and change within their company. However, such contribution has been largely unaccounted for. It is argued that one of the most significant successes of the modern corporation is to attract talented workers, who otherwise might have become independent entrepreneurs, without offering them ownership, control, or even the obligation of directors' considerations towards their interests.⁴²

Today's consumers demand customised products, which will inevitably result in a more demanding role for employees in terms of their initiative and creativity. Thus, corporate directors should identify and encourage the development of the employees' "human assets" in personalised ways and utilization of the employees' highly subjective tastes and idiosyncratic ways of thinking, in order to contribute to the company's success.⁴³

The massive shift in manufacturing capacity, from Western economies to those countries that offer access to cheaper labour, will continue to be a significant trend in the era of new economy. This will not only create jobs for local communities in developing countries, but will also "create severe pressure for unskilled workers in more advanced economies."⁴⁴ This transition will also cause social problems concerning employment environments in developing countries, where the interests of employees cannot be effectively and thoroughly protected by employment law. Disasters might happen and unethical working conditions might prevail in developing countries due to the negligence of corporate directors. Meanwhile, employees in those countries do not have access to relevant information in order to protect themselves, because of their poorly

⁴¹ EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR EMPLOYMENT AND SOCIAL AFFAIRS, *supra* note 5, at 4.

⁴² FISK, *supra* note 1 at 843 (2005) (exploring metaphors and narratives in context of labor and employment law).

⁴³ AOI, *supra* note 40, at 247.

⁴⁴ PHILIP SADLER, BUILDING TOMORROW'S COMPANY: A GUIDE TO SUSTAINABLE BUSINESS SUCCESS 19 (2002).

developed information systems compared with those countries which have already transitioned to the new economy.

For example, in the Bhopal incident in 1984, 20,000 people, including employees, were killed or harmed by a chemical leak from the American-owned Union Carbide India Limited pesticide plant in the city.⁴⁵ The leak could have been prevented if procedures, management and maintenance at the plant had been more rigorous. As a second example, the use of child labour in factories in the developing world, whereby multinational companies produce cheap products to sell in Western markets, “became an international issue in the 1990s and the first decade of the new millennium.”⁴⁶ In light of these examples, there are proposals that directors should have regards to employees’ interests, including those employed by their subsidiaries or suppliers, as key stakeholders, in order to secure the health and safety of their employees. Multinational enterprises have evolved to become complex organisations inculcated with personhood, institutional structure, and state-like qualities that have a profound impact on our society.⁴⁷ The constant issue in the discourse on corporate responsibility and corporate objectives is how to address the problem of vulnerability and help the constituencies such as employees in the developing or the least development countries who are particularly vulnerable to the effects of corporate actions. Corporations should be managed in the public interest as compensation for the limited liability granted to them by states, and governments should only distribute resources on the condition of corporations meeting their wider duties.⁴⁸ Employees should be

⁴⁵ Swati Bhasin, *Lest We Forget: Bhopal Gas Tragedy That Choked Thousands to Death In 1984* (Dec. 3, 2019, 1:13 PM), <https://www.ndtv.com/india-news/35-years-on-bhopal-gas-tragedy-that-choked-thousands-to-death-in-1984-2142537> [<https://perma.cc/S24D-HRRN>].

⁴⁶ COLIN FISHER & ALAN LOVELL, *BUSINESS ETHICS AND VALUE: INDIVIDUAL, CORPORATE AND INTERNATIONAL PERSPECTIVE* 53 (3rd ed. 2006).

⁴⁷ Heather M. Kolinsky, *Situating the Corporations within the Vulnerability Paradigm: What Impact Does Corporate Personhood Have on Vulnerability, Dependency and Resilience*, 25 AM. U. J. GENDER SOC. POL'Y & L. 51, 52 (2017).

⁴⁸ George Shepherd, *Not Just Profits: The Fiduciary Duty of Corporate Leaders to the Public, Not Just Shareholders* 11 (unpublished article, University of Leeds, School of Law, UK, A Workshop on Professionalism and Vulnerability October 27–28, 2017) (on file with authors), https://www.slsa.ac.uk/images/2017winter/Professionalismand_vulnerability-link.pdf [<https://perma.cc/G7GA-XXR3>].

offered more information about the company by the directors, including operational information and safety knowledge. Also, they should be aware of both the domestic and international legal requirements and should give local managers sufficient training about legal and local ethical policy issues.

In addition to the information disclosure, employees acting as stakeholder directors of the company and participating in the board could also help in decision-making. Since employees are closely aligned with key elements of CSR such as working environment or the needs of the employees, employee directors will facilitate a better environment for the board to explain the rationale underlying its decisions. Therefore, boards with employee directors may promote a more explicit recognition and appreciation of stakeholder concerns and form a powerful and legitimate representation of a company's power in decisions-making. Alternatively, the company could organize periodic stakeholder meetings with participation by its employees, in order to give employees an opportunity to stay involved in the operation of the company. Realistically, these meetings could be held annually, adopting a similar format to shareholders' annual meetings, in order to provide a way to achieve strategic objectives through stakeholder communication initiating and facilitating "respectful, honest and productive multi-lateral communication with their stakeholders."⁴⁹ These meetings also allow stakeholders to have adequate time to think about proposals and suggestions. Such annual meetings will also allow employees to consider all the factors raised by stakeholders in their catalogue. These meetings will be educational and informational for both board members and stakeholder participants. They will not only deal with general inquiries and feedback but also cover issues surrounding the risks and challenges that the company might face in the future. A well-attended and useful meeting will reflect a well-maintained relationship between the company and its employees.

⁴⁹ James Noland & Robert Phillips, *Stakeholder Engagement, Discourse Ethics and Strategic Management*, 12 INT'L J. MGMT. REV. 39, 48 (2010).

PROTECTION OF THE INTERESTS OF EMPLOYEES UNDER ENGLISH COMPANY LAW

The UK has been regarded as a leader in the Anglo-American countries in terms of its transition towards the Continental model. This comes as a result of integrating stakeholder considerations into the narrowly defined objective of shareholder value in its company law. The objective is achieved by the recent introduction of the ESV principle, which requires directors to take stakeholders' interests into consideration, and the rapid growth of CSR activities.⁵⁰ The ESV principle explicitly advocates a shift in focus towards the long-term interests of the company, which requires the directors of the company to recognize and report the effects of their business performance on various non-shareholder constituencies, such as employees, communities and the environment. The goal of the company law legislation in the UK's appears to be the maintenance of "its corporations' financial accountability to a constituency of dispersed, independent shareholders while simultaneously using market forces to nudge companies in the direction of greater social responsibility" by taking stakeholders' interests into account.⁵¹

"Whether it is a question of fair wages and conditions, sexual harassment in the workplace", or maybe just the employees taking advantage of company resources, such as the phone or the internet, for personal use, "employee-related ethical problems are unavoidable for most cotemporary managers."⁵² This Article only focuses on the employment issues that should be considered by managers and directors under company law, rather than employment law and pension law in general, although directors' duties in those areas are also significant.

⁵⁰ Cynthia A. Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493, 550 (2005); Simon Deakin, *The Coming Transformation of Shareholder Value*, 13 CORP. GOVERNANCE: AN INT'L REV 11, 16 (2005).

⁵¹ WILLIAMS & CONLEY, *supra* note 50, 500 (2005).

⁵² ANDREW CRANE & DIRK MATTEN, *BUSINESS ETHICS: A EUROPEAN PERSPECTIVE MANAGING CORPORATE CITIZENSHIP AND SUSTAINABILITY IN THE AGE OF GLOBALIZATION* 286 (4th ed. 2016).

Legislative Attempts before the Companies Act 2006

Based on the idea that company law and labor law were in essence separate fields of regulatory policies,⁵³ English company law statutes before the 1970s paid little attention to employees' interests. The interests of employees and their relationships with employers were mainly defined and protected through labour and employment legislations, including the Employment Rights Act 1996 (ERA 1996) and the Employment Regulations Act 1999 (ERA 1999).⁵⁴ Employees were perceived as having no legitimate interests in the business of the company or its assets, and directors owed no duties towards the employees. Therefore, employees might only benefit from the directors' decisions when the interest of employees is consistent with that of the shareholders.⁵⁵ In *Hampton v Price's Patent Candle Co.*, it was held that keeping the workforce happy and satisfied was a prudent capitalist policy, but it was not a legal requirement.⁵⁶ The refusal of the court to consider the interests of employees was once again reflected by the operation of the *ultra vires* rule in *Hutton v. West Cork Rwy. Co. Ltd.*, in which the Court of Appeal confirmed that it was beyond the capacity of a company to make gratuitous payments to past or present employees.⁵⁷ In sum, in the early years of the UK company law, directors were not required to consider employees' interests.

As a consequence of the increasing interactions between businesses and employees in practice,⁵⁸ employees' interests were

⁵³ HANSMANN, *supra* note 30, at 589; Steven Anderman, *Termination of Employment: Whose Property Rights?*, in *THE FUTURE OF LABOUR LAW* 101, 126 (Catherine Barnard, Simon Deakin & Gillian Morris eds., 2004).

⁵⁴ PROCTOR & MILES, *supra* note 4, at 54.

⁵⁵ See *Hutton v. West Cork Rwy. Co. Ltd.* [1883] 23 Ch. D. 654 (AC) (holding that directors may only spend money "for the purposes which are reasonably incidental to the carrying on of the business of the company" and thus are not free to pay the employees); see also David Milman, *From Servant to Stakeholder: Protecting the Employee Interests in Company Law*, in *CORPORATE AND COMMERCIAL LAW: MODERN DEVELOPMENTS* 149 (David Feldman & Frank Meisel eds., 1996).

⁵⁶ *Hampton v Price's Patent Candle Co.* [1876] 44 LJ Ch 437.

⁵⁷ *Hutton v. West Cork Rwy. Co. Ltd.* [1883] 23 Ch. D. 654, 671.

⁵⁸ See Charlotte Villiers, *UK Report on the Employer and the Relationship between Labour Law and Company Law* (2000), <http://www.dirittodellavoro.it/public/current/miscellanea/atti/pontignano2000/Villiers.html> [<https://perma.cc/V7N2-63LT>] (discussing the similarity between directors' service agreements and employment law documents as well as the

first recognised in UK company law in the government white paper on company law in 1977.⁵⁹ In 1977, the Bullock Report⁶⁰ on Industrial Democracy was set up by the Labour government of the day, in order to advocate for a radical extension of industrial democracy through requiring that unions be given the right in law to protect employees' interests. There were three proposals considered by the Bullock Committee. First, the Committee considered the establishment of a Trade Union Council, which would have given trades unions the right to demand that employees elect half of the directors in large companies.⁶¹ Second, there was also a proposal for the establishment of an Eurasian Economic Commission, which would require large companies to have a supervisory council in addition to an executive board, in which one third of the members would be elected by the company employees.⁶² Third, it was proposed by the Confederation of British Industry that companies should be required to negotiate employee representation schemes with their own employees, without any legislation to prescribe format or proportions.⁶³

The Bullock Committee concluded by recommending the creation of a commission to observe, encourage and recommend specific steps for employee representation.⁶⁴ In detail, it was required that employees "should have equal right with shareholder to representation on board of private companies employing two thousand or more" employees.⁶⁵ Unlike in some Continental European countries, this representation take place through trade union machinery, rather than by all the employees.⁶⁶ However, the response of the Confederation of British Industry was "almost uniformly antagonistic."⁶⁷ In response to the universal hostile

relationship between business decisions and employment relationships).

⁵⁹ H.M.S.O., *THE CONDUCT OF COMPANY DIRECTORS*, 1977, Cmnd. 7037, at 2 (UK).

⁶⁰ LORD BULLOCK, *REPORT OF THE COMMITTEE OF INQUIRY ON INDUSTRIAL DEMOCRACY*, 1977, Cmnd. 6706, at 84.

⁶¹ *Id.* at 26–28.

⁶² *Id.* at 28–30.

⁶³ *Id.* at 30–32.

⁶⁴ *Id.* at 160–166.

⁶⁵ Ben Clift, Andrew Gamble & Michael Harris, *The Labour Party and the Company*, in *THE POLITICAL ECONOMY OF THE COMPANY* 51, 77 (John Parkinson, Andrew Camble & Gavin Kelly eds., 2000).

⁶⁶ *Id.*

⁶⁷ See Adrian Williamson *The Bullock Report on Industrial Democracy and the*

attitude from business and lack of enthusiasm in the Cabinet, after consultations, a White Paper on Industrial Democracy appeared in May 1978 as a “much diluted form of the Bullock Report.”⁶⁸ Eventually, the Labor government lost power before any of these proposals were actually adopted by Parliament. After the return of a Conservative government in 1979, the issue of employee involvement was removed from the political agenda.⁶⁹

Apart from the unsuccessful attempt by the Bullock Report to protect employees’ interests, directors’ duties to consider the interests of their employees were also recognized in 1977, when a government white paper, *Conduct of Company Directors*, acknowledges that directors ought to consider their employees’ interests:

The Government believes that employees should be given legal recognition by company law. The statutory definition of the duty of directors will require directors to take into account the interests of employees as well as of shareholders. They will also be required to send the annual report to all employees as well as to shareholders.⁷⁰

A Companies Bill in 1978 also proposes the statutory codification of directors’ duties towards employees.⁷¹ It is provided in Clause 46 of the Bill that: “The matters to which the directors of the company are to have regard in the performance of their functions shall include the interests of the company’s employees generally, as well as the interests of its members.”⁷² However, the Bill was never enacted since it had lapsed by the 1979 General Election.⁷³

Post-War Consensus, Contemporary British History, 30 CONTEMP. BRIT. HIST. 119, 119 (2016).

⁶⁸ CLIFT, GAMBLE & HARRIS, *supra* note 65, at 80.

⁶⁹ See Adrian Williamson, *The Bullock Report on Industrial Democracy and the Post-War Consensus, Contemporary British History*, 30 CONTEMP. BRI. HIST. 119, 135–137 (2016).

⁷⁰ DEPARTMENT OF TRADE, *THE CONDUCT OF COMPANY DIRECTORS, 1977*, Cmnd. 7037 (Eng.).

⁷¹ Companies Bill 1978, §46 (Eng.).

⁷² Companies Bill 1978, §46 (Eng.).

⁷³ SALEEM SHEIKH, *A PRACTICAL APPROACH TO CORPORATE GOVERNANCE* 332–333 (2003).

Assessment of Article 309

The first company statute to acknowledge employees' interests was the Companies Act 1985,⁷⁴ in which it is stated that "the matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members."⁷⁵ Under company law legislation, Section 309 of the Companies Act 1985 imposes a statutory duty upon directors to consider the interests of employees when carrying out their duties, and disclose information in annual reports about employees and employment practices. Section 309 specifically states that the duty it imposes on directors is owed exclusively to the company and enforceable in the same way as other fiduciary duties owed to a company. This means that the duty to consider the interests of employees "can be enforced only by the directors themselves or by shareholders through derivative action."⁷⁶ Moreover, the duty is not a great burden for the directors since the law simply requires the directors to *consider* the employees, rather than *acting in their best interests*. According to the statute, it is enough merely for directors "to have regard" to their employees' interests, a provision by which it created a defense for directors who have prioritized employees' interests over those of members.⁷⁷ The Section has not provided any legal mechanisms that could be used by employees or employee representatives to enforce the duty; therefore, it has been rarely invoked in the courts.⁷⁸ Moore argued that Section 309 "served to detract from, rather than reaffirmed primacy of

⁷⁴ See The Companies Act 1985, § 719 (Eng.); The Insolvency Act 1986, § 187 (Eng.) (discussing the interests of employees, granting the power to a company to make gratuitous provision for employees on the cessation of a company's business, even though this provision "is not in the best interests of the company").

⁷⁵ The Companies Act 1985, §309 (Eng.).

⁷⁶ See WANJIRU NJOYA, PROPERTY IN WORK: THE EMPLOYMENT RELATIONSHIP IN THE ANGLO-AMERICAN FIRM 158 (2007).

⁷⁷ Alistair Alcock, *An Accidental Change to Directors' Duties?* 30 COMP. L. 362, 365 (2009).

⁷⁸ John Armour, Simon Deakin & Suzanne J. Konzelmann, *Shareholder Primacy and the Trajectory of UK Corporate Governance*, 41 BRIT. J. INDUS. REL. 531, 537 (2003).

shareholders as a corporate beneficiary.”⁷⁹ Section 309 was effectively a “statutory provision without teeth.”⁸⁰

From a practical point of view, Parkinson also argued against certain deficiencies of Section 309 when he pointed out that the Section would not have much effect on the way companies operate in practice.⁸¹ This is because the duty imposed by Section 309 is a subjective duty. Directors “must act in accordance with what they believe to be an appropriate balancing of sometimes conflicting interests,”⁸² while the court is unable to “intervene merely because it disagrees with the way in which the directors have weighted those interests.”⁸³ Further, there is no guidance in the Section for how directors should interpret their responsibility under the provision. There is also no guidance about directors’ direction, or about a practical method for how directors should balance the interests of shareholders and employees “or the relative weight which can be given to the interests of employees.”⁸⁴ Managerial strategies will mostly be based on the unrestricted discretion of the directors.

Furthermore, this specific duty appears to be unenforceable because there is no direct means of enforcing it, either individually or collectively. According to Section 309 (2), “the duty is owed to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its directors.”⁸⁵ Therefore, if the employees of the company and other parties hope to challenge the directors’ decisions and conduct, they must bring the actions derivatively through the company. If the people in control of the company at the relevant time do not authorize the company to bring an action against the directors, the employees will have no

⁷⁹ MARC MOORE, *CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE* 192 (2013).

⁸⁰ See John Farrar & Brenda Hannigan, *FARRAR’S COMPANY LAW* 302 (1998).

⁸¹ JOHN EDWARD PARKINSON, *CORPORATE POWER AND RESPONSIBILITY: ISSUES IN THE THEORY OF COMPANY LAW* 83–84 (1995).

⁸² *Id.* at 84.

⁸³ *Id.* at 84.

⁸⁴ See Simon Goulding & Lilian Miles, *Regulating the Approaches of Companies towards Employees: The New Statutory Duties and Reporting Obligations of Directors within the United Kingdom*, in *RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY* 90 (Stephen Tully ed., 2005).

⁸⁵ PARKINSON, *supra* note 81, at 83.

remedy under Section 309, even when their interests have been adversely affected by those actions.⁸⁶

Moreover, proceedings for breach of fiduciary duties may, under certain circumstances, be commenced in the derivative form by a member of a company on the company's behalf. "This raises the possibility of an employee with a shareholding being allowed to enforce the section 309 duty derivatively."⁸⁷ However, recent rulings effectively "bar any derivative action that does not have the approval of a majority of shareholders other than those who are defendant."⁸⁸ Therefore, the only way that Section 309 might be enforced would be if employees are also shareholders who own a majority of shares in the company, and they subsequently bring an action against the directors. Therefore, "Fitting such a claim into the requirements for a derivative action would, however, demand greater judicial creativity than can perhaps in the circumstances be realistically expected."⁸⁹ It is also significant to stress that Section 309 is permissive rather than mandatory, and that it clearly states that the employees cannot sue for any breach of duty owed to them. These characteristics—the non-mandatory nature and the lack of direct standing to sue—are also typical of current constituency statutes in the US.⁹⁰

Despite all those deficiencies, Section 309 is still a positive and significant provision, which "represents a tentative step towards recognising the employees' role in an enterprise."⁹¹ Nevertheless, the Company Law Review Steering Group stipulated that Section 309 should be repealed.⁹² In their view, there was a danger that the Section might be interpreted as enabling directors to prefer employees' interests over those of shareholders, which would threaten the principle of shareholder supremacy.⁹³ Therefore,

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Leonard S. Sealy, *Director's Wider Responsibilities—Problems Conceptual, Practical and Procedural*, 13 MONASH U. L. REV. 164, 184 (1987).

⁸⁹ PARKINSON, *supra* note 81, at 83.

⁹⁰ See Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227 (2004).

⁹¹ See JOHN H. FARRAR & BRENDA HANNIGAN, *FARRAR'S COMPANY LAW* 386 (1998).

⁹² See Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Strategic Framework*, §§5.1.20–5.1.23 (1999).

⁹³ *Id.* at §§5.1.21.

directors should consider employees' interests only in the process of promoting shareholders' interests.⁹⁴ This argument is not convincing, since it fails to consider the importance of sustaining the relationship between shareholders and other stakeholders, including employees, in the process of pursuing the objective of long-term shareholder value.

Information Disclosure and the Operating and Financial Review

The traditional functions of disclosure include reducing information asymmetries and avoiding market failure.⁹⁵ Open, clear, interactive and honest reporting will assist the company in building sustainable relationships with stakeholders. The European Commission alleges that transparency in regards to information on environmental and social matters leads to better corporate performance over time, reduces financing costs, attracts and retains talented employees, meaning that such a company is ultimately more successful.⁹⁶ As an essential element of the accountability approach to company law, disclosure is designed to demonstrate corporate commitment, and to increase the public's understanding and awareness of corporate social performance.⁹⁷ Justice Brandeis stated that the purpose of disclosure (publicity) is "a remedy for social and industrial diseases" as "sunlight is said to be the best of disinfectants[.]"⁹⁸

The Company Law Review ("CLR") proposed that companies of economic significance should prepare an Operating and Financial Review ("OFR"), which is intended to be qualitative in character, containing all the information pertinent to assessing the performance and future prospects of a company, including its relationships with its employees and its impact on the community and

⁹⁴ *Id* at §§5.1.23.

⁹⁵ BARNALI CHOUDHURY & MARTIN PETRIN, CORPORATE DUTIES TO THE PUBLIC 77–78 (2019).

⁹⁶ European Commission, *Disclosure of Non-financial and Diversity Information by Large Companies and Groups—Frequently Asked Questions* (Apr. 15, 2014), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_301 [<https://perma.cc/VU9W-FGTW>].

⁹⁷ Kellye Y Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1235 (2002).

⁹⁸ LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 65 (2009).

environment.⁹⁹ It was acknowledged by the CLR that stakeholders such as employees “had a legitimate interest in the company’s activities, particularly in the case of companies which exercise significant economic power.”¹⁰⁰ OFR should provide necessary information judged by the directors judge “for an understanding of the business, such as relationships with employees, suppliers and customers, environmental and community impact, corporate governance and management of risk.”¹⁰¹

After an extensive public consultation process, the British “parliament passed a statute, requiring 1,290 British-based companies listed on the London Stock Exchange, the New York Stock Exchange or NASDAQ publish an OFR” on May 21, 2004.¹⁰² The new OFR requires companies to identify material, social and environmental risks, and to disclose information about those risks.¹⁰³ The regulation has operated to give much greater prominence to issues related to corporate social and environmental responsibilities.

The purpose of the OFR is to give directors a chance to explain to shareholders and other stakeholder issues such as how they have looked after their social responsibilities, their employees, the environment, consumers and the community. The OFR is regarded as a safeguard against the negative implications and effects of an excessive focus on short-term shareholder returns. The ultimate aim of this inclusive approach is to be achieved by companies establishing successful relationships with members of the supply chain, the community and the environment.¹⁰⁴

It is also proposed by the White Paper that rather than imposing duties on the directors, “wider interests” will be taken care of by providing “a narrative report covering the main factors underlying the company’s performance and which is intended to give a broader view of the company’s operations than the purely financial

⁹⁹ Robert Goddard, *Modernising Company Law: The Government’s White Paper*, 66 MOD. L. REV. 402, 405 (2003).

¹⁰⁰ COMPANY LAW REVIEW, MODERN COMPANY LAW: FINAL REPORT, §§ 3.28–30 (2001).

¹⁰¹ MODERN COMPANY LAW: FINAL REPORT, *supra* note 100, at 19 (2001).

¹⁰² Cynthia A. Williams & John M. Conley, *Triumph or Tragedy—The Curious Path of Corporate Disclosure Reform in the U.K.*, 31 WM. & MARY ENVTL. L. & POL’Y REV. 317, 317 (2007).

¹⁰³ WILLIAMS & CONLEY, *supra* note 50, at 500 (2005).

¹⁰⁴ Lee Roach, *The Legal Model of the Company and the Company Law Review*, 26 COMPANY LAW. 98, 102 (2005).

reports”¹⁰⁵—namely the OFR.¹⁰⁶ The report is intended to be qualitative (e.g. including the balance sheet) and historical (e.g. reporting past years’ financial results). It is also intended to cover internal company matters (e.g. the size of the workforce) and contain all the information that is material to an assessment of the company’s performance and future prospects, including its relationship with its employees, customers and suppliers and its impact on the community and environment.¹⁰⁷ The government also made suggestions on proposed legislation for the OFR, to shed light on its important role in company reporting.¹⁰⁸

The legal requirement for quoted companies¹⁰⁹ to provide an OFR was once again stipulated in the Company Law Bill 2005, in which directors were required to prepare an OFR for each fiscal year.¹¹⁰ Directors who fail to comply with the requirements will be committing an offence, and will be liable to a fine not exceeding a statutory maximum.¹¹¹ The Secretary of State may also make provision by regulation as to the objective and contents of the OFR.¹¹²

However, the legislation and enforcement of the OFR as a reporting policy for directors are still open to debate, and further modifications are necessary to perfect them. In practice, if ESV means balancing the interests of shareholders and stakeholders for the benefit of the long-term interests of a company, the disclosure of relevant issues in the OFR cannot by itself generate meaningful change in corporate practice as the disclosure measures is only seen

¹⁰⁵ *The White Paper on Modernising Company Law*, HOUSE OF COMMONS TRADE AND INDUSTRY COMMITTEE 18 (2002). A White Paper is an authoritative report and is seen as a statement of government policy.

¹⁰⁶ *Id.* at 18.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 18.

¹⁰⁹ According to Section The Companies Act 2006, §385(2), (Eng.), a quoted company is a company whose equity share capital:

- (a) has been included in the official list in accordance with the provisions of Part 6 of the Financial Services and Markets Act 2000 (c. 8), or
- (b) is officially listed in an EEA State, or
- (c) is admitted to dealing on either the New York Stock Exchange or the exchange known as Nasdaq.

¹¹⁰ Company Law Reform Bill 2005–6, HL Bill [34] cl. 393 (Gr. Brit.).

¹¹¹ *Id.* at cl. 395.

¹¹² *Id.* at cl. 394.

as one of the dimensions or legislative approaches of the regulatory framework to promote interests of stakeholders.¹¹³

Progressive Changes Brought by the Companies Act 2006

Before the Companies Act 2006, the maximization of shareholder wealth was not only a theory, but also a basic feature of the corporate ideology and public belief in the UK.¹¹⁴ As a consequence, this legal framework was criticized on the grounds of “limiting any accountability to stakeholders within a framework of, and to the overall purpose of, profit-maximization for shareholders.”¹¹⁵ The UK ESV principle, a newly-defined corporate objective of the company, has been set out in the Companies Act 2006, stipulated in Section 172 (1). The ESV principle¹¹⁶ emphasizes the significance of coordinating stakeholder relationships for corporations’ long-term development, and it also aims to make directors aware of the gradual transformation occurring in legal and social frameworks in which corporations exist and operate, and to allow them to subsequently adjust their managerial routines. For those directors who are enthusiastic in balancing shareholder and stakeholder concerns, Section 172 offers them legitimacy in doing so and some surety against being sued, provided that their actions benefit shareholders too.¹¹⁷ The ESV in new UK company law is a significant attempt to introduce stakeholder considerations into the previous shareholder-centered corporate governance scheme; it is hoped that the growing consideration of stakeholders’ interests in codified directors’ duties will be an efficient means of establishing a

¹¹³ See Jingchen Zhao, *Promoting More Socially Responsible Corporations through A Corporate Law Regulatory Framework*, 37 LEG. STUD. 103, 115–133 (2017).

¹¹⁴ ARMOUR ET AL, *supra* note 78, at 535 (2003); Stephen M. Bainbridge, *Director Primacy, the Means and Ends of Corporate Governance* 97 NW. U. L. REV. 547, 576 (2003).

¹¹⁵ Janice Dean, *Stakeholding and Company Law*, 22 COMP. L. 66, 70 (2001).

¹¹⁶ See generally ANDREW KEAY, *THE ENLIGHTENED SHAREHOLDER VALUE PRINCIPLE AND CORPORATE GOVERNANCE* (2013) (offering a comprehensive and in detail discussion on ESVP).

¹¹⁷ Andrew Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s ‘Enlightened Shareholder Value Approach’*, 29 SYDNEY L. REV. 577, 599 (2007).

long-term corporate culture, and the necessity of corporate disclosure will further enhance directors' regard for stakeholder interests.

There were no separate sections regarding directors' duties towards employees in the Companies Act 2006. The legislative position with regard to the extent as to which directors of companies are required to consider the interests of their employees when making management decisions has now been reformulated by Section 172 in the context of directors' duties to promote the success of the company.¹¹⁸ Section 172 of the Companies Act 2006 emphasized the likely consequences of directors' duties in the long term.¹¹⁹ Recognition of the long-term interests of companies is one of the major advantages of adopting the stakeholder model in company law. The interests of employees, as the primary stakeholders who play a significant role in innovation and reform within corporations, are certainly crucial in shaping an efficient corporate structure for the benefit of the long-term interests of the company.

Compared to Section 309 in the 1985 Act, Section 172 (1) (b) of the 2006 Act gives legitimacy to directors who consider the interests of employees.¹²⁰ This means that where (or to the extent that) the purposes of the company consist of or include the purpose of the benefit of its employees, it can be asserted that directors' decisions are made with the goal of promoting the success of the company for the benefit of its members. Since the success of the company was defined clearly in Section 172 (1) (a) as long-term success,¹²¹ corporate decisions in favor of employees' interests will be justified as long as they are directed at the long-term interests of the corporation. These decisions are common among companies in the new knowledge-based economic age, where specific employees are hired because of their unique professional knowledge that is crucial to product improvements and professional techniques. Indeed, the same holds true for companies that employ irreplaceable employees.

Functioning alongside directors' duties, corporate disclosure has long been regarded as an important way of enhancing corporate accountability and improving the transparency of corporate activities. In light of the growing awareness of long-term development and

¹¹⁸ The Companies Act 2006, §172 (1) (b) (Gr. Brit.).

¹¹⁹ *Id.* at §172 (1) (a).

¹²⁰ *Id.* at §172 (1) (b).

¹²¹ *Id.* at §172 (1) (a).

stakeholder considerations, there has been an increasing demand for corporations to produce reports detailing their commitments to social and environmental issues. A significant modification in the Companies Act 2006 is the introduction of the Business Review as the replacement of OFR in line with the minimum requirements of the EU Accounts Modernisation Directive 2003. This is announced by the Chancellor of the Exchequer on November 2005 in a speech to the Confederation of British Industry.¹²² The Directive called for a company's annual report to include "both financial and, where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters (when necessary)."¹²³

After the enforcement of Section 417 of the Companies Act 2006, "the Directors' Report and Business Review became the central narrative reporting document in the corporate disclosure regime."¹²⁴ The general idea is that the Business Review's requirements for directors will be less onerous on companies but still valuable for shareholders and other stakeholders. Section 417 of the Companies Act 2006 makes an amendment on information disclosure requirement by requiring directors to include in the Business Review "a fair review of the company's business and a description of the principal risks and uncertainties facing the company."¹²⁵ The Business Review must "to the extent necessary for an understanding of the development, performance or position of the company's business."¹²⁶ "The amendment places an obligation on the directors of public companies to include in their annual business review anything that might be a liability to the company's profits" by incurring reputational damages, such as contracts with stakeholders that could

¹²² The OFR requirement was amended on March 21, 2005 in Schedule 7ZA of the Companies Act 1985. The Companies Act 1985 (Operating and Financial Review and Directors' Report etc.) Regulations 2005, 2005 No. 1011 (Gr. Brit.); *see also* Company Law Reform Bill 2005–6, HL Bill [34] cl. 393–95 (Gr. Brit.).

¹²³ Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, art. 2, 2003 O.J. (L 178) 10 (EC).

¹²⁴ Olajo Aiyegbayo & Charlotte Villiers, *The Enhanced Business Review: Has It Made Corporate Governance More Effective?*, J. BUS. L. 699, 699 (2011).

¹²⁵ The Companies Act 2006, §417 (3) (Gr. Brit.).

¹²⁶ *Id.* at §417 (5).

potentially expose the company to take excessive risk of causing social or environmental harm.¹²⁷ The purpose of the Business Review is “to inform members of the company and help them assess how the directors have performed their duty under Section 172.”¹²⁸ The obligations imposed on quoted companies are more onerous in comparison. Their Business Reviews must “to the extent necessary for an understanding of the development, performance or position of the company’s business, include—(a) the main trends and factors likely to affect the future development, performance and position of the company’s business; and (b) information about—(i) environmental matters . . . , (ii) the company’s employees, and (iii) social and community issues[.]”¹²⁹

However, it is also argued that in order to ensure that the Business Review achieves the aim associated with directors’ duties to promote the success of the company, it is important to offer more guidance to directors to avoid a box-ticking approach and protect directors from the increased administrative burden.¹³⁰ Furthermore, it is debatable whether the Review will constitute a genuine account of the stewardship of all relationships in which the company is involved. On the positive side, as the second limb of the ESV principle embedded in Section 172 of the UK Companies Act 2006, the requirement for a Business Review can do a good enough job if companies embrace the idea underpinning the need for the requirement. It provides legislative support for minimum information disclosure in Company Law statutes on environmental and social issues. The requirement is regarded as one of the main approaches to the legal enforcement of CSR-related corporate strategy.¹³¹

The Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013 amended the Companies Act 2006

¹²⁷ Demetra Arsalidou, *The Withdrawal of the Operating and Financial Review in the Company Bill 2006: Progression or Regression?*, 28 *COMPANY LAW* 131, 134 (2007)

¹²⁸ Companies Act 2006, c. 46, § 417 (2) (Gr. Brit.).

¹²⁹ *Id.* at § 417 (5).

¹³⁰ DAVID CHIVERS, *THE COMPANIES ACT 2006: DIRECTORS’ DUTIES GUIDANCE*, CORPORATE RESPONSIBILITY COALITION 7 (2007).

¹³¹ See David K. Millon, *Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose without Law*, in *CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS* 68, 79–92 (P.M. Vasudev & Susan Watson eds., 2012).

regarding issues of information disclosure.¹³² Section 417 of the Companies Act 2006 was repealed in this amendment.¹³³ Instead of a “business review,” companies must now produce a “strategic report” pursuant to the new Sections 414A-D in Companies Act 2006.¹³⁴ Similar to the OFR and the Business Review, companies submitting strategic reports will need to consider reporting social and environmental elements to inform members of the company so that the members can assess how the directors have performed their duty to promote the success of the company through information about any policies of the company in relation to social and environmental matters and their effectiveness.¹³⁵

The nature and scope of the strategic report principally replicate the business review. However, there are also a few changes for quoted companies. First, apart from environmental matters, company employees and social and community issues,¹³⁶ quoted companies also have to include, “to the extent necessary for an understanding of the development, performance or position of their business,” information about human rights issues, including information on any human rights policy and its effectiveness.¹³⁷ Second, quoted companies also have to include, with the purpose of enhancing the requirements on employees:

[A] breakdown showing, at the end of the financial year—(i) the number of persons of each sex who were directors of the quoted company; (ii) the number of persons of each sex who were senior managers of the quoted company and the undertakings consolidated in the quoted company’s accounts; and (iii) the number of persons of each sex who were employees of the quoted company and its consolidated undertakings.¹³⁸

¹³² See The Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013, §414A–D (Gr. Brit.).

¹³³ Companies Act 2006 (Strategic Report and Directors’ Report) Regulation 2013, Explanatory Notes 4 (Gr. Brit.).

¹³⁴ *Id.* at 2.

¹³⁵ Companies Act 2006, c. 46, § 414C (Gr. Brit.).

¹³⁶ *Id.* at § 417(5).

¹³⁷ Companies Act 2006 (Strategic Report and Directors’ Report) Regulation 2013, 2013 No. 1970, pt. 2 (Gr. Brit.).

¹³⁸ *Id.*

Third, taking the environmental issues one step further, “disclosure concerning greenhouse gas emissions” is introduced in Part 7 of the amendment, where a quoted company is required to “state the annual quantity of emissions in tonnes of carbon dioxide.”¹³⁹ Another two terminologies are also introduced to ascertain the scope of strategic reports for quoted companies, namely “company’s strategy” and “business model.”¹⁴⁰ These are terms that are repeatedly used in corporate governance codes when discussing annual reports,¹⁴¹ long-term corporate value¹⁴² and advice from audit committees.¹⁴³ Therefore, this new requirement can be regarded as a bridge between the Companies Act and the UK Corporate Governance Code, making existing “comply or explain” disclosures mandatory. In the author’s opinion, the new strategic report has not substantially changed the requirements embedded in the business review. However, it is encouraging to see that the amendment provides more detailed requirements regarding employees’ and environmental issues, as well as a recognition of human rights issues and links between corporate governance codes and information disclosure for quoted companies.

PROTECTION OF THE INTERESTS OF EMPLOYEES UNDER CHINESE COMPANY LAW

After the establishment of the People’s Republic of China in 1949, the initial development stage of companies and company-related policies were related to the strongly centralized planned economy in the years between 1949 and 1978. During that time, the *Danwei* (work unit) was a popular notion, referring to a place of employment that was commonly used in the context of state-owned enterprises (“SOEs”). *Danwei* was a unique organizational structure which divided individuals into different groups based on their employers. The term “played an all-encompassing role for urban citizens” as *danwei* of an employee will dictate her “work life, political life, economic well-being and, ultimately, membership in

¹³⁹ *Id.* at pt. 7.

¹⁴⁰ *Id.* at pt. 2.

¹⁴¹ Financial Reporting Council, UK Corporate Governance Code 2012, 2012, § C.1.1 (Gr. Brit.).

¹⁴² *Id.* at § C.1.2.

¹⁴³ *Id.* at § C.3.4.

society.”¹⁴⁴ At that stage, corporations bore responsibilities beyond the scope of corporate responsibility as they should have been borne by the government.

Employees’ interests in China have also been recognized in Chinese company law. The idea of protecting domestic and international employees, introduced into China in the 1990s mainly through global supply chains, was driven by both internal social problems and by economic interests in the global market.¹⁴⁵ The Chinese government reconsidered its policy and economic development goals for the long-term sustainable development of China in order to respond to these pressures. Currently, in the Chinese Company Law (hereinafter CCL) 2006 and the Chinese Corporate Governance Code 2018, we can observe the following legislative initiatives to promote employees’ interests directly or indirectly.

Article 5 on CSR

Low level of transparency for the legislative process in China “leaves it unclear why the legislators finally decided to incorporate CSR into the company law.”¹⁴⁶ Article 5 of CCL 2018 states that “a company shall comply with the laws and administrative regulations, social morality, and business morality. It shall act in good faith, accept the supervision of the government and general public, and bear social responsibilities.”¹⁴⁷ It is implied in Article 5 that commercial

¹⁴⁴ Yu Xie & Xiaogang Wu, *Danwei Profitability and Earnings Inequality in Urban China*, 195 CHINA Q. 558, 559 (2008).

¹⁴⁵ JINGCHEN ZHAO, CORPORATE SOCIAL RESPONSIBILITY IN CONTEMPORARY CHINA 69–70 (2014).

¹⁴⁶ Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change*, 28 BERKELEY J. INT’L L. 64, 71 (2010).

¹⁴⁷ Zhonghua Renmin Gongheguo Gongsifa (中华人民共和国公司法) [Company Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2005, effective Jan. 1, 2006; revised by the Standing Comm, Nat’l People’s Cong., October 26, 2018, effective Oct. 26 2018) ST. COUNCIL GAZ., art. 5, <http://lawinfochina.com/display.aspx?id=e797dd968c30e172bdfb&lib=law> [https://perma.cc/KUF4-GWN5] [hereinafter PRC 2018 Company Law] (China); see also Li Xiuxin Yu Qingdao Jiesheng Youxiang Gongsi, Xue Xiaoming Gongsi Jiesan Jiufen Zaishen Minshi Panjue (李秀针与青岛杰盛置业有限公司、薛晓明公司解散纠纷再审民事判决) [Li Xiuxin and Qingdao Jiesheng Real Estate Co.,

activities of a company have a wider impact on social interests, including those of its employees. Moreover, ethical terms such as “business ethics” and “social responsibilities” were introduced in the general provisions of CCL to encourage corporate responsibility beyond economic and legal responsibility explicitly.¹⁴⁸ The Article gives directors legitimacy to consider employees’ interests. Despite the fact that Article 5 has been widely criticized for its lack of enforceability and effectiveness, the Article has had an educational impact on corporations, and affirms the government’s attention to and policy support for the recognition of the interests of stakeholders through the explicit consideration of CSR in company law.

Employee Participation and Company Trade Unions

Employee participation is a broad term, including possible co-determination measures like employee representation on the corporate board, employee representation through labour union, collective bargaining arrangements, or sharing ownership with employees. Employees may not always be able protect themselves contractually against loss of their human capital investment in the company due to the limits of *ex ante* contractual solutions.¹⁴⁹ They are somehow as vulnerable as shareholders.¹⁵⁰ Consequently, employees’ interests and shareholders’ interests should be considered simultaneously by the board of directors. Employee participation may also change employees’ attitudes to work, increase their alignment with corporate and management values and consequently enhance employee motivation and company performance.¹⁵¹ Employee directorship is already a common practice globally, but the adoption of this notion can also be observed in jurisdictions that are

Ltd., Xue Xiaoming Company Dissolution Dispute Case], Stanford L. Sch. China Guiding Project (Higher People's Ct. of Shandong Province Oct. 23, 2015) (holding that it is necessary to consider not only the interests of shareholders but also the impact of corporate dissolution on the public interest when judging whether a company should be dissolved).

¹⁴⁸ PRC 2018 COMPANY LAW, *supra* note 147, at art. 5

¹⁴⁹ Robert Howse & Michael J. Trebilcock, *Protecting the Employment Bargain*, U. TORONTO L. J. 751, 754–766 (1993).

¹⁵⁰ MICHAEL LOWER, *EMPLOYEE PARTICIPATION IN GOVERNANCE: A LEGAL AND ETHICAL ANALYSIS* 98 (2010)

¹⁵¹ See JULIETTE SUMMERS & JEFF HYMAN, *EMPLOYEE PARTICIPATION AND COMPANY PERFORMANCE: A REVIEW OF THE LITERATURE* 8–10 (2005).

traditionally shareholder value oriented, such as the US and the UK. In terms of the UK government's willingness to accept a proposal for stakeholder participation, at the launch of her campaign to become the Leader of the Conservative Party and Prime Minister of the United Kingdom, Theresa May claimed that "the people who run big businesses are supposed to be accountable to outsiders, to non-executive directors, who are supposed to ask the difficult questions."¹⁵² She promised to "have not just consumers represented on company boards, but employees as well."¹⁵³ May used the term "accountable" positively when addressing corporations' responsibilities to outsiders, and she is an advocate of the notion of stakeholder participation to benefit the long-term interests of the corporations.

In China, CCL 2018 set out a series of new stipulations concerning employee participation. As far as limited liability companies are concerned, based on Article 44 "if a limited liability company established by two or more state-owned enterprises or other state-owned investors, the board of directors shall include representatives of the employees of the companies. The board of directors of any other limited liability company may also include representatives of the employees of the company concerned."¹⁵⁴ Compared to the old company law, the new company law enlarges the scope of employees as internal directors in all forms of companies. As for joint stock limited companies, according to Article 109 of CCL 2018 "the board of directors may include representatives of the company's employees. The representatives of the employees who serve as board directors shall be democratically elected through the assembly of the representatives of the employees, the assembly of employees, or other methods. . ."¹⁵⁵ This piece of legislation ensures that the voice of employees will be heard and employees' interests will be considered at board meetings when decisions are made.

Moreover, trade unions play an important role in promoting the interests of employees in the Chinese corporate governance model. Trade unions generally are regarded as legitimate and effective

¹⁵² Theresa May, Home Secretary, Speech to Launch Leadership Campaign in Birmingham: We Can Make Britain A Country that Works for Everyone (July 11, 2016).

¹⁵³ *Id.*

¹⁵⁴ PRC 2018 COMPANY LAW, *supra* note 147, at art. 45.

¹⁵⁵ *Id.* at art. 109.

deliberative partners with the firm in the trajectory of development towards more ethical companies with positive contributions towards deliberative democracy.¹⁵⁶ According to Article 18 of CCL 2018, a company's employees shall organise a labour union to carry out trade union activities and safeguard the lawful rights and interests of the employees.¹⁵⁷ "The company shall provide necessary conditions for its labour union to carry out activities. The labour union shall, on behalf of the employees, sign collective contracts with the company with respect to the remuneration, working hours, welfare, insurance, work safety and sanitation, and other matters."¹⁵⁸ To make a decision about restructuring or any major issues concerning its business operation or the formulation of important rules and regulations, a company shall solicit opinions from its trade union, and its staff and workers through the staff and workers' congress or other forums.¹⁵⁹

Ethical Elements in Corporate Governance Code

As a general principle under the Code of Corporate Governance for Listed Companies, a listed company is required to "respect the legitimate rights of . . . employees[.]"¹⁶⁰ More actively, the code also facilitates opportunities and environments for protecting the interests of stakeholders, including employees, by requiring companies to "provide the necessary conditions to ensure the legitimate rights of stakeholders" with "channels for redress for infringement of rights."¹⁶¹ A company shall encourage employee feedback regarding the company's operating and financial situations and important decisions affecting employee benefits through direct communication with the board of directors, the supervisory board and management personnel. Furthermore, communication with employees is also encouraged by listening to and reflecting their

¹⁵⁶ Geraint Harvey, Andy Hodder & Stephen Brammer, *Trade Union Participation in CSR Deliberation: An Evaluation*, 48 INDUS. REL. J. 42, 42; 51–52 (2017).

¹⁵⁷ PRC 2018 COMPANY LAW, *supra* note 147, at art. 18.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Shangshi Gongsì Zhili Zhunze (上市公司治理准则) [Code of Corporate Governance for Listed Companies] (promulgated by the China Sec. Reg. Comm., Sept. 30, 2018, effective Sept. 30, 2018) ST. COUNCIL GAZ. Sept. 30, 2018, art. 81, http://www.gov.cn/gongbao/content/2019/content_5363087.htm [<https://perma.cc/HT47-J5GW>] (China).

¹⁶¹ *Id.* at art. 83.

voices and interests, both individually and collectively, to establish interactive, collaborative, and mutually engaged relationships with employees, with these engagements focusing on goals beyond corporate self-interest. According to the Code of Corporate Governance for Listed Companies, “[a] company shall encourage employees’ feedback regarding . . . important decisions affecting employee’s benefits through direct communications with the board of directors, the supervisory board and the management personnel.”¹⁶²

The Corporate Governance Code in China is “soft law” established by the China Securities Regulatory Commission.¹⁶³ These soft law approaches have “potential benefits in dealing with costs, contingencies and complementarities”¹⁶⁴ and these benefits are key for addressing social and environmental challenges as they are always resistant to conventional approaches and uncertain. Soft law does allow a role for individual autonomy and circumstances in shaping an appropriate compliance response, and its inherent flexibility facilitates companies in buying into the “spirit” of the code as well as the letter.¹⁶⁵ However, the approach has also received criticism for the lack of an independent judiciary with enforcement powers and the inability to mandate uniform minimum standards.¹⁶⁶ The approach is seen as a window-dressing exercise, “less definitive and does not create enforceable rights and duties.”¹⁶⁷ In other word, “soft law is voluntary” and “lacks mutually agreed upon

¹⁶² *Id.* at art. 85.

¹⁶³ Junhai Liu, *Globlaisaiton of Corporate Governance Depends on Both Soft Law and Hard Law*, in *CORPORATE GOVERNANCE CODES FOR THE 21ST CENTURY: INTERNATIONAL PERSPECTIVES AND CRITICAL ANALYSES* 275, 285 (Jean J. du Plessis & Chee Keong Low eds., 2017).

¹⁶⁴ Ruth V. Aguilera, Igor Filatotchev, Howard Gospel & Gregory Jackson, *An Organizational Approach to Comparative Corporate Governance: Costs, Contingencies, and Complementarities*, 19 *ORG. SCI.* 475, 488 (2008).

¹⁶⁵ ZHAO, *supra* note 113, at 125–27.

¹⁶⁶ See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance* 54 *INT’L ORG.*, 421–22 (2000). For examples of the soft law approach, see OECD, *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2011 ed.); INTL’ ORG. FOR STANDARDIZATION, *ISO 26000* (2010); and The Companies Act, No.18, Acts of Parliaments, 2013 (India) (adopting provisions in relations to CSR).

¹⁶⁷ Eugene K. B. Tan, *Corporate Social Responsibility as Corporate Soft Law: Mainstreaming Ethical and Responsible Conduct in Corporate Governance*, 31 *SING. L. REV.* 227, 236 (2013).

obligations.”¹⁶⁸ Furthermore, Chandler sees voluntary approaches to address these sustainability challenges as a curse, distracting attention from the necessity for effective external control, as “governments failed to respond adequately to the implications of a globally economy and to demand accountability from company.”¹⁶⁹ An approach with voluntary characteristics may not be able to keep pace with the intensity and broad range of sustainability challenges, as well as the strong push not only from social expectations but also from external forces such as global best practices standards and the need for global public goods. These best practice standards come from various sources. With a focus on employees’ interests and human rights-related issues, SA8000:2014¹⁷⁰ is a set of auditable corporate social accountability standards established in 1997 by the Council of Economic Priorities Accreditation Association. It is currently supervised by Social Accountability International. SA8000:2014 is designed to “provide an auditable, voluntary standard, based on the UN Declaration of Human Rights, ILO and other international human rights and labour norms and national labour laws.”¹⁷¹ The system requires ongoing compliance and continual improvement of ethical standards of corporations, with involvement from stakeholders including participation by all key sectors in the SA8000 system, such as employees, trade unions, companies, socially responsible investors, nongovernmental organizations, the government and the public.¹⁷² The system also introduces nine social accountability requirements such as child labour and forced or compulsory labour.¹⁷³ Therefore, a hybrid regulatory framework involving both soft law and hard law will “promote the alignment of internal business goals with externally set societal goals.”¹⁷⁴ Combination of mandatory and voluntary

¹⁶⁸ ABRAHAM L. NEWMAN, ELLIOT POSNER VOLUNTARY DISRUPTIONS: INTERNATIONAL SOFT LAW, FINANCE, AND POWER 22 (2018).

¹⁶⁹ Geoffrey Chandler, *The Curse of Corporate Social Responsibility*, 2 NEW ACAD. REV. 31 (2003).

¹⁷⁰ See SOCIAL ACCOUNTABILITY INTERNATIONAL (SAI), <https://sa-intl.org/about/> [<https://perma.cc/KGD8-7U8R>] (last visited Sept. 9, 2020).

¹⁷¹ See SOCIAL ACCOUNTABILITY INTERNATIONAL, SOCIAL ACCOUNTABILITY 8000, §1.1 (2001).

¹⁷² See SOCIAL ACCOUNTABILITY INTERNATIONAL, GUIDANCE DOCUMENT FOR SOCIAL ACCOUNTABILITY 8000 124 (2016).

¹⁷³ See SOCIAL ACCOUNTABILITY INTERNATIONAL (SAI), *supra* note 171.

¹⁷⁴ ZHAO, *supra* note 113, at 136.

mechanisms will provide the most appropriate solution, where each complements the other.¹⁷⁵

CONCLUSION

The new economy has finally arrived in the twenty-first century after being heralded for a long time. The new economy focuses on talent, knowledge and information, and is based on mobile devices such as email, the Internet and intranets. It is characterized by a greater stability of GDP and prices, together with a potential drop in unemployment and inflation. In the new economic era, companies benefit from the impact of technological innovation on creating long-term wealth. Compared to the old economy, information technology plays a massive role, and successful companies are always those who are the first to obtain sensitive information.

In the new economy, successful companies always engage with various stakeholders not only inside the company, but also outside—for goods and services, finance, labor and political patronage. Good relationships with employees, consumers, local communities and the media are significant in promoting the competence and reputation of a company. The performance of its employees in terms of technological innovation has and will continue to accelerate the development of the company, especially in the field of advanced technologies. It is evident that human capital plays a crucial role and contributes significantly to the productivity growth in the new economy. Therefore, rather than being regarded as an expense of companies, employees should be regarded as an investment.

In terms of the classic corporate objective debate, employees are classified as primary and internal stakeholders. Jurisdictions following a stakeholder approach requires the interests of employees to be considered and protected by corporate directors. Hence, it is argued that the stakeholder approach, if effectively implemented, is an efficient way of protecting the interests of employees in the new economic era.

The interests of employees are always in conflict with those of shareholders and other stakeholders, and how to protect their

¹⁷⁵ Kunnawee Thirarungrueang, *Rethinking CSR in Australia: Time for Binding Regulation?*, 55 INT'L J. L. & MGMT 173, 177 (2013).

interests under company law is an important question. After discussing directors' duties towards their employees, we find, under the ESV model in the UK as well as under Chinese company law and corporate governance codes, that the legal mechanisms are difficult to enforce, regardless of their educational and guiding functions that can help directors think more about operating in the long term and change their behaviors when making decisions in relation to employees' interests. Although directors have been offered legitimacy to consider employees' interests, employees do not possess practical abilities to claim remedies if the directors' decisions injure their interests. Even though there are exceptions, the chances of success in a challenge of this kind are extremely slim.

Further research on the enforcement of directors' duties towards employees under company law—in jurisdictions other than the UK and China will be beneficial, both academically and practically. From an analysis of the CSR ratings for 23,000 companies from 114 countries, Liang and Renneboog claimed that the CSR ratings and a country's legal origin are closely and strongly correlated.¹⁷⁶ Comparing the business case of CSR and other factors such as ownership, political institutions, and globalisation, legal origin is argued as a strong explanation for CSR rating, with Scandinavian civil law firms ranking the highest.¹⁷⁷ Since this CSR rating has a strong relationship with legal protection offered to employees, we think it is worthwhile to investigate the legislative experiences in jurisdictions such as Finland, Denmark, Germany or Japan, which may open up new possibilities for transportation. Moreover, as the performance of the new economy is aligned with the pillars of sustainability including economic, environment, and social pillars,¹⁷⁸ it is also crucial to study the relationship between the advantages of the stakeholder approach and the new economy in the narrow and broad perspective. The study will broaden the horizon of stakeholder protection in the new economy era beyond interests of employees. The research findings will support policy makers to design legislative approaches to address the sustainability challenges as a result of irresponsible corporate conducts and mitigate risks of

¹⁷⁶ Hao Liang & Luc Renneboog, *On the Foundations of Corporate Social Responsibility*, 72 J. FIN. 853 (2017).

¹⁷⁷ *Id.*

¹⁷⁸ Otieno Mbare, *The Role of Corporate Social Responsibility (CSR) in the New Economy*, 25 ELEC. J. BUS. ETHICS & ORG. STUD. 1, 1 (2004)

stakeholder misalignment by developing effective approaches to tackle challenges with respect new economy.