

**CORPORATIONS AND THE PUBLIC INTEREST
THE PUBLIC INTEREST MODEL OF THE CORPORATION: AN INSTITUTIONAL
PERSPECTIVE ON THE CORPORATE PURPOSE QUESTION**

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ABSTRACT

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The thesis argues that the proper purpose of the large business corporation is the public interest. By large business corporation is meant the corporations with tradable shares in the capital markets.

The debate about the corporate objective function is one that is almost as old as the modern corporate form. It is an enduring question that has troubled generations of corporate law scholars. The issue came up for discussion by the Company Law Review, which drafted a report leading up to the enactment of the UK Companies Act 2006. A halfway solution, that is, the enlightened shareholder value approach was settled for, and is reflected in section 172 of the Act.

The basic question of the purpose of the corporation remains, even though the dominant view on the question in academic discourse, as well as in the business and popular press, is that corporations (are to) maximize profits for their shareholders. The novel 'enlightened shareholder value' norm does not seem to have made much impact in changing minds and practices, that is to say, in achieving the professed aim, namely, to make corporate directors and managers more responsive to the interests of non-shareholders. The belief sustaining the shareholder value norm that shareholders are the owners of their companies persists.

The shareholder primacy doctrine has been subjected to serious criticisms. A stakeholder model blurring into various corporate social responsibility agendas, including, loud public outcries and displays of disapproval of corporate misdemeanours, seem to be on the rise, to counteract albeit indirectly shareholder value norm.

The model argued for by this thesis takes a different approach. The purpose of the corporation is sought in the broader context of the corporate enterprise. The public interest model is conceived in an institutional perspective, which sets store in correctly characterising the corporation. The conception of interest as a justifiable claim shows that the shareholders' interests are reconcilable with the interests of all other stakeholders, and are understood to redound to the public interest.

The intellectual contexts of the corporate enterprise, that is to say, economics and ethics are unifiable so as to clarify the proper purpose of the economy. A business ethics distinct from 'applied' business ethics (market-failure's approach), provides the foundation for an ethical corporation. A socially responsible corporation, it is argued, is a moral corporation.

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DEDICATION

To both my late father, Francis Chukwudozie Oti and mother, Grace Oti

INTRODUCTION

The obvious is given to all from the start. But for those who have lost it, it is easier to discover the strangest and most complicated things than to find it again.¹

The questions concerning the nature and function of the large business corporation are not new. This essay addresses these perennial questions of corporate law and governance. A view may be taken on the one hand, broadly speaking, that corporations exist for the production and distribution of products and services, by which wealth (profits) are created for the property owners. On the other hand, there is the view, that corporations have a duty to enhance social benefit or welfare. 'Social benefit' in this case stands for a values above and beyond the production of "economic rent" for whosoever the property rights holders might be. The corporate social responsibility dispute traverses these two competing positions.

The above differing viewpoints may be advanced as representing the shareholder and stakeholder value models of the business corporation respectively. These divergent orientations pertain also to the different conceptions of the responsibility of corporate directors/managers. In other words, there are at least two competing conceptions of the rightful beneficiaries of 'corporate fiduciary obligations'. Corporate directors/managers are in their roles entrusted with serving the interests of others: who these exactly are, is a subject also for contestation. In the shareholder value viewpoint, *fiduciary* duties are owed solely to the shareholders as 'owners' of the corporation; in the stakeholder perspective it is contended contrarily that other corporate constituents, and some others too 'external' to the corporation, are proper beneficiaries together with the shareholders of corporate *fiduciary* obligation.

In this thesis I posit a purpose for the corporation that is intended to positively resolve, it is hoped, the shareholder/stakeholder dispute; or, at least, address it boldly in a manner that holds out a prospect of a resolution. With the 'public interest model of the corporation' it is proposed to address directly this enduring question of

¹ Lanza del Vasto, *Principles and Precepts of the Return to the Obvious* (Schocken Books Inc., New York 1974) 118 [228]. (Originally published in French under the title *Principes et Preceptes du retour a l'évidence* (Denoël, Paris 1945).

corporate law and governance, and to show that both the shareholder and stakeholder value perspectives, respectively, are inadequate to account for the justifiable purpose of the corporation. Either perspective is to be understood, it is envisaged, as a *means* only to an *end*: an end ultimately that must correspond to the function or purpose of the economy. The historical development of the (free) market economy confirms the view that economic activities are for the benefit of society overall.² And modern economics since the time of Adam Smith has not altered this underlying conception.³

The *integrative* capacity of the concepts of 'interest' and the 'public interest' is the rationale for their application to the conceptualization of the corporation's social-benefit goal. The existence or/and denial of interest is a provocation to action, which means agency, and which is integral to 'personality' or 'identity'. It is argued that the concept of interest serves as a *moral* standard: 'interest' is construed in the final analysis as a justifiable claim. The shareholder interest (to use the more familiar term, shareholder value) should not in this light be taken as a given. It is contestable through and through.

It is not a novelty to apply the term 'the public interest' to the corporation; to enquire about the service of the public interest, the social or general interest, or the public good by the corporation.⁴ For Lee, that corporations serve the public interest, is trite; however, to say that corporations serve the public interest is not the same thing as the validation of the public interest as *the raison d'être* of corporations. Brian McCall adopts the analogous concept of the common good in his legitimation of the corporation. Gunther Teubner proceeds from the concept of 'corporate interest', and discusses its putative orientation towards the broader social interests (the public interest). The public interest *in relation to* the corporation is, according Teubner, the

² R.H. Tawney, *Religion and the Rise of Capitalism* (Penguin Books Ltd, Middlesex 1926).

³ See Thomas M. Jones and Will Felps, 'Stakeholder Happiness Enhancement: A Neo-Utilitarian Objective for the Modern Corporation' (July 2013) 23 (3) *Business Ethics Quarterly* 349,351.

⁴ See I.B. Lee, 'Corporations and the Public Interest' in Claire Hill and Brett McDonnell (eds.), *RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW* (Edward Elgar Publishing, Cheltenham 2012) chapter 7. <<http://ssrn.com/abstract=1909014>> 1; Günther Teubner, 'Company Interest: The Public Interest of the Corporation 'in itself' in Ralf Rogowski and Ton Wildhagen (eds.), *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Kluwer, Boston 1994) 21; and Brian McCall, 'Corporations as Imperfect Society' <<http://ssrn.com/abstract=1944325>> accessed on 16 November 2013.

social-economic interest in the realisation of profits, payment of wages, taxes and the satisfaction of consumer needs. Emphasis is especially placed on the satisfaction of the future needs of society,⁵ which view marries rightly ‘the public interest of the corporation’ to the current, topical theme of sustainability, in particular in the utilization of natural resources.

On the presumption that the public interest is a defensible goal of the corporation, the task of corporate governance should then be to reconcile the intermediate goals or values of the corporate enterprise to this higher goal. The merit of the postulate of the public interest is to underline the requisite *morality* of corporate actions, and by extension, the morality of the corporation’s social context of action.

An objection may plausibly be raised; that the public interest is too general and indefinable as a goal of corporate action. To that the response is that, to ‘make a profit’, or ‘serve shareholder or stakeholder value’, or “enhance stakeholder happiness”⁶, is not any more precise and achievable. With the public interest goal, we are openly embracing the complexities and ambiguities of the politico-socio-economic and ethical dimensions of the corporate enterprise, and, thereby, insisting on the necessity for a moral ideal or vision to guide action. The strategy of the public interest model is integrative, aided by a socio-legal methodology, and an institutional perspective on the corporation. The methodological considerations follow after the introduction.

Chapter one explains the rationale of the public interest model of the corporation. It is aimed at the formulation of the objective of the corporation in its broader socio-political context. The public interest model as being a ‘political theory of the corporation’ is hinted at. The public interest as a political concept, posited as the end-goal of the corporation, makes the politicization of the corporation inevitable. However, it is not suggested that the corporation therefore assumes less and less the character of an economic institution, which is primed to compete in the ‘free’

⁵ Cf. Seteven Lydenberg, *Corporations and the Public Interest: Guiding the Invisible Hand* (Berrett-Koehler Publishers, Inc., San Francisco 2005) 19 for a related definition of the public interest of the corporation as “the creation of value that will continue to benefit members of society even if the corporation were dissolved today.”

⁶ See Thomas M. Jones and Will Felps, n. 3.

market place.

Chapter two aims to conceptualise the corporation as a social institution. The prevailing shareholder value norm of corporate governance, and its attendant “ownership rationality”, as well as other foundational assumptions are questioned. The features of the corporation that make it what it is, that is, the company share, separate legal personality, and centralised management are highlighted. The evolution of the share contributes to the conception of the corporation, and very significantly underpins the essential separate personality of the corporation.⁷

Our conception of the conception is predicated on a *social* institutionalism, which is characteristically broader than a legal institutionalism, and more so, an economic institutionalism. On a social-institutional perspective, corporate legal personality is taken seriously, underscoring the corporation's capacity for action. It is however admitted that the view as to the source of corporate personality is debatable. The essence of corporate personality in our view is *the capacity for social action*. This capacity is conceivable as inherent in a collectivity, i.e., an assemblage of ‘persons intent’ on activities towards a common purpose. Legal personality is in this view not (simply) a product of a legal fiat. This proposition is opposed to the so-called concession theory of the corporation.

Concession theory is apparently conceived to justify state intervention in the corporate enterprise⁸, and applicable in supporting an independent managerial authority of directors.⁹ The institutional perspective of the public interest model on the contrary does not depend on state regulatory interventions, in order for the corporation to be able to fulfil its social-responsibility function. The autonomy of the corporation, which is strongly defended, is predicated on the feasibility and desirability of both the internal and external regulation of the corporation, including the vital aspect of '*ordo-responsibility*', for the corporation's 'social licence' to operate

⁷ Folkert Wilken, *The Liberation of Property* (David Green, tr.) (George Allen & Unwin Ltd, London 1982) 259; Paddy Ireland et al., 'The Conceptual Foundations of Modern Company Law' (Spring 1987) 14 (1) *Journal of Law and Society* 151.

⁸ See J. E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Clarendon Press, Oxford 1993) 27.

⁹ See Marc T. Moore and Antoine Reberlioux, 'Revitalizing the Institutional Roots of Anglo-American Corporate Governance' (2011) 40 (1) *Economy and Society* 84, 97.

in the economy.

Chapter 3 will deal systematically with the concepts of 'interest' and 'the public interest'. 'Interest' is conceived as a justifiable claim; whilst at the same time recognising the equivocality of 'interest'. Thus, only the meaning of interest that is significant politically is adverted to. It is in the sense of political significance that 'interest' is a moral standard. Interests are distinguishable from demands or wants. Interests as claims conflict with other claims and counterclaims. This makes the task of defining an individual interest, a group interest or the public interest the task of justifying claims. The elaboration of the application of the ethics of discourse, for justifying claims, is adopted as applying to the definition of the public interest.

Aimed at integration, the public interest model of the corporation is concerned with the socio-economic context of corporate action. That the corporation is an economic actor needs hardly to be stated; however, it can be forgotten easily that it acts within a social milieu, a space that is irreducibly moral. Nonetheless, the goal of economic action clearly is, according to economic orthodoxy, to make a profit. This is acceptable. It must also be accepted that there are social or moral concerns that may not always coincide with the purely economic one of making money. The task is therefore to make profit-making, that is, the (intermediate) goal of economic activity, to align more with social concerns, amongst which must include the issue of social wealth distribution, liberty for all (the ideal of democracy), the protection of natural environments, etc.

In chapter four, therefore, the conception of socio-economics is employed in the project of integrating economics and ethics. There can be other approaches to this objective, that is, the objective of bringing economics into harmony with ethics. For example, there is a corrective business ethics, which, as its name indicates, aims at filling any gaps left between the presumably unavoidable results of economic action, and what is deemed to be socially and politically desirable.

Integrative economic ethics relies on the procedural methodologies that parallel a discourse norm, on which the explication of the public interest depends. For both the public interest concept, and the integrative economic ethics, the *public* is the site of

morality. Integrative economic ethics avoids a division of moral labour - corporate ethics is derived from economic ethics, which is itself well-anchored on *philosophical ethics* or *rational ethics*.

Rational ethics says that there are rational principles, norms, or rules that can help establish standards or values on which moral judgment or argumentation can be based. Such a moral or ethical system can be distinguished from, for example, one that is reliant on intuition or innate human virtue. *Discourse ethics* is an example of a rational ethics, which we will have enough to say about. In brief, it is a rational or philosophical ethics, because it is based on cognizable and relevant principles of discourse, that is, “communication ethos”, vid, absence of coercion, reciprocal recognition of argumentation partners, the competence of argumentation partners, etc.

The concluding chapter five explores the conception of the ‘corporate interest’. Who is to define the corporate interest, in order to bring it into alignment with the public interest? And what are the mechanics for this task? On the clear normative position of a legal theory of corporations, and a social institutional perspective, a ‘director primacy’, is contended to be a clearly correct pragmatic solution to the question of the locus of corporate governance authority.

However, the board in exercising its governance authority has to *listen* to the stakeholders, who admittedly have qualitatively different claims on (*interests* in) the corporation. Communication with ‘stakeholders’ would therefore be the first principle of corporate ethics (reference to discourse ethics), and satisfaction of ‘stakeholder’ interests *the linkage* to the public interest. How any inputs by the stakeholders is to be received is a matter of practical organizational learning and experimentation.

In defining and pursuing the corporate interest, the board and its representatives, ought to act as a “neutral” agency.¹⁰ It is engaged in the exercise of power, guided thereby by ethical principles – the concept of fiduciary obligation – is to that effect. Part of the rational for stakeholder communication, is to countervail the

¹⁰ See Marc T. Moore and Antoine Reberieux, n. 9, p. 100

directorial/managerial power, i.e. to help to make it *legitimate*.

Ethical awareness through education, socialization and ethics training, is a *sine qua none* if actors are to be 'capacitated' and 'sensitized' to the moral aspects of their actions, individually and collectively. It is then clear that ethics cannot be separated from corporate practice any more than from economic practice.

METHODOLOGICAL CONSIDERATIONS

In this section we focus on methodological considerations, beginning with a description of the socio-legal research programme.

Social-Legal Methodology

A socio-legal or theoretical research methodology, is contrasted to another main approach to academic legal research, that is, the doctrinal approach. It is easier to explain the latter, because its aim is straightforward and clearer. Legal rules are designed by legal institutions – the legislature, courts, and (may be) other bodies, e.g., law commissions. Legal doctrinal research has as its aim the clarification of points of law, namely, legal principles, doctrines or concepts with a view to their direct practical application. Thus, the clarity and consistency of rules for application to real life situations, is the driving force. A socio-legal approach on the other hand, is not aimed at elucidating actual or prospective legal principles, doctrines or concepts for legal practice purposes.¹¹ A characterization of socio-legal research methodology, including its application to our topic, follows immediately.

The characterization of socio-legal research programme in terms of its aims and specific methods is complicated, not least because of the evident reference to the sociological background of the law. Because the relevant disputed issues often transcend the disciplinary boundary of positive law, this methodology poses a difficult question relating to the conception of the law; it is, therefore, criticisable on that front. The relevant issues or questions that form the social background of the law certainly do not belong solely to any one discipline. And the definition of theorizing as an “activity directed to posing, reposing, and seeking answers to *general* questions”¹², does not help much (emphasis supplied). It raises more questions than answers. A general question concerning any matter presumably does not call for, and cannot elicit a specific answer, or an answer that is singly valid.

¹¹ See Reza Banakar, ‘Having one’s cake and eating it: the paradox of contextualization in socio-legal research’ (December 2011) 7 (4) *International Journal of Law in Context* 487, 1: Review Essay: Law in Modern Society by Denis J. Galligan (Clarendon Press, 2006).

¹² William Twining, ‘Introduction’ in William Twining (ed.), *Legal Theory and Common Law* (Basil Blackwell Ltd, Oxford 1986) 6.

Some of the issues that arise in connection with our topic include: power relationships within the corporation (that is, the distribution of power amongst the corporate constituents), the political-moral questions relating to the source and justification of the socio-economic powers of corporations in a democracy, the extent of the regulatory powers of the sovereign, and the attainment, non-attainment or nullification of political ends by the corporation, etc.¹³

The rationale of a theoretical approach in company law has been addressed by Brian Cheffins, by arguing that corporate activities are influenced or determined not only by company law. Indeed, company law in many cases is not the most important factor¹⁴; for, if accounts are to be taken of how business organisations impact on society, insights from other disciplines, such as, economics, sociology, management, etc. are to be factored in.¹⁵

The aims of socio-legal approach can be perceived by the breadth of its interest in diverse subject matters; and by the methods (empirical, theoretical, descriptive or normative) available to be used. The aims are difficult to classify, because different researchers have different aims and, therefore, perspectives. The diversity of outlook and approach is reflected also in the different descriptive labels given to the socio-legal programme, i.e., 'law and sociology' and 'law and society' in different jurisdictional territories. However, the unifying factor can be said to be the strong emphasis put on contextualization.

The merit of contextualization can consist in the revelation of the institutional structures and status of law. The various institutions of the legal, political, economic systems are explored in their *social*-institutional contexts. In this endeavour, the malleability of 'institution' is of great advantage. "Institutional thinking" encourages experimentation, not least in the conception, design and application of practical solutions to difficult questions.

¹³ Cf. Sally Wheeler, 'The Business Enterprise: A Socio-Legal Introduction' in Sally Wheeler (ed.), *A Reader on The Law of the Business Enterprise* (Oxford Readings in Socio-Legal Studies, OUP, Oxford 1994) 3.

¹⁴ Brian Cheffins, 'Using Theory to Study Law: A Company Law Perspective' (Mar., 1999) 58 (1) *The Cambridge Law Journal* 197, 215.

¹⁵ *Ibid* 216.

Integral to the socio-legal approach to legal research is a rejection of the normative imposition of a legal definition. This does not mean a rejection of legal doctrines *per se*; however, a socio-legal researcher approaches doctrines or concepts with an openness of mind, recognising that these are almost always abstractions from the real social realities or facts, and often under ideological influences. The legal definition of a company can be offered as a ready example. Company law in its conception of the company as a legal institution, sees it as encompassing solely the relationships between ‘the owners of capital’ and those commissioned to manage the assets of the owners. This characterization applies *only* to public companies or large private companies, in which the dichotomy of ownership and management exists.¹⁶ At any rate, company law doctrinally seen, abstracts the ‘agency problem’ from the complexities of socio-economic production and distribution, in which the corporation operating in a market economy in a democratic society is steeped.

A socio-legal approach to the corporate enterprise is interested not only in the justifiable private interests of the ‘owners’ of the corporation (beneficiaries of corporate production, to be precise), but also in the interests of all those whose lives (well-being, moral rights, and life-prospects) are directly or indirectly affected, as well as in the collective interests of society in the relevant polity, in virtue of which the organization of a peaceful communal life is at all possible.

It is useful to emphasize what most distinguishes the socio-legal approach. It is the mind-set that is averse to “the authority paradigm”: To escape this prison, a socio-legal researcher grasps towards other disciplines other than the law. This understandably causes an anxiety, that what is distinct about law or the legal system as such, may be compromised. However, it is in our view, arguably, so much better for the *integrity* of the law, for its *raison d’être*, to be confronted with questions transcending the category of law. An attitude of open-mindedness is preferable when compared to its opposite. Law in a democratic state carries the promise of securing welfare for all. This is a more important task than any striving to keep law out of politics or morality, which in itself is futile.

¹⁶ See Sally Wheeler, n. 13, *ibid*: “The legal model of the company does not orientate itself towards the economic function or purpose of the company.”

However, if someone is to deeply query the ‘social-scientific perspective on law’, that is, the philosophical foundation of the socio-legal approach, the answer that can be given would be that Law (as it can be generally understood), has its grounding on *reason*, as opposed to revelation or arbitrary command. It is on the same basis of reason that the scientific study of society is pursued.¹⁷ Law and ethics or systems of morals distinguish themselves, in that they constitute normative orders. This means that their principles serve to regulate the conduct or activities or persons, natural or artificial, in society. The regulation or mediation of conduct is essential because conflicts, but sometimes, co-operation or competition, characterize the nature of human activity in every dimension of life.

Social Institutionalism

The starting point perhaps should be a definition of an institution, although it can be said with certainty that everyone knows what an institution is, and is in contact with one or more institutions routinely. We do not however need to give thought to the pervasiveness of institutions in our lives, or what are the commonalities amongst diverse “institutional forms”. Marriage is an institution; so is the Church of England, a court of law, the law, morality etc. That the business corporation evinces the essential characteristics of an institution is not really debatable. Neil MacCormick in (teleologically) defining an institution uses the corporation amongst others as an illustration.¹⁸

Richard Scott defines an institution generically as:

“Institutions comprise regulative, normative, and cultural-cognitive elements that, together with associated activities and resources, provide stability and meaning to social life.”¹⁹

One notices from the definition that the existence of an institution involves an integration of different elements: the normative, regulative, and cognitive. Richard

¹⁷ On how reason accounts for ‘the interpenetration of law, politics and morality’, see, Jürgen Habermas, ‘Law and Morality’ (Kenneth Baynes, tr.) (October 1 & 2, 1986) TANNER LECTURES ON HUMAN VALUES, Harvard University.

¹⁸ Neil MacCormick, ‘Norms, Institutions, and Institutional Facts’ (1998) 17 *Law and Philosophy* 301, 335: “Corporations are associations of individuals to which a separate legal personality attaches for the purpose of holding property and bearing and discharging legal obligations and responsibilities.”

¹⁹ W. Richard Scott, *Institutions and Organizations: Ideas, Interests, and Identities* 4th edn. (Sage Publications Inc., California 2014) 56.

Scott refers to these as the three pillars of institutions.²⁰ We shall not be examining theories of institutions, how these elements interact with each other, or how different theorists describe them. Some familiarity with the concept of an institution is sufficient for the purpose of the elaboration of our theme.

Again, from the above definition, we can make out that the existence of social norms or rules, and their necessary application, is the core of an institution. The law is a clear example. Yet, there is ‘an *institutional* theory of law’²¹; signifying that this is a particular lens through which to look at the legal system. As Peter Morton explains it, citing MacCormick and Weinberger²², an institutional theory of law highlights the point that “norms, aims and values” – the constitutive elements of the law, are not self-organising and self-justificatory. These elements embed in social reality, and are “systems of deliberation and control which are constituted through social action and interaction”.²³

Legal concepts seen through institutional thinking or perspective are taken seriously, however, their meanings are not isolated from the social context or reality of the relevant activities. Beliefs, motives, aspirations and language are all relevant in the construction of meanings of concepts.²⁴ Thus, there is indeed a meeting point between a socio-legal research methodology and a social institutional perspective. An essential feature of all institutions is that they have a context, and their reason for existence is found in that context. Institutions exist to serve some aims or interests and are leveraged to realize important social values.²⁵

Social institutionalism has to adopt a distanced position in relation to law, economy and politics, so as to be able to integrate them. Social institutionalism is, therefore, not the same as legal institutionalism”, which in the context of the corporation, has been defined as the centring of legal rules in the practice (understanding) of

²⁰ Ibid.

²¹ See, for example, Peter Morton, *An Institutional Theory of Law: Keeping Law in its Place* (Clarendon Press, Oxford 1998) and Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, Oxford 2007)

²² Neil MacCormick and Otto Weinberger, *The Institutional Theory of Law* (Dordrecht, D. Reidel 1986) cited in Peter Morton, n. 21, fn.1, p.1

²³ Peter Norton, n. 21, p. 1.

²⁴ Peter Norton, n. 21, p. 2

²⁵ See Neil MacCormick, n. 13, p. 333.

corporate capitalism: “legal institutionalism upholds that an understanding of legal rules is essential for economists and other social scientists”.²⁶

Social institutionalism is premised on the general prevalence of rules or norms, which are not all legal rules; on the incompleteness, and occasional self-contradiction and ambiguity of laws; which are all perceived as normal and creative of opportunities for new and better insights.

Legal institutionalism can serve as a foil to social institutionalism. Legal institutionalism on its own cannot serve the ends of political morality. Because of the all-encompassing character of the modern economy, that is, capitalism, aided by the state through state law, the corporation as a legal mechanism, requires a re-conceptualization, which is the task of the *social* institutional perspective. Legal institutionalists acknowledge that the law is not impartial, “is a central mechanism of social power”²⁷, and that “[p]owerful actors can influence the making or implementation of law.”²⁸ Thus, a space is open for social institutionalism to argue for a (moral) legitimation of the corporate enterprise. The public interest model of the corporations assumes this task.

And, finally, what about economic institutionalism? It is clear, that economics can only provide a “thin” account of the relevant concepts, such as, property, contract, and, of course, the corporation.²⁹ (Legal personality has been depicted as “an analytic device”. Social institutionalism is on the contrary predicated on a ‘thick’ account of institutions, or concepts, which is geared to elucidating the real nature and function of these institutions in a modern polity. Integral to this task is the need to clarify the rationality or underlying principle of a practice or an institution, that is, its moral purpose, in view essentially of a life of peaceable communal existence.

²⁶ Simon Deakin, et. al, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' (April 2015) University of Cambridge Legal Studies Research Paper Series No. 26/2015 <<http://www.law.cam.ac.uk/ssrn/>>1 accessed on 30 April 2015.

²⁷ Simon Deakin, n. 26, p. 7.

²⁸ Ibid.

²⁹ See Simon Deakin, n. 26, pp. 8-23; also, Eric W. Orts, *Business Persons: A Legal Theory of the Firm* (Oxford University Press, New York 2013) ix-xviii for a concise summary of the weaknesses of the economic theory of the firm.

Chapter 1

THE RATIONALE OF THE PUBLIC INTEREST MODEL OF THE CORPORATION

1.1 Introduction

The chapter brings into focus the central themes in the relationship between corporations and society, that is, corporate governance and corporate social responsibility. The brief discussion is aimed at introducing what we have termed 'the public interest' model of the corporation. The idea of the model primarily is to underline the intrinsic connection between corporate governance and corporate social responsibility. The conventional view of the corporation currently is that corporate social responsibility is an add-on to corporate governance.

The main grounds for the public interest approach are articulated. Integral to this tentative approach is a rejection of the so-called division of moral labour. A division of moral labour encourages the view that various professional, disciplinary or technical activities are carried on under specialized ethical rules, which differ from every day morality. We contend against a division of moral labour; and make the suggestion, consequently, that the corporate interest and the public interest are moral standards. In other words, a moral point of view is taken to the themes of the relationship between corporations and society. It is finally considered whether the public interest model of the corporation can be understood as a political theory of the corporation.

1.2 Corporate Governance/Corporate Social Responsibility: the Approach to Foundational Questions

The competing shareholder and stakeholder models of the corporation relate to differing conceptions of the purpose of the corporation, even though this foundational issue may remain unarticulated. Nonetheless, some writers have tackled the question of corporate purpose directly, for example, Christopher Bruner.³⁰ As the title of his paper makes clear, he believes that the core issues of corporate legal theory, namely, the site of corporate governance authority, "the intended beneficiaries of corporate production", and the nexus between corporate law and social welfare,

³⁰ Christopher Bruner, 'The Enduring Ambivalence of Corporate Law' (October, 2008) 59 (5) *Alabama Law Review* 1385, 1386.

have to date been answered “doctrinally and morally” only ambiguously. He cites as the clearest evidence of this ambivalence the legal provision for the beneficiaries of corporate fiduciary duties. The duties are expressed to be simultaneously owed to the corporation and shareholders.³¹ There are equivalent provisions in the UK, and contained in section 172 of Companies Act 2006. Citing Lyman Johnson³², who has suggested that this provision is merely “a pragmatic doctrinal accommodation” of divergent views on the corporate purpose question, Christopher Bruner affirms this ambivalence in relation, specifically, to the determination of the beneficiaries of corporate fiduciary obligation.³³ His analysis is moreover extended to cover the other theme of corporate governance referred to above, namely, the site of corporate governance authority. The correct position according to Christopher Bruner, therefore, amounts to a rejection of any governance theory assigning primacy to either the board of directors or the shareholders.³⁴ The question for him is indeterminate.

The bracketing-off in corporate legal theory of the question of the beneficiaries of corporate production may be interpreted, in our view, as a concession to other possible perspectives or solutions to the thorny question, i.e. solutions that are essentially non-legal. The silence or ambivalence, at any rate, could be a ‘statement’ about the responsiveness of the issue to an *institutional* perspective. If so, the social and political character of the question is underlined.

Christopher Bruner asserts, correctly, in accord with a widely accepted view, that there is no weightier policy question than that of the beneficiaries of corporate production;³⁵ and that there is a general assumption that corporate production contributes to the social good.³⁶ This indeterminacy in corporate law then brings to the forefront the question of the social good or interest in relation to the corporation,

³¹ Ibid.

³² Lyman Johnson, 'The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law' (1990) 68 Texas Law Review, fn. 133, p. 900.

³³ Christopher Bruner, n. 30, pp. 1425-6

³⁴ Christopher Bruner, n. 30, p.1426.

³⁵ Ibid.

³⁶ See Christopher Bruner, n. 30, p. 1427; also, I.B. Lee, 'Corporations and the Public Interest' in Claire Hill and Brett McDonnell (eds.), *RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW* (Edward Elgar Publishing, Cheltenham 2012) chapter 7. <<http://ssrn.com/abstract=1909014>> 1

and how best it can be realised. The public interest model of the corporation is poised to answer this question.

With his thesis on ‘the law of corporate purpose’, David Yosifon³⁷ recommends a solution that is related to the position to be canvassed within the public interest model. He advocates a “prescriptive discourse norm”, the norm for the discovery of the purpose of the corporation. He disclaims the shareholder value paradigm, concluding that there is no basis for it in law.

It may, also, be suggested that the perceived reluctance concerning the question of corporate purpose in corporate legal theory, and (may be) also in economic theory, stems from a presumption that morality has no, or a limited place in economic life³⁸, of which the corporate enterprise has unquestionably become the dominant form. For to ask seriously about the purpose of anything whatsoever, is to engage in moral considerations; that is to say, to ask about *ends* and the *means* for their attainment and, above all, to enquire about their justifiability respectively. This requires that such certain values as technical efficiency, utility, loyalty, self-interest, etc. are not valorised unqualifiedly, in neglect of other-regarding values, of empathy, solidarity and community spirit.

A focus on purpose in any context is self-justifying, for it is the only means by which the morality of action can be clarified. Morality in the sense here employed is not related principally to our conceptions in the distinction between a *moral* and an *immoral* act or action.³⁹ To portray the relevant meaning of ‘moral’, an image of a “demoralized” person has been appealed to, to indicate that s/he is someone who has lost his or her way. S/he is said not to be self-possessed, productive or creative in any real sense.⁴⁰ In the case of the corporation, the question that then arises is, whether the doctrine of shareholder value or stakeholder value should be compelling

³⁷ David G. Yosifon, ‘The Law of Corporate Purpose’ (May 2013) Santa Clara University School of Law Legal Studies Research Papers Series Working Paper No. 14-12.

³⁸ See Sen, ‘Does Business Ethics Make Economic Sense?’ in Thomas Donaldson, Patricia H. Werhane and Margaret Cording (eds.), *Ethical Issues in Business: A Philosophical Approach 7th edn* (Prentice Hall, New Jersey 2002) 244.

³⁹ See Adela Cortina, ‘The General Public as the Locus of Ethics in Modern Society’ in Peter Ulrich and Charles Sarasin (eds.), *Facing Public Interest: The Ethical Challenge to Business Policy and Corporate Communication* (Kluwer Academic Publishers, Dordrecht 1995) 46 (citation omitted).

⁴⁰ *Ibid.*

to anyone seriously enquiring about the (moral) purpose of the corporation.

The nature of the relationship between corporations and society is elucidated by various theories of corporate social responsibility. It goes without saying that different researchers have different focal points, and pursue different agendas. The topic of corporate social responsibility is certainly wider than the quest for the rightful beneficiaries of corporate fiduciary obligation. There are also important questions about the production, and the subsequent absorption of the remedial costs of the social costs of corporate production, technically termed externalities. Air or water pollution resulting from economic activities, for which the producer bears no specific economic or social cost, is one clear example of an externality. The cost of an externality in whatever form, is by definition born by the wider society.

Theorists may also engage themselves with any of the following: the merits and demerits of corporate philanthropy; the participation of corporations in one form or another in politics; the improvement of the regulatory environments for the economic system of the market economy, etc. Corporations participate and are increasingly expected to participate in designing the rules aimed at improving the conduct and behaviour of market participants, as well as the market regulatory rules and principles.⁴¹

1.3 The Specificities of the Public Interest Model⁴²

The public interest model is integrative in conception, and is focused on the theme of corporate social responsibility *as such*, that is, the role of corporations in society. Indeed, 'corporate social responsibility' properly understood, in our view, equates to, and is interchangeable with 'the public interest of corporations', or 'the public interest' in relation to the corporation. John Hasnas makes, on the contrary, a point of distinguishing between broad 'social responsibility' and what is known incontrovertibly as the social responsibility ("ordinary") responsibility of any

⁴¹ See Joseph Heath, *Morality, Competition, and the Firm* (OUP, Oxford 2014); Ingo Pies, Markus Beckmann, and Stefan Hielscher, 'Competitive Markets, Corporate Firms, and New Governance – An Ordonomic Conceptualization' in Ingo Pies and Peter Koslowski (eds.), *Corporate Citizenship and New Governance: The Political Role of Corporations* (Springer, Dordrecht 2011) 171; and Cynthia A. Williams, 'Corporate Social Responsibility and Corporate Governance', Osgoode Legal Studies Research Paper No. 32/2015. Available at <ssrn.com/abstract=2635473> 53.

⁴² In underlining what 'the public interest model' denies, its merit, hopefully, should become clearer.

business.⁴³ In the former broad sense of responsibility, which is decried by the shareholder value viewpoint⁴⁴, 'social responsibility' stands for anything extraneous to the requirement of promoting the 'corporate interest' as perceived by managers (as agents of the shareholders-principals). The perception of managers as regards their fiduciary obligation is of crucial importance, which thus makes their education, socialization and belief systems matters of great social importance.

The advocates of shareholder value or stakeholder value are not oblivious of the social-political and ethical issues that arise in the conduct of business, say, for example, the problem of pollution mentioned above. However, it is the case that, especially, the shareholder value advocates, broadly speaking, may be said to subscribe to 'a division of moral labour' – a frequent refrain in Joseph Heath's business ethics.⁴⁵ 'A division of moral labour' as employed by Heath, as well as, by Virginia Held⁴⁶, is connotative of diverse meanings and ideas. In Heath's conception, the phrase implies in the context of business ethics, that market institutions (exemplified by corporations) are designed to promote *efficiency* only⁴⁷; and he relies on the notion in attacking the stakeholder model of the corporation.

Virginia Held, recognising the one clear pitfall in this division of morality, namely, "the danger of fragmentation", is, nonetheless, convinced that it is a less evil than the lack of progress in moral enquiry that otherwise ensures in its absence.⁴⁸ The thrust of her arguments for a division of moral labour is, that it is considerably easier for a *moral person* (my emphasis), to better fulfil the duties of any role, if they are only focused on specific aspects of morality as pertain to that role, as opposed to allowing oneself to be tempted "to do the entire job of morality all at once and single-handedly".⁴⁹ It is, in short, an institutionalization of "role morality", instantiated, for example, by the rules of professional ethics for lawyers or for doctors, guiding the

⁴³ John Hasnas, 'The Normative Theories of Business Ethics: A Guide for the Perplexed', (Jan. 1988) 8 (1) Business Ethics Quarterly 19, fn. 2, p. 2.

⁴⁴ See, Milton Friedman's acclaimed statement in *New York Times Magazine*, September 13, 1970; also Milton Friedman, *Capitalism and Freedom* 40th anniversary edn (The University of Chicago Press, Chicago 2002) 133

⁴⁵ Joseph Heath, n. 41, 10, 84, 94 & 203

⁴⁶ Virginia Held, *Rights and Goods: Justifying Social Action* (The University of Chicago Press, Chicago 1989) 4 and chapter 3

⁴⁷ Joseph Heath, n. 41, p. 10.

⁴⁸ Virginia Held, *Rights and Goods*, n. 46, p. 4.

⁴⁹ Virginia Held, *Rights and Goods*, n. 46, p. 21

latter in deciding, for example, the justifiability of any medical intervention, that is, *solely* on medical grounds. This is thought to be possible as the value to be served, namely, the health of a particular patient, is a value that is relatively clear-cut and incontestable.⁵⁰

Virginia Held's proposal for a division of moral labour includes the distinction between deontological and teleological arguments. Concerning the area of our main interest, which is business ethics, suffice to say, that so long as business or economic ethics is corralled into a division of moral labour, it can no longer be *integrative*. It must then be predicated on a *partial* view, on one hand of economics, and on the other of ethics: its advocates (in form either of a shareholder value or 'strategic stakeholder model' of the corporation) can only hope and expect society to *legislate* an improved ethical (legal and moral) regime for business. It is here that the idea of a corrective business ethics is pertinent. "The systematic role of a corrective economic or business ethics ... is always that of an 'antidote' against an excess of economic rationality."⁵¹

The premise of a *moral person* referred to above, as justifying a division of moral labour, fails to tell us what this morality consists in, and how a person can *become* moral. To be concise, any conception of business ethics, or more broadly, professional or applied ethics, would be inadequate, if it fails to query the ethical rationality of the practice in question, that is, its moral purpose. And this cannot be done in ignorance of, or lack of commitment to what Virginia Held denotes as 'the entire job of morality'. Adopting the language of institution, and in reference to Neil MacCormick, it is akin to not understanding "the underlying principle or final cause of a given institution..."⁵² According to MacCormick, it would avail of little, if we are adept at the construction of a given institution (with its 'applied ethics'), while lacking familiarity with its underlying principle. It is hard to imagine the underlying principle of any institution existing in isolation.

⁵⁰ Virginia Held, *Rights and Goods*, n. 46, p. 22

⁵¹ Peter Ulrich, *Integrative Economic Ethics: Foundations of a Civilized Market Economy* (Cambridge University Press, Cambridge 2008) 87.

⁵² Neil MacCormick, Neil MacCormick, 'Norms, Institutions, and Institutional Facts' (1998) 17 *Law and Philosophy* 301, 335.

In stakeholder perspective, *responsibility* is, as hinted above, dichotomized, the one corresponding to an 'empirical theory of management' and the other to 'normative stakeholder theory'.⁵³ The question of 'social responsibility' arises only in the latter; in the former, according to John Hasnas, it is about keeping the stakeholders happy, in order to better satisfy shareholder value. In other words, the sense (the theory and practice) of responsibility is merely instrumental and strategic. The public interest model has no truck with the strategic value of social responsibility, or with the associated language of sacrifice of profits. Moreover, profits cannot be *maximized*, as the maximization of any value whatsoever is logically and practically incompatible with, in particular, 'the corporate interest', as defined under the public interest model in chapter 5. Also, no value whatsoever can or ought to be maximized, because a value by its nature, as with a principle, requires other values to co-operate with it in action. It is the aim of the public interest model to integrate the shareholder and stakeholder viewpoints, in an explication of the corporate interest/ the public interest.

The idea of the corporate interest is consequently essential to achieving this integration. It is predicated on a conception of the corporation that is capacious enough to accommodate the demands of justice, in contrast to Joseph Heath's conception of "private economic institutions", capable to account "only to a weaker conception of social justice". Institutions in the public sector, according to him, are contrariwise dedicated to pursuing the stronger form social justice.⁵⁴ This clear division of moral labour ignores the well-established practice of co-responsibility by corporations even as private economic institutions, for not only voluntary, self-regulatory, but also, industrial-sectoral regulatory measures, i.e. a conception of *ordo-responsibility*.⁵⁵ Moreover, the usefulness in the context of the notion of 'strong' and 'weak' form social justice may be doubted: corporations in the public interest model, at any rate, do not set out to pursue *directly* and form of social justice.

1.4 A Social or Political Theory of the Corporation?

Is the public interest model of the corporation a political theory of the corporation? The employment of 'the public interest', as a quintessential political concept, would

⁵³ John Hasnas, n. 43, pp. 16-17.

⁵⁴ Joseph Heath, n. 45, p. 203.

⁵⁵ See Cynthia Williams, n. 41, pp. 52-54. ('*Ordo-responsibility*' is an instance of an integration of the competing views of corporate responsibility, i.e., the shareholder and stakeholder models).

suggest that the answer is 'yes'. Some specifications of what a political theory of the corporation would aim at can help to clarify the rationale of the public interest model of the corporation. The public interest concept, it is argued, is *'the political concept'*, as opposed to, say, for example, freedom, which Agnes Heller⁵⁶ has maintained is the concept of the political. To be 'the concept of the political' means, that the public interest is, according to C.W. Cassinelli, "the highest ethical standard applicable to political affairs" and "the ultimate moral goals of political association"⁵⁷. I disagree nonetheless with Cassinelli when he says that the concept of the public interest howsoever "comprises only phenomena directly related to governmental policy"⁵⁸. That would give a too-restrictive interpretation to the concept. The concept cannot in that vein serve, albeit, obliquely, as the proper end-goal of the corporation.

'Corporate interest', arguably, as the objective of the corporation⁵⁹, is only credible when it couples, or orients itself to the public interest⁶⁰ – the interest that is not at all a direct product of government policy or action, but stems rather from the *business* of the corporation. I agree wholly, on the other hand, that the concept of the public interest is the highest ethical standard and an ultimate moral goal of politics. What is the business of the corporation is a question that cannot be answered abstractly. Every corporation has its business, which all those involved in in the corporation ideally must understand and commit to pursuing. It is in this very pursuit that the corporate interest is realized.

The public interest goal can be said to translate into a *political morality* that is founded on the moral equality of all members of the political community.⁶¹ The idea of moral equality is what justifies democracy as a celebrated political ideal, and therefore must be presupposed, in the view of a political morality. A moral equality

⁵⁶ Agnes Heller, 'The Concept of the Political Revisited' in David Held (ed.), *Political Theory Today* (Polity Press, Cambridge 1991) 338.

⁵⁷ C.W. Cassinelli, 'The Public Interest in Political Ethics' in Carl J. Friedrich, (ed.), *The Public Interest NOMOS V* (Atherton Press, New York 1962) 44, 46.

⁵⁸ C.W. Cassinelli, n. 57, p. 51.

⁵⁹ Cf. Andrew Keay, 'Ascertaining the Corporate Objective: An Entity Maximization and Sustainability Model' (2008) 71 *Modern Law Review* 663 <<http://ssrn.com/abstract=1889236>>.

⁶⁰ Cf. Teubner, 'Company Interest: The Public Interest of the Enterprise 'in Itself' in Ralf Rogowski and Ton Wildhagen (eds), *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Kluwer, Boston 1994) 21.

⁶¹ Political morality and the public interest are henceforth in this section used interchangeably. Cf. the definition of "the ends of morality" in Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (OUP, Oxford 2002), n. 334 below.

recommends (among other things) the respectful recognition of the rights and duties of all citizens, which thus makes a peaceful communal existence possible. Note, however, as Cassinelli reminds us, that “[t]he public interest need not imply that all men are entitled to identical or equal benefits, but it always implies that everyone should receive their due...”⁶² In arguing for a political morality, it may be necessary to highlight the correspondence between rights and duties, since it seems possible that in some conception of politics, that political, moral or legal rights are wholeheartedly, if not overzealously, embraced, whilst the corresponding duties are neglected or at least deemphasized.⁶³ Contrasting in this connection the liberal and republican perspectives on politics, Claus Offe states that “... from a republican perspective the common good results from obedience to duties held to be incumbent on all social actors, both political leaders and ordinary citizens”.⁶⁴ Liberalism on the contrary is predicated on the pursuit of individual interests.⁶⁵

The conception and application of the public interest requires a focus on the means, as well as, the ends of political action. 'Means' relates to the notion of ethical standard mentioned above, as the ideal of a democratic ethics (e.g. participation right) encapsulates. The 'ends-side' of the equation is equally very significant: its purport is that the conception of the public interest should not be concerned with only procedural correctness. Put another way, it is not simply about process for the sake of process. A lot can be said about the obvious limitations of merely paying attention to procedures, that is, a preoccupation solely with compliance with rules or formalities. Staying on the theme of the democratic ethics, it is nothing new that, for example, the valid election of representatives does not guarantee the representation of the interests of the body of electorates, which is supposed to be the promise of democracy. In other words, a political system might be democratic, or seemingly so, to be more accurate, without the *ends* of democracy being universally appreciated, let alone attained. It will become evident from our discussion on the public interest concept, that it would be hard for someone to concur with the envisaged conception of the public interest or of political morality or of the common good, without first

⁶² C.W. Cassinelli, n. 57, p. 46.

⁶³ See, for example, David Selbourne, *The Principle of Duty: An Essay on the Foundations of the Civic Order* (Abacus, London 1997).

⁶⁴ Claus Offe, 'Whose Good is the Common Good?' (William Rehg (tr.), (2012) 38 (7) *Philosophy and Social Criticism* 665,666

⁶⁵ For further see p. 82 below.

grasping and conceding that the public interest represents both means and ends of action, which must be combined.⁶⁶

The value(s) of peace and justice represent for us the public interest⁶⁷, the values that are purchasable by following ethical standards. Other values, such as, freedom, autonomy, equality, prosperity, etc. are obviously also ensconced in the public interest. Freedom, it must be granted, plays a central role in communal existence, and, therefore, in political life. Without freedom or autonomy, a political agent or, more broadly, a social actor cannot even begin to pay their debt to the community; and so cannot be in communion with others. It is consequently not a great surprise that freedom is for some political theorists the concept of the political.⁶⁸

The task of the political theory of the corporation is, therefore, the *integration* of the concerns of political philosophy; namely, the issues pertaining to political morality, with the concerns of corporate capitalism. In other words, a political theory of corporations should for our purposes at least be able to bring the concerns of law, economy and the polity together to bear on the evaluation of corporate plans, policies and actions. The core questions of the various approaches to business ethics or corporate social responsibility in their diversities of formulations, are underlain by this search for an accommodation between, on the one hand, the demands of justice and peace, and, on the other, the 'liberal' *values* of individual interest, initiative and liberty.⁶⁹

This effort at the accommodation of moral concerns, a re-visioning of the role of the corporation in a democracy, would seem to have been a one-sided affair, as Abraham Singer argues.⁷⁰ He expresses the view that political theory has tended to stand aloof, and not to grapple with the issues, and hence the lack of a developed

⁶⁶ See Claus Offe, n. 64, pp. 670-671 where the distinction between "an active and passive side in the norm of the common good", relates to this point.

⁶⁷ Cf. Claus Offe, n. 64, at p. 666: A "*moral* quality is attributed to the common good, as a political goal that synthesizes values of modernity and justice".

⁶⁸ See Agnes Heller, n. 56; also C. W. Cassinelli, n. 57, pp. 49-50, equating the public interest with freedom.

⁶⁹ See Abraham Singer, 'There is no Rawlsian Theory of Corporate Governance' (February, 2015) 1 Business Ethics Quarterly 1-2 for an illustrative list of the principal questions.

⁷⁰ Ibid 4; see Suman Gupta, *Corporate Capitalism and Political Philosophy* (Pluto Press, London 2002) for the thesis that corporate capitalism "evades political philosophy".

'political theory of the corporation'. However, corporate theory in this connection seems not to have fared a lot better. Rejecting the predominantly “anti-political” focus in the literature on the company, as well as the economy generally, Andrew Gamble and Gavin Kelly⁷¹ re-echoed the thesis of the evasiveness of corporate capitalism from political philosophy.⁷²

However, Abraham Singer should be heeded, for as he warns: “A political liberal approach to business ethics and corporate governance must be derived from principles that apply specifically to those associations and organizations voluntarily entered into, yet are crucial for economic and social cooperation”.⁷³ The issue for the public interest of the corporation is to ensure that the ethics of the corporation is realistic, and thoroughly grounded in the context, that is, of the free market economy, in which business corporations operate.

The public interest model of the corporation as a political theory of the corporation is, then, perhaps, a (moderate) ‘politicization’ of the corporate enterprise. However, it is not at all intended to make the corporation a political democratic institution, but rather to make it more responsive to the needs of everyone in society. Because the relevant issues traverse law, economy, and the polity, the model must be integrative in conception and approach. Some of the central normative questions, which should be part of corporate governance include, for example, the following questions: How is the task of corporate governance to be conceived; does the commitment to the democratic ethos warrant and compel the corporate constituents’ participation in governance; what should the role of the state be; what does efficiency mean in the context of corporate social production; and crowning it all, what is the purpose of the corporation?

1.5 Conclusion

The last mentioned question in the preceding paragraph is the question that we have posed in this thesis. A political theory of the corporation has the effect of challenging

⁷¹ Andrew Gamble and Gavin Kelly, ‘The Politics of the Company’ in Andrew Gamble et. al, (eds.) *The Political Economy of the Company* (Hart Publishing, Oxford 2000) 21.

⁷² Cf. Suman Gupta, n. 70.

⁷³ Abraham Singer, n. 69, p. 23.

the assumptions of 'liberal democracy'⁷⁴, such as, the division of law into public and private, a monolithic property conception, individualistic ethics, etc. The following chapter concerned with the conceptualization of the corporation, will suggest the possibility of a greater accommodation of the concerns of a political morality. And a depiction of the corporation, if broad enough and accurate, would help immensely in providing answers to the foundational question of corporate governance, i.e., the purpose of the corporation.

⁷⁴ See David Ciolek, 'Beyond Public and Private: Toward a Political Theory of the Corporation', (2013) Vol. 107, (1) *American Political Science Review* 139.

Chapter 2

TOWARDS THE CONCEPTUALIZATION OF THE CORPORATION

2.1 Introduction

The task in this chapter is to show that a perceived objective of the corporation is intimately connected to the conception of the corporation by the perceiver. It follows that the various theories or models of the corporation are all possible formulations of the corporate objective. The view dominant in the literature currently is that shareholder wealth maximization or shareholder value is the proper objective of the large public corporation. The principle or norm of shareholder value stipulates that the interests of shareholders are to be prioritised and maximized. The related objective of shareholder empowerment promotes the giving of more decision-making power, control or influence over the affairs of the corporation to shareholders.

In contention against the seeming consensus around shareholder value norm, is the stakeholder theory. Stakeholder theory is predicated on the necessity for equal recognition of other corporate constituents as co-contributors to the corporate resource. All stakeholders are thus to be treated as equal co-beneficiaries of corporate production. The concept of a stakeholder is not restricted to only those who have direct interest, or are actively involved in the corporate enterprise, such as, employees, lenders, contractors, other suppliers, etc. Consumers can be stakeholders as well. Also, as the local community in which a corporation operates has real interests in the activities of the corporation, it is counted a stakeholder.⁷⁵

It is proposed to first underline the prevalence of shareholder value thinking. This is then followed by a consideration of a recent powerful critique of shareholder value principle, as formulated by Professor Lynn Stout. We shall consider subsequently important aspects of theorising about the corporation. It is considered relevant to enquire about the ideological commitments of corporate theorists. Specific theoretical models of the corporation are referred to for illustration. Then, our

⁷⁵ See, e.g., Barnali Choudhury, 'Aligning Corporate and Community Interests: From Abominable to Symbiotic' Queen Mary University of London, School of Law Legal Studies Research Paper No. 147/2013 <<http://ssrn.com/abstract=2259942>> accessed on 23 May 2013.

institutional perspective on the corporation is elaborated, while focusing on specific core features of the corporation.

2.2 The Shareholder Value Norm

The shareholder value principle as stated above says that “to maximize the market value of the company...” is the corporate objective. The pursuit of this objective is deemed to be the best means of securing social welfare and prosperity.⁷⁶ Shareholder primacy is claimed by its proponents and detractors alike to be the orthodox norm of corporate governance. Andrew Keay⁷⁷ cites as the proponents of the shareholder value norm such scholars as Stephen Bainbridge⁷⁸, Henry Hansmann and Reiner Kraakman⁷⁹. The prevailing orthodoxy of the shareholder value norm is also confirmed by, for example, by Margaret Blair and Lynn Stout⁸⁰, who not only contest shareholder ownership of corporate assets, but also substitute a ‘team model’ of corporate production for the principal/agent-model – the premise of shareholder primacy.

The principle of shareholder value has received statutory backing in the UK corporate governance law, although with some qualification. A committee⁸¹ that was set up to make recommendations for reform leading up to the UK Companies Act 2006 suggested an improvement to the pre-existing regime. Thus, section 172 of the Companies Act 2006 nominates the shareholders as the beneficiaries of directorial/managerial duties; directors are, however, also explicitly enjoined to have regard to other interests.⁸² Note that the fundamental principle that the directorial

⁷⁶ Andrew Keay, ‘Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s ‘Enlightened Shareholder Value Approach’ (2007) 29 Sydney Law Review 577, 578

⁷⁷ Ibid.

⁷⁸ Stephen Bainbridge, ‘Director Primacy: The Means and Ends of Corporate Governance’ (2003) 97 Northwestern University Law Review 547, 563.

⁷⁹ Hansmann & Reiner Kraakman, ‘The End of History for Corporate Law’ (2001) Georgetown Law Journal 439, 440-441. See, also, Leo E. Strine, Jr, ‘The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law’ (2015) Univ. Penn Law Review Research Paper No. 15-08, fn. 73, p. 28 citing Hansmann & Kraakman, loc. cit. “There is no longer”, Leo Strine says, “any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value” (p.439).

⁸⁰ Margaret Blair & Lynn Stout, ‘A Team Production Theory of Corporate Law’ (1999) 85 Virginia Law Review 248.

⁸¹ The Company Law Review Steering Group recommended the ‘enlightened shareholder value’ in its report, Modern Company Law for a Competitive Economy: The Strategic Framework (Feb., 1999).

⁸² The UK Companies Act 2006 s.172 states that the directors are to promote “the success of the company for the benefit of its members as a whole”; s. 172 (1) enumerates other factors to be taken into account, including the interests of persons other than the members.

duty is owed to *the company* is restated in s. 170. The change in the law has not, according to the views of scholars, brought about a departure from the shareholder value principle.⁸³

2.2.1 On a New Perspective on the Shareholder Value Principle

As stated above, the shareholder value orientation is the orthodox view of the UK corporate governance; therefore, different conceptions of the *stakeholder company* have been proposed to counter it. It is certainly not proposed to present a new defence of the shareholder value norm; nor a stakeholder model as a viable alternative. Different proponents of the stakeholder company have different inspirations and agendas. A conception of stakeholder corporation can represent hope and expectation to legitimize corporate power; or be deemed apt “for improving competitiveness”, or be seen as a socialization of the corporate enterprise.⁸⁴ These debates between the two dominant perspectives in corporate theory have been raging for a very long time, since the emergence of the large corporation as a dominant form of business organisation.⁸⁵

In ‘*On New Thinking on “Shareholder Primacy”*’⁸⁶ Lynn Stout advocates an alternative viewpoint to the shareholder value primacy that seems capable of moving the debate forward in a positive direction. She proposes a brand of ‘director primacy’, which is discussed next.

Shareholder primacy gained ascendancy on the back of economic analysis of the firm in the 1970s, thanks to the ‘Chicago School of Economics’. The theory of the firm propounded by Michael Jensen and William Meckling⁸⁷ depicts shareholders as principals, who hire director-agents, with the sole responsibility of the agents being

⁸³ Andrew Keay, n. 76, p. 572.

⁸⁴ Paddy Ireland, ‘Corporate Governance, Stakeholding and the Company: Towards a Less Degenerate Capitalism?’ (Sep.1996) 23 (3) *Journal of Law and Society* 287, 288.

⁸⁵ The debates between Adolph A. Berle and E. Merrick Dodd regarding the question of the proper purpose of the corporation in 1932 in the *Harvard Law Review* epitomize the beginning of the contest. Adolph A. Berle, ‘Corporate Powers as Powers in Trust’ (1932) 44 (7) *Harvard Law Review* 1049; Merrick E. Dodd, Jr, ‘For Whom Are Our Corporate Managers Trustees?’ (1932) 45 (7) *Harvard Law Review* 1145.

⁸⁶ Lynn Stout, ‘New Thinking On “Shareholder Primacy”’ (Feb. 2011) UCLA School of Law Law-Econ Research Paper No. 11-04 <<http://ssrn.com/abstract=1763944>> 1.

⁸⁷ Michael C. Jensen and William H. Meckling, ‘Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure’ (1976) 3 (4) *Journal of Financial Economics* 305.

the maximization of the wealth of the shareholders. To advert to any other goal(s) is to reduce social wealth, through the precursory and consequential increase in 'agency costs'. According to Lynn Stout, the Chicago Economists have succeeded to shift the balance of opinion in favour of shareholder primacy by the 1990s.⁸⁸ Her thesis is that shareholder primacy is now losing its dominance as a result of a combination of factors, including "developments in economic and corporate theory", changes in corporate practice and numerous empirical studies.⁸⁹

Significantly, a harmonization of the shareholder and stakeholder models of the corporation can be envisaged under the aegis of the director primacy.⁹⁰ Moreover, what this integration portends is in essence a critique of shareholder value principle; it also makes possible the equilibration of the shareholder interest with the public interest. The thesis of the public interest model of the corporation can therefore be advanced. To move in that direction, we shall from this point, closely following Lynn Stout, clarify the antithesis between director primacy and shareholder primacy as follows.

(a) Market Efficiency and Director Primacy⁹¹

Efficiency is relevant here, because it is employed in making of the case for shareholder primacy. The necessary assumption is that the market price of company shares captures accurately the true economic value of the shares in terms of their likely future returns and perceived risks. So, the markets are efficient in making predictions and allocating economic values.

The shareholder's interest (shareholder value) consists in the maximization of the market price of their shares, which, therefore, serves the corporate objective function. However, all shareholders are not the same; there are those with

⁸⁸ Lynn Stout, n. 86, p. 3.

⁸⁹ Lynn Stout, n. 86, p. 4.

⁹⁰ Ibid.

⁹¹ See William W. Bratton, 'Framing a Purpose for Corporate Law', (2014) 39 (4) *Journal of Corporation Law* 718: "Several assumption-laden steps separate all-inclusive optimality from shareholder primacy." William Bratton after critiquing the underlying assumptions, that is, regarding shareholders' incomplete contracts and shareholders' position of vulnerability in the corporate contractual nexus, rejects shareholder primacy. Castigating "shareholder maximization norm" (shareholder primacy) as reflective of "a particular conception of the optimal incentive alignment within the firm," he labels the norm as only "a debate point, rather than a point of general agreement" (p. 720).

substantial holdings, such as hedge funds and institutional shareholders. Different shareholders do have different incentives and requirements as shareholders, which, then, can create also conflicts of interests amongst them. It follows that no one business strategy, say, for example, a strategy aimed at raising the share price in the short term, will meet the needs of all shareholders.⁹² In the face of this conflict, a role for independent-minded directors suggests itself.⁹³ Note, however, that the necessary and implied, underlying assumption here, of unselfishness and loyalty on the part of directors has been queried by Ian B. Lee⁹⁴. Ian B. Lee notes, too, that Lynn Stout and Margaret Blair⁹⁵ are cognizant of their assumption's deviation from the standard behavioural assumption of maximization of self-interest. Directors are economic agents in their own right, and must be self-centred as all economic agents are presumed to be.

(b) "Capital "Lock In" and Director Primacy"⁹⁶

This goes to the nature and definition of the corporation (the separation of ownership from control and the separate legal personality of the corporation). The existence of the corporation is predicated on these and more *institutional* facts. 'Capital lock in' is, it is maintained, an essential feature of the corporation⁹⁷, on which, for example, corporate immortality is predicated. Corporate assets vest in the corporation, and are under the exclusive control and management of the directors. Director primacy in this regard, must be presupposed, in order to reassure shareholders, as well as, the other stakeholders, that their interests, proprietary or otherwise, are protected.

(c) Team Production and Director Primacy

Team production is a theory of the corporation developed by Lynn Stout and Margaret M. Blair.⁹⁸ It recognises that corporate production is a co-operative enterprise; it puts premium on "the economic importance of firm-specific investment", for which an organizing mechanism is required. The board of directors as the

⁹² See, Lynn Stout, n. 86, p. 15.

⁹³ Ibid.

⁹⁴ Ian B. Lee, 'Efficiency and Ethics in the Debate About Shareholder Primacy' (2008) 31 Delaware Journal of Corporate Law 533, 571.

⁹⁵ Margaret M. Blair & Lynn A. Stout, n. 80, 250-51 (cited in Ian B. Lee, n. 106, p. 572).

⁹⁶ Lynn Stout, n. 86, pp. 15-16.

⁹⁷ For example, Margaret M. Blair, 'Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century' (2003) 51 (2) UCLA Law Review 387.

⁹⁸ Margaret Blair & Lynn Stout, n. 80, 248.

controlling organ of the corporation is apparently well-positioned, to act to forestall opportunistic behaviour on the part of any member of the production team. Director primacy is essential, for specific contracts may not be adequate to provide protection against opportunism.⁹⁹

(d) Director Primacy and Universal Shareholder

Shareholder wealth maximization as an objective function of corporations, recommends to directors and officers of any corporation, the policies and strategies that increase the market price of the company shares. But the business strategies pursued by the directors and officers of one corporation, can represent costs to other companies in the same sector at least. Often the value of equity shares can be raised in correspondence to the lowering of the value of the same corporation's debt securities.

The issue is that it is the wealth of "nondiversified shareholders" that is increased when the share price rises, but the aggregate wealth of the diversified (universal) shareholders or investors may be reduced. Universal shareholders hold shares, or are the beneficiaries of shareholding in diversified pension or mutual funds, or other portfolios, holding shares or debts in many companies.¹⁰⁰ Many of the beneficiaries of the shares held by the universal shareholder are customers or employees of the same corporations, and are also part of the corporations' social or physical environments. The interconnectedness in this regard, raises the question as to whether any strategies aimed simply at raising the share price of any one or the other corporation, are really in the interest of the beneficiaries of equity shares, if they were to suffer disadvantages in their capacities as employees or customers, or are otherwise adversely affected as a result the strategies to raise share prices.

To make corporations to serve the interests of the universal shareholder, the empowerment of institutional investors is one idea that is often touted. However, besides the agenda of increasing the shareholders' influence as participants in corporate production, attention is rather often turned to the directors. It is so,

⁹⁹ But see the criticism referenced in Ian B. Lee, n. 94.

¹⁰⁰ Lynn Stout, n. 86, p.18.

because the directors have nothing to gain by favouring the ‘nondiversified’ as against the diversified shareholders.¹⁰¹

The idea of the universal investor provides a useful insight into the true shareholder interest (wealth); an insight into its character, that is, how it can be pursued, and where it lies. It makes clear that the maximization of share price cannot be the corporate objective function of the corporation, because the strategy can harm shareholders or investors (creditors, shareholders in other corporations, employees, etc.). The status of universal shareholder underlies the necessity of a capacious conception of shareholder interest, and at the same time the correlation of shareholder interests with director primacy.

A conception of the universal shareholder furthermore integrates the shareholder and stakeholder values in corporate production, a synthesis that is not far removed from a postulate of a public interest goal of the corporation. We are accordingly compelled to conceptualise the corporation, with a view to accommodating more fully the pertinent stakeholder-social interests.

2.3 Theorising the Corporation: ‘Good’ and ‘Bad’ Ideologies

*What ultimately produces a scientific culture is not the information content of theories but the formation among theorists themselves of a thoughtful and enlightened mode of life.*¹⁰²

Commenting on ‘New Thinking on Shareholder Primacy’¹⁰³, Jean-Philippe Robé referred to the ideology of the norm of shareholder value.¹⁰⁴ The obvious inconsistency between the claim of ownership over the assets of the corporation, or the corporation itself, and limitation of liability on the part of shareholders, is especially pertinent in his attribution of ideology to the shareholder value norm. ‘Entity status’, that is, a separate legal personality, is another highlighted factor, vis-

¹⁰¹ Lynn Stout, n. 86, p.19.

¹⁰² Jürgen Habermas, *Knowledge and Human Interests* (Jeremy J. Shapiro, tr.), (Polity Press, Cambridge 1987) 302.

¹⁰³ Lynn Stout, n.86 above.

¹⁰⁴ Jean-Philippe Robé, Science vs. Ideology: A Comment on Lynn Stout’s New Thinking on “Shareholder Primacy”, (2012) 2 (2) *Accounting, Economics, and Law* (Article 7). Also, see Paddy Ireland, ‘Recontractualising the Corporation: Implicit Contract as Ideology’ in David Campbell et. al. (eds.), *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (Hart Publishing, Oxford 2003) 255; and Robert Flannigan, ‘The Political Imposture of Passive Capital’ (April 2009) *Journal of Corporate Law Studies*, 139, 161.

a-vis the purported relationship of principal and agent, as between the corporate shareholders and managers. This relationship is conceived to exist between the managers and shareholders in a 'shareholder value corporation'. A 'nexus-of-contract' or the contractarian perspective on the corporation as discussed below, is currently the paradigmatic theoretical understanding of corporate law and the corporation. We want to suggest that the notion of a principal/agent relationship within the contractarian perspective is only feasible as a matter of ideology.

In our view, however, the different theories of the corporation aspire to some 'truth' about the corporation: its nature, structure, objective or purpose. It is also the case that our ideals and interests influence our conceptions about the corporation. Therefore, part of the responsibilities of a theorist, then, must be to become self-aware, in order at least to minimise the inconsistencies or contradictions that can arise in theorising. That said, it cannot, however, be stated too strongly, that the distinctions between different corporate theories revolve around the one fundamental *normative* question, namely, 'whose interest is the corporate interest'? Thus, a theory of the corporation should have no more "interesting" and important question to address than that of the proper beneficiaries of corporate production.¹⁰⁵ In this chapter, the question of corporate objective/purpose certainly has not been avoided, since it is always implicit in any conception of the corporation. For divergences of viewpoints, ideological commitments are inescapable.

'Ideology' defines and encompasses the underlying interests, inner beliefs or assumptions, commitments and worldview, by which a person is guided in their everyday or professional life. It represents a set of doctrines that may inform a particular political, economic or other system. Regarding the theories of the corporation, two opposing ideological world views may be postulated, namely, the 'economic-democratic'/progressive, and the non- progressive worldviews.¹⁰⁶ The divergent world views respectively have strong affinity, as Jean Philippe Robé has observed, to the advocacy of "the general interest" and of "partial interests". It is safe to assume that any democrat should support unreservedly the 'democratisation of

¹⁰⁵ See Paddy Ireland, n.104.

¹⁰⁶ See, for example, Lorraine Talbot, *PROGRESSIVE CORPORATE GOVERNANCE FOR THE 21ST CENTURY* (Routledge: London, 2013).

the corporation', especially in terms of the fair distribution of the wealth created, at any rate, amongst the direct contributors to that wealth creation. A true democrat, in my view, can be excused if s/he is less enamoured with the full democratic-participatory rights in the corporate enterprise, because practicality ought not to be sacrificed to idealism. The effectiveness of corporate governance is in this view the crux of the argument for director/managerial primacy, as it is contended below.

Do 'informational contents' of corporate theories reveal the inner beliefs and implicit assumptions of the corporate theorists, one may ask? Information is only a set of data or facts, which acquire meaning according to how they are interpreted and in which context, and therefore does not, necessarily, represent objective reality. The answer to the question would seem to be 'no', as communicated information alone, in like manner, cannot reveal the true intention of the speaker. It is consequently in the exposure of inner contradictions and inconsistencies in a theorist's self-interpretations, that their ideology becomes evident. We shall in what follows, hopefully, clarify and exemplify the foregoing remarks.

The core corporate law issue of the separation of ownership and control, having been given prominence by Berle and Means,¹⁰⁷ the 'Berle and Means corporation' became for a long time the widely accepted understanding of the corporation. Separation of ownership and control has from the earliest beginnings, it is noted, characterised the conception and evolution of the publicly traded corporation. The 'Berle and Means corporation' can thus be seen as underlining the issue of the legitimacy of corporate managerial power¹⁰⁸, which was, according to William Bratton, perceived as an issue of "social policy" rather than one of "legal theory or doctrine".¹⁰⁹ Mary Stokes castigates as "a mistake" for good reasons, in my view, "a tendency among corporate law scholars" to sidestep the contested issue of the

¹⁰⁷ Adolf A. Berle, Jr. and Gardiner C. Means, *The Modern Corporation and Private Property* (The Macmillan Company, New York 1993)

¹⁰⁸ See Mary Stokes, 'Company Law and Legal Theory' in Sally Wheeler (ed.), *A Reader on The Law of the Business Enterprise* (OUP: Oxford 1994), pp.81 et. seq. (Company law has two strategies for dealing with the question, namely, to rationalize corporate managerial power, and to show that the 'unlimited' directorial/managerial power is subject to control mechanisms, applied to ensure that the power is not exercised for the holders' own purposes or any other arbitrary purpose (ibid, p.86)).

¹⁰⁹ William W. Bratton, JR., 'The New Economic Theory of the Firm: Critical Perspectives from History' in Sally Wheeler, op.cit, n. 108, p. 135.

nature of the company, for theoretical conceptions of the corporation cannot be separated from the efforts to rationalize corporate managerial power.¹¹⁰

The legitimacy question is an abiding one, as it touches on the understanding and practice of modern democracy: it queries the authority and competencies of corporate directors in making decisions that have social policy implications. Mary Stokes concurs, in reference to the implicit understanding, that corporate law theories are discourses about the legitimation of power, both public and private.¹¹¹ It would seem more apposite in my view for corporate law and governance theorists, to be less concerned about the fact of managerial power, in order instead, to focus more on the *appropriateness* of ends to which its exercise is directed.

The 'Berle and Means corporation' posed a remarkable question, that is, whether the undeniably *contractual basis* of the relationships between managers, their corporations, investors and other groups, could resolve the problem of the managerial exercise of discretionary power. However, as a practical matter, because the exercise of discretionary power by managers, ensured and maintained the economic success of the corporate enterprise, the legitimacy question became a minor issue. A 'managerialist' conception of the corporation thus established itself.

Managerialism continued to be a universally accepted account of the large public corporation up until the 1970s when agency theory's¹¹² contractarian perspectives began to take hold. Every (new) corporate theory is notable by the (re)interpretation or (re)construction it tends to craft on the cognisable features of the corporation. The corporation as it has evolved has definable features. As pertains to the relationships in and around the corporation, there are two dimensions. An internal dimension comprises the interrelationships amongst shareholders/investors, the employees, and directors/managers, who respectively make claims on the corporation. Secondly, an external dimension pertains to the relationship of the corporation to the wider society, including the outsider parties with specific claims on the corporation,

¹¹⁰ Mary Stokes, n. 108, p. 88. The same can be said in regard to the various conceptions of the corporation and the question ultimately of the objective of the corporation. The rationale indeed of this chapter is to link the question of the nature of the corporation to the envisaged corporate objective.

¹¹¹ Mary Stokes, n.108, p. 86

¹¹² It is agency theory that links the contractarian perspective to shareholder primacy.

such as, creditors, contractors and customers. Internally, the contractarian perspective, according to agency theory, is by definition opposed to the organizational-(‘thick’-institutional) perspective on the corporation (as elaborated in section 2.4 below). In regard to the relationship of the external dimension, the principle question relates to the regimes of social control over the corporation.¹¹³

The idea of the separate legal personality is in our view the most important aspect of the corporation, for it elucidates the conception of the corporation.¹¹⁴ The conception of corporation has been analogized to: “governance”¹¹⁵, “commons”¹¹⁶, “nexus of property”¹¹⁷, “imperfect society”¹¹⁸ etc. A good point of departure in theorising the corporation should, however, be the idea of corporate personality. The significance of corporate personality can be missed though, where, as it so often happens, the distinction is not carefully observed between the legal or juristic person (corporate actor) and the enterprise or undertaking. The term ‘corporation’ is in consequence applied to both aspects indiscriminately, leading to confusing analysis in the various theories of the corporation.¹¹⁹ The enterprise is the socio-economically productive organisation *owned* by the “corporate actor”. This raises the question: who or what does the “corporate actor” consist in?¹²⁰

For a fully developed theory of the corporation, both the internal and external dimensions have to be addressed. The three key themes or concepts that emerge, sticking to familiar terms, are *contract*, *property* and *governance*. Contract relates to the internal relationships; property to the basis of those relationships within and without the corporation; and governance to questions of control and accountability/responsibility for sustaining relationships and for protection of property interests. Underlying and implicit in the corporation is of course the reason for the co-

¹¹³ See Peer Zumbansen, ‘Rethinking the nature of the Firm: The Corporation as Governance’, (2012) 35 Seattle Law Review 1269, 1271.

¹¹⁴ See further section 2.4.1 below.

¹¹⁵ Peer Zumbansen, n. 113.

¹¹⁶ Simon Deakin, ‘The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise’ (2012) 39 (2) Queen’s Law Journal, 339.

¹¹⁷ Amnon Lehavi, ‘The Corporation as a Nexus of Property’ <<http://ssrn.com/abstract=2239619>>.

¹¹⁸ Brian McCall, ‘Corporations as Imperfect Society’ <<http://ssrn.com/abstract=1944325>> accessed on 16 November 2013.

¹¹⁹ See, for example, Jean-Philippe Robé, n. 104 above for an illustration of this error.

¹²⁰ See Günther Teubner, ‘Enterprise Corporatism: New Industrial Policy and the “Essence” of the Legal Person’ in Sally Wheeler (ed.), *op. cit.*, n. 104, p. 51. Teubner analyzes this fundamental distinction in his conceptualization of the juristic person vis-à-vis the enterprise.

operation. We shall first refer again, briefly, to the team production theory of the corporation, before focusing on the dominant contractarian model of the corporation. The team production model is notable for incorporating the important elements of both managerialism and contractarianism.

2.3.1 The Team Production Model of the Corporation

It is evident from the short reference to the team production model of the corporation in subparagraph (c) at p. 37 above, that ‘director primacy’ is an integral part of that theory. The board of directors in the team production model is posited as a “mediating hierarch”, capable of balancing the divergent interests of the corporate constituents. This view of the *resolution* of the conflictual relationships within the corporation is a reflection of the “managerialist” conception.¹²¹ The model therefore sees the separation of ownership and control as the central problem of corporate governance, as contrasted to an institutional perspective on the corporation, which rather co-opts the separation between management and ‘ownership’ for the defence of the corporation. Margaret Blair and Lynn Stout in their theory, as Brian Cheffins observes, did not contest the prevailing contractual perspective, i.e. ‘the nexus-of-contracts’ theory of the corporation, as such.¹²²

To assail shareholder primacy was the real objective of the team production theorists.¹²³ However, critics question the model’s merit and success, given that shareholder primacy or shareholder value norm persisted and persists as the dominant conception of the corporation. Are boards of directors, as it is posited, capable and willing to resist the subservience of the ‘corporate interest’ to shareholder interest; to see the interests-balancing mission through? Brian Cheffins thinks not, as he points to the continuing upsurge of shareholder influence, for example, through institutional shareholder activism.¹²⁴

It is claimed that the mind-set and values of corporate directors and managers shifted from what it used to be during the rise of managerialism in the period after

¹²¹ See Brian Cheffins, ‘Team Production Model as a Paradigm’, (July 2014) University of Cambridge Faculty of Law Legal Research Paper Series No. 38/2014 <Available at <<http://ssrn.com/abstract=425500>> p. 3. Accessed on 27.07.14 ((2015) 38 Seattle U. L. Rev. 397.)

¹²² Brian Cheffins, n. 121, pp. 3-4. See also I. B. Lee, ‘Ethics and Efficiency’, n. 94 above

¹²³ Brian Cheffins, *ibid.*

¹²⁴ Brian Cheffins, n. 121, pp. 4-5; 30-46.

WW II: Directors/managers “viewed themselves,” according to the Blair and Stout, “as stewards or trustees charged with guiding a vital and economic and social institution”.¹²⁵ This statement supports our emphasis on individual ethics, which must be coupled to institutional ethics, as a viable solution to the corporate responsibility question.¹²⁶ Because of the strong affinity of Blair’s and Stout’s position with the thesis developed in *The Modern Corporation and Private Property*, Brian Cheffins questions the status of the team production model as a new paradigm, strictly speaking, of corporate theory.¹²⁷

The existence of a contractual nexus was the starting point for both the Berle and Means Corporation, and the team production model.¹²⁸ As already noted, the team production approach “does not reject ... contractarian thinking, but builds upon it by acknowledging the limit of what can be achieved by explicit contracting”.¹²⁹ Note however that contractarian thinking is quite different to the principal/agent cum the shareholder primacy model. The shareholder value norm or primacy has only a loose association to the contractarian perspective.¹³⁰ Agency costs or the principal/agency terminology is only a way of characterising contractual relationships. ‘Contract’, it should be emphasized, is a socio-legal concept (an institution), which can do a job for the theorist as they see fit to employ it, depending on their ideological preferences (see further below).

The parallels between the managerialist corporation and the team production model are limited. The corporate executives in the former are all-powerful, which leaves the board at the apex of the corporate hierarchy little space for the exercise of discretionary power, in order to be able to mediate between conflicting interests.¹³¹ In consequence the team production model has the strongest affinity with the idea of director primacy.

¹²⁵ Cited in Cheffins, n. 121, p. 9, fn. 39.

¹²⁶ See in particular chapter 4, pp. 91-105. Morally or socially responsible acts or the commitment to cultural change has to proceed from within the individual actors.

¹²⁷ Brian Cheffins, n. 121, pp. 10-11; and p. 17.

¹²⁸ Brian Cheffins, n. 121, p. 18.

¹²⁹ Margaret Blair and Lynn Stout, n.80, p. 320.

¹³⁰ Brian Cheffin, n. 121, p. 19 and references cited.

¹³¹ Brian Cheffins, n. 121, p. 27.

In summary, the team production model's blind spots include the fact that no distinction is made between classes of shareholders, that is, between ordinary and controlling shareholders. There is a difference between "investors" whose capital investment are or may be used in corporate production, and "savers" dealing in secondary market for shares.¹³² Moreover, shareholders and employees do not invest in "firm-specific assets" - corporations do.¹³³

2.3.2 The Nexus-of-Contracts Corporation

For the 'nexus-of-contracts' model of the corporation, it is essential to do away with the 'reality' of the corporate person. This is replaced by a 'legal fiction', to which all the contracting relationships are connected, making no distinction between a juristic person (the corporate actor or corporation) and the firm (enterprise). "This confusion between the legal form and organizational form can only be the source of numerous confusions."¹³⁴ Confounding the two aspects can lead to a focus of analysis to be only on the bilateral relationship between shareholders and managers, for company law depicts them as the only corporate constituents.

The contractual approach in the agency-theoretical model sees the purpose of the corporation as fundamentally *financial*. The corporation in agency theory is not a productive organisation.¹³⁵ But the corporation is in reality a productive organisation, as the essential distinction below between the corporate person and the enterprise makes clear.

Jean-Philippe Robé differentiating the enterprise (the firm) from the corporation says that, it "...is an organization within which power is exercised to coordinate the production and distribution of goods and services. It is legally structured using a network of contracts and other legal arrangements connecting resource holders to the corporation ... But all these contributors of resources are not "part" of the

¹³² See William Lazonick, 'Innovative Enterprise or Sweatshop Economics? In search of Foundations of Economic Analysis' (Oct. 2015) Institute for New Economic Thinking Working Paper No. 25. <Available at <https://ssrn.com/abstract=2682893>> p. 28. Accessed 3.11.15; and Jean-Philippe Robé, n. 104, p. 6. Except in the case of controlling shareholders, it is not apposite to describe investors in publicly traded corporations as part of any 'team': Jean-Philippe Robé, *ibid*, pp. 5-6.

¹³³ Jean-Philippe Robé, n. 104, p.5

¹³⁴ Olivier Weinstein, *Firm, Property and Governance: From Berle and Means to the Agency Theory, and Beyond* (2012) 2 (2) *Accounting, Economics, and Law: A Convivium*, (Article 2), p. 36.

¹³⁵ Olivier Weinstein, n. 134, pp. 36-37.

corporation.”¹³⁶ All resource contributors have either contracts with, or are in the legal environment of the corporation.¹³⁷ The corporation in contradistinction to the firm is a legal *vehicle*, recognised as a juristic *person*. This makes the corporation a subject and not just an object in law. A legal subject has a measure of autonomy, of which legal and moral responsibilities, as well as, a capacity for action, are attributes.¹³⁸

It is the question of the management of the enterprise (governance) that raises the most issues, e.g. of directorial or managerial primacy, the legitimacy of discretionary power, shirking, etc. According to Jean-Philippe Robé, the firm is managed and not the corporation¹³⁹; meaning, that the managers and by extension directors, act for and on behalf of the corporation in managing the enterprise. The Chief Executive Officer is the head of the management “team”, in contradistinction to the team production model’s depiction of all corporate shareholders and non-shareholders as members of a team. Non-controlling shareholders are discounted from the team membership, including the non-executive directors.¹⁴⁰

As for *primacy*, it is the management, distinguished from the directors, who only act as supervisors, which “exercise fiat, power and authority towards a wealth of contributors to the firm, using capital and assets in part supplied by shareholders”.¹⁴¹ Primacy is consequently merely functional and not based on entitlement, beneficial or otherwise. Regarding the question of the beneficiaries of corporate managerial responsibility it should, again, be essential to note a distinction between the corporation (executives, directors and shareholders) and the constituents of the firm. The managerial primacy crucially covers this question. It is thus our contention that the managerial/directorial role consists in the definition of the corporate interest.

2.3.3 A Re-conceptualization of the ‘Nexus-of-Contracts’ Corporation

¹³⁶ Jean-Philippe Robé, n. 104, p. 7

¹³⁷ Ibid. Cf: the dichotomy between the internal and external dimension of the corporation referenced above.

¹³⁸ For further see sections 2.4.1, 2.4.2-2.4.4

¹³⁹ Jean-Philippe Robé, n.104, p. 7.

¹⁴⁰ Ibid.

¹⁴¹ Jean-Philippe Robé, 104, p. 8.

“Every way of handling a thing is but a way of handling it for some purpose. Conceptions ... are teleological instruments.”¹⁴² Our (re)definition of the nexus of contract has a clear objective in view. The aim of the chapter is to contend for a socio-institutional perspective on the corporation. It is intended to interpret ‘contracting’, broadening its conception as a social institution. Corollary to this task is the need to expose the drawbacks of the contractarian theory, in particular, the ideology shareholder primacy. Shareholder primacy says that shareholders are *entitled* to have control over the corporation, or have the corporation governed in their interest. The governance of the corporation on the shareholders’ behalf raises familiar difficulties, e.g. the question of the controllers’ loyalty. This and other related problems and solutions are discussed in agency theory.

But the question in need of urgent answer by the “shareholder primacists” is: on what basis does the shareholder class as one among other corporate contractors assume the claimed privileged position? It may be arguable that the shareholders contract¹⁴³ for corporate control and the priority of their interests. However, we are still required to have a proper understanding of this ‘contract’ in context. ‘Interest’, at any rate, is a justifiable claim; that is, a moral standard, as it is contended in chapter 3. For moral justifiability, the test ought to be rather stringent.

Robert Flannigan even made the crucial point, that the primacy of the shareholders, in a voting context, does not translate into a general shareholder class entitlements.¹⁴⁴ Clearly rejecting the orthodox contractarian view, that bargaining for positions (rights or interests) implies a “default shareholder primacy or restrained regulation,” he confirms that the fact of contracting or negotiating, rather than implying the legal primacy of any claim in the nexus, implies “... that each contract defines the relative primacy of each party to it...”¹⁴⁵ The meaning of ‘contract’,

¹⁴² William James, ‘The Sentiment of Rationality’ in Robert M. Hutchins et al. (eds.) *Gateway to the Great Books vol. 10 Philosophical Essays* (Encyclopaedia Britannica, Inc., Chicago 1963) 62.

¹⁴³ See, for example, Robert Flannigan, n. 104, p.161: “Shareholders contract for voting powers that they believe will provide them with a measure of influence or control over the operation of the business... That is, voting powers are just terms of the bargain they make. Other constituencies may also bargain for specific or general voting rights that may or may not be tied to securities.”

¹⁴⁴ Ibid.

¹⁴⁵ Robert Flannigan, n.104, fn.77, p. 162.

therefore, must further be enlarged, if the need for the regulation and interpretation of conflicting (contractual) claims, rights and interests, is to be satisfied.¹⁴⁶

The shareholders' "firm-specific asset" is the finance capital invested in the corporation. Moreover, shareholders in the contractual theory of the corporation are *deemed* to carry the risk of conduct of business by the corporation, what is termed 'residual risk'. Every corporate contractor can bear the residual risk; however, it has become the specialized role of the shareholder.¹⁴⁷ (It can only be the legacy of the development of the corporation from the old Joint Stock Company.) It is this role that distinguishes the position of the shareholder from other resource contributors, and not the provision of finance capital as such; for others, for example, bond holders and banks make financial contribution as well. Employees provide capital too albeit in form of human or intellectual capital.

The shareholders' role as residual risk bearers means or requires that their contract with the firm is not fixed in duration, whereas the others' contracts are fixed. It matters, then, which interpretation is put on this putatively 'specialized role' of the shareholders. Assuming it is contracted for by shareholders with the firm,¹⁴⁸ whether it is, factually, exclusive to shareholders, is the question. That is to say, are the actual costs of non-avoidance of the risks of failure or loss of business born, to a greater extent, let alone, exclusively and ultimately by shareholders? The answer to this question is 'no', as has been contended by Margaret Blair.¹⁴⁹ Similar points have also been made by Lynn Stout.¹⁵⁰ I think that it is an empirical fact that is easy to accept.

More significantly, however, the alleged special position of shareholders is deemed to be in need of additional protection and, indeed, outside of the contractual relation. For that is the import of the shareholders' *assumed* primacy, and concomitantly, the assimilation of shareholders' interests into the 'corporate interest' - the objective of the corporation. The fact that shareholders of public corporations enjoy limited

¹⁴⁶ See section 2.3.4 below.

¹⁴⁷ John R. Boatright, *Ethics in Finance* (Blackwell Publishing, Oxford 1999) 177.

¹⁴⁸ See n. 143 above and the accompanying text.

¹⁴⁹ Margaret M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-first Century* (Brookings Institution, Washington, DC 1995) cited in John Boatright, n. 147, p. 181.

¹⁵⁰ Lynn Stout, 'New Thinking on Shareholder Primacy', n. 86 above.

liability is conveniently overlooked in this contention for (extra) shareholder protection.

The view is also canvassed under the contractarian model of the corporation that the firm would perform *efficiently* where the interests of the shareholders, namely, the *financial profit* of the corporation, form the yardstick against which managers measure their success or failure in managing the corporation. The efficiency argument is important, but problematic, which we cannot go into here.¹⁵¹ The question of what justifies shareholder primacy/value in the contractarian model of the corporation abides.

The control or influence that shareholders in practice exercise may be adduced as a justifiable ground for shareholder primacy.¹⁵² Neither in law nor in morality may such a justification be founded. It is plain enough that the duty of directors is to do what is in the best interests of the corporation; therefore, the financial interest of shareholders cannot substitute for or supplant the corporate objective. Control by shareholders is *not* contracted for by shareholders; shareholder control is in fact a function of legal policy.¹⁵³ The control of the corporation is at any rate a benefit that can be bargained for between corporate constituents. Hence, there are employee-owned/controlled corporation; and creditors assume control of corporation in financial distress, which goes to show that control in itself, does *not* determine the question of corporate objective or purpose.

What is, therefore, a definition of 'contracting' that is best suited to a conception of a social institution? According to economic theory firms have cost advantages over markets; that is to say, higher transaction costs obtain in markets than in firms. To further reduce transaction costs, there would need to be an improved understanding and practice of contracting. What is here required is the incorporation of norms that are often implicit in other institutions of social life, namely, trust, fairness, solidarity, reasonable expectations, etc.¹⁵⁴ One of Kent Greenfield's reform pillars is the direct

¹⁵¹ See William W. Bratton, n. 91, pp. 715-718.

¹⁵² John R. Boatright, n. 147, p. 178

¹⁵³ See Marc Moore, 'Private Ordering and Public Policy: The Paradoxical Foundations of Corporate Contractarianism', (2014) Oxford Journal of Legal Studies, 1; also John Boatright, n. 147, p.182.

¹⁵⁴ See Kent Greenfield, 'Sticking the Landing: Making the Most of the "Stakeholder Moment,"' (2015)

extension of directorial/managerial fiduciary duties of care and loyalty to all stakeholders of the corporation. This suggestion is not different to the contention for the primacy of culture (ethics) as the principle regulatory mechanism. Care and loyalty are qualities that are difficult to inculcate and enforce legislatively. What is therefore most required is a moral capacity on the part of the corporation's agents, the capacity to know and do the right thing; and with their actions evaluated certainly within the relevant background institutions (law, custom and "rules of the game" of the corporate enterprise).¹⁵⁵

The notion of 'relational contracting' is presented as descriptive of the contractual nexus between the internal corporate constituents; it is used to address the question of interests in and beyond the corporation.¹⁵⁶ Comparable to relational contracting are 'implicit contracts', which, according to Paddy Ireland, are crystallizations of unexpressed customs and expectations amongst parties in a "contracting community".¹⁵⁷ Implicit contracts are "shaped not only by agreement, but by wider, social and normative considerations".¹⁵⁸ Paddy Ireland notes, however, that it is paradoxical that the notion of implicit contract is in the corporate context employed to stress the "private, contractual nature of directors' duties and of corporations as a whole ..., as well as, to minimise its social-institutional import."¹⁵⁹

The conceptions and applications of implicit contracts thus underscore, as we can see, the essentialness of ideology, which, in the context can be, on the one hand, handmaiden to the interests of anti-democratic economic power constellations, and, on the other, of service to the general interest or the public interest or political morality. A theorist has the choice, then, how to interpret contracting - either relationally, giving it a normative public dimension, or as entirely a private matter, secluded from public interest considerations. In the manner of making this choice, expressly or implicitly, consciously or unconsciously, 'ideology' also divides between 'bad' or 'good'.

European Business Law Review, 153.

¹⁵⁵ For the confirmation of the view that fiduciary duties are contractual elements, see Paddy Ireland, n. 104, p. 268.

¹⁵⁶ Peer Zumbansen, 'Rethinking the Nature of the Firm: The Corporation as Governance', n. 113.

¹⁵⁷ Paddy Ireland, n. 104, p. 286.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

2.4 The Social Institutional Perspective on the Corporation

To form a social institutional perspective on the corporation is to subscribe to a *vision* for the corporation (as a social institution). Our posited purpose of the corporation, *defines* the corporation.¹⁶⁰ We have already in the introductory chapter referred to the main features of an institution particularly the *integrative* power of institutions, which is employed here, in order to characterize the objective of the corporation.

The conception of the corporation as a social institution aims to integrate the different models or theories of the corporation – be it the contractarian, team production, concession, managerialist theories. It seems possible, as Eric Orts seems to suggest, to draw a dividing line between various theories, from which the insight into the corporation as a social institution is then formed. He sees it fit to integrate only the contractarian and the concession perspectives. Eric Orts terms the contrasting models as a ‘bottoms-up’ (“participant”) and a ‘top-down’ perspective respectively. “The top-down view sees the business corporation ... as the subordinate subject of law and, derivatively, of the governments that charter or otherwise recognize them.”¹⁶¹ The bottoms-up view on the contrary sees the corporation, “as representing, derivatively, [the participants’] interests and expectations, rather than those of a sponsoring government”.¹⁶² A combination of the two views produces his “institutional theory of the firm”: “an intermediate perspective that views firms as existing at a social level between political states and individual people”.¹⁶³

Integration, in our case, happens on multiple points or levels, which is aimed at giving as a comprehensive account of the corporation as it is possible. There are acceptably core features of the corporation, namely, the independent board, separate legal personality, capital lock in, limited liability, and of course the separation of ownership from control, which can all be explained on an institutional

¹⁶⁰ Cf. William James, n. 142; Cf. Eric W. Orts, *Business Persons: A Legal Theory of the Firm* (Oxford University Press, Oxford 2013) 1-20, elucidating an ‘institutional theory of the corporation’.

¹⁶¹ Eric W. Orts, n. 160, p. 10 (footnote omitted).

¹⁶² Ibid.

¹⁶³ Eric W. Orts, n. 160, p.12

perspective, that is, in a manner that the complexities become socially and practically meaningful.¹⁶⁴

‘Corporations are social institutions’ means, according to Eric Orts, that they have acquired an ‘entity’ status and a ‘personality’¹⁶⁵. These two aspects also play pivotal roles in our conceptualization of the corporation. Here, we consider the essential features, and, finally, their wider social and moral implications.

2.4.1 The Value of Legal Personality

Legal personality¹⁶⁶ as a foundational concept of the corporation is so pervasive that the interest in it is not jurisdictionally specific.¹⁶⁷ It has been stated that the separate personality of the corporation is an accepted fundamental company law principle.¹⁶⁸ Corporate legal personality is not contested; however, its entailments are.¹⁶⁹ For example, J. Armour, H. Hansmann and R. Kraakman deduce from corporate legal personality the expression of the fundamental rules that: (a) demarcate the assets of the corporation from those of its constituent members, (b) indicate to third parties the individuals with the authority to act in the name of and on behalf of the corporation, and (c) specify the manner in which legal actions by and against the corporation can be brought.¹⁷⁰ However, the question of corporate personality relates directly to the important issue of the moral autonomy of the corporation, which is further addressed below.

¹⁶⁴ Cf. Eric Orts, n. 160, p. 45: “An attribution of legal personality is needed for business firms to have social meaning.”

¹⁶⁵ Eric Orts, n. 160, p. 14.

¹⁶⁶ ‘Legal personality’ is used interchangeably with ‘corporate personality’; legal personality refers, however, specifically to the institutional *identity* of an entity. It is possible for a corporation to exist without legal institutional identity - a point to be made against the concession theory of the corporation.

¹⁶⁷ See Brian Cheffins, ‘The Trajectory of (Corporate Law) Scholarship’ (Jul. 2004) 63 (2) *The Cambridge Law Journal* 456, 479 and 488.

¹⁶⁸ Also, see Andrew Hicks, ‘Corporate form: questioning the unsung hero’ (July 1997) *JBL* 313.

¹⁶⁹ Accordingly, there is as a matter of legal theory no consensus in connection with the true essence of the corporation. See Paul L. Davies, *Gower’s Principles of Modern Company Law* 6th edn. (Sweet & Maxwell, London 1997) for comments on the inadequacy of legal definitions in view of the dynamic changes at the heart of what it means to form a corporation (pp. 8-10).

¹⁷⁰ J. Armour, H. Hansmann and R. Kraakman, ‘The Essential Elements of Corporate Law’ (2009) University of Oxford Legal Studies Research Paper No. 20/2009, Yale Law, Economics & Public Policy Research Paper No. 387 and Harvard Law School Law and Economics Research Paper No. 643 <<http://ssrn.com/abstract=1436551>> 6-10 accessed 31 December 2011.

Note, moreover, that theoretical constructions of the corporation aimed at addressing the normative questions of its purpose and social goal, adopt varying philosophical views of corporate personality.¹⁷¹

2.4.1.1 The Special Role of the Company Share

The conception of the share is of utmost importance, because the relationships within the corporation, i.e. as between the company *as such*, the directors and the shareholders can only be understood in the light of the true nature of the object, which underlies their relationship, namely, the company share. The consideration of the company share by Sarah Worthington is as to how its nature frames the shareholders' claim to have the corporation governed in a particular way. Our interest in the nature of a company share is limited to the insight to be gained into the question of corporate personality, and its wider social import, through the analysis of the share.

The share connects corporations to the system of the capitalist economy. It is common place that the recognition of the company as a separate legal entity had the effect of displacing the shareholders as owners of the assets of the company, even though the position of the shareholders has continued to date to be analysed sometimes on the basis of ownership.¹⁷² This displacement was a parallel process to the transition from partnership principle to the company law principle. The account of the evolution of the share throws light on this development.

A fundamental change in the perception of the business corporation in law occurred as the courts in the last decades of the 19th century began to reject the shareholders' proprietary claims to the company's assets, as well as the shareholders' claim to the right to override the decisions of the controllers of the company¹⁷³. It is clear in the authorities that prior to this development, that a 'share' meant a share in the tangible

¹⁷¹ See Sarah Worthington, 'Shares and shareholders: property, power and entitlement' [pt. 1] (2001) 22 Company Lawyer 258 and [pt. 2] (2001) 22 Company Lawyer 307, where three different conceptions are examined in relation to the nature of a share in a company.

¹⁷² Ross Grantham, 'The Doctrinal Basis of the Rights of Company Shareholders' (Nov. 1998) 57 CLJ 554. The three incidences of property, power and entitlement are all encapsulated in the share concept: Worthington, n. 171, [pt. 1] p. 258.

¹⁷³ Ross Grantham, n.172, p. 560. Worthington in a similar vein affirms that the directors of the companies ceased thereupon to be seen as the agents of the shareholders (n. 171 [pt. 1] p. 260).

collective assets of the company. On the other hand, the shareholders in the Deed of Settlement Company (founded on partnership law principle) had equitable interest in the company's assets held on trust for them.

The then incipient and progressive treatment of shares, as no longer being tangible assets, and their owners, as less and less entitled to "severable interest in the company's assets", were directly in response to the changing economic and legal realities. Shares needed to be freely transferable. The position was eventually arrived at in the beginning of the 20th century, that shareholders had no direct interest in the assets of the company.¹⁷⁴ The nature of the share evolved further from representing an interest in the company into becoming "the rights to a dividend, to a return of capital on winding up and to vote."¹⁷⁵ Thus, a complete *dematerialisation* of the share occurred in tandem with *depersonalization*¹⁷⁶, i.e. the acquisition of the separate legal personality of the corporation.¹⁷⁷

The modern separate personality concept thus originated in the "changing economic and legal nature of the joint stock company share".¹⁷⁸ It has furthermore been highlighted that the whole basis of the capitalist economic system is the share¹⁷⁹; and that in it resides the "myth of corporate permanence."¹⁸⁰ The notion of corporate permanence or immortality means perpetual existence, which is one of the defining characteristics of the corporation. "The financial essence of the capital share is that it need not be paid back. Such is the way that ownership relationship of the shareholders with the enterprise is defined."¹⁸¹

The highpoint of the case of *Salomon v. Salomon* seen in the light of the preceding paragraph, is the effective undermining of the erstwhile "associative underpinning of

¹⁷⁴ Grantham, n. 172, p. 562; *Borland's Trustees v. Steel Brothers & Co. Ltd* [1901] 1 Ch. 279 is cited as establishing the principle that the shareholders instead acquired an interest in the company.

¹⁷⁵ Grantham, n. 172, p. 563.

¹⁷⁶ It is noted that 'dehumanization' is a more apt term to 'depersonalization' as a corporation acquires a personality in substitution for those of its members.

¹⁷⁷ Cf. Folkert Wilken, *The Liberation of Capital* (David Green, tr.), (George Allen & Unwin Ltd, London 1982) 259: "The share capital could not be share capital without the concept of legal personality."

¹⁷⁸ Paddy Ireland et. al (eds.) 'The Conceptual Foundations of Modern Company Law' (Spring 1987) 14 (1) *Journal of Law and Society: Critical Legal Studies* 151.

¹⁷⁹ Folkert Wilken, n 177, p.36. For a description of the "double life" of the share, see Folkert Wilken, n. 133, pp. 37-39.

¹⁸⁰ Folkert Wilken, n. 177, p. 259.

¹⁸¹ Folkert Wilken, n. 177, p.36.

incorporation,”¹⁸² and not, as it is commonly assumed, the enunciation of the principle of separate (corporate) personality as a consequence of incorporation.

2.4.2 Corporate Personality and the Institutional Perspective

The institutional perspective encompasses values from diverse sources, such as, the economy, politics, ethics and, certainly, the law. It must also of necessity be historical in dimension. When such a broad outlook is neglected or minimized, we get what has been described as a *thin* institutionalism.¹⁸³ “The act of association, according to Philip Selznick, “is itself a quest for “institutional” solution to problems of economy and coordination.”¹⁸⁴ Therefore, the notion of ‘institution’ is ingrained in the fabric of social life in every sense, especially as we are forced to co-operate, in order to achieve individual goals, as well as collective ones. It is here contended that ‘corporate personality’ is analogously pervasive, anchoring the ‘thick institutionalism’ of the corporation.

A ‘corporate person’ poses the question: what is personality? Or perhaps more accurately, what does personification denote; what does ‘depersonalization’ denote? “The nature (explanatory account) of any active reality is best understood by identifying its capacities/potentialities and these by attending to its activities.”¹⁸⁵ Relying on the above John Finnis’ statement, we may confirm that ‘personality’ or ‘personification’ denotes the capacity for social action. The ‘corporate person’, it is claimed, is co-opted by law as an instrument of policy¹⁸⁶; law tends to cultivate social artefacts or constructs that are constitutive of social order and stability, and of social prosperity, one must add.

Roger Scruton identifies the essential features or conditions of corporate personality, including, procedures for decision-making and channels of accountability, etc., required in order that the decisions made by a corporate body, cannot be the

¹⁸² Ross Grantham, n. 172, p. 561: it is recalled that the court held that the company was properly incorporated even though only one person, Mr Salomon, was the only actual member of the company.

¹⁸³ Cf. William W. Bratton, n. 109, fn. 11, p. 118: “As the context of discussion becomes wider ... relentlessly ahistorical perspectives become limiting and damaging.”

¹⁸⁴ Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley and Los Angeles, University of California Press 1992) 234.

¹⁸⁵ John Finnis, ‘Persons and Their Associations’ [pt. II] in Roger Scruton and John Finnis, ‘Corporate Persons’ (1989) vol. 63 *Proceedings of the Aristotelian Society: Supplementary Volumes* 269.

¹⁸⁶ Gunther Teubner, n. 120; (1988) 36 *American Journal of Comparative Law* 130.

decisions of any one individual; or their consequences the responsibility of any one individual on their own. These features make up the institutional life of the corporate entity.¹⁸⁷ The 'identity conditions' for institutions in Scruton's list also include, *inter alia*, voluntary association, membership benefits, and authority. Accountability is allied to legitimate authority.¹⁸⁸ To depict the corporation as a social institution is not, to quote Philip Selznick, "to deny that it is primarily an engine of capitalist economic activity. The question is what perspective, what vision, is brought to bear on that activity."¹⁸⁹ The institutional perspective aims, then, at putting of the question of the purpose of the corporation centre stage in conceptualizing the corporation.

To depict a corporation as an institution is aimed at bringing it and its operations into a normative order of values, extending beyond the singular *economic* value of efficiency in production. The corporate person theory described above is, therefore, superior, in my view, to the 'top-down' approach of the concession theory.¹⁹⁰ The corporate person has consequently been theorised, as not being (entirely) reliant on state power for the acquisition of its essential autonomy. Corporations should then be expected to more directly face up to the demands of social responsibility, as the following two sections point to.

2.4.3 Questioning Corporate Moral Agency (Personhood)

This section will begin with a critique of the account of 'the moral person' presented by Thomas Donaldson,¹⁹¹ and is followed by a discussion about the feasibility of corporate moral responsibility. The view about the moral personality of the corporation is, according to Thomas Donaldson, premised on agency: since corporations are agents, they must be moral agents, as all agents are. The question arises as to how to show that corporations are really agents, which requires the definition of an agent. The concept of intentionality is resorted to, as this quality is

¹⁸⁷ Roger Scruton, 'Corporate Persons', in n. 185, p. 252.

¹⁸⁸ For further, see Marc Moore, n. 509, pp. 135-6 below.

¹⁸⁹ Philip Selznick, n. 184, p. 352.

¹⁹⁰ Cf. "Had Parliament not stepped into the fray in 1720, it seems plausible that courts would have continued to develop a common law of joint-stock companies that would have treated them as a separate legal person General incorporation, in other words, was Parliament's solution to a problem largely of Parliament's creation." Paul Mahoney, 'Contract or Concession? An Essay on the History of Corporate Law' (2000) 34 *Georgia Law Review* 873. (Quoted in Colin Mayer, *Firm Commitment: Why The Corporation is Failing us and How to Restore Trust in it* (Oxford University Press, Oxford 2013) 218.

¹⁹¹ Thomas Donaldson, *Corporations & Morality* (Prentice-Hall, Inc., New Jersey 1982).

somehow attributed to the corporation.¹⁹² An agent is taken to be someone or something that acts with intentions or with an intention.

Donaldson refers to P. French¹⁹³, who justifies corporate moral personality on the possession by corporations of the self-same privileges, rights and duties as do moral persons.¹⁹⁴ An issue may be taken, as Donaldson does, to the likening of the (moral) agency or personality of the corporation to that of a moral person (a human being). “Why does it [(the moral person view)] not simply hold as the law seems to imply, that corporations are artificial legal persons, or “juristic” persons, who are merely creations of the law?” he queries.¹⁹⁵ It is in answering this question that the integrative or unifying power of the institutional method – which is twinned with the philosophical outlook of pragmatism – comes to the fore. The institutional perspective does not deny the essential ‘artificiality’ of corporate legal personality. To valorize or infuse with a higher meaning is not to deny the social construction of the reality in question.¹⁹⁶

To answer the question posed by Donaldson directly, it would seem to be incorrect or at least unhelpful, to maintain that a corporation or the corporate person is a ‘fiction’ *tout court*: it would, if possible, in my opinion be better, to avoid the expression or similar. In answering his own question, Thomas Donaldson states: “that juristic personhood fails to establish full-fledged moral agency. To say that something is a juristic person is in some instances inadequate for attributing moral responsibility”.¹⁹⁷ He cites the example of a deceased person, who ‘has’ the legal right to have their will executed properly as a juristic person with *attenuated* moral agency, for they except for past deeds “cannot be held *morally* responsible for anything.”¹⁹⁸

¹⁹² Thomas Donaldson, n. 191, pp. 21-22.

¹⁹³ Peter French, ‘The Corporation as a Moral Person’ (1979) 16 *American Philosophical Quarterly* 207.

¹⁹⁴ Thomas Donaldson, n. 191, fn. 6, p. 21.

¹⁹⁵ Thomas Donaldson, n. 191, p. 21.

¹⁹⁶ Cf. Andreas Georg Scherer, ‘Can Hypernorms Be Justified? Insights From a Discourse-Ethical Perspective’ (Dec. 2015) 11 *Business Ethics Quarterly* 11, explaining “the pragmatic turn in philosophy”.

¹⁹⁷ Thomas Donaldson, n. 191, p. 21.

¹⁹⁸ *Ibid.*

It is correct to say, that legal personality may not equate to moral personality; but the real question is the meaning in context of 'morally responsible'. The false impression is given that some incapacity attaches inexorably to 'juristic person'. Fortunately, this view is contested, albeit, implicitly by the institutional perspective. Words by themselves are not inconsistent, non-referential, inadequate or incomplete; it is the user on whom it behoves to see to the adequacy of their linguistic expressions, to make them intelligible, that is, to convey their (conventional or non-conventional meanings). The invocation of 'responsibility', legal or moral, is not dispositive of the relevant questions; it is, on the contrary, the starting point for the relevant questions, i.e. the analysis of the problem situation.¹⁹⁹

The difficulty of locating 'intention' is also highlighted by Donaldson. Recall that this notion, 'intentionality', that is, the ability to have an intention, or to act purposively, has been introduced in order to define an agent, namely the corporation. The issue of corporate intentionality, it will be seen in the next section, is the issue of the "collective analogue to the individual intent".²⁰⁰ There is an interesting symmetry in the identification of the individual intent and the location of corporate intent.

2.4.4 Questioning Corporate Moral Responsibility (Intentionality)

Because the issue for us is the fixing of corporate moral responsibility or accountability, in particular, for the need for remediation of harm caused by corporations, I surmise that some progress can be made if focus is shifted away from a search for 'the real actors' intentions. The relevant individuals in many situations may remain undiscoverable; or when known, the fact may be of no avail to anyone. It is useful instead to focus on acts, results or consequences, as such. Recall that personification is explicated as a capacity for action. Action is here, thus, to be explored as a common denominator between *personality*, *identity* and *agency* (individual and collective). Action, therefore, underpins responsibility and intentionality.

¹⁹⁹ Compare, for example, the treatment of corporate social responsibility in chapter 5, pp. 127 et seq.

²⁰⁰ Thomas Donaldson, n. 191, fn. 8, p. 22.

Meir Dan-Cohen²⁰¹ takes a “role-atomistic” approach to the question of identity – of the self and the collectivity. The approach interrogates the “ontological status” of individuality and of collectivity, and reaches for a conception of identity that is socially constructed. The population of the social world by entities (both individuals and collectivities) requires that neither individual entities nor collective ones should have priority over the other in social theory.²⁰²

Dan-Cohen defines the idea of a social role as “a patterned set of expectations regarding modes of behavior as well as the mental states, such as intentions, desires, and beliefs that are thought to properly underlie or accompany the expected behavior”.²⁰³ The preceding definition states the plain fact, that rules, including social norms, are part-constitutive of roles - (the latter’s *formal aspect*). It is a plain fact, because expectations of a mode of behaviour can only be based on extant rules. A *material aspect* of roles, on the other hand, consists “in the actual patterned behavior and the requisite states of mind that conform to the script”.²⁰⁴ ‘Script’ denotes a social norm, in the absence of which no behaviour would have a meaning, or be intelligible.

Because of the multiplicities and diversities of roles, there must be some connection or relation of roles, one to another, in order for a composite entity (individual or collective) to be formed. Different roles can be connected in two ways, namely, formally or materially, to form relatively stable and recognisable clusters. The roles in a cluster are connected formally by their scripts. Material connections between roles on the other hand, are made by the actual performance of the roles. “A formal, coordinated cluster of roles forms a collective entity (or a collectivity for short); a material cluster of proximate roles is a self (or an individual).”²⁰⁵

The use of roles in social construction of identities, both individual and collective, avoids the risk of reducing one to the other, while their “constitutive relationships” are maintained. Dan-Cohen employs the further concept of “*role distance*, which

²⁰¹ Meir Dan-Cohen, ‘Between Selves and Collectivities: Toward a Jurisprudence of Identity’ (1994) 61 (4) *The University of Chicago Law Review* 1213.

²⁰² Meir Dan-Cohen, n. 201, p.1217.

²⁰³ Meir Dan-Cohen, n. 201, p. 1218 (footnote omitted).

²⁰⁴ Meir Dan-Cohen, n. 201, p.1219.

²⁰⁵ *Ibid.*

conveys the self's capacity to locate itself, metaphorically speaking, at variable distances from the different roles it occupies", in order to elaborate on the constitution of the self through roles.²⁰⁶

More significantly in the context of our topic is the construction of a collectivity (a collective entity) and identity, which Dan-Cohen details as follows. In the case of the construction of collective identities, it is "the formal synthesis of roles" that we look to. It should be noted, firstly, that every role is not involved in collective identity formation. For example, such role as a freelance writer or photographer is of this sort: they are "*personal* roles".²⁰⁷ Contrasted to personal roles are those that form a "collective entity", which are thus "*collective* roles".²⁰⁸ The gist of the distinction is that in the case of personal roles their interconnections are transient and unsettled. A journalist working freelance would not be part of the collective identity, (e.g. of a news media organisation), for his journalism role does not have strong enough connection to the collective entity.²⁰⁹

Collective roles are further divided into "*collectivity-specific* and *collectivity-general* roles; with the former corresponding to membership "of a particular collectivity", whereas the latter can feature in any collective entity of "the same general type". The role of a parent, to illustrate, is in regard to a particular family relationship, and to a particular child or children. Being a General Practitioner on the contrary is not so defined. The important point for our purposes is that roles constitute identities and collectivities likewise. Therefore, actions or activities in form of roles underlie identity, individuality and collectivity.

A reference to 'metaphor' has been made by some writers, however, with the intent of contesting the corporate person's intentionality, and by extension the reality of corporate identity.²¹⁰ The crux of the arguments of the authors is based on the corporation's lack of "the unity consciousness to enable self-reflexivity, identity and

²⁰⁶ Meir Dan-Cohen, n. 201, pp. 1220-1225.

²⁰⁷ Meir Dan-Cohen, n. 201, p. 1225.

²⁰⁸ Ibid.

²⁰⁹ Meir Dan-Cohen, n. 201, fn. 22, p. 1225.

²¹⁰ See Ian Ashman and Diana Winstanley, 'For or against Corporate Identity? Personification and the Problem of Moral Agency' (Nov., 2007) 76 (1) Journal of Business Ethics 83.

intention The corporation, therefore, is better seen as a metaphor, analogy or projection ...”²¹¹ However, the question that arises is: ‘a metaphor for what?’

The answer to this question, in my view, should be to opine that the matter is better approached in a pragmatic, ‘common sensical’ manner, philosophically speaking,²¹² as it is a metaphysical question in the final analysis. This means that to contend that the corporate personality is a metaphor is not a warrant to denying their ‘reality’, ‘intentionality’ or ‘identity’, that is, in the form in which each attribution is intelligible. Metaphors are no strange or inferior *Denkmittels*, i.e., the means by which ‘facts’ are handled.²¹³ Reliance on metaphor in order to grasp the complexities of the corporate enterprise is unavoidable.²¹⁴

2.5 Conclusion

The depiction of the corporation as a social institution is deliberately affirmative of the basic understanding of the corporation, which is, that the corporation has the legal capacity to act, especially in socially significant ways. How its acts and the effects are interpreted, that is, whether as based mainly on a private law notion of contract or property, or on public law, is really a matter of normative commitment. The institutional perspective inclines especially to integrate divergent orientations in the search for a socially-satisfying meaning. It looks therefore beyond the private and public law dichotomy to the *ends* of an institution. The central concerns of the ‘nexus of contracts’, the concession theory or the agency theory of the corporation, assume a secondary importance in the institutional conception of the corporation.

The following chapter on ‘clarification of interest and the public interest’, in exploring the meaning of ‘interest’ helps to enlarge the scope for the integration of the

²¹¹ Ian Ashman and Diana Winstanley, n. 210, p. 88 (Citation omitted).

²¹² The application of common sense in philosophy as distinct from ordinary parlance is, according to William James, the use of “certain intellectual forms or categories of thought”. William James, *Pragmatism and The Meaning of Truth* (Harvard University Press, Cambridge, Massachusetts 1978) 84.

²¹³ See, *ibid.*

²¹⁴ For application to a wider context, see, J. Christopher Rideout, ‘Penumbral Thinking Revisited: Metaphor in Legal Argumentation’ (2010) 7 *Legal Communication & Rhetoric: JALWD* 155 <<http://digitalcommons.law.seattleu.edu/faculty/572>>. Metaphors in modern understanding are matters of thought and not just of language and style; they organize our thoughts, distinguishing between conceptual and linguistic elements.

conflicting interests of the corporate constituents, as well as the possibility of extending the corporate interest to the interests of the wider society.

Chapter 3

CLARIFICATION OF 'INTEREST' AND 'THE PUBLIC INTEREST'

For those ancient authors whose ideas chiefly provide the foundations of the modern ideal of freedom, the stoics and Cicero, public utility and justice were the same. And on the frequent occasions when *utilitas publica* was invoked during the Middle Ages, what was generally meant was simply the preservation of peace and justice. ... the 'public interest ... was no other than the common right and justice excluding all partiality or private interest' and therefore identical with 'the empire of laws and not of men'.²¹⁵

3.1 Introduction

The public interest continues to attract attention from social and political philosophers, in spite of, or perhaps, because of its ubiquity as a language of politics and law. The importance or popularity²¹⁶ of the public interest is undeniable even by those who disparage it for the alleged lack of content or applicable meaning.²¹⁷ It may be undefinable and indeterminable; however, the utility of the public interest concept indeed lies in this indeterminacy. The concept is essential to politics, because it is timeless and provocative: it provokes communication, in order for a course of action or decision to be justified, but always only for here and now.

In exploring the similarities between the public interest and the common good, Bruce Douglas²¹⁸ declares his aim: to reconceptualise, "revise" the public interest in the direction towards the familiar meaning of the common good (the good of all the members of at least one political community). In this chapter, in the conception of the public interest envisaged, there is no substantive distinction between the public interest and the common good – either concept represents the *means* and *ends* of politics or political organization or government. Indeed, I have used both interchangeably, and intend to underline their commonality.

²¹⁵ F. A. Hayek, *Law, Legislation and Liberty Vol. 2, The Mirage of Social Justice*, (Routledge & Kegan Paul, London 1982) 2.

²¹⁶ See, for example, Brian Barry, 'The Public Interest' (1964) 38 *Proceedings of the Aristotelian Society Supplementary Volumes* 1, 17-18; Claus Offe, (William Rehg, tr.) 'Whose Good is the Common Good?' (September 2012) 38 (7) *Philosophy and Social Criticism* 665; Christian Blum, 'Determining the Common Good: A (Re-) constructive Critique of the Proceduralist Paradigm (2012) 3 *Phenomenology and Mind* 176 who speak of a renaissance of the concept of the public interest; and Ian O'Flynn, 'Deliberating About the Public Interest' (2010) 16 *Res Publica* 299.

²¹⁷ See, for example, Frank J. Sorauf, 'The Conceptual Muddle' in Carl J. Friedrich (ed.), *The Public Interest* (Atherton Press, New York 1966) 183.

²¹⁸ Bruce Douglas, 'The Common Good and the Public Interest' (Feb., 1980) 8 (1) *Political Theory* 103.

Our approach to the question of the public interest may be regarded as counterposed to Bruce Douglas' revisionist's approach referred to above. It tends rather towards affirmation, because, firstly, I have chosen to *clarify* 'the public interest' for a specific purpose, i.e. for legitimizing the large business corporation. And, secondly, to make this clarification, 'interest' is first explicated, in particular, by a reference to the root of the word.

Beginning therefore with a delineation of the meanings of 'interest', emphasising especially the "juridical and plural" aspects of 'interest', which derive from its origin in the legal concept of *id quod interest*, the interpretation of the concept is fixed as a *justifiable claim*. It differentiates 'interest' from being a "bare demand". A justifiable claim connotes the inescapable idea of the contestability of claims, to be resolved through a process of (moral) argumentation, in the confirmation either of an individual interest, a collective interest or the public interest. The explication of interest is followed by a reference to the relationship between individual interest, group interest and the public interest.

The definition of the public interest is, then, a matter of justifying claims on behalf of the public, but raising simultaneously the question of who or what 'the public' is. Interest exists not only when it has been articulated or pressed by someone, a fact implicit in 'interest' being definable both as 'ends and means'. The 'ends ("passive")-side' of this definition corresponds to an existing favourable condition, whereas the 'means ("active")-side' is procedural.²¹⁹ A condition is deemed favourable, if it is conducive for the satisfaction of human wants, desires and needs, and this requires the members of the respective political community to become involved, at least, to have and maintain a *right attitude*.²²⁰ The public interest or the common good imposes therefore the (moral) duty of self-restraint on citizens. It is not therefore only a gift of the government in form of laws and their supporting sanctions.

²¹⁹ The terms "active" and "passive" have been adopted by Claus Offe (n. 216) to designate the two different but related senses.

²²⁰ See, Brian Barry, 'The Public Interest', n. 216, p. 1, interpreting and applying 'the Rousseauian General Will'. Civic mindedness is highlighted as of importance. An attitude of understanding is a crucial element in the practice of discourse ethics as elaborated, for example, by Peter Ulrich, *Integrative Economic Ethics: Foundations of a Civilized Market Economy* (Cambridge University Press, Cambridge 2008) (See below, pp. 85 et. seq.)

3.2 On the Concept of 'Interest'

It should be plain from the introductory section that we are focusing on only a conception of 'interest' that is relevant politically. We have earlier in chapter 1 argued that 'the public interest' is the concept of the political, by which it is meant, that our communal existence of necessity requires a reconciliation of competing interests or claims, wants or desires. It would seem obvious that any person's interest (claims, wants or desires), that do not impact in any appreciable way on others' can scarcely be expected to elicit counterclaims, and is hence irrelevant *politically*. (The definition of the concept of the political as the distinction between a friend and a foe²²¹ is here apposite).

With the expression "in so-and-so's interest", Brian Barry purports to carve out the category of 'interest' that is politically significant.²²² "In so-and so's interest" is, therefore, apt for the conceptualization of the public interest. This means that all other meanings or usages of 'interest' are either irrelevant or reducible to this expression. We shall shortly explore the definition of "in so-and-so's interest", and the ramifications from it.

We first refer to a dictionary definition, to have a sense of the possible meanings and usages of 'interest', and to underscore its equivocality. The following definitions according to the Oxford English Dictionary are commonplace: (a) "the state of wanting to know about something or someone" ("a quality exciting curiosity or holding the attention"; "a subject in which one is concerned"), and (b) "the advantage or benefit of someone". Etymologically, interest is derived from Latin through French: *inter* = between and *esse* = to be.²²³ The definition in (b) above evidently corresponds to the relevant sense of 'interest' for our purposes.

We can now explore the definition of "in so-and-so's interest" suggested by Brian Barry, which it is hoped, can clarify the different uses of 'interest', namely: " a policy, law or institution is in someone's interest if it increases his opportunities to get what

²²¹ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press, Cambridge, Mass 1985; id, *The Concept of the Political*, referred to in Agnes Heller, 'The Concept of the Political Revisited' in David Held (ed.), *Political Theory Today* (Polity Press, Cambridge 1991) 332-3

²²² Brian Barry, n. 216, p. 4.

²²³ Judy Pearsall (ed.), *The Concise Oxford Dictionary* 10th edn. (OUP Inc., New York 1999).

he wants – whatever that may be”.²²⁴ Conventionally associated with ‘interest’ as the foregoing makes clear, is the term ‘want’ or ‘desire’. Brian Barry makes a point of clarifying the distinctions between saying ‘A wants x’, and ‘x is in A’s interest’.²²⁵ We shall refer to these shortly. Before that, I refer to, perhaps, the most cogent question concerning the explication of ‘interest’, which is the question, whether a judgement or determination of ‘x is in A’s interest’, is purely empirical or objective and individualist. In other words, can someone else decide for ‘A’ what he or she should want or desire. The answer to this question according to the definition offered by Brian Barry is pre-empted, and it is a ‘yes’.

It is so, because it is always a policy (incorporating law and *institutions*) “that is said to be “in so-and-so’s interest” ...”²²⁶ By restricting the definition to policy, and not extending it to the effects of policy, Barry’s positive response to the question above escapes a possible charge of paternalism. And one’s commitment to ‘a liberal interest’ can be protected at least momentarily! Barry interprets the statement or view, that is, that someone can “mistake their interests”, or may not know or be the best judge of their interests, as pertaining only to the correct or incorrect assessment of the policy’s *impacts* on them.²²⁷ Any policy can only do either one of two things: increase or decrease the opportunity for someone to get what he or she wants. The actual *effect* of the policy on anyone’s circumstances (known only to and by him-or herself) is for that person to know and to judge.

The notion of a “liberal interest” is disparaged for presenting ‘interest’ as signifying a “calculating self-regard”²²⁸, which is but a by-product or, perhaps, a culmination of the historical evolution of the meanings of ‘interest’ as a political term. Bruce Douglas’ revisionist agenda is undertaken against the background of the perceived changed and changing meaning(s) of ‘interest’.²²⁹ However, from the point of view of

²²⁴ Brian Barry, ‘The Public Interest’, n. 216, p.4.

²²⁵ Virginia Held endorses the approach as a good point of departure in analysing ‘in so-and-so’s interest’. *Idem*, *Individual Interest and the Public Interest* (Basic Books Inc., New York. London 1970) 21.

²²⁶ Brian Barry, n. 216, p. 5.

²²⁷ *Ibid.*

²²⁸ Dean Mathiowetz, *Appeals to Interest: Language, Contestation, and the Shaping of Political Agency* (The Pennsylvania State University Press, Pennsylvania 2011) 140.

²²⁹ Bruce Douglas, n. 218, pp. 103-117. Albert O Hirschman, *The Passions and the Interests: Political Arguments for Capitalism Before its Triumph* (Princeton University Press, Princeton and Oxford 2013)

Dean Mathiowetz, a “liberal interest’, is a retrograde step; his exposition of ‘appeals to interest’ is unmistakably critical of liberalism – construed as resting squarely on philosophical individualism.

It is crucial that the subjectivity and individualism of ‘interest’ is countered. Thus, the restriction of its definition to a policy broadly conceived. Dean Mathiowetz goes a further step in emphasising the non-subjectivism of interest, by exposing the contradiction inherent in the term. ‘Interest’, he says, “is a contradiction: it opposes itself as soon as it is voiced. When viewed as an individual preference, “interest” implies an impenetrable interiority, a hidden origin of desire, but this very invocation of interest is always an opening into the idea of an external standard”.²³⁰ An illustration can be given by the decision to vote for a particular party in the expression of one’s interest (understood as a matter of personal preference), which can invite others to also judge whether the party’s policies do indeed represent this voter’s interest.²³¹ This is an instance of the intrusion of an external standard – an evaluation independent of the voter’s personal judgement (or merely biases). So, to understand ‘interest’ as some (ethical) *standard* is a commonplace, even when this standard is not interpreted as a fully moral one?²³²

The restriction of the definition of the expression, “in so-and-so’s interest” to policy, helps to make sense of the various uses of interest, for example, the fact that a policy (x) can be in A’s interest instead of, or more so than another policy (y), which explains the inherent comparison of interest.²³³

In *Political Argument*, Brian Barry identifies and rejects what he describes as the three alternative definitions of the expression, ‘x is in A’s interest’: namely; it equates to saying (i) that ‘A wants x’; (ii) that ‘x is a justifiable claim on A’s part’ or (iii) that ‘x will give A more pleasure than any other available alternative’.²³⁴ The divergences

[1977]) is a seminal account of the political-historically evolved meaning of ‘interest’; see, also Richard Flathman, *The Public Interest: An Essay Concerning the Normative Discourse of Politics* (John Wiley & Sons, Inc., New York 1966) 14, on ‘interest’ supplanting ‘good’ as a language of commendation or approval of policies.

²³⁰ Dean Mathiowetz, n. 228, pp. 4-5.

²³¹ Cf. Dean Mathiowetz, n. 228, p. 5.

²³² See, for example, Bruce Douglas, n. 218, p. 113; also Virginia Held, n. 225, p.189.

²³³ See Brian Barry, ‘The Public Interest’, n. 216, p. 6.

²³⁴ Brian Barry, *Political Argument* (University of California Press, Berkeley and Los Angeles 1990)

between the expressions 'x is in A's interest' and 'A wants x' are very carefully elaborated²³⁵. The points of differences, including especially the fact that 'x is in A's interest', as opposed to 'A wants x' is underlined as a reference normally to a policy or action. The restriction of 'x' to actions or policies, in Brian Barry's view, explains a matter-of-fact situation, in which one can know what is good for oneself and yet *be* mistaken about one's interests²³⁶.

Note that although 'x (an action or policy) is in A's interest' does not equate to 'A wants x implemented'; the likelihood is high that when one is true, the other will be also²³⁷. Barry arrived finally at the point where, to say that 'x is in A's interest', is *not* to say (mean) that 'x satisfies A's immediate wants, but rather that 'x puts A in a better position to satisfy his wants'. In other words, 'interest' is regarded as a *means to ultimate or other ends*²³⁸ (my emphasis).

We now know that 'x is in A's interest' is at least not always equivalent to 'A wants or desires x'. Barry accounted for his rejection of a definition of 'x is in A's interest' as equivalent to 'x is a justifiable claim on the part of A', by stating: "This rules out asking 'x is in A's interests but would it be justifiable for him to claim it?"". Regardless of any intuitive response to this query, I want to contend that it does not rule out the conception of 'interest', as a justifiable claim. Would it not that *justifiability* after all is the ultimately significant test? This point will be fleshed out later in this section.

Barry's challenge in the meantime can be approached as follows. By the terms of his proposed definition of interest, it is a policy, law, an institution, or (an existing conducive situation, for the sake of completeness), that creates the opportunity for the satisfaction of wants. It is however important to remember that any policy worthy of the name does not exist in a vacuum, but is always somehow justified or subject to the necessity of justification. That is to say, that a presumption of their legitimacy or justifiability must be made if we are to allow that policies create opportunities for

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²³⁵ Brian Barry, *Political Argument*, n. 234, pp. 179-186

²³⁶ Brian Barry, *Political Argument*, n. 234, p. 179.

²³⁷ Brian Barry, *Political Argument*, n. 234, p. 180.

²³⁸ Brian Barry, *Political Argument*, n. 234, p. 183.

'wants-satisfaction'. The act of legitimation of policies, and the rights or interests with the corresponding duties thereby established, are always *in virtue* of some recognised system of legitimation, namely, the legal, political and the moral. We happen under our proposed scheme of legitimation to set store in the 'moral system'.

Virginia Held's explication of the public interest rests on the exercise of political authority within a political system. The public interest is, accordingly, a justifiable claim in behalf of the public. It would be seen however that her appeal to normative justification for interest, is narrower than the appeal to a *moral* standard, preferred in our case, in order for a conception of interest and the public interest to accord more with a vision of political morality or justice.

It follows that 'x is in A's interest' (meaning that 'x is a justifiable claim on the part of A'), can at best be a presumptive statement. Not being conclusive, it means that the question as to whether it is justifiable for 'A' to claim 'x', is not *without more ado* ruled out. Virginia Held concurs, as she maintains: To assert that 'x' is in the interest of 'A' is to say that it is "justifiable", but not that it is "justified" as "a normative judgement in a final sense".²³⁹

I note consequently that our proposed clarification of interest centres on the legitimation of claims, be they asserted or not. I note too that Brian Barry is not altogether opposed to the conception of interest as a 'claim requiring justification', as it is made clear from his elucidation of the public interest in relation to individual, as well as, special interests.²⁴⁰

3.2.1 The Language of 'Interest' in Politics and the Etymology of 'Interest'

The historical evolution of the conceptions of interest and with it, of the public interest, was mentioned in the preceding sections. The history of interest concept is long and complicated.²⁴¹ It is commonplace that the emergence of 'interest' as a term of political discourse coincides with the emergence of modern political theory at the beginning of the 17th century in Europe. Political theory and the other social

²³⁹ Virginia Held, n. 225, p.164.

²⁴⁰ See, Brian Barry, 'The Public Interest', n. 216.

²⁴¹ J. Heilbron, 'Interest: History of the Concept', in N. Smelser and P. Baltes (eds.) *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier, Amsterdam 2001) 7708.

sciences, such as, economics and sociology, are concerned, of course, with the understanding of human behaviour in society, that is, its drivers or motivations and changes in these. Albert Hirschman²⁴² details the influence of the early political economists and philosophers in the discreet employment of the concept of interest, and in helping it to gain immense importance in a theory of political life. 'Interest' was well established in economic theories from the early 19th century.²⁴³

In 1600 a more general meaning of the concept was, according to Heilbron, as a reference to the sense of advantage or the all-too-human inclination to seek one's own benefit, and hence, 'self-interest'. This notion of interest was further developed by the Renaissance political theorists, who had concerns with the actions of the ruling princes. The 'public interest' was upheld as supervening particular interests, where both were in conflict. At the time a prince was an alter ego of the state, and, therefore, his interest was the state interest. The pursuit accordingly of the state interest, had to be "the only legitimate principle of action", both for the prince and other statesmen.²⁴⁴ This is how interest came to be seen as the driving motive of human behaviour, and "as the only realistic rule of political conduct".²⁴⁵ Interest subsequently assumed primacy as the singular motivation for private economic action; and gained entrance into other intellectual domains, mainly, natural law and moral philosophy.²⁴⁶

It is also an accepted view that 'interest' gained prominence in the 17th century as the general vernacular of politics, in substitution for 'good', which was the erstwhile accepted motivation for political action.²⁴⁷ The growth and expansion of foreign trade is cited as being precursory to the supplanting of 'good' by 'interest'. This phenomenon required, as well as resulted in a development of a new *morality*, that

²⁴² Albert Hirschman, *The Passions and the Interests*, n. 229; and idem, 'The Concept of Interest: From Euphemism to Tautology' in Albert Hirschman, *Rival Views of Market Society And Other Recent Essays* (Viking Penguin Inc., New York 1986) chapter 2.

²⁴³ J. Heilbron, n. 241, p. 7708.

²⁴⁴ J. Heilbron, n. 241, p. 7709

²⁴⁵ Ibid.

²⁴⁶ J. Heilbron, n. 241, pp. 7709-7710.

²⁴⁷ See, Richard Flathman, n. 229, p. 14; J. Heilbron, n. 241 p. 7709: "From a predominantly critical concept, directed against ecclesiastical and humanistic virtues, it had gained a more positive meaning."; and Bruce Douglas, n. 218, pp. 103-117.

is, one that is more individualistic and secular in outlook.²⁴⁸ (The moral and world outlook of agricultural peasants and village artisans would not quite compare to those of international merchants). Folkert Wilken explains that the development of individuality accompanied the upsurge in commerce from the later Middle Ages and up to the early modern times (the period between the 13th and 16th centuries).²⁴⁹

Additionally, our focus in this section is on the origin of ‘interest’, and how its understanding avails us of the essential “juridical and plural sides of interest”. It is this aspect or feature of ‘interest’ that underpins ‘the public interest’.

Confirmatory of the foregoing, Dean Mathiowetz observes that when ‘interest’ is invoked outside the legal context, the legal past of interest usually goes unnoticed²⁵⁰, resulting, very likely, in a paucity of understanding, where the public interest is concerned, or worse to cynicism. It is, however, rather encouraging that “lawmen” feel able to employ the public interest concept “as an integral part of their professional vocabulary”²⁵¹. It is consequently to a legal formula, that we at last advert.

We can recall *inter-esse*, referenced above.²⁵² The phrase means ‘to be between’. A relational property is thus contained in ‘interest’ as part of the historical origin and evolution of the interest concept.²⁵³ Another feature of interest that is worth bearing in mind in this connection is the implicit comparison inherent in ‘interest’.

The legal formula *Id quod interest*, following Dean Mathiowetz’s account, is the origin of ‘interest’, and what underpins its juridical function.²⁵⁴ This expression means literally: “what matters; “what is of importance” or “what makes a difference” at sites

²⁴⁸ See Folkert Wilken, *The Liberation of Capital* (David Green, tr.), (George Allen & Unwin Ltd, London 1982) 2.

²⁴⁹ Ibid.

²⁵⁰ Dean Mathiowetz, n. 228, p. 7.

²⁵¹ See Julius Cohen, ‘A Lawman’s View of the Public Interest’ in Carl J. Friedrich (ed.), *The Public Interest* (Atherton Press, New York 1966) 155.

²⁵² See *The Concise Oxford Dictionary 10th edn.* (OUP Inc., New York 1999).

²⁵³ Cf. Brian Barry, *Political Argument*, n. 234: “Being in someone’s interests’ is at least a triadic relation between a person and at least two policies” (p. 192). In contradistinction to a question as to whether a particular policy is ‘fair’, in which no comparison with some other policy, would necessarily be implied.

²⁵⁴ Dean Mathiowetz, n. 228, p. 33.

of conflicts and contestation.²⁵⁵ It is understood to have spread across Europe for the first time through this formula in the Roman law practice.²⁵⁶ Thus, the focus on the etymology of ‘interest’, that is, on the legal usage that was its practical vector into modernity, gives impetus to “the intrinsic plurality of interest”²⁵⁷ Subsumed under ‘the juridical’ as the relevant side of interest are three elements, namely, “(1) a norm, (2) a conflict or contest over application of the norm, and (3) a decision (including “who decides”)²⁵⁸. A proper juridical process typically has very familiar attributes, such as, fairness, reasonableness, authority, etc. Applying this knowledge to the conception of the public interest, the individual or self-interest, then, allows the expectation of the interplay of these and other juridical attributes. This insight is further elaborated below under ‘interest as a justifiable claim’.

But, for the sake of clarity and in advance of the envisaged conclusion, it can be stated here that these juridical traits are embodied in and make up the “*active*” (procedural) side of ‘the public interest’: these traits or ingredients engender or secure stability, order or peace, i.e., the “*passive*” side or end-goal of ‘the public interest’. It needs hardly be stated that it is almost impossible to say what is reasonable or fair in the abstract; which leaves one with the only option, i.e. of the refinements of applicable procedures, which in the main, are the procedures for communication and understanding.

3.2.2 Interest as a Justifiable Claim

To clarify the concept of ‘interest’, Charles Fried draws the distinction between ‘wants’ or ‘desires’ and ‘interests’.

The main distinction may be made in terms of the difference between wants, that is, bare demands for satisfaction, which are the raw stuff of social conflict, and interests - with which they are frequently confused – which represent appeals to some existing system or proposed scheme of justification, some system for satisfying wants.²⁵⁹

An interest exists, thus, only when a claim made can be justified.

²⁵⁵ Dean Mathiowetz, n. 228, p. 7.

²⁵⁶ Dean Mathiowetz, n. 228, p. 33.

²⁵⁷ Ibid.

²⁵⁸ Dean Mathiowetz, n. 228, p. 8

²⁵⁹ ‘Two Concepts of Interests: Some Reflections on the Supreme Court’s Balancing Test’ (Feb., 1963) 76 HLR 755,756.

To decide between competing claims involves a “balancing of interests.” A reference to political rights or liberties, such as the right to freedom of expression, which are justified in terms of interests, and the unavoidable conflict with, say, a claim on behalf of national security, might help to clarify the conception of interest as a justifiable claim. It is generally accepted that interests underpin rights; that claims about rights relate to two elements, namely, the duties on particular agents and the interests or values by which the duties are justified²⁶⁰. In the case of the right here under consideration, that is, right to freedom of expression, the individual (private) interest (in conjunction with other interests, e.g., ‘the special interest’ of journalists) is the individual’s ability to communicate without interference in speech or writing. The necessity of “balancing of interests” arises, because it is possible or even probable that the enjoyment of ‘free speech’, prejudices national security interests. The question of what should happen, that is to say, how the conflict is to be resolved satisfactorily, then, arises.

T. M. Scanlon makes the contention that “claims about rights are claims about the necessary and feasible limitation on the discretion to act of individual or institutional agent.” The limitations are deemed necessary, so as to afford protection to important interests; and must also be feasible. Feasibility implies that the envisaged limitations are not to impose too high a cost on the enjoyment of other interests, regard had to the importance of the interest being protected.²⁶¹ Applying this interpretation of right/interest-claims to the above conflictual situation, one can say that an individual’s right to free speech imposes a *practical* limitation on the actions and decisions that are taken with a view to the protection of national security. What is a “necessary and feasible limitation” is not determinable a priori, but by debate on the available evidence and facts on the ground – always within appropriate structures.

Elaborating on a conception of interest – underlying the political right to freedom of expression or conscience - Fried asserts that a claim to this right “is not simply a claim for immediate satisfaction; it is the assertion of an interest which can be

²⁶⁰ See T.M. Scanlon, ‘Rights and Interests’, in K. Basu and R. Kanbur (eds), *Arguments for a Better World: Essays in Honor of Amartya Sen vol.1* (OUP Inc., New York 2009) 70.

²⁶¹ T.M. Scanlon, n. 260, p.77.

understood only as a reference to systematic ways of doing things, to roles, institutions and practices.”²⁶² The importance of making a *particular* speech is not *what matters* in the individual’s claim to freedom of expression. The sentence should serve to remind us of the meaning of ‘interest’, which is traceable to its origin as *id quod interest* (‘what makes the difference or matters in a conflict situation’). His or her interest is not making a particular speech (satisfaction of immediate want); it rather amounts to “an assertion of competence to determine how much weight exactly to give the want.”²⁶³ This conception accords with the de-emphasising by Brian Barry of the immediate satisfaction of wants, as contrasted with his emphasis on the opportunity, i.e., the possibility, feasibility or conditions, for a ‘wants-satisfaction’. The enquiry or concern for the existence of the relevant opportunity pertains evidently to questions of public policy.

The reference “to roles, institutions and practices”, firstly, by Charles Fried and, secondly, to public policy, by Brian Barry confirms simply that it is not up to any individuals to determine entirely all by themselves, their general or special competence or role in society. Charles Fried adds very cogently that we may have this view, that is, ‘of what matters in any situation’, (and, to be sure, of the divisions and contiguities of competencies), “without yet involving ourselves in any relativization of truth, without depriving ourselves of our powers of judgment”. Fried says, furthermore, that this decision about ‘who decides’, and the materiality of factors, is a matter of judgment. And moreover, any decisions concerning the decision makers are not to be taken as “... always or even generally correct”.²⁶⁴ There is no suggestion in this recognition of the role of institutions, that the individual is marginalised; it complements on the contrary the individualist basis or tinge of interest.

The foregoing clarification addresses, therefore, any anxiety about an undue moralism and objectivism in connection with a non-subjectivist definition of interest. Bruce Douglas has, for example, expressed the view that “[t]hose who are trying to wean the concept [of interest] away from liberal and utilitarian connotations do so

²⁶² Charles Fried, n. 251, p. 769.

²⁶³ Charles Fried, n. 251, p. 770.

²⁶⁴ Charles Fried, n. 251, p. 767.

because they are in various ways, dissatisfied with liberal and utilitarian politics”.²⁶⁵ Being critical of a liberal politics does not, in my view, hinder someone from having a more rounded conception of interest. A *rationalistic* and “calculating self-regard” perception of self-interest, does not stand up to scrutiny, even in economic science with its notorious predilection for philosophical individualism.²⁶⁶

For illustrative purposes: a relevant authority may, for example, decide to lawfully and compulsorily acquire someone’s land, thereby, depriving that person of their interest in property. The right to private property is here confronted with a claim on behalf of the public. An individual’s *competence* as a property owner was of course never meant to be absolute, it being circumscribed by, at any rate, the pre-existing property regime in a given polity. However, to make a case for the public interest, the authority must show that there are overriding social values or interests, for example, public safety, utility, environmental protection, etc. that trump the recognised value of private land ownership.²⁶⁷ Here, as in all cases, due attention must be paid to the *active-side* of ‘the public interest’.

Now, to the vital question: how are ‘competing interests’ to be balanced? In concrete terms, how is the conflict, namely, between the right to freedom of expression and the interest in national security to be adjudicated? On Fried’s analysis of the problem, the decision-maker’s task is, to clarify “a delimitation of two contiguous jurisdictions”²⁶⁸ (competencies), and to *validate* the interests of one as against the other party to the dispute, all things considered. This suggestion ties in with Scanlon’s interpretation of claims about rights as “claims about the necessary and feasible limitation on the discretion to act of individual or institutional agent.”²⁶⁹ Property ownership gives the owner discretionary powers over or in respect to the

²⁶⁵ Bruce Douglas, n. 218, p. 114.

²⁶⁶ See, e.g., Sen, *On Economics and Ethics* (Basil Blackwell, Inc., Cambridge, Massachusetts 1987) 15-28.

²⁶⁷ Cf. Mike Feintuck, ‘The Holy Grail or Just Another Empty Vessel? “The Public Interest” in Regulation’, Inaugural Lecture (21 February, 2005) University of Hall 13.

²⁶⁸ Charles Fried, n. 251, p. 773.

²⁶⁹ T. M. Scanlon, n. 260. He explains that when it is argued that the freedom of expression and the interest in national security conflict, thereby necessitating a restriction of the former, what is claimed is that the guarantee of freedom of expression understood in a certain way, is not feasible; meaning that the limitations it would impose on the governing authority to restrict prejudicial disclosure of information, “are too stringent, and have unacceptable costs” (p. 77).

property. These are limitable and indeed extinguishable if and when necessary and practicable.

One can venture to answer the same question by maintaining that there can be no clear guiding principle where the resolution of the tension is concerned, either between different or conflicting interests/claims, or as between democratic values and private economic interests²⁷⁰. An exercise of judgement is called for always, which may be judicial or political in character. Competent decision makers will in all cases be applying norms, principles or standards, which, in law "... never had, and never will have, a semantic form or a well-defined content that would leave to the judge only an algorithmic application".²⁷¹

The task that presents itself, then, is *how* to justify claims or apply norms, so as to differentiate the private, special and public interest one from the other. Before moving further on to justification of claims, it is worth referring to Virginia Held's explication of 'interest'. She says:

To say... that [A] has an interest in x, or that x is in his interest, is to say that - in terms of good political arguments - a proposal for x is worth being taken seriously, that a case can be made for x, by or in behalf of [A]; it is not to say that the case can be won.²⁷²

This explication of interest is coterminous with the construction of it as a justifiable claim, and reminds us of what the claim of, or appeal to the public interest, is all about, namely, the making of good political arguments.

An illustration will be in order. If one makes a case 'in the interest of the environment': it should be clear that the person making this appeal is seeking to justify or explain an action or policy in respect to environmental protection/improvement. Now, the need for justification presupposes the contestability of the various relevant considerations that might enter into the subject of the environment. These contentions regarding the proposed policies and their recommended actions are, for example, as regards their meanings, impacts,

²⁷⁰ See Mike Feinstuck, n. 267, p. 7.

²⁷¹ Jürgen Habermas, 'Law and Morality' (Kenneth Baynes, tr.) (1 and 2 October, 1986) THE TANNER LECTURES ON HUMAN VALUES, Harvard University 276.

²⁷² Virginia Held, n. 225, pp. 33-34.

consequences, results, or side effects. Because all the interested parties may have different views on environmental protection, the possibility of an incontrovertible judgment as to what *one* course of action is recommended, is very unrealistic. In this situation, therefore, the only one course of action that must enjoy universal approval, and hence priority, is the requirement of justifying ones point of view, i.e. engaging in the ensuing battle of ideas, and making ones arguments for or against the environment, on the grounds of 'publicly-exchangeable' reasons.²⁷³ This view then leads us to the following section on the interrelationship between the different species of 'interest'.

3.3 Individual Interests, Group or Special Interests and the Public Interest

This section and the one following it are directly connected. They are connected because the question of balancing interests between the individual, the group and the public, is the subject matter of a (democratic) political theory. A 'public interest' theory, if there is one, thus should really be concerned with the interest-balancing question.

'Interest' as above elucidated serves as a moral standard, a standard that is embodied and is exemplified by the normative conditions and practices elaborated under discourse ethics as follows. Regarding this issue of explicating the interrelationships between individual interests, group interests and the public interest, I venture to say, that the matter is no different to the task of justifying a claim as such, i.e., any claim. Brian Barry has asked a pertinent question in connection to the possibility of a common interest or the public interest, as follows: "... is there (in most matters) any one course of action which is better for everyone than another? Fairly obviously, the answer is: No", he answers.²⁷⁴ But does this say that there is not a meaningful concept of a common interest? The answer too is 'no'. His question relates to the limitation of an analytic approach to a notion of a collectivised interest and, indeed, of 'interest', because "...making complete justifiability analytic to the notion of interest", has *not* been our proposal for the definition of interest.²⁷⁵

²⁷³ Cf. Dean Mathiowetz, n. 228, pp.196-197.

²⁷⁴ Brian Barry, 'The Public Interest', n. 216, p. 8.

²⁷⁵ See, Virginia Held, n. 225, p. 34.

To understand an issue or issues at stake, and to be capable of approaching them by way of making the 'right' choices and decisions in favour of one course of action as against another, including inaction, is the quality that political administrators and politicians, can hope that the citizens can bring to civic life and political participation. The question therefore boils down to this: how to make citizens to know the right things to do, and, also, to actually do them. This problem cannot be avoided, because it is about human nature and the fact of communal existence. The effort to answer this question is the stuff of political theories of various strands, for example, the liberal or the republican versions.²⁷⁶

A group has often a special interest that conflicts with the public interest. The public interest prevails, however, not only because of the compelling reason that these individuals, singly and collectively, are also members of the public, but also because they can on their own press for their special interest.²⁷⁷ "*Public*, as opposed to *private*, is that which has no immediate relation to any specified person or persons, but may directly concern any member or members of the community, without distinction."²⁷⁸ This character of the 'public' makes it reasonable that it should, generally speaking, override any conflicting individual and special interests.

"A dispute between a valid claim of public interest and a valid claim of individual interest can only be resolved at a level outside the political system... If and when a moral system exists to perform this task, decisions between conflicting claims of public interest and individual interests may be possible, and even, perhaps, effective".²⁷⁹ We are here presumably invited to 'discover' a moral system, in order to confidently decide on the conflicting validities of the public interest and the individual interest claims. I contend contrary to the view advanced by Held, that a 'moral' (encompassing the legal and the political) system is required, not only to resolve conflicting validities, but also initially in conferment of validity. It follows that such a system of validation is already in place. Except, if one is prepared to maintain, that no such conflicts are as of to date resolvable, and never have been

²⁷⁶ See Claus Offe and Ulrich K. Preuss, 'Democratic Institutions and Moral Resources', in David Held (ed.), *Political Theory Today* (Polity Press, Cambridge 1991) 143, 157-158.

²⁷⁷ See Brian Barry, 'The Public Interest' n. 216, p. 16.

²⁷⁸ Sir George Cornwell Lewis, *Remarks on the Use and Abuse of Some Political Terms* (London. 1832), quoted in Brian Barry, *Political Argument*, n. 234, p. 190.

²⁷⁹ Virginia Held, n. 225, p. 197.

resolved before. As already mentioned above, the discussion about balancing interests between the individual, the group and the public, is squarely in the field of democratic theory.

3.4 Is there a Theory of the Public Interest?

There is some commonality of views on many aspects of the public interest discourse among many writers, in spite of the diversity of approaches that are noticeable. This has enabled Virginia Held to devise three categories under which the main views can be subsumed. Her classificatory scheme is on the basis of the type of relation posited to exist between individual interests and the public interest. There are three categories: (i) preponderance theories under which the public interest is conceived as equatable with a preponderance of individual interests (i.e. 'the greatest good of the greatest number'); (ii) the public interest as common interest, i.e., the interests the public have in common, e.g. in a form of government, and (iii) a unitary conception of the public interest on the assumption of "a single ordered and consistent scheme of values".²⁸⁰

Virginia Held states herself that such classificatory schemes are not indispensable; that they might even be unhelpful. I agree. Her categories are not intended to be exhaustive, and although they encompass the major classical and contemporary views, they do not incorporate all aspects of the most recent treatments of the subject. Their value as theories, she maintains, is their possible relevance to a choice of an adequate meaning of 'the public interest'²⁸¹. I leave to the reader to judge the relevance or otherwise of Held's classification.

Glendon Schubert came to the conclusion that there is no public interest theory.²⁸² Schubert, it must be said, is a sceptic when it comes to the usage of the public interest term. He and Frank Sorauf²⁸³ deride the 'public interest' for its indefinability.²⁸⁴ Schubert bases his views on the analysis of America-centric political theorisations around the period of the early 20th century. The relevant

²⁸⁰ Virginia Held, n. 225, pp. 43-45.

²⁸¹ See, Virginia Held, n. 225, p. 36.

²⁸² Glendon Schubert, 'Is There A Public Interest Theory?' in Carl J. Friedrich (ed.), *The Public Interest Nomos V* (Atterton Press, New York 1966) 162, 171.

²⁸³ Frank J. Sorauf, 'The Conceptual Muddle' in Carl J. Friedrich (ed.), op. cit, n. 282, p.190, 185.

²⁸⁴ See Glendon Schubert, n. 282, p.172.

theories, that is, pertaining to the public interest, are centred on governmental decision making at the national level. Five broad areas of responsibilities or role divisions are identified, which include: “the constituency” – described by Schubert as decision making by persons other than public officials, i.e. “the public, political parties, and interest groups”. The remaining four categories include congress, the Presidency, administrators and the judiciary.²⁸⁵

Political theorists are then divided into three categories, vid, the rationalists, realists and idealists, whose conceptions of the public interest he goes on to delineate.²⁸⁶ Idealists, for example, are depicted as being “propublic, antiparty, and anti-interest group”.²⁸⁷ They are cast from our perspective as the true believers in the public interest. “Idealists believe that the public interest reposes not in the positive law made by men, but in the higher law, in natural law.”²⁸⁸ Schubert opines consequently that the idealist strand does away with ‘interest-group’ politics. The problematic of conflicts of interests is, therefore, otiose in relation to the idealist conception of the public interest.

Opposed to the idealist theory of the public interest is the realist theory, which is “prointerest group”.²⁸⁹ Political parties are even counted as interest groups; the ‘public’ is reducible into “publics”, by which a political party assumes the character of an interest group. The value of the ‘public interest’ for a subgroup of the realist theory consists in the representation of the compromise, which is the result of a resolution of a particular conflict of interest.²⁹⁰ Schubert concludes significantly as mentioned above, that there is no theory of the public interest.²⁹¹

Incidentally, the last statement of the preceding paragraph is the one point on which both the sceptics and the rest can agree. In *Appeals to Interest*, Dean Mathiowetz says that interest’s value in the constitution or construction of agency and identity, is “not from the perspective of a free-standing social theory, but instead from

²⁸⁵ Glendon Schubert, n. 282, p.163.

²⁸⁶ Glendon Schubert, n. 282, pp. 164-167.

²⁸⁷ Glendon Schubert, n. 282, p. 166.

²⁸⁸ Ibid.

²⁸⁹ Glendon Schubert, n. 282, p.167.

²⁹⁰ Ibid.

²⁹¹ Glendon Schubert, n. 282, p.175.

encounters with everyday political argument”.²⁹² However, Schubert’s approach to the question of the ‘public interest theory’ should be contrasted to the examination of the relationship between individual interests and the common good (the public interest) by Claus Offe and Ulrich K. Preuss.²⁹³ They compared and contrasted the American and French political traditions, that is, the liberal and republican democratic theories and practice respectively. The comparison is facilitated through an examination of the different conceptions of individual interest, and its relation to the common good.

In the American ultra-liberal tradition, “checks and controls” on power by various devices are pre-eminent. Initially, “*interests check interests*” via the legal guarantee of private property and contractual freedom in a market system. At another level, “checks and controls” on governmental power via interests (i.e., political and constitutional rights) are in place. At a third level are “checks and controls” on power by power via the density of the interrelationships between the notable political institutions, namely, the Presidency, Congress, the state and federal administrations, and the Supreme Court.²⁹⁴ The checks are inspired, according to Offe and Preuss by a suspicion of democratic politics and popular sovereignty, and that the polity is founded on the ideal of the individual liberty to pursue happiness. In this scheme of things, the common good is simply tantamount to the security of the individual’s freedom to pursue their own good.²⁹⁵ The significant point is the observation that there is a less demanding expectation regarding the *moral qualities* of the citizens in their involvement and participation in public life. Note well: less demanding expectation, but not a lack of a continuing need for ‘moral resources’²⁹⁶, always with a view to the refinement of preferences, and to the assurance, or hope, at any rate, that individual private interests converge more on the public interest.

Without this expectation, there is hardly a possibility that a peaceful communal existence can flourish. Civic life necessitates some measure of self-constraint, which is unachievable through social contracting. According to the liberal theory “the

²⁹² Dean Mathiowetz, n. 228, p. 208.

²⁹³ Claus Offe and Ulrich K. Preuss, n. 276, p. 143.

²⁹⁴ Claus Offe and Ulrich K. Preuss, n. 276, p. 152; cf. Glendon Schubert, n. 282.

²⁹⁵ Claus Offe and Ulrich K. Preuss, n. 276, p. 152.

²⁹⁶ Claus Offe and Ulrich K. Preuss, n. 276, pp. 156 and 158.

social contract *originates* in pure self-interest, [but] its *duration* in time cannot be accounted for in terms of interest alone”.²⁹⁷

The French political tradition is, on the contrary, committed to an “encompassing vision of the common good”. Thus, the problem of political life is perceived differently to the American system. Instead of the fashioning of the devices for control over power or “passions” or “factions”, more effort is rather invested in turning citizens into “good citizens”, that is, perhaps, on how to overcome the ‘weakness of will’ of the “popular sovereign”, and for which recourse is had to the constitution.²⁹⁸ Premium is accordingly put on moral socialization, as a way of advancing the end of the common good.

We can conclude that whether there is or not a public interest theory, the concept of the public interest is unavoidable; it equiperates to the “highest ethical goal of political relationships”.²⁹⁹ That is to say, that it is a moral standard. On the other hand, it can also have a meaning “logically independent” from the sense of political ethics, namely, as “an interest (or set of interests) *possessed by the public*”.³⁰⁰

3.5 The Public Interest in Discourse Ethics

The recourse to discourse ethics is not adventitious; it leads us directly to a system of validation of claims. All moral thinking or argumentations entail the application of moral principles.³⁰¹ They involve reasoning of a practical, as opposed to a theoretical nature; in other words, ‘morality’ requires reasoning about what is to be done *in practice*.

Discourse ethics³⁰² embodies the essential features of the model of practical reasoning. Practical reasoning will invariably have to pay attention to facts. Because

²⁹⁷ Claus Offe and Ulrich K. Preuss, n. 276, p.156.

²⁹⁸ Claus Offe and Ulrich K. Preuss, n. 276, p. 153.

²⁹⁹ C.W. Cassinelli, ‘Comment on Frank J. Sorauf’s “The Public Interest Reconsidered” (Aug. 1958) 20 (3) The Journal of Politics 553.

³⁰⁰ C.W. Cassinelli, n. 299, pp. 553-554.

³⁰¹ See, Richard Flathman, *The Public Interest: An Essay Concerning the Normative Discourse of Politics* (John Wiley & Sons, Inc., New York 1966) chapter 8, for a detailed consideration and application of the moral principles of consequentialism and universalization to the definition of the public interest.

³⁰² Jürgen Habermas and Karl Otto-Apel are credited with the development of discourse ethics. The

'reasoning' does distinguish itself from 'rationality' (which can be cognitive only of the relation between means and ends), having regard to others constitutes an important element of the reasoning implied in any discourse. These features will be explained in what follows.

In discourse ethics, "the normative condition" for the possibility of argumentation, i.e., the reciprocity of recognition of persons, who are argumentative partners, is underlined. The starting point is the presupposition of a "*communicative ethos*", in order to make *rational* communication possible. Peter Ulrich interprets this ethos as "the general primacy of practical reason over theoretical reason".³⁰³ Ethics is of practical philosophy, because it puts forward only *practical* claims of "normative correctness", as contrasted to "theoretical claims to validity". The latter relate to *facts*, whose truth requires testing.³⁰⁴ 'Normative correctness' has, in my view, to be presumed; because it underpins the compatibility of our norms or values, as they guide 'successfully' the individual, as well as, social choices of actions. The 'normative correctness' or rightness of an individual choice of actions, let alone, of social decisions, in regard to their intended/realised effects, cannot by virtue of any applicable tests be vouched for. Wherefore, other considerations, such as, individual rights, dignity, and welfare, etc., which are constitutive of social values or commitments, are relevant, and adverted to in the making of socio-political decisions. These values or norms are however not provable, and are thus unamenable to theoretical reason.

The interpretation of the "moral point of view" in discourse ethics is predicated on "the ideal communicative community"³⁰⁵. The moral principle of universalization is applied towards the legitimation of claims; this principle becomes the notion that in "an argumentative community", say, for example, a democratic polity, all responsible persons are obliged to argumentatively justify the normative validity of their claims.³⁰⁶

discussion that follows draws principally on the elaboration of discourse ethics by Peter Ulrich.

³⁰³ Peter Ulrich, *Integrative Economic Ethics: Foundations of a Civilized Market Economy* (Cambridge University Press, Cambridge 2008) fn. 70, p. 64.

³⁰⁴ Peter Ulrich, n. 303, fn. 76 p. 65

³⁰⁵ Peter Ulrich, n. 303, p. 64.

³⁰⁶ Peter Ulrich, n. 303, p.65.

Goodwill or civic-mindedness on the part of the participants in discourse is also presupposed. The discourse-dependent clarification of the moral point of view is substituted for ‘the Kantian transcendental rationality of a subject’ and in a similar vein for ‘the impartial spectator of Adam Smith’s moral theory’.³⁰⁷

Four specific corresponding, normative ideas (as background) to discourse ethics are elaborated as follows. One normative idea is what Ulrich calls a “necessary understanding-oriented attitude”. The second idea relates to the interest of all the participants in discourse in “legitimate action”. The third idea is the concept of responsibility. The fourth relates to the requirement of the awareness and acceptance of the ‘publicness’ of morality, that is, the locus of morality in a modern polity. Elaborations on each of the normative ideas follow *seriatim*.

(a) *An understanding-oriented attitude*

This normative idea encapsulates the vital premises upon which any rational argumentation can proceed. The essential attitude on the part of all participants is, according to Ulrich, divided into three, namely, the commitment: (1) only to make “those validity claims they truly regard as right”; (2) to give reasons for their claims; and, lastly, (3) to use “universalizable validity claims” as the only means by which to reach “a rational consensus”.³⁰⁸ These mentioned points speak for themselves; however, further comments may be added for clarity.

Firstly, there is recognition of the importance of *civic virtue* in any moral thinking or acting.³⁰⁹ The question may be asked: how can any claim be “truly regard[ed] as right” by any person or group of persons? Our moral intuitions, it is believed, afford the expectation and hope that people in ordinary situations, can know what the right thing to do is. In the defence of the *moral principle* of utilitarianism, R.M. Hare identifies two levels of moral thought – the intuitive and the critical. His contention is that “principles, intuitions, feelings, reactions, dispositions...” (the terminology is deemed to be irrelevant), are applied in our moral thinking as these have been

³⁰⁷ Ibid.

³⁰⁸ Peter Ulrich, n. 303, p. 67.

³⁰⁹ Cf. Claus Offe and Ulrich K. Preuss, n. 276, p.148 et seq.: virtue, self-interest and reason are the 3 “moral capabilities” of citizens, on the basis of which they are expected to be able to meet their citizenship obligations, including interpersonal obligations.

“learned and acquired” in our moral development. To serve their purposes, principles have to be relatively general. They have to be at such a level as to be able to guide our responses and reactions “to relatively broad, and perhaps not very exact, characterisations of actions and circumstances”.³¹⁰ There may be stringent principles or norms, but it is in the final analysis the “law’ of the situation’, i.e. context, that always determines the right outcome in any moral or legal controversy. The knowledge that no issue can be fully determined by any one specific principle or set of principles or doctrine is a commonplace, especially in legal practice.³¹¹

Because, as Hare puts it, “a highly specific response to highly specific situations could not be learned and, even if it would, would not be useful”³¹², virtue as here employed, therefore, consists in the correct appreciation and employment of the ‘principles’ as these have been imbibed by the citizen. The imbibing of the ‘correct’ manner of acting and being is called “moral socialization” The virtue of truthfulness, an example given by Hare, would on this account consist in “... a repugnance toward lying...that will be activated by situations resembling one another in certain broad features...” Importantly, *having* this disposition, namely a repugnance toward lying (a repugnance, which may be expressible verbally as a moral principle or prescription), should be distinguishable from the inclination or ability to verbalize the prescription.³¹³ Also it does not suffice to be motivated by any outside factors, e.g., the fear of punishment for falling foul of the principle, i.e. telling a lie.³¹⁴

Secondly, the giving of reasons implies the essential respectful recognition of interlocutors. Argumentative partners are to be persuaded by good argument, not in any other way. Thirdly, the complete reliance on “universalizable validity claims” also shows that the interlocutors have mutual regard for one another, and ensures

³¹⁰ See R.M. Hare, ‘Utility and Rights: Comments on David Lyons’s Essay’ in J. Roland Pennock and John W. Chapman, *Ethics, Economics & The Law NOMOS XXIV* (New York University Press, New York 1982) 148-149.

³¹¹ Cf. Joseph Singer, ‘Normative Methods for Lawyers’ (Feb., 2008) Harvard Law School Public Law Research Paper No. 08-05 <<http://ssrn.com/abstract=109338>> (Lawyers are adept at practical reasoning, as law is applied moral and political theory (pp.37-54) and cf. Julius Cohen, ‘A Lawman’s View of the Public Interest’, in Carl J. Friedrich (ed.), *op. cit.*, n. 282, p. 155.

³¹² R. M. Hare, n. 310, p. 149.

³¹³ *Ibid.*

³¹⁴ *Ibid.*

that claims that do not meet the test of universalizability are invalidated and not put forward.

Ulrich describes the understanding orientation in discourse ethics as corresponding to “the normative basis of communicative rationality”, and as being opposed to what he terms a “success orientation”. Success orientation corresponds to the category of “technical rationality”, namely, the “instrumental” and “strategic”.³¹⁵ Discourse ethics does not describe *how* to achieve a guaranteed success in the form of consensus. It is only geared towards clarifying the “normative conditions” essential for reaching understanding via arguments.³¹⁶

(b) Interest in legitimate action

The idea defends the reality and legitimacy of individual interests.³¹⁷ The practical significance of the ‘understanding orientation’ in the coordination of actions is to require actors with *personal* aims and interests, to have regard to others’ interests and aims. And because the pursuit and realisation of personal aims have consequences for others, there is the requirement for a justification. An actor’s plans of actions have to be acceptable to the affected others: making this happen through genuine dialogue is what justification involves.

Note that the subjection of personal or special interests to a normative condition of legitimacy is self-imposed. This self-imposition of limitations on projecting oneself may be what is frequently referred to as a moral conscience. Ulrich defines ‘a normative condition of legitimacy’ of interests as “their justification in regard to the preservations of the dignity and inviolable moral rights of all the persons involved”.³¹⁸ The protection of ‘interest in legitimate action’ ensures that a moral action is an action neither in self-sacrifice, altruism, nor to say the least in the pursuit of ‘pure’ self-interest. The truth lies between two opposite poles.

³¹⁵ Peter Ulrich, n. 303, p. 67.

³¹⁶ Peter Ulrich, n. 303, p. 69.

³¹⁷ See, Virginia Held, n. 225. Her argument for the public interest rests on ‘defeasibility’ of individual interests by the public interest. Defeasibility pertains not to denial of interest, but rather to a giving in, in my view, correctly, to superior or better arguments or considerations, in regard to the public interest, or perhaps other group interest, vis-a-vis an individual interest.

³¹⁸ Virginia Held, n. 225, p. 70.

Because discourse ethics pays regard both to the consequences of actions, and to the moral rights and interests of others, a marriage of “teleological-ethical” with deontological perspectives is adjudged feasible. Integration is possible, because a legitimate act is defined as one that the actor decides on, only after taking into consideration the *consequences* on others; and because these consequences pertain to their moral rights, dignity or welfare.

(c) *A “three-stage concept of responsibility”*

A concept of ‘responsibility ethics’ (which is always a deontological ethics³¹⁹) when transformed into discourse ethics, involves first the assessment and determination of the viability of the existing conditions (if any) for reciprocal understanding through *communication*. Secondly, a ‘legitimation discourse’ accordingly could be “*real*” or “*proxy fictive*”, as when only “solitary reflection” is the only option available. Thirdly, responsibility could relate to a “share of political responsibility” for the realisation of the requisite institutional frameworks. This third stage is an analogue of an aspect of corporate social responsibility, mentioned already in chapter 1 (p. 27), and further in varying contexts in chapters 4 and 5.

(d) *Public discourse as the ‘site’ of morality*

The point is here underlined that the practical reasoning of discourse ethics always occurs “within an institutional context”.³²⁰ Moreover, the enabling socio-political, communicative conditions are presupposed;³²¹ for example, the existence of a free press in a true democracy. It is important to note, as Peter Ulrich underlines, that discourse ethics is only “... a methodical form of reflection on the moral point of view...”³²²

The *ideal of public discourse* is arguably the highpoint of discourse ethics. Public discourse, it is maintained, takes normative priority over all other social institutions, because it is the *ideal* “that guarantees the preconditions” for the legitimacy of the determinations and ‘certainties’ made and reached by the other “partly closed” social institutions; say, for example the legal system. It takes priority over the judiciary

³¹⁹ See Virginia Held, n. 225, pp. 57-62.

³²⁰ Virginia Held, n. 225, p. 75.

³²¹ Ibid.

³²² Virginia Held, n. 225, p. 76.

system, the local administration, medical practice, etc. It is in the realm of the public sphere, within which debates in the last analysis about community values take place. The public sphere is the site of morality for any modern society.

3.6 Conclusion

'Interest' is equivocal. It is not just a *thing*. Interest can be construed as both a means and an end. The appeals to 'interest' are especially salient politically: agency and identities are thereby constructed. The 'public interest' is "the highest ethical standard in politics"; it denotes correlatively *things* possessed by the public, so that these can justly as well be described as being '(in) the public interest' – e.g. buildings, road, other infrastructure etc.

The public interest qualifies as a targetable purpose of the corporation, in that the corporation is 'designed' to serve the divergent needs of divergent constituents. Especially the need of the wider society for sustainable prosperity and peace must be catered for by the domineering corporation, if it is to continue to receive public support. The public interest legitimation of the corporation calls for a consideration of the intellectual foundations of the corporate enterprise. This is undertaken in chapter 4, which deals with the necessary integration of economics and ethics.

Chapter 4

ETHICS AND ECONOMICS

*[E]conomics is not primarily an expository science; it also serves the controlling economic interest. It cultivates the beliefs and therewith the behaviour that such interest requires.*³²³

*There is no economic problem and, in a sense, there never has been. But there is a moral problem, and moral problems are not convergent, capable of being solved so that the future generations can live without effort. No, they are divergent problems, which have to be understood and transcended.*³²⁴

4.1 Introduction

We shall focus in this chapter, as the title indicates, on the relationship between economics and ethics. Their relationship requires to be clarified, in order to provide a basis for the expected role of morality in the corporate enterprise. The envisaged integration of economics and ethics is against the backdrop of a common belief that ethics has very limited role to play in economic life.

We proceed in the following order. A preliminary matter for consideration is first identified, namely, how an ethical economy relates to a belief in a free market economic system. We contended for the pivotal role of culture in both economics and ethics. 'Socio-economics' is then explained by contrasting it to neo-classical economics. This is followed by an initial discussion of integrative economic ethics, a model of economic ethics that undergirds our conception of an ethical economy.

We argued against the conception of economic/business ethics as 'applied ethics' in section 4.5. In section 4.6 there is some discussion about economic rationality, in preparation for a focus on socio-economic rationality.

³²³ J.K. Galbraith, *Economics and the Public Purpose* (Penguin Books Ltd, Harmondsworth 1975) 12.

³²⁴ E.F. Schumacher, *A Guide For The Perplexed* (Harper & Row, Publishers, Inc.: New York, 1978) 140. Schumacher applied the terms 'convergent' and 'divergent' respectively to the two sorts of problems of human existence, namely, solved or yet to be solved on the one hand, and on the other, unsolved or insoluble problems (chapter 10). The former relates to the stability over time of available solutions to a problem. The example of the bicycle is used, which represents the convergence of all the known and available (possible) solutions to the problem of constructing "a two-wheeled, man-powered means of transportation" (p. 121). The latter, on the contrary, is of a totally different type. Known solutions to a divergent problem tend instead to converge the more the problems are tackled, rather give rise to more and different problems. The problems of economics and ethics are plainly of the latter category.

The (re-)incorporation of ethics into economic theory and practice is the main goal of socio-economics. A model or means of this incorporation is what is referred to as 'socio-economic rationality'. Sections 4.8 and 4.9 engage with the possibility of an ethical economy in context, that is, in consideration of the ethics of the corporation. We maintain that it is in the making of *profits*, which may still be of surprise to some readers, that the 'ethics' of the corporation consists. Profit is not at all 'a dirty word' in integrative economic ethics. What is emphasized in other words is the precondition for the extraction of profits by corporations.

4.2 Framing the Question of an Ethical Economy

4.2.1 The Primacy of Culture (I)

It may be thought that the central concern of an ethical or moral economy is the distinction between regulatory intervention and non-intervention in the free market economy. There are admittedly 'free marketers' who strongly argue on ideological grounds against governmental intervention in the market economy, for example, F.A. Hayek³²⁵ and David Henderson.³²⁶ However, even staunch free marketers cannot discount the requirements for public policy in regard to the economy, for instance, in the area of the promotion or limitation of competition. The role of ethics in the economy, as it is proposed to argue, is not strongly linked to advocacy against intervention as such. Neither, on the other hand, is an ethical economy as we envisage, allied to any reformist agenda. It is proposed to argue for the *primacy* of ethics over economics, and the *primacy* of ethics in economic life. Thus, the ethics of the corporation should be conceived in that light, that is, as integral to the business of the corporation.

There are disagreements certainly amongst the advocates of ethical economy; disputes centering not on the possibility or desirability of ethics, but rather on the *sort* of applicable ethics of the economy.³²⁷ The question of the sort of ethics is indeed

³²⁵ F. A. Hayek, *Law, Legislation and Liberty, Vol. 2, The Mirage of Social Justice*, (Routledge & Kegan Paul, London 1982).

³²⁶ David Henderson, *Misguided Virtue: False Notions of Corporate Social Responsibility* (The Institute of Economic Affairs, London 2001) and *The Role of Business in the Modern World: Progress, Pressures and Prospects for the Market Economy* (The Institute of Economic Affairs, London 2004).

³²⁷ Cf. Rebecca M. Blank and William McGurn, *Is the Market Moral?: A Dialogue on Religion, Economics & Justice* (Brookings Institution Press, Washington, D.C. 2004).

critical: it will be contended below that what falls under the rubric of ‘applied ethics’ in general, and applied business ethics, in particular, is *fehl am platz* (inapposite), if the proposition of an ethical economy is to be taken seriously. ‘Applied ethics’ is counterpoised to an ethics that is rooted in *culture*, that is, which makes accommodation fully for the socio-economic conditions of a peaceable human communal existence. ‘Culture’ is here to be understood anthropologically, and not specific to any one area of human activity or interest, place or time. It relates to the material, intellectual, economic, political, and social, including the spiritual aspects of human life.

Integrative economic ethics, as the phrase indicates, aims to integrate economics and ethics; and is, moreover, conformable to a unity of the deontological and consequentialist views of ethics.³²⁸ We mean, with ‘integrative economic ethics’, to anticipate and talk about ‘authentic’ ethics in business/economic matters. Notwithstanding the diverse “moral horizons”, or points of views, or moralities, it is feasible still to aspire to ‘truth’. There must be some moral truth(s), paradoxically, because no moral principle is immune completely to the requirements of refinement and reformulation. In the recognition of this fact lies, arguably, the principal virtue of discourse ethics; namely, that it does not seek to replace any existing moral horizons, but rather to enable their processes of re-evaluation, refinement and reformulation³²⁹ – i.e. the continual enlightened re-making of culture – through the public use of reason. It follows pursuing the health metaphor, that reason itself should be duly inoculated against its “*pathologies*”³³⁰, for it not infrequently leads to a “Culture of Death”. The current problem of radicalization is only a case in point. The answer offered by discourse ethics, as we have seen in chapter 3, lies in open and genuine dialogue.

³²⁸ See the normative background ideas to discourse ethics, above at pp. 85 et seq.

³²⁹ Cf. Mathias Kettner, Chapter 20, ‘Discourse Ethics: Apel, Habermas, and Beyond’ in Rehmann-Sutter et. al. (eds), *Bioethics in Cultural Context: Reflections on Methods and Finitude* (International Library of Ethics, Law and the New Medicine) Vol. 28 (Springer, Dordrecht 2006) 299, 307.

³³⁰ Joseph Ratzinger in Jürgen Habermas and Joseph Ratzinger, *The Dialects of Secularization: On Reason and Religion* (Brian McNeil, trans.) (Ignatius Press, San Francisco 2005) 77-80. Joseph Ratzinger referred first to “*pathologies in religion*” and then to “*pathologies of reason*” in arguing that both religion and reason must show a “willingness to learn” from each other, in order to reinforce and mutually benefit from their essential relatedness; and are both subject to a process of purifications.

Integrative economic ethics as an applicable ethics of the economy requires some validation. We shall embark on that in section 4.2.3 below, after a reference to a dispute concerning the sort of ethics that is needed in the economy.

William McGurn emphasized the salience of culture to ethics and economics in his exchanges with Rebecca Blank. The interlocutors are persons of different faith traditions, one Catholic and the other Protestant, which, as would be expected, have moulded their respective core beliefs and world views. In McGurn's view, culture embodies "the essential morality of the market". Rebecca on her part is less canonical about the role of culture that is supposed to underpin the market economy. Her position would seem to tend towards a 'division of moral labour'. The concept of a 'division of moral labour' can serve as a framework for evaluating the arguments made in favour or disfavour of economic/business ethics.

A division of moral labour sets up a tension between private economic interests or motives and the *communal* values of justice, fairness, solidarity, etc. Private interests or motives for action need to be harmonised with communal values, in order for a peaceable social life to be sustainable. It is safe to say that that it is the aim in the final analysis of economic ethics. The concept has been examined as it relates to the necessity of political support for taxation.³³¹ A division of moral labour says, according to the authors, that there is a division of labour when it comes to the promotion of social justice (or the public interest) as between individuals and social-political institutions.³³² The is so, because individuals as members of a polity, accepting the polity's political objectives of the general welfare, justice fairness and other specific communal values, contribute towards these objectives in form of the payment of taxes. Tax income, it needs hardly to be stated, derives from private economic endeavours.

The question, then, arises, given the already discharged citizenship obligation referred to in the preceding paragraph, whether a fundamental distinction exists between the moral principles of individual conduct and those of social institutions.

³³¹ Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (OUP, Oxford 2002), 70-73.

³³² Murphy and Nagel, n. 331, p. 71

On the one hand, it is thought that institutions are inherently constituted to be impartial, and to act impartially. Individuals, on the other hand, acting as individuals, are not under any such moral constriction; they can be partial to themselves or loved ones vis-à-vis other persons. Hence, the “discontinuity” view of morality – “one for individuals and one for society”.³³³

The contrast, a “continuity” view maintains that the same fundamental moral standard governs individuals, as well as institutions – *with the ends of (political) morality in view*. To this end the responsibility of individuals and the responsibility of institutions are equally recognised. The “ends of morality”, include:

a decent condition of life for everyone, the elimination of serious social inequalities, and an opportunity for each person to flourish by pursuing individual aims and interests within the framework of a just system. In other words, there is a single morality, but it justifies a complex division of responsibilities between individuals and society.³³⁴

The authors queried the ‘psychological coherence’ of individual acquisitiveness, competitiveness and the singular pursuit of personal interests with the impartial concern for the interests of all – as professed political preferences. They explain how the division between “private partiality and public impartiality” poses serious challenges to the maintenance of political support for measures in favour of “economic justice”.³³⁵ They finally make this conjecture: that if our moral conviction as citizens requires that the disadvantaged are no more to be helped through taxes than our individual moral conviction dictates, it means then that our political preferences are on the same self-interest ground as “govern our private economic choices”.³³⁶ The morale is that expressed political preferences and most utterances of piety, one can dare to say, is a charade. In common parlance, people do not mean what they say.

Rebecca Blank’s position is asserted thus: “A continuum of values and perspectives is present in both the market and family life, but they have different weights and

³³³ Ibid.

³³⁴ Ibid. (Footnote omitted).

³³⁵ Liam Murphy and Thomas Nagel, n. 331 p. 72

³³⁶ Liam Murphy and Thomas Nagel, n. 331, p. 73.

saliency in one area than in another.”³³⁷ In this view a division of moral labour means a distinction between the private and public spheres of human life, in terms of the standard or quality, say, of care, truthfulness, empathy, etc. that are expected of a person’s conduct. Is this distinction meaningful and justifiable, or seems so only superficially?³³⁸

Rebecca Blank represents may be more accurately a “complementarity” view of morality.³³⁹ Karl-Otto Apel refers to a complementarity view of ethics (ethics “of the Liberal West”) as an ethics that has no need of *rational* foundation, and from which the functioning of the market economy, political and legal processes are separated. These subsystems of society belong to the ‘public sphere’ and subject to “scientific rationalism”, that is, “value neutral procedural rationality”.

A primacy of culture asserts, on the contrary, the overriding role of morality that, thus, clarifies the *purpose* of any act or institution. Culture or morality in this connection is never an entirely private affair, but rather vitalizes the acting person in whatever circumstances, whether in providing for one’s family, doing charitable work, or doing one’s best at work. It is in this same vein, that culture underpins the inexorable sociality of market exchanges. Economics as a social science studies the governing rules and roles of market institutions. The ‘laws’ economics discovers and formulates are neither self-enforcing, nor operative in a socio-political vacuum; but instead are always susceptible to human will, power and politics.

Rebecca Blank in querying the primacy of culture, has relied on ‘individualistic ethics’, in view of the evident ethno-religious diversities in the 21st century USA. These diversities make it difficult, if not impossible, to identify “a universally acceptable culture or set of ethical constructs”.³⁴⁰ The prevailing secularism too cuts a sharp relief against the perceived disorientating cultural pluralism. Rebecca Blank in consequence sets great store - in spite of her strong commitment to the free market – to governmental regulatory intervention in the operation of the market.

³³⁷ In Rebecca M. Blank and William McGurn, n. 327, at p. 119.

³³⁸ Cf: the earlier remarks on this topic in chapter 1, section 1.3 at pp. 25-26 above.

³³⁹ See Karl-Otto Apel, *The Response of Discourse Ethics to the Moral Challenges of the Human Situation as Such and Especially Today* (Peeters: Leuven, 2001) 30-31.

³⁴⁰ Ibid.

Her 'loss of faith' in ethics raises starkly the question of the proper place of morality or ethics in the economy; in other words, the over-hasty recourse to governmental or state power in this regard appears to question the very possibility of an 'ethical economy'. It is worth noting that Ms Blank's preferred 'individualised ethics', as opposed to a 'social ethics' solution, recognises nonetheless the critical elements or conditions for an *ethics of discourse*. Our adopted integrative ethics of the market economy, it is recalled, depends ultimately on public discourse.

The divergences between McGurn's and Blank's respective positions can be summarized as follows:

- i. Blank's is a representation of a specialized ethical standard in application to the market economy (a divided morality), which is comparable to 'applied' business ethics;
- ii. Her rejection of the primacy of culture is tantamount to maintenance of a separation between ethics and economics, and indeed to a negation of ethical orientation in the economy.
- iii. The foundation of the relevant social virtues is in Blank's view the market, as contrasted to a view of their roots in culture (civilisation as such); and
- iv. Finally, there is a real distinction in the perception by the interlocutors of the problem that requires governmental intervention. The logic of Blank's position is, to the extent that morality is imperative for the market economy it is to be dependent on government action and sanction. In this connection I share McGurn's strong ambivalence about the role of government, that is to say, in attempting to impose or regulate morality.³⁴¹ Ms Blank's position parallels the so-called 'corrective business ethics' that is distinguishable from 'integrative business ethics'. (Sections 4.5 & 4.8-4.9 for further elaborations).

4.2.2 The Primacy of Culture (II)

On this topic of 'the primacy of culture', we have yet to say what exactly culture is, and how it matters to the ethics of the economy. We aim to make good on that in

³⁴¹ See, Rebecca M. Blank and William McGurn, n. 327, p.130.

this subsection. It is also important to make more explicit the real division between the contending positions referred to in the preceding subsection: the dividing line is *not* as between regulatory intervention and non-intervention. Rather it is the form or quality of regulation that makes the difference. The question, that is, is which regulation - in the broadest of meanings - is best facilitative of the goal of socio-economic production? In other words, the question is whether or not a regulatory measure is in line with a prevailing culture, fulfils the purpose of integrating the economy into society. There is of course the presumption that culture is adaptive.

Market mechanisms properly conceived are part of the regulation of the economy to the above effect. The so-called 'invisible hand' (competition) is predicated on moral preconditions, which serve a market-regulatory function.³⁴² To subsume all market mechanisms under 'the market-economy regulatory order' is pertinent to the argument made below, against 'applied business ethics'. The gist of the contention is that the ethics of economic action is the same as the ethical standard applicable to any other sphere of human activity. It is not uncontroversial granted. Some other scholars of business ethics are of a different viewpoint; however, our contention is justifiable not least in the interest of a socially-integrated (embedded) economy.

'Embeddedness' of the economy in society in the sense of economic ethics is, according to Bettina Hollstein³⁴³, open to two different interpretations. One version corresponds to the economic theory of ethics of Karl Homman.³⁴⁴ In it the economy is permitted its own logic (rationality), albeit within a set of institutional frameworks of action. Thus economic ethics has a role only in regard to the framework of action. The other version of 'embeddedness in economic ethics' (prevalent in the German speaking world) interprets embeddedness to mean that every economic action "is interwoven in its context".

³⁴² Wolfgang Fikentscher, Philipp Hacker and Rupprecht Podszun, *FairEconomy: Crises, Culture, Competition and the Role of Law* (Springer-Verlag, Berlin and Heidelberg 2013), at p. 15, arguing in reference to Adam Smith, that regulations are presuppositions of economic freedom.

³⁴³ Bettina Hollstein, 'The Moral Dimension' and its meaning for economic ethics' DISCUSSION FORUM, Amitai Etzioni – Twenty years of 'The Moral Dimension: Toward a New Economics', *Socio-Economic Review* (2008) 6, 142-153.

³⁴⁴ See Mathias Kettner, n. 366 and accompanying text.

It would follow from the last sentence of the preceding paragraph that the necessity for moral justification of economic actions extends to the actions themselves and the contexts of actions. (There is to my knowledge no brand of economic ethics or more generally economic theory, which prides itself on its *immoral* presuppositions or unfair outcomes). This second alternative interpretation of the social embeddedness of the economy in the perspective of economic ethics, invites a reflection on the foundational and intellectual assumptions of the operation of the economy.³⁴⁵ Hence, integrative economic ethics seeks, first and foremost, to clarify the foundational assumptions of the market economy.

Culture may be defined as a way or manner of being by humans in their social/communal life. This definition is clearly all-encompassing. What it means is that culture permeates and shapes all aspects of life; political, economic, ethical, and social. So it is not a question of whether culture matters, but rather how it matters in any specific context³⁴⁶; that is, how and to what extent it shapes individual behaviour. Human behaviour is of course exhibited in action, inaction or reaction, each phase motivated by interests, needs or desires, which may be physical, emotional or spiritual. The fact of communal existence imposes internal and external constraints on human behaviour. Laws, norms, morals and institutions are equally involved in “the hemming in of natural propensities”.³⁴⁷ So, one may ask, how then does culture distinguish itself from these?

Communal existence depends on the other hand on human interactions and interrelationships. Since human behaviour is known to be shaped by culture, culture must be involved in generating, regulating and changing human relationships and expectations, and vice versa. It would be impossible to delineate culture precisely, especially, given the similarity in meaning to norms and institutions in certain contexts. Nonetheless, it seems correct to say that ‘culture’ reaches much deeper and wider in its influence on conduct than, for example, norms, which are a reflection

³⁴⁵ See Bettina Hollstein, n. 343: She contends that Amitai Etzioni’s socio-economics is closer to the second version of embeddedness as mentioned above. (p. 146).

³⁴⁶ See, Amartya Sen, ‘HOW DOES CULTURE MATTER?’ in Vijayendra Rao and Michael Walton (eds.), *Culture and Public Action* (Stanford University Press, Stanford 2004), 37-58.

³⁴⁷ See Wolfgang Fikentscher et al., n. 342, p.23.

of culture.³⁴⁸ Culture from Wolfgang Fikentscher's definition is also depicted as all-inclusive. Characteristic of culture is also that it is not fixed in time, or remorselessly prescriptive in its demands. It is as already stated essentially interactive, namely, that it is a product of human interaction, amenable therefore to change over time, and differs from one place to another. We shall next consider the role culture plays in constructing an ethical economy and, in particular, in corporate ethics.

4.2.2.1 The Role of Culture in the Proposed Economic Ethics and Corporate Ethics

Reference may be made for illustrative purposes initially to a dominant role of culture in corporate theory as this has been highlighted by Brian Cheffins.³⁴⁹ Brian Cheffins has in the essay questioned the 'law matters' thesis - a thesis that has been advanced in comparative corporate governance theory. The view is that law provides the protections on the basis of which minority shareholders invest with confidence in large publicly traded corporations. Minority shareholders can be exploited by the controlling or dominant shareholders by sheer exercise of economic power, for the latter owe no "status" fiduciary obligation to the former.³⁵⁰ A distinction is drawn in the literature between the corporate governance systems characterized by diffuse shareholding, such as the US and UK and the others, in which wide dispersal of shareholding is not the norm (shares are held in large blocks), e.g. as obtain in most of continental Europe. The implication of the thesis is that, if the second group of countries wanted to adopt the US/UK corporate governance systems, they would *first* have to amend their company and securities legislations along the US/UK line.

In his historical comparative analysis Brian Cheffins concluded that it was not legislation, neither in the US nor in the UK, which provided the necessary protection and assurance for minority shareholders. On the contrary it was developments more appropriately termed cultural, which occurred over a course of time, as opposed to any specific legal-institutional enactments.

³⁴⁸ Wolfgang Fikentscher, n. 342, p.4. He defines culture as: "the attribute of a society that refers to the patterns of conduct of its participants – traditional but open to change – in situations concerning knowledge, belief, art, morals, law, custom or other mentally reflected themes."

³⁴⁹ Brian Cheffins, 'Law as Bedrock: The Foundations of an Economy Dominated by Widely Held Public Companies' (2003) 23 (1) *Oxford Journal of Legal Studies*, 1-23.

³⁵⁰ See Robert Flannigan, 'Fiduciary Duties of Shareholders and Directors', (May 2004) 277 *J.B.L.*, 285-287.

Against the 'law matters' thesis it is contended, that institutions, that is, culture influences the evolution of corporate law. Brian Cheffins endorsed the statement made by Berle and Means³⁵¹ regarding the basis of the right of shareholders during the emergence of the separation of ownership and control, namely, "the expectation of fair dealing rather than [the shareholders' confidence] in the ability to enforce supposed legal claims".³⁵² Expectation of fair dealing considered by Brian Cheffins as a realistic basis should be appreciated more so against the backdrop, that dividends were not guaranteed, contributions by shareholders were irrevocable, and that shareholders lacked control. That is to say, that *trust* and an overarching sense of business probity proved adequate as a regulatory mechanism, for the protection of legitimate economic rights and interests.³⁵³

It is part of our aim to show that market mechanisms properly construed are not different to and separable from applicable everyday moral standards. Cultural awareness or lack thereof makes the important difference.

Turning his attention to the UK, Brian Cheffins contends that just like in the US, "the law's contribution to the emergence of the Berle-Means corporation was apparently minor".³⁵⁴ He cites the obvious case of the protection of shareholders against insider dealing. Insider dealing was only criminalized under the Criminal Justice Act 1993 (c. 36), ss. 52-64. Again, the claim by minority shareholders for what is now known as unfair prejudice was put on statutory footing first by CA 1985, s. 459. Noteworthy in this connection is that the UK system of corporate governance, of a widely dispersed share ownership, had long been well-established before these legislative interventions beginning from the 1940s.³⁵⁵

The lesson to be drawn is, then, that "market-orientated factors" secured investor confidence. The factors include: good business reputation for honesty and

³⁵¹ Berle and Means, *The Modern Corporation and Private Property* (1932).

³⁵² Cited in Brian Cheffins, n. 349, fn. 58, p. 10.

³⁵³ See Wolfgang Fikentscher, n. 342 for a discussion of the different approaches of the common law and the civil law systems in regard to a 'fairness test' as applied to business/commercial law and practice. His historical-comparative account is persuasive to the effect that the said rejection of a 'fairness test' in the common law must be taken as unwarranted.

³⁵⁴ Brian Cheffins, n. 349, p. 13.

³⁵⁵ *Ibid.*

competence, generous dividends awards, the professionalism of financial intermediaries, the role of the London Stock Exchange, which is a private entity, etc. According to Brian Cheffins "...market dynamics, together with privately-oriented regulatory initiatives, did much more than the legal system to enhance the confidence of British investors as the Berle-Means corporation became dominant."³⁵⁶

The far-reaching impact of culture does not in our view mean a rejection of legal regulatory measures. Integrative economic ethics and corporate ethics still require legal institutional framework of action, and always accommodate hard law. *The essential dichotomy as already indicated is not as between intervention and non-intervention, or between the so-called market mechanisms and regulatory interventions.* Market mechanisms are integral part of the regulatory/regulated economic order. The important test is for us which approach does the best job, case by case, of embedding the economy in society.

It is also the case, as will be briefly argued, that a moral or an ethical act is context-dependent always. That is, in our view, where ethics and culture meet together. The same context-dependence of morality informs too our critical posture towards the idea of 'applied ethics', considered in section 4.5 below. The view is maintained that the justification and application of ethical norms are integratable, rendering 'applied' business ethics somewhat superfluous and, more worrisome, revealing that 'applied' business ethics can actuate a negation of ethics.

The counterpart of a moral act or action conventionally is an immoral act – both of which are determined culturally only to some extent. With 'convention' meaning a commonly accepted standard or practice; and morality defined with reference to a given context, it should be plain enough that a moral or immoral act does not exist in a vacuum. A moral act has, nonetheless, some definite elements.³⁵⁷ Bettina Hollstein in reference to Etzioni outlines and critically analyses the following elements of a moral act.³⁵⁸ Moral acts are: (a) *imperative*, which connotes obligation and the consequent restriction of individual autonomy. A value-commitment on the

³⁵⁶ Brian Cheffins, n. 349, p. 14.

³⁵⁷ See Bettina Hollstein, n. 343.

³⁵⁸ See Bettina Hollstein, n. 343, pp. 147-152.

part of any agent is not consonant with the freedom of action of the agent; (b) *generalizable*, which calls to mind the application of the Kantian universal law; (c) *symmetrical* – interpreted as in identification with (b) above - signifying reciprocity, i.e. a reciprocal recognition and respect of others. Morality especially in the context of economic ethics does not mean a heroic self-sacrifice – one's own and others' *legitimate* interests count; and (d) *of inner motivation*, which relates to the imperative of personal moral disposition. Bettina Hollstein notes that none of the elements is sufficient in itself, although, each is necessary. It is interesting that the foregoing features can be identifiable in the preconditions for ethics discourse, which we have elaborated above (chapter 3, section 3.5).

Human action is shaped by culture, but is not controlled by it absolutely. People rebel against cultural traditions and values; cultures themselves are subject to other external cultural influences, resulting in the dynamism and fluidity of culture. Put differently, conventions can be broken, and in their social meaning-making attributes, can be stretchable for good reasons. Culture is understandably affected by changing economic circumstances. For example, the perceptions of the role of women in any society changes whenever a considerable proportion of women become financially independent. In a similar fashion, cultural values and sensibilities may impact on the employability, or the prospects of financial independence of some segments of a multicultural society.

Cultural awareness broadens perspectives on economic theories. The motivations, possibilities and limits of economic action can be re-evaluated normatively (see section 4.3 below). The hypothesis of the individual utility-maximizing, rational actor of the neoclassical economics would be rejected as descriptively inaccurate. The individual preferences of an economic agent alone would not serve as the determinant of economic action. Values of all sorts would be recognised as communal; and that a commitment to any value whatsoever diminishes the force of individual freedom and rational choice.

Whenever for instance a culture of consumption is mentioned, it refers to a pattern of, for example, ostentatious, wasteful or unsustainable consumption. The consumption culture may equally be one of thrift or savings for future needs and

investments, or “moral consumption”³⁵⁹. Individual consumption habits are observed to be related to a widely prevailing culture. Corporations are, in this connection, “cultural and moral actors”.³⁶⁰ Their production and trading activities are shaped by a prevailing culture, as much as they tend to shape socio-cultural trends. The case of such companies like Google Inc. and Apple are obvious.

The question of the form cultural/moral actions by corporations should take is the question broadly of economic ethics, and specifically of corporate ethics, which are discussed in further detail below (sections 4.8 through to 4.10). Any action whatsoever carries with it the responsibility for action. The moral responsibility of the corporation is in the main *a function* of the purpose of the corporation. Again, consistent with the context-dependence of culture and morality, it would be impossible to say in advance what the specific moral responsibility of a corporation should be. This should be the task of its corporate governance system, to articulate and pursue, because corporate governance in our analysis is intrinsically connected to corporate social responsibility.³⁶¹ The responsibility of the corporation is fulfilled in the pursuit of the ‘corporate interest’³⁶². It is proposed to consider a practical approach to ethics in the corporation at the end, after a general consideration of integrative corporate ethics.

4.2.3 Integrative Economic Ethics in the ‘Rational Ethics’ of Discourse

‘Integrative economic ethics’, as it is introduced below, is aimed at demonstrating that ethics is very relevant to economic theory and practice, and as an off-shoot of discourse ethics, it is a rational ethics.

In our first discussion of discourse ethics in chapter 2, it is classified as a ‘rational ethics’. ‘Philosophical ethics’ is also a terminology frequently applied to the same notion, namely, a moral philosophy – a branch of philosophy concerned with clarifying the grounds of morality and searching for ethical principles as are applicable to different areas of human life. ‘Ethics’ as distinguished from ‘morals’

³⁵⁹ See Bettina Hollstein, n. 343, p. 148 (citation omitted).

³⁶⁰ Fabian Scholtes, ‘Zur Einleitung: Kultur als Herausforderung an Ökonomie und Wirtschaftsethik’ (Introduction: Culture as a Challenge to the Economy and Economic Ethics) in Fabian Scholtes et. al. (eds.), *Kultur-Ökonomie-Ethik* (Rainer Hampp Verlag: Munich and Mering, 2007) 12.

³⁶¹ See chapter 5.

³⁶² See chapter 5, section 5.4.

philosophizes about 'morality', whereas 'morals' or 'morality' relates to lived human experience, and are easily identifiable with particular outlooks or value systems, e.g., the Catholic, Protestant or Islamic world views.³⁶³

'Rational' as was highlighted in chapter 3 in relation to ethics, underlines that a desired and expected generalised assent to a system of values or morals, is to be on the strength of rational arguments, as opposed to, say, dogma or intuition, and not to mention brute force. Discourse ethics makes this claim to rationality. The "discourse principle" says, that it is only the norms of action (including claims or interests) that meet or could meet the approval of all those affected by the action "as participants in a *practical* discourse", which can lay claim to validity.³⁶⁴

The elementary requirement(s) of discourse ethics can be summed up as goodwill and the capacity to engage in discourse by discourse partners³⁶⁵, which, according to Peter Ulrich, consists in the 'normative pre-conditions', and, according to Mathias Kettner, in the "five parameters of moral discourse" of discourse ethics. Mathias Kettner elaborates on "two philosophical paradigms of economic ethics in Germany."³⁶⁶ Integrative business ethics is one. The other is the 'Economic Ethics' of Karl Homann. What differentiate the two approaches are their respective conceptions of rationality and morality, as well as, their conceptions of the relation of the one to the other.³⁶⁷ Whereas Homann's economic ethics (economic rationality) is relieved (freed) of morality *as such*; Peter Ulrich's integrative economic ethics (economic rationality) is broadened and enlivened by morality. This integration or infusion of morality into economic rationality is discussed below as 'socio-economic rationality'.

Note that Mathias Kettner indeed recognises other models of economic/business ethics thinking in Germany. His focus on the two referred to above is on the basis of

³⁶³ Adela Cortina, 'Der Status der Anwendungsethik: Kritische Hermeneutik der menschlichen Aktivitäten' (1998) 84 (3) Archives for Philosophy of Law and Social Philosophy 394-404, 394.

³⁶⁴ Mathias Kettner, chapter 20: 'Discourse Ethics', n. 329, p. 301.

³⁶⁵ See Karl-Otto Apel, n. 339, p.83.

³⁶⁶ Mathias Kettner, 'Zwei Philosophische Paradigmen der Wirtschaftsethik in Deutschland', Information Philosophie: Die Zeitschrift, die über Philosophie informiert <www.information-philosophie.de> Accessed 17.02.16.

³⁶⁷ Ibid.

their respective well-established positions in the German-speaking world, as well as, on their very pronounced moral-philosophical differences, referred to above.³⁶⁸

The main thrust of integrative economic ethics, as already stated, is the integration of economic rationality and ethical rationality – namely, *efficiency* and *legitimacy*, respectively. Both of these goals can be achieved only through communication or discourse amongst the participants in the relevant activities. It is therefore the key to our envisaged ethics of the corporation.

Our intention can be restated at this juncture to be: to recover the sense of *moral obligatoriness* in economic life, that should undergird a peaceable socio-economic life. It is the self-same moral obligatoriness that governs all interpersonal interrelationships, which amounts to, in Mathias Kettner's terms, a "generalised demand for legitimacy – a basic moral-normative demand..." The "basic moral-normative demand" is a requirement that all those affected by an act or course of action should consider it legitimate. A generalised demand for legitimacy is translatable into the general interest, that is, in an expectation of a "pareto-superior outcome – a basic economic-rational demand".³⁶⁹ The view can therefore be argued for that *profitability* is not opposed to *morality* in the corporate enterprise; that both in fact are interdependent. This contention is fleshed out in sections 4.8-4.10 below.

Finally, it is worth noting that Peter Ulrich in his 'application' of discourse ethics to the economy does *not* see the necessity to divide between 'justification' and 'application' of norms, in contrast to, for example, Karl-Otto Apel.³⁷⁰ Indeed, Peter Ulrich disparages the 'application of discourse ethics' equally as the maligned 'applied ethics'.³⁷¹

4.3 Socio-Economics Contrasted to Neo-classical Economics

³⁶⁸ For a survey of the different models of German business ethics, see Lutz Preuss, 'Ethical Theory in German Business Ethics Research' (Feb. 1999) 18 (4) *Journal of Business Ethics*, 407.

³⁶⁹ Mathias Kettner, n. 366, p. 3.

³⁷⁰ See Karl-Otto Apel, n. 339, pp. 97-101. Contrast Peter Ulrich, *Integrative Economic Ethics: Foundations of a Civilized Market Economy* (Cambridge University Press, Cambridge 2008), 82-89.

³⁷¹ Cf. Alasdair MacIntyre, 'Does Applied Ethics Rest on a Mistake?' (Oct. 1984) 67 (4) *The Monist*, *Ethics and the Modern World*, 498.

Economics is notably non-monolithic.³⁷² J. K. Galbraith paints a model of the economic system, which divides into two parts, 'the market system and the planning system'. In the market system is the territory of the entrepreneur, small firms, where the classical features of the market still obtain, for example, the singular entrepreneurial goal of money-making.³⁷³ In the planning system, on the other hand, the large corporations with complex organisational structures and enormous power are no longer, or hardly ever amenable to market principles and pressures.³⁷⁴ The accuracy or otherwise of his descriptive analysis of the existing circumstances notwithstanding, the bifurcation helps the required treatment of large public corporations as *sue generis*.

The mainstream thought in economics is the neo-classical, and can be perceived to be at the opposite pole of socio-economics. In neo-classical economics, private property is the most important social institution, and self-interest the chief driver of human action.³⁷⁵ "Fairness and justice" in its philosophy "mean respect for other peoples' property"³⁷⁶.

Under neo-classical economics the 'maximization of profits' is the social responsibility of a business corporation. As an empirical observation, it is not necessary to link the successes of the market economy as they are to the peculiar philosophy of neo-classical economics, namely "philosophical individualism".³⁷⁷ The elements of the fundamental conceptions of neo-classical economics, which derive from individualism, are susceptible to criticisms on their own terms.³⁷⁸ Martha Nussbaum for instance attacks the equation of *rationality* with a self-interested maximization of utility (want satisfaction), the norm of wealth maximization, and the acceptance of 'Pareto optimality' as "a normative criterion of social choice". (Critical

³⁷² See, for example, Ha-Joon Chang, *Economics: The User's Guide* (Pelican Books Ltd, London 2014) chapter 4. The diverse approaches to economics described include: "Austrian, Behaviouralist, Classical, Developmentalist, Institutional, Keynesian, Marxist, Neoclassical and Schumpeterian" (p.113).

³⁷³ J. K. Galbraith, *Economics and the Public Purpose* (Penguin Books Ltd, Middlesex 1975) 61.

³⁷⁴ *Ibid.*

³⁷⁵ John Kay, *The Business of Economics* (Oxford University Press Inc., New York 1996) 138.

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.* Japan, Switzerland and Norway are examples given of non-individualistic countries with successful market economy.

³⁷⁸ See, for example, Martha C. Nussbaum, 'Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics' (1997) 64 *The University of Chicago Law Review* 1197.

appraisals of these foundational notions are the staple preoccupations of economists in the socio-economic tradition)³⁷⁹.

'Socio-economics' in terms makes plain that the various markets of the market economy are "social institutions".³⁸⁰ Against this social institutional view, the neo-classical perspective claims as follow: The pursuit of individual self-interest accounts for the necessary integration of the individualized actions constituting a completed exchange in the market order. The self-interest assumption is furthermore posited as the basis of the social order, and with the stability of this order resting on the advantages that the market offers its participants.³⁸¹

However, there is a persistent question that cannot be overlooked. The crux of it is the questionable feasibility of the necessary coordination of economic activities through markets in the face of "the heterogeneous and partly antagonistic motives and interests of the participants?"³⁸² Jens Beckert discussed the coordination problem as amounting to the tripartite problems of value, competition and co-operation. Because the *expectations* of market participants "are formed by the structural, institutional and cultural embeddedness of market exchange,"³⁸³ it is suggested that the expectations indeed should be comparable to the 'Invisible Hand' of the market economy.³⁸⁴

They are characterized as "the social order of markets" by Jens Beckert. This makes the *character* of expectations decisive for the stability or otherwise of the ensuring social order.³⁸⁵ Expectations can be manageable, and are to be managed; in like manner, the 'Invisible Hand', that is, market competition is manageable, and ought in certain areas to be debarred as a matter of socio-political choice.

³⁷⁹ Counted amongst their number are Amartya Sen, Jon Elster, Amitai Etzioni and Adam Smith; see, Peter Ulrich, n. 370, p. 382.

³⁸⁰ John Kay, n 375, p. 139; cf. Jens Beckert, 'The Social Order of Markets' Discussion Paper (Max Planck Institute for the Study of society, Cologne 2007) 246. Available at < www.mpifg.de>.

³⁸¹ Jens Beckert, n. 380, 249.

³⁸² Jens Beckert, n. 380, p. 246.

³⁸³ Jens Beckert, n. 380, p. 247.

³⁸⁴ As contrasted to the "fiction self-interest" as a regulator.

³⁸⁵ See, Peter Ulrich, n. 370, who articulates the *reasonableness* of expectations by market participants as the solution to the problematic of "inherent necessity of competition" in the free market economy (pp.139-146).

4.4. Towards a Conception of Socio-Economics

The term 'socio-economics' is traceable to Amitai Etzioni, in reference to the theoretical orientation of his work in the 1980s, leading up to the publication of *The Moral Dimension*³⁸⁶. More restrictively, it has been used "to refer to theoretical perspectives and empirical studies inspired by, or at least in the spirit of, Etzioni's critique of neo-classical economics".³⁸⁷ Socio-economics offers an alternative viewpoint to the perspective of neo-classical economics painted above, an alternative to a "mono-utility conception of behaviour".³⁸⁸ Human behaviour or action that forms the object lesson of economic theory, it is posited, is essentially not atomistic. And the drivers of action are not always rational in an instrumental sense. "Etzioni characterizes the socio-economic conception of behaviour as "moderately deontological," in that it views moral commitments as causes."³⁸⁹

Socio-economics re-imagines the problems of social order, which, against the hopes of neo-classical economists, the axiomatic principles of the market alone cannot solve.³⁹⁰ Contrary to the fetishism of the market, it has for example been argued by John Gray for the welfare state to be recognised as a pillar of the (socio-) market economy.³⁹¹ The welfare state with its principles and values, therefore, should also be constitutive of the expectations of market participants, namely, *all* citizens, and including the corporations. It is not merely ironic then to talk about 'corporate welfare'.³⁹² It must be reasonably obvious that self-interest and pure competitiveness are not the only guiding principles of the welfare state; which means that for hopes and efforts at social improvements, other norms or ideals must be required to complement market principles.

We shall now describe a conception of socio-economics, before going on to consider the controversial issue of applied ethics mentioned above.

³⁸⁶ Richard M. Coughlin, 'Whose Morality? Which Community? What Interests? Socio-Economic and Communitarian Perspectives' in Amitai Etzioni (ed), *Essays in Socio-Economics: Studies in Economic Ethics and Philosophy* (Springer-Verlag, Berlin & Heidelberg 1999) 158.

³⁸⁷ Richard M. Coughlin, n. 386, fn. 2, p.158.

³⁸⁸ Ibid.

³⁸⁹ Richard M. Coughlin, n. 386, p. 159.

³⁹⁰ See, *ibid.*

³⁹¹ John Gray, *The Moral Foundations of Market Institutions* (The IEA Health and Welfare Unit, London 1992), chapter 6.

³⁹² See Ha-Joon Chang, 'Company profits depend on the 'welfare payments' they get from society' *The Guardian* (London Friday 5 April 2013).

With the concept of 'merit goods', W. Ver Eecke³⁹³, offers insight into the transformation of economics into political economy and socio-economics. 'Merit goods' are distinguished from 'private goods' and 'public goods'. The understanding of a 'merit good' can be approached this way: Typically the justification for an economic activity is the benefit it confers on the economic agent. An alternative way of justification, according to Ver Eecke, is the adoption of the 'Kantian transcendental method of thinking', which says that if the consumer wishes for something, they have to accept willy nilly its *possibility conditions*.

This means a recognition and acceptance of the fact of *logical relations* in reality.³⁹⁴ Merit goods are thus "those goods which are the *conditions for the possibility* of something that is desired by the consumers, even and especially if these merit goods or services themselves are not preferred by consumers".³⁹⁵ This definition runs against the grain of a canon of economic thought, namely, the sovereignty or the freedom of choice of the economic agent resting on transparent rationality. (Note that implicit in the postulate of self-interest is a calculative rationality, and of course, the freedom that goes with choice). This follows that economic thought has to make allowance for the government or whoever to "perform economic activities which interfere with the wishes of consumers". Putting the matter differently, Ver Eecke says, that it means that "we can assume that economic thinking will propose economic activities to the government which will respect neither the Pareto principle nor the consumer sovereignty principle". Because economic-related actions which will occasion both advantages to some, and disadvantages to others must equally be recommendable, economics of necessity has to become political economy or socio-economics.³⁹⁶ For merit and 'de-merit' goods all have to be accounted for.

Note therefore that the crucial distinction between merit and public goods is that, in the case of provision for the latter, there is the requirement that those who thereby suffer "negative disutility", should be compensated; for example, if a motor way has

³⁹³ W.Ver Eecke, 'The Concept of a "Merit Good" The Ethical Dimension in Economic Theory and the History of Economic Thought or the Transformation of Economics Into Socio-Economics' (1998) 27 (1) Journal of Socio-Economics 133,138 et. seq.

³⁹⁴ W.Ver Eecke n. 393, p. 139.

³⁹⁵ Ibid.

³⁹⁶ Ibid.

to be built on a privately owned land. Whereas with merit goods, using Ver Eecke's example, monopolists are not expected to be compensated for the restrictions imposed on them through anti-competitive regulations. Anti-competition law is, then, a 'de-merit' good from the point of view of a potential monopolist.

It is noted that different kinds of merit goods have always been present in the history of economic theorising. Ver Eecke cites Adam Smith, the neo-liberals, Keynes and the establishment of the welfare state.³⁹⁷ The influence of ethical considerations is definitely not something new in economic thinking and practice.

4.5 Against the View of Business Ethics as 'Applied Ethics'

The suggestion is made by Joseph Heath that business ethics should be treated as professional ethics, that is, akin to the practical ethics applicable to specific areas of life, such as medicine or law. This is a well-intentioned suggestion, in seeking to bring ethical principles to bear in the actual conduct of business (human) affairs. Corollary to a 'professionalization' of business ethics is its presumed 'separation' from 'ordinary morality'. It is not immediately obvious in his account what this entails; that is to say, for example, what makes up the substance of ordinary morality, from which professional ethics of business practice is to extricate itself. Be that as it may, the basis of Heath's market failures (corrective) approach to business ethics belongs to what has been called a "separatist thesis" by the philosopher Alan Gewirth.³⁹⁸

The relevant issues are debatable as can be testified by the various contributions by scholars on the subject.³⁹⁹ Alan Gewirth isolates the different components of the separatist's claim, including, for example, the view that a "professional-role morality" is immune to "all or many other moral requirements of rights or other values", and that the latter cannot outweigh the former. He categorizes the thesis as stipulating

³⁹⁷ W. Ver Eecke, n. 393, p. 140.

³⁹⁸ Alan Gewirth, 'Professional Ethics: The Separatist Thesis' (Jan., 1986) 96 *Ethics* 282.

³⁹⁹ See, for example, Benjamin Freedman, 'A Meta-Ethics for Professional Morality' (Oct., 1978) *Ethics*, Vol. 89, No. 1, 1: arguing for the separation thesis; Mike W. Martin, 'Rights and the Meta-Ethics of Professional Morality' (July, 1981) Vol. 91, No. 4, 619: a rejoinder to Benjamin Freedman's essay, criticising his position. Followed by Benjamin Freedman, 'What Really Make Professional Morality Different: Response to Martin' (July 1981) *Ethics*, Vol. 91, 626, and a reply by Martin W. Mike, 'Professional and Ordinary Morality: A Reply to Freedman' [1981] *Ethics* 631.

(among other things) that an end justifies the means.⁴⁰⁰ The concept of ordinary morality taken on by ‘separatists’, according to Alan Gewirth, has not represented any clear set of moral judgements to be able to serve as a reference point in any (hoped-for) differentiation of professional ethics.⁴⁰¹ For a proponent of the separation thesis has to be able to compare and contrast professional ethics to some ethics that has a sufficiently solid basis. After his complex conception of a “rational ethics” and moral rights, the development and application of criteria for legitimate infringement of moral rights, including the *institutional* infringement of rights, he comes to the conclusion that the separatist thesis is mistaken.⁴⁰²

Our interest is limited to the case of ‘applied’ economic ethics. It is not doubttable that in the matter of application of ethical principles (in business or any other area), that context is everything; that the problem of application is distinguishable from that of an inquiry into any universal principles – principles comparable to the constituents of Alan Gewirth’s ‘rational ethics’. In regard to the former, what is *always* in issue is “argumentative communication on good reasons for alternative proposals for action.”⁴⁰³ Expanding on this point, Peter Ulrich continues, “All practical discourses on normative validity claims occur ‘in given situations’ and are justifying discourses in regard to the moral rights and norms which are valid in this situation.”⁴⁰⁴ His statements are in confirmation of the opinion expressed above, about the centrality of context.

In reference to discourse ethics, it is recalled that a moral point of view consists essentially in the overriding perspective, on which specific actions can be justified morally, and not only prudentially or legally.⁴⁰⁵ *Therefore, presupposing a human capacity for moral action (or the moral life), it would seem that the real moral issue in economic ethics is with economics, and not ethics.* Peter Ulrich seemingly in confirmation, states that the matter with ‘applied ethics’ in form of “merely corrective economic ethics,” consists in “the abandonment of reflection in the face of the given

⁴⁰⁰ Alan Gewirth, n. 394, p.284.

⁴⁰¹ Alan Gewirth, n. 394, p. 287.

⁴⁰² Cf. Alasdair MacIntyre, n. 371: that applied ethics is based on a mistake that is “harmfully influential”.

⁴⁰³ See Peter Ulrich, n. 370, p. 83.

⁴⁰⁴ Peter Ulrich, n. 370, p. 84.

⁴⁰⁵ See, Peter Ulrich, n. 370, p.85.

‘conditions of the market economy’ and the economic understanding of rationality as such”.⁴⁰⁶ And the absence of critical reflection for whatever reasons amounts to a tacit acquiescence in the *status quo*, in the given conditions, and in the powerful social interests served by them.⁴⁰⁷ To us, it should be unacceptable, not least, for being averse to our avowed socio-legal and institutional perspective, which is critical of any ‘power paradigms’ as such, and is primed to question existing orthodoxies of any sort – ethical, legal or social.

4.6 Economic Rationality

Rationality is of normative significance, because “rationality is an orientational concept whose practical purpose is, in the final analysis, to tell us how we ought rationally to behave”.⁴⁰⁸ The problem we are dealing with is, in summary, not of economic production, i.e. of the technical production of goods and services.

The issue or question of economic rationality may perhaps be brought nearer home, when it is considered, if the reports are to be believed, that tonnes of perfectly edible food are thrown away in the UK by supermarkets. In the UK at the same time, again, if the reports are credible, unacceptably high numbers of individuals go hungry, and are only saved from starvation by charitable donations. This raises the question of how and why food retailers feel compelled and justified to throw away edible food under these circumstances. Other similar examples of *rational* economic policies in action could easily be found. The answer can be guessed, that is, it is a *dictat* of economic rationality; which, to heed Schumacher’s advice, needs to be “understood and transcended”.

Economic rationality, however it may be characterised, is a manifestation of the power of belief. Power of all sorts, more especially of belief, is the key to social dynamics.⁴⁰⁹ The exercise of economic power, as it is to be expected, is influenced and directed by the holders of economic power. But the public has to go along, which means that the power holders themselves or others in their behest, neither neglect, nor can afford to neglect to persuade everyone else that the existing policies and practices are ‘in the public interest’. That is where belief or the power of belief

⁴⁰⁶ Peter Ulrich, n. 370, p. 87

⁴⁰⁷ Ibid.

⁴⁰⁸ Peter Ulrich, n. 370, p.161.

⁴⁰⁹ Bertrand Russell, *Power* (Unwin Books, London 1960).

propagated by the dominant economic orthodoxy comes in.⁴¹⁰ Describing the nature of the power over belief, Russell contends that it, arguably, “is omnipotent, and that all other forms of power are derived from it.”⁴¹¹ Belief is described as consisting of three elements. “Belief, when it is not simply traditional, is a product of several factors: desire, evidence, and iteration...” And to create a common belief, that is, the sort that is “socially important”, the three elements have to some degree to be present.⁴¹² The much-vaulted ‘American dream’, is to be sure, a clear example of such a belief.

To transcend economic rationality, it would be necessary to observe the familiar distinction between rationality and reasonableness. A rational behaviour is not necessarily a reasonable behaviour. The differentiation can be equated to that between a prudential justification and a moral justification of action. The latter is definitely superior from the point of view of a political morality. Justifying an action or establishing the proper basis or ground of action is making clear what the principle of ‘right’ action in the situation is. In the context of the corporate governance, for instance, a distinction between rationality and reasonableness can be drawn in regard to the exercise of fiduciary duties, as Steve Lydenberg shows.⁴¹³

Horst Steinmann has also tackled the distinction between reason and rationality in the context of corporate action. His differentiations are couched however in terminologies slightly different to ‘reason’ vis-a-vis ‘rationality’. He draws a distinction between two broadly divergent conceptions of rationality, namely, the “*technical*” and the “*normative*”,⁴¹⁴ with technical rationality revolving around the relationship between means and ends, and the normative connoting justice. A normative rationality, accordingly, has concern for equal and fair treatment of all those affected by the proposed action. According to Steinmann, the two correspond

⁴¹⁰ Cf. J.K. Galbraith, *Economics and the Public Purpose*, n. 327, pp. 239-250, writing about the power of belief, and the need for “emancipation of belief” as condition precedent to the reform of the economic system.

⁴¹¹ Bertrand Russell, n. 409, p. 93.

⁴¹² Bertrand Russell, n. 409, p. 96.

⁴¹³ Steve Lydenberg, ‘Reason, Rationality, and Fiduciary Duty’ (2014) *Journal of Business Ethics* 119, 365.

⁴¹⁴ Horst Steinmann, ‘The Enterprise as a Political System’ in Günther Teubner and Klaus J. Hopt (eds.), *Corporate Governance and Directors Liability: Legal, Economic and Sociological Analysis of Corporate Social Responsibility* (De Gruyter, Berlin. New York 1985) 402.

to a familiar division between a “descriptive” rationality, and a “prescriptive” rationality.⁴¹⁵ He refers to an “idea of a transsubjective *dialogue*” with its qualifying conditions (comparable to the aspects of ‘understanding orientated attitude’ of discourse ethics) as the point of departure, in order to make possible the differentiation of “*rational* actions... from pure *factual* actions which have not (yet) been tested for rationality.”⁴¹⁶ Rationality is tested *communicatively*.⁴¹⁷ The foregoing confirms the important distinction between reasonableness and rationality – in their guidance of actions.

4.7 Socio-Economic Rationality

The task of integrative economics ethics, according to Ulrich, is to develop an alternative to a ‘pure’ economic rationality. E. F. Schumacher has branded the judgment of this rationality as “*fragmentary*”, in that it only asks, “whether a thing yields a money profit *to those who undertake it* or not”.⁴¹⁸ Integrative economic ethics aims to supplant the fragmentary judgment of economic rationality with a more comprehensive view of rationality in economic action. Economic rationality is *normative*, as is every form of rationality. In transcending ‘pure’ economic rationality, Ulrich suggests, firstly, a “critical reflection” on it, that is, on the foundations of its normativity.⁴¹⁹ Secondly, the alternative rationality, i.e. one founded on a more comprehensive view of economic action, is clarified. This alternative is called “socio-economic rationality”, taking its cue from the fact that economic action is social. An economic action thus requires a justification that befits an action that is social in character, both in terms of its structure and impacts. Recourse is had to discourse ethics in chapter 2 for the justification of moral judgements, and it is the case in this instance. Thirdly, the site of morality for socio-economic rationality is determined.⁴²⁰

⁴¹⁵ Horst Steinmann, n. 414, p. 403.

⁴¹⁶ Ibid.

⁴¹⁷ Horst Steinmann, n. 414, pp. 404-5.

⁴¹⁸ E.F. Schumacher, *Small is Beautiful: A Study of Economics As If People Mattered*, ABACUS edition, (Sphere Books Ltd, London 1974) 35.

⁴¹⁹ Peter Ulrich, n. 370, p. 101.

⁴²⁰ Peter Ulrich, n. 370, p. 101.

A critique of economic rationality finds that its normativity is not justified, that is to say, that it is not in consonance with a “rational ethics of economic activity”.⁴²¹ As no activity takes place in a moral vacuum, a rational ethics for economic action is proposed and clarified. This consist in “...a transformation of the foundations of an economic conception of rationality from utilitarian to communicative ethics”.⁴²² But perhaps it is the recognition of the “indispensable primacy of ethics... over economics...” that is the more remarkable feat in integrative economic ethics.⁴²³ Ethical *rationality* (its normative logic) enjoins “the *unconditional* reciprocal recognition of human beings”. (Most people would agree with this normativity, for it is, unquestionably, the basis of popular democracy and human rights law). On the other hand, economic rationality (its normative logic) is predicated on “...the *conditional* cooperation of individuals acting in their own interests...”⁴²⁴

It may be useful to underline the merit and cogency of the requirement of mutual recognition, by drawing attention to its application in an, albeit different, but related context of property ownership. It is, according to Avihay Dorfman⁴²⁵, the ultimate underlying justifying ground for private ownership. It is for the sake of respect or regard for the other that the duty not to trespass obtains to protect private ownership. The contention is that ownership *as such* is intrinsically valuable, for its ‘production’ and securement of ‘society’, whose members have to mutually respect each other. It follows that the “formal core” of property, even with the exclusionary feature of the trespassory duty is underlain by *sociality*.

Socio-economic rationality is, then, a broadening of the conception of economic rationality, “so that it possesses ethical content already itself and can therefore serve as an *integrative* regulative idea of rational economic activity...”⁴²⁶ The awareness of the much wider scope for human motivations for actions; the relationship of human

⁴²¹ Peter Ulrich, n. 370, p. 102.

⁴²² Peter Ulrich, n. 370, fn. 89, p.105.

⁴²³ “The primacy of ethics is the central feature of a comprehensive perspective of rational economic activity and rational action per se.”

⁴²⁴ Peter Ulrich, n. 370, p. 105.

⁴²⁵ Avihay Dorfman, ‘The Normativity of the Private Ownership Form’ (2012) 75 (6) MLR 981.

⁴²⁶ Peter Ulrich, n. 370, p. 105.

beings to the environment⁴²⁷; that self-interest does not mean selfishness or egoism, etc. all belong to the broadening of the conception of economic rationality.⁴²⁸

An economic action is rational ethically where it satisfies the “unconditional basic moral requirement, which claims validity as the normative condition of all rational action”.⁴²⁹ The basic moral requirement is the requirement to have regard to the possible consequences of one’s actions in the pursuit of own interests. This other-regarding attitude corresponds to the imperative of justification of one’s “plans of action”, which when successful (that is the justification), then, confers legitimacy, or validates the attendant action or claim.⁴³⁰

The integration of ethics and economics can then lead to the understanding and treatment of the “*divergent*” problems of the socio-economy, such as, for example, the limitation of resources, informed by efficiency considerations, and “an ethically rational” understanding and resolution of inevitable “social conflicts”, via the legitimacy considerations.⁴³¹ Thus, regard had to the primacy of ethics, the protection “of the moral rights of all concerned has priority over private interests of economic agents in the employment of their resources in a way that is most efficient for them”.⁴³²

Considerations relating to the third task of integrative economics ethics involve the determination of the sites of morality. Sites of morality can be located at multifarious institutions, including within the corporate enterprise⁴³³, and within the background institutions. The public is however ultimately the site of morality in a democratic polity, as has been indicated in the discussion of the public interest.

4.8 Towards the Ethics of the Corporation

⁴²⁷ See, E.F. Schumacher, n. 415, 38-43. Schumacher used the term ‘meta-economics’ to refer to the subject matter of socio-economics.

⁴²⁸ Cf. Sen, *On Economics and Ethics* (Basil Blackwell, Inc., Cambridge, Massachusetts 1987) chapter 3.

⁴²⁹ Peter Ulrich, n. 370, 106.

⁴³⁰ Cf. Peter Ulrich, n. 370, p. 70: “the private pursuit of individual or special interests is subjected to the self-imposed normative condition of their legitimacy.”

⁴³¹ Peter Ulrich, n. 370, p.106.

⁴³² *Ibid.*

⁴³³ See chapter 5 for the office of directorship in this regard.

The economist Kenneth Boulding described business as “an aspect of all organizations and all human life”.⁴³⁴ “Getting down to business”, he says, furthermore, “involves profit making, revaluing things above cost, whether as accounting profit or psychological or even spiritual profit”.⁴³⁵ The corporation is in business to make profit; that is what in the final analysis the ethics of the corporation should consist in. Thus, a discussion about corporate ethics is a discussion about *moral* profit making by corporations,⁴³⁶ as opposed to the denial or sacrifice of profit.

It is *not* impossible to act morally in business and, so, corporations can generate moral profits. Even Joseph Heath whilst insisting on a separation between ordinary morality and business ethics, argues powerfully for considerable ethical restraints on the opportunities for profit making by firms.⁴³⁷ In fact morality is intrinsic to economic or business transactions.⁴³⁸

Corporate ethical restraint can be predicated on the belief that a restriction of profit seeking motivated by moral awareness in particular circumstances, is hardly ever a cause for demise from the market.⁴³⁹ This belief is supported by the recognition that the entrepreneurial opportunities for profit exist under the market condition of uncertainties, inequalities and *imperfect competition*.⁴⁴⁰ An opportunity given up in some place may lead to better opportunities to be exploited elsewhere.

In ‘moral profit-making’ the imperative of critical reflection is extended to profit as such, as opposed to reflection only on the means of making profits. This means that profit-making does not serve as a ‘formal goal’ of the enterprise, i.e. a neutral, value-free objective, which, therefore, needs neither compete against, nor co-operate with other values. These other values, such as, environmental protection, the sustenance of local communities, etc. in some cases may have a higher validity

⁴³⁴ Kenneth Boulding, ‘Business in the Ecosystem of Power’ in Brenda Sutton (ed.), *The Legitimate Corporation: Essential Readings in Business Ethics & Corporate Governance* (Blackwell Publishers, Cambridge, Massachusetts 1993) 183,193.

⁴³⁵ Kenneth Boulding, n. 434, p. 194.

⁴³⁶ See Peter Ulrich, n. 370, pp.379-398, for analysis of five different interpretations of corporate profit orientation.

⁴³⁷ See, Joseph Heath, *Morality, Competition, and the Firm* (OUP, Oxford 2014) in particular, chapters 1 and 7.

⁴³⁸ See, for example, Wolfgang Fikentscher n. 342.

⁴³⁹ Peter Ulrich, n. 370, pp.391-392.

⁴⁴⁰ See Wolfgang Fikentscher, n. 342.

claim, are more legitimate in the circumstances. That is to say, that may be always other more important interests and rights at stake.⁴⁴¹ This view agrees with the emphatic rejection of *profit* maximization, as already alluded to, and, indeed, the very idea and language of ‘maximization’ of any value whatsoever. No value can be maximized if it is in co-operation and competition with one or more others.

On the contrary, economism, however, accords economic action a normative logic that is ‘freed’ from ethically-critical evaluation. It results in all the other interests affected by the economic agent’s action to be subordinated to those of the *singular* economic agent. Thus, “corporate political economism” fosters a division of moral labour. It is submitted that the ‘separatist thesis’ is neither facilitative of political ethics, business ethics nor individualist ethics. An integrative economic ethics, on the other hand, is geared towards the “de-differentiation” of the economic system, enabling the political system to better regulate capitalism.

The advocates of a market failures/corrective business ethics approach are not accused of unreflective faith in the orderly functioning of the ‘free’ market. They maintain though, that, it is *only* where and when market failures occur that ethics should avail, and, hence, a “stopgap conception of corporate ethics”.⁴⁴² This position would unwittingly allow the persistence of unjust economic situations or relationships. However, it is not be the *business* of ethics to turn a blind eye to injustice.⁴⁴³ The talk of ethics in business should be about the best principles and practices relevant to the conduct of business and in the proper context.⁴⁴⁴ Joseph Heath’s “ambition” in contradistinction is, as he says, “... to find a more precise way of articulating the way that normative principles can be weakened, in order to render them more incentive-compatible, without being dissolved entirely”.⁴⁴⁵ Merely typifying the economic outlook of ‘incentive-compatibility’, such an altitude is scarcely worthy of the name ‘moral’.

⁴⁴¹ See Peter Ulrich, n. 370.

⁴⁴² Ibid.

⁴⁴³ See, Norman C. Gillespie, ‘The Business of Ethics’ in Thomas Donaldson, Patricia H. Werhane and Margaret Cording (eds.), *Ethical Issues in Business: A Philosophical Approach 7th Edn.* (Pearson Education, Inc., New Jersey 2002) 115: he considers the application of ordinary moral principles in a competitive business environment to even real situations of non-compliance with the *expected* ethical norms by a majority of the actors.

⁴⁴⁴ Norman C. Gillespie, n. 443, p. 113.

⁴⁴⁵ Joseph Heath, n. 437, p. 204.

4.9 Integrative Corporate Ethics

There are different levels of accountability/responsibility, as there are various levels of decision making, the corporation being hierarchically organised. In economic ethics, the starting point is the understanding that the pursuit of profit by corporations must satisfy ethical standards, especially the requirement of accountability.⁴⁴⁶ Profit ought moreover to signal value creation in society.⁴⁴⁷ A corporation 'acting ethically in making a profit', reflects on choice of goals and the means for their attainment – as it is always required by a percept of ordinary morality.⁴⁴⁸ The board of directors is constituted at the apex of the corporation for the purpose in the main of leading on critical reflection about *value* creation.

Two sites are identifiable for realization of sound business policies; firstly, in the creation of value. Value creation is for society and in a simple term means finding a solution to a (social) problem. The commitment to a social value creation translates into business integrity or morality. Secondly, it is at the level of what we have already in the introduction, and subsequently also, referred to as *Ordnungsverantwortung* ("institutional co-responsibility").⁴⁴⁹ This is obviously a very important conception of moral responsibility, which is far superior to any temptation to succumb to ethical cynicism or conventionalism.

The importance is underlined, because it weakens further the case for a 'division of moral labour'. Norman Gillespie has shown that ordinary moral rules apply, in virtue of 'institutional co-responsibility', to "organized irresponsibility", that is, a situation in which "...virtually everyone is not doing what ought to be done". Ordinary moral rules apply, because they define the situation as one in which expected norms are not obeyed, as well as, the relevant considerations for determining an actor's responsibility in the circumstances.⁴⁵⁰ The grounds for *ordnungsverantwortung* are

⁴⁴⁶ Peter Ulrich, n. 370, p. 408.

⁴⁴⁷ See, for example, Nick Hanauer & Eric Beinhocker, 'Capitalism Redefined: What Prosperity is, Where growth comes from, Why Markets Work - And How We Resolve the Tension Between a Prosperous World and a Moral One' (Winter 2014) DEMOCRACY JOURNAL .ORG <www.democracyjournal.org/magazine/31/capitalism-redefined/> 30-39.

⁴⁴⁸ 'On reflection' see, chapter 5, pp. 106, et seq. where it is requisite to the determination of the 'corporate interest'.

⁴⁴⁹ See, Peter Ulrich, n. 370, pp. 414-418.

⁴⁵⁰ Norman C. Gillespie, n. 443, p.115.

not peculiar to business ethics: for instance, they should be compelling equally, also, say, in sports, international relations, in global governance and administration, etc.

An existing framework may encourage and reward the good behaviours of market participants with cost advantages, and likewise punish misbehaviours with cost disadvantages. Public outcry and calls sometimes for the boycotting of certain firms, for aggressive tax-avoidance arrangements, for example, are a clear example of the exposure of corporations to public censure and financial disincentive (a de-legitimization) for what are perceived as unethical, as opposed to illegal practices.

4.10 'Ethical Programmes for Corporations'

Individuals at each level of the corporate organization may face all sorts of temptations. One might be tempted, for example, to choose either to continue to further personal advantages by being uncritically compliant and loyal on the one hand, or to risk suffering some disadvantages by otherwise acting with moral integrity and courage on the other. However, to fight against opportunistic behaviour, which is one source of unethical actions in/and by corporations, the corporate organizational structures must be equipped for the purpose. In what follows we shall examine a sample of an ethics programme for a corporation.

(a) Our remarks on culture have highlighted the necessity for a convergence between "individualistic ethics" and "institutional ethics".⁴⁵¹ It is the task of corporate management to ensure that all the governance and management systems internalize good ethical standards and practice. These should be incorporated into principles of action, guidelines, protocols, performance measures, and incentive and remuneration policies.⁴⁵² Peter Ulrich has suggested a substitution for or, at least, a supplementary account to the conventional "profit accounts ... by a value creation

⁴⁵¹ See above p. 100 on the classification of 'moral acts', which in economic ethics, as well as in other contexts, must embody individual moral dispositions, linked to the institutional frameworks of the actions. Attention has also been drawn to the need for institutional frameworks in our discussion on discourse ethics in chapter 3.

⁴⁵² Cf. Peter Ulrich, n. 370, p. 437. For the ethical questions of the distribution of corporate profits, see John N. Reynolds, *Sharing Profits: The Ethics of Remuneration, Tax and Shareholder Returns* (Pelgrave Macmillan: London, 2015). I do take issues though with his clear prioritisation of returns to shareholders.

account which is at least formally neutral in regard to the distribution of the achieved value creation among all stakeholders”.⁴⁵³

A fitting value creation account would go a long way in driving a corporation to meeting its moral responsibility.

(b) The adoption of codes of ethics of conduct: It is now commonplace in many organizations, medium-sized or large. The codes should contain detailed guidelines on specific areas of the activities of the corporation, aimed at helping employees and managers to act to avoid moral pitfalls. Procurement, employment practices, disciplinary processes, etc. are such matters that require careful treatment. But, above all, the purpose of the corporation, that is, its business must be clearly stated in a mission statement.

(c) Codes of ethics of conduct and mission statement are however not enough. It is in the putting into practice of guidelines, principles, standards and vision that ‘corporate ethics talk’ is transformed into good corporate culture. For elaboration, we can in reference to Peter Ulrich speak of two cultures – a culture of “*argumentative integrity*”, and a culture of “*business integrity*”.⁴⁵⁴ It is recalled that culture is interactive and develops over time. Moreover, a corporate culture should be ingrained in the self-understanding of the members of a corporation (“organizational citizens” – to borrow from Peter Ulrich) (the citizens) and in their interactions. The moral actions of organizational citizens depend on one hand on personal moral dispositions and, on the other, on “corporate cultural preconditions”. That is to say, that the citizens would initially have grown ethically-aware, gained insight into the moral aspects of their daily activities and, then, also feel able to draw moral strength from their enabling working environments.

A culture of “*argumentative integrity*” relates to the quality of interpersonal relationships and interactions in which moral learning can occur. Doubtful questions and dilemmas are cleared through critical reflection and arguments, in which the citizens participate as fully as reasonably feasible. This culture to be effective in

⁴⁵³ Peter Ulrich, n. 370, p. 438. See, ‘Value Creation: Background Paper for Integrated Reporting’, (July, 2013) International Integrated Reporting Council, for the explanation of relevant concepts. Available at <www.integratedreporting.org/wp-content/uploads/2013/08/Background-Paper-Value-Creation.pdf>.

⁴⁵⁴ This section is indebted to his development of the theme of ethical programme for corporations (pp. 438-442).

promoting responsibility must not be imposed from above. Being the outcome of open and free communications amongst the citizens, it makes clear the purpose or the value of the corporation's activities and relationships. It is from these that *business integrity* derives. *Argumentative integrity* distinguishes corporate ethics programmes from mere "compliance programmes", which are one-directional in imposing values from above and, in consequence, tend to negate the moral autonomy of the citizens, who are otherwise subjected to some dictatorial regime.⁴⁵⁵ The key to ethical conduct by corporations, to emphasize, lies in genuine discussion with partners, and in consideration of all relevant interests.

The role of public opinion in the ethics of the corporation must be self-evident. Corporations should ensure that their public relations are not one-dimensional. The efforts to influence public perception should be complemented by an ability and readiness to make amends when things go wrong, and to learn the relevant ethical lessons.

4.11 Conclusion

This chapter has focused on arguing for the possibility of an ethical economy, and by extension, of an ethical or moral corporation. The most important point in this regard is the observation that morality is not something imposed from outside. A sense of the moral must be intrinsic to the relevant activity, or a way of being. A moral corporation is self-regulating in the above sense. Law is necessary primarily as a means to "the regulation of self-regulation". At the same time, the 'rule of law' means that the law should be complied with, and that it is the essential backstop. Because of the 'rule of the law', 'corporate citizens' should be well-advised to be keenly involved in the business of law-making and reform.

To be a moral actor requires vigilance. It is above all to continually be aware of oneself and of one's environment, and to act authentically. A corporation has the capacity to be a moral actor.

⁴⁵⁵ Peter Ulrich, n. 370, p. 440.

Chapter 5

‘JUSTIFYING’ THE OBJECTIVE OF THE CORPORATION: FROM THE CORPORATE INTEREST TO THE PUBLIC INTEREST OF THE CORPORATION

5.1 Introduction

We set out to demonstrate that the public interest is the veritable purpose of the corporation. In other words, the corporation is meant to serve the public interest as its end-goal. Note that the interpretation of the public interest is interchangeable with corporate social responsibility (csr) *as such*. Recall that the question as to whose interest(s) the public corporation is to serve is the principal question of corporate governance.

In this last chapter, our aim is to connect the corporate interest to the public interest. To do that, we shall proceed by asking the following questions: first, what is the corporate interest? Second, who defines it, and by what authority? Thirdly, how is the corporate interest steered towards the public interest? Finally, corporate social responsibility is conceived as the objective of corporate governance.

5.2 The Exploration of the ‘Corporate Interest’ Term: Preliminaries

The significance of the question of the corporate interest is that the ‘corporate interest’, if clarified, provides a solution to the elusive question of the objective of the corporation. Both questions are therefore correlated. The corporate interest/objective is significant; because it is in relation to it that any judgment about the responsibility or accountability of directors is made. Directors and managers are consequently obligated to promote the corporate interest. The directors owe their fiduciary duties under the common law to the corporation,⁴⁵⁶ duties that are discharged in the service of the corporate interest. (‘Corporate interest’ and ‘corporate objective’ can, therefore, be used interchangeably, except where the context otherwise requires). A proper conception of the corporate interest should guide good corporate governance, and vice versa. For a system of corporate governance exists to ensure that those entrusted with the management of the

⁴⁵⁶ A position continuing under the statutory provision for directors’ duties in the UK Companies Act, 2006, section 170.

corporation are carrying out the corporation's proper objectives.⁴⁵⁷ The point ancillary to the foregoing can be made, namely, that the mechanisms of governance and any efforts aimed at reforming them will be ineffective until the initial question of the objective(s) of the corporation is adequately addressed.⁴⁵⁸

'In the corporate interest' or 'in the best interests of the corporation or 'to the benefit of the company' is of frequent application to the corporate enterprise. This usage of the 'interest formula', is parallel to 'in the public interest' in political theory and administration. The public interest, it was contended in chapter 2, is the goal of politics. "A politics of the public interest [in the sense of the continual search for the defining principles of the common good] has always been central to the company as an institution."⁴⁵⁹ Different conceptions of the public interest, that is to say, the view as to how it may best be attained, give rise correspondingly to different conceptions of the corporation. The authors suggest that the company considered as a "private association" requires regulatory interventions on behalf of the public interest; seen on the other hand "as a public body... has clearly defined public responsibilities and purposes".⁴⁶⁰ Our aim has been the integration of the two perspectives on the corporation.

The debate about the question of: 'in whose interests' the corporation is to be operated is a long-standing and enduring one.⁴⁶¹ Directors are, according to one view, required under the UK law to prioritise the interests of shareholders⁴⁶²; and so there is no formal recognition of "a multiple interest model of corporate purpose".⁴⁶³ A counterposing view has been put, and rather strongly by Professor John Kay in a recent report: "If some directors think that their duty can be reduced to an obligation

⁴⁵⁷ See, John Parkinson, 'Law and Stakeholder Governance' in Gavin Kelly et al. (eds.), *Stakeholder Capitalism* (Macmillan Press Ltd, London 1997) 142.

⁴⁵⁸ See *ibid.*

⁴⁵⁹ Andrew Gamble and Gavin Kelly, 'The Politics of the Company' in Andrew Gamble et al. (eds.), *The Political Economy of the Company* (Hart Publishing, Oxford 2000) 26.

⁴⁶⁰ Andrew Gamble and Gavin Kelly, n. 459, p. 27.

⁴⁶¹ See, Janet Dine and Sheldon Leader, 'chapter 8 United Kingdom', in Arthur R. Pinto and Gustavo Visentini (eds.), *The Legal Basis of Corporate Governance in Publicly Held Corporations: A Comparative Approach vol.1 Studies in Comparative Corporate and Financial Law* (Kluwer Law International Ltd, London 1998) 248.

⁴⁶² See, Companies Act 2006, section 172.

⁴⁶³ See Len Sealy and Sarah Worthington, *Sealy's Cases and Materials in Company Law* (9th Edition (Oxford University Press, Oxford 2010) 302, for confirmation of the rejection of a pluralist interest model of the company under the Companies Act 2006.

to achieve the highest possible share price in the short-term, then the problem arises because they misunderstand British law, not because the law is itself in need of revision”.⁴⁶⁴ Shareholders are obviously right to be concerned with the price of shares at the market, which is equatable to their interest. Professor Kay in the above quotation is only dismissing a suggestion, that a revision of the law relating to the responsibilities of directors is required, in order to put stronger accent on “long-term factors”.

Professor Kay is equally clear in his answer to the question about the rightful beneficiaries’ of directorial responsibility. His position is stated under Principles No. 4:-

“...Directors are stewards of the assets and operations of their business; The duties of company directors are to the company, not its share price, and companies should aim to develop relationships with investors, rather than with ‘the market’”⁴⁶⁵

Professor Kay is not alone, in speaking up for the ideal of British law, even against an explicit provision that is more likely than not interpretable as favouring the prioritisation of shareholder interests.⁴⁶⁶ The Chief Economist of the Bank of England, Mr Andrew Haldane during a television interview in summer of 2015 has spoken out against the prioritisation of shareholders’ interests. Mr Liam Byrne MP, a Treasury Minister in the last Labour Government in the UK, gave a major speech to Policy Network, in which he conceded, citing Mr Andrew Haldane, that the provision in section 172 of the Companies Act 2006, a legislation that was enacted by the Labour Government was a mistake.⁴⁶⁷

It is arguable therefore that the law as it currently stands, does not give a full account of the corporate interest, to which definition we now turn.

⁴⁶⁴ The Kay Review, ‘UK Equity Markets and Long-Term Decision Making’ (Final Report, July 2012) Principle No. 4, at p.12.

⁴⁶⁵ Ibid.

⁴⁶⁶ I.e. s. 172 (1) of the Companies Act 2006.

⁴⁶⁷ Liam Byrne, ‘Reclaiming idealism: Entrepreneurial socialism and the case for a new clause IV’ (3 November 2015) <www.policy-network.net>.

5.2.1 The Conception of the 'Corporate Interest'

The reading of the authorities, according to Paul Davies, is to the effect that the directors “are not expected to act on the basis of what is for the economic advantage of the corporate entity, disregarding the interests of the members”.⁴⁶⁸ The author is interpreting “in the interests of company” in a discussion about the generic duties of directors. However, the existence of a clear authority for the view advanced may be doubted.⁴⁶⁹ Paul Davies cites with approval the statement of Evershed M.R. in *Greenhalgh v. Arderne Cinemas*⁴⁷⁰, which was made in relation to voting by members in general meetings, and is as follows: “the phrase ‘the company as a whole’ does not (at any rate in such a case as the present) mean the company as a commercial entity as distinct from the incorporators”. Direct reference was made in the text to “the separate personality of the company”, which in Davies’ analysis, as it turned out, seems inconsequential.

The free choice of action by directors to recommend a payment of dividend, as opposed to retaining surplus revenue in the corporation was stressed. The point was to insist on a dichotomy between “the economic advantage of the corporate entity” and “the interests of the members”.⁴⁷¹ However, the directors/managers can only engage in considerations of facts as they present themselves; decide freely on them - which are the tasks of managing the business for “sustainable performance”. The test of the ‘corporate interest’ must always be a matter of exercising judgment about which course of action to take amongst different alternatives. To the extent that this example relates to the question of the corporate interest or the objective of the corporation, it fails to recognize that any benefit any stakeholder (shareholder, employee or manager, etc.) derives from the corporate enterprise, is dependent on the prosperity of the corporation.

Furthermore, the development of the law giving creditors more protection was considered, with the author suggesting that the duties of directors “should be seen as being owed to those who have the ultimate financial interest in the company”⁴⁷².

⁴⁶⁸ Paul Davies, *Gower’s Principles of Modern Company Law* (Sweet & Maxwell, London 1997) 602.

⁴⁶⁹ See Robert Flannigan, ‘Shareholder Fiduciary Accountability’ (2014) JBL 1.

⁴⁷⁰ (1951) Ch. 286, 291.

⁴⁷¹ Paul Davies, n. 468, p. 602.

⁴⁷² Paul Davies, n. 468, p. 603.

There is thus far no basis for identifying the corporate interest with the interests of the shareholders. The reason why the creditors are considered the ultimate beneficiaries of corporate fiduciary responsibility is because the financial interest of creditors supervenes the corporate interest as such. Creditors are not members of the corporation

Sheldon Leader and Janet Dine⁴⁷³ approached the question of ‘whose interests it is the duty of the company to serve’, by introducing the idea of a ‘notional circle of personal interests around the corporate interest’. They start by casting as a false choice the distinction between shareholders and other corporate constituents in the debate about the corporation’s interest.⁴⁷⁴ According to the authors, “the difference between interests which are properly dominant on the corporate agenda and those which are secondary is not a difference as connected to *people*, but arises out of the quality of those interests”.⁴⁷⁵ What I understand the distinction to mean in the light of a statement that immediately follows is, that ‘human interests’ in the corporate enterprise are of two main types, the dominant and the secondary, which correspond respectively to derivative and personal interests. “We can already see in corporate law that human interests and corporate performance are linked in two ways: derivatively and personally”.⁴⁷⁶ The categories of derivative and personal interests are tied respectively to derivative and personal courses of actions as obtain in corporate law and practice.

Responding to the crucial question of ‘in whose interests’ the corporation is to be operated, Sheldon and Dine opine that the corporation exist for the satisfaction of the shareholders’ derivative, but not personal interests. “As a side-constraint, it must also not *abuse* (without due compensation) those personal interests, but that is not its very reason for existence”.⁴⁷⁷ The challenge of disentangling derivative interests from personal interests is not minimized by the further contention that the “mix of interests characteristic of shareholders” applies to other corporate constituents, e.g., the employees and creditors. There is recognition of the fact that the company’s

⁴⁷³ Janet Dine and Sheldon Leader, n. 461, p. 249; see also Sheldon Leader, ‘Participation and Property Rights’ (September 1999) 21 (2/3) Journal of Business Ethics 97.

⁴⁷⁴ Janet Dine and Sheldon Leader, n. 461, p. 248.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Janet Dine and Sheldon Leader, n. 461, p. 248

success depends on the satisfaction of a wide spectrum of ‘interest holders’.⁴⁷⁸ The authors endorse unequivocally a pluralist model of the company as a matter of law, contending that the ‘corporate commitment cannot be limited to shareholders’.

Andrew Keay dissatisfied with the dominant shareholder and stakeholder models of the corporate-objective question develops the entity maximization and sustainability model of the public company (EMS). He states that the uncertainty surrounding the question of the company’s “actual objective” stems from the lack of its clear articulation by company law.⁴⁷⁹ Reference is made to the absence historically of legislative and judicial direction in the question of the corporate objective.⁴⁸⁰ He reviewed the shareholder model and the stakeholder model of the corporation. In spite of its shortcomings, the stakeholder theory in his estimation is justified for underlining the necessity for all corporate participants to win “continuously over time”. It needs to be a win-win situation because other than the shareholders others invest capital in the corporation.⁴⁸¹ The observation is made rightly, in my view, that “at some level, stakeholder interests have to be joint – they must be travelling in the same direction – or else there will be exit, and a new collaboration formed”.⁴⁸²

It is our view that ‘the corporate interest’ is the ideation of a successful combination of interests. That is its logical function. Andrew Keay surmises as well that the attraction of the stakeholder model for many of its adherents lies in the emphasis put on moral values in “the strategic management process”.⁴⁸³

His model resting on two prongs: maximization of the entity, contrasted to *profit* maximization and sustainability of the operations, has the critical virtue of treating the company as “an institution in its own right”.⁴⁸⁴ He refers to derivative action as being “consistent with the acceptance of the entity theory and, even, entity maximization”.⁴⁸⁵

⁴⁷⁸ Janet Dine and Sheldon Leader, n. 461, p. 249.

⁴⁷⁹ Andrew Keay, ‘Ascertaining The Corporate Objective: An Entity Maximization and Sustainability Model’ (2008) 71 *Modern Law Review* 663. Available at <<http://ssrn.com/abstract=1889236>>1.

⁴⁸⁰ Andrew Keay, n. 479, p. 4.

⁴⁸¹ Andrew Keay, n. 479, p. 22.

⁴⁸² Andrew Keay, n. 479, fn. 91, p.16

⁴⁸³ Andrew Keay, n. 479, p.16.

⁴⁸⁴ Andrew Keay, n. 479, pp. 22-23.

⁴⁸⁵ Andrew Keay, n. 479, p. 27.

A “community of interest”, which Keay refers to, and explains as “the common interest of all who have invested in the company”⁴⁸⁶, overlaps with my view of the corporate interest. The important point is that a commonality of interests does not mean a parity of interests, or that no one group or person at any point in time should gain more than another, or have some advantage at the expense of another.⁴⁸⁷ ‘Community’ is instructive. It evokes the sense of a continual process of explicit and implicit negotiations over interests-conflicts, and of a mutuality of dependence of the ‘members’ of the corporation. The process of negotiated solutions to conflicts and its acceptance creates the viability and stability of any community.⁴⁸⁸

The entity maximization and sustainability model argues for the shifting of focus from the investors and their interests to “the entity and what will enhance its position. Any benefits for investors flow from that very object”.⁴⁸⁹ Regarding the question of balancing of interests, Keay states that the balancing required is not of interests; it is instead of “courses of actions...”⁴⁹⁰ On this interpretation, the duty to the corporation is translatable into acting in *good faith* in the exercise of judgement about alternative courses of actions or decisions to take, having regard to all relevant circumstances. Having definable procedures to be followed should increase the quality of the decisions made, which would incline them more towards the objective of the EMS model.

The entity maximization and sustainability model is justified on “fairness and efficiency” grounds.⁴⁹¹ It is only fair that the *legitimate* reasonable expectations of the investors in the corporate enterprise are met to the extent possible. However,

⁴⁸⁶ Andrew Keay, n. 479, p. 30.

⁴⁸⁷ Ibid.

⁴⁸⁸ See Roger Cotterrell, ‘Community as a Legal Concept? Some Uses of a Law-and-Community Approach in Legal Theory’ in Roger Cotterrell (ed), *Living Law: Studies in Legal and Social Theory* (Ashgate, Farnham 2008) 17; (Dec. 13, 2011) Queen Mary School of Law Legal Studies Research Paper No. 95/2011. Available at <<http://ssrn.com/abstract=19716107>>. The author defines a community by reference to the stability of social relations, their duration and the element of trust, and expresses the view that it is the role of the law “to protect community and to express or support conditions for it” (p.7).

⁴⁸⁹ Andrew Keay, n. 479, p. 30.

⁴⁹⁰ Andrew Keay, n. 479. 431, p. 33.

⁴⁹¹ Ibid.

there cannot be a guarantee of satisfaction for all investors all of the time.⁴⁹² The entity maximization and sustainability model puts emphasis on the wealth-creating capacity of the corporation. It is addressed in other words to the institutional *end* or function of the corporation, making it resemble a ‘public interest model of the corporation’. The expressed justifying or legitimacy ground of fairness or justice, is also worthy of note.

Gunther Teubner explicates the concept of ‘the corporate interest’ by a combination of two viewpoints, namely, “... (i) the self-interest of the organization; [and] (ii) the public interest in economic organization.”⁴⁹³ The formulation is akin to Andrew Keay’s, namely, the sustenance of the operations and “long-term wealth creating capacity” of the entity. Teubner’s focus “on the normative meaning of the interest formula” moreover evokes the consequent proceduralization of ‘the public interest’. The concept of ‘interest’ is applied as an imposition of procedural requirements; for grounds need to be stipulated and some consensus reached, in order for one (legitimate) claim to trump another. “The enterprise interest ... cannot be ‘juridified’”, he observes, “through substantive legal rules, but only through procedural preconditions for a reconciliation of conflicts of internal interests”.⁴⁹⁴

The ‘corporate interest’ concept has to address the question of the economic and social function of the corporation, the question that corporate governance cannot ignore completely. The crucial difference is as to the ranking of the various objectives by different models of corporate governance. Broadly speaking these issues, amongst others, must be relevant to any system of corporate governance, that is, the resolution of conflicting private interests or claims on the corporation, agency problems, and the gauging and meeting of public expectations. The corporate interest construct mediates between all relevant interests. The corporation (“enterprise”) according to Teubner, however, “is not only a ‘reference point and coordination centre of interests’...”; above all, it reorganises wider social interests. The notable role of the corporation in the ‘socialization of property’ is germane in this

⁴⁹² Andrew Keay, n. 479, p. 37.

⁴⁹³ Günther Teubner, ‘Company Interest: The Public Interest of the Enterprise ‘in itself’ in Ralf Rogowski and Ton Wilthagen (eds), *Reflexive Labour Law: Studies in Industrial Relation and Employment Regulation* (Kluwer Deventer 1994) 24.

⁴⁹⁴ Günther Teubner, n. 493, p. 26.

connection.⁴⁹⁵ It defines and maintains its “self-interest” as an organisation, in that social values are created through specific contributions to society.⁴⁹⁶ Noteworthy is the fact that by the act of self-definition, starting with Andrew Keay’s idea of sustainability-cum-long-term wealth creation, to Teubner’s proceduralization of ‘interest’, the corporation’s interest is already *identifiable* with the public interest.

Teubner observes at any rate that the very real problem of directing social institutions to be “more sensitive”, and to serve human needs, “is obscured by formulations of its ‘individualist basis’⁴⁹⁷; that is to say, an adherence to ‘methodological individualism’. It is a critique that is comparable to the argument against individualistic ethics as the basis of the ethics of the economy, as contrasted to a conception of social ethics, which is required to underpin an ethical economy.⁴⁹⁸ Interests, be they of artificial persons or natural persons, are only social realities (institutional facts). Therefore, corporations being almost incontrovertibly autonomous entities can be treated as subjects capable of having rights and interests.

How is then the reconstruction/orientation of broader public interests within the corporation possible? The observation in the last sentence of the last but one paragraph above has provided some insight into answering this important question. Teubner addresses it directly with various suggestions, including, to mention only two, “a discursive balancing of interests” and “*corporate social responsibility?*”⁴⁹⁹ (my emphasis).

“[T]he role of the corporate interest as a legal concept is to provide a corrective of corporate action where this is not socially adequate.”⁵⁰⁰ It would seem, then, that the ‘corporate interest’, *as a legal concept*, is parallel to corrective business ethics. We shall, for the rest of this chapter, explore how the *legal* concept of the corporate

⁴⁹⁵ See, for example, Philip Selznick, *Law, Society, and Industrial Justice* (Russel Sage Foundation, Berkeley 1969) 67; David Ciepley, ‘Beyond Public and Private: Toward a Political Theory of the Corporation’ (Feb. 2013) 107 (1) *The American Political Science Review* 139.

⁴⁹⁶ Günther Teubner, n. 493, p. 35.

⁴⁹⁷ Günther Teubner, n. 493, p. 33.

⁴⁹⁸ See chapter 4, section 4.2.

⁴⁹⁹ Günther Teubner, n. 493, p.38.

⁵⁰⁰ Günther Teubner, n. 493, p. 45.

interest, is linked to the goal of the public interest, or to corporate social responsibility. Before that, we shall first examine the role of directors, who, in our view, are empowered to carry out the 'interest-balancing' act in the corporation.

5.3 The Role of Directors

In corporate governance directorship assumes such a central role that it has been analysed as a *model* of the corporation.⁵⁰¹ With the office of directors playing such a central role, a good appreciation of this organ of the corporation should go a long way in answering the fundamental and enduring question of the purpose of the corporation. It would follow that this question cannot be answered independently from locating the control-centre of the corporation, and linking its function to the determination of the beneficiaries of corporate production. *Trusteeship* is a depiction of the relationship between directors and other corporate participants that resonates with our conception of the corporation as a social institution.⁵⁰² The authors envisage a reform of corporate governance to put premium on the normative values on which a trust relationship is based, and hence their innovation respectively of a "trustee model"⁵⁰³ of the corporation and a "trust firm"⁵⁰⁴.

René Reich-Graefé in setting out his "Absolute Director Primacy" model came to the view that the answer to the underlying question: "whose interest(s)" the corporation is to serve, is something "essentially *protolegal*".⁵⁰⁵ It is in essence something undefinable; but, he goes on to enumerate the variable ingredients of the "*protolegal*", including: "Good faith, loyalty (and, implicitly, trust and trustworthiness), and notions of duty... [, etc. which] have become heavily reflected in director

⁵⁰¹ See, for example, Stephen M. Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' UCLA School of Law Research Paper Series No. 02-06; and René Reich-Graefe, 'Deconstructing Corporate Governance: Absolute Director Primacy' (2011) 5 *Brook. J. Corp. Fin. & Com. L.* 341. Western New England University School of Law Legal Research Paper Series No. 11-12. Available at <<http://ssrn.com/abstract=1971298>>. The 'team production model' of corporation is also understood as predicated on the central role of the board of directors as referred to in chapter 2.

⁵⁰² See John Kay, *The Business of Economics* (OUP, Oxford 1996) 114-116 (chapter 13 co-authored with Aubrey Silberston and previously published in (August, 1995) 153 (1) *National Institute of Economic Review* 84; idem, 'The Stakeholder Corporation' in Gavin Kelly et al. (eds.), *Stakeholder Capitalism* (Macmillan Press Ltd, Basingstoke 1997) 125; and Colin Mayer, *Firm Commitment: Why the Corporation is Failing us and How to Restore Trust in it* (OUP, Oxford 2013)144.

⁵⁰³ John Kay, *The Business of Economics*, n. 502; idem, 'The Stakeholder Corporation' in Gavin Kelly et al., n. 502, pp.134-136.

⁵⁰⁴ Colin Mayer, n. 502, pp. 264-269.

⁵⁰⁵ René Reich-Graefe, n. 501, fn. 97, p.360.

fiduciary duties...”⁵⁰⁶ So, in Reich-Graefé’s model of the corporation, the obligation of the director is to serve an objective that we can all agree is indefinable or indefinite. This indefiniteness of objective makes sense, it is suggested, if it is applied to the real life context of directorial decision-making (confirmed also by the previous discussion relating to the corporate interest). Reich-Graefé reaches his conclusion after the consideration of the micro-theoretical approaches to this core question of the beneficiaries of corporate production.⁵⁰⁷

The reality of the decision making power of directors is a commonality amongst the various theories of the corporation. Directors control the corporate asset, and define the will and intentions of the corporate person. The main question then is how to control this power and to legitimize it. Reich-Graefé, commenting specifically on US law, concludes that their powers are currently unaccountable, and hence his model of “Absolute Director Primacy”.⁵⁰⁸

Marc Moore⁵⁰⁹ has however argued that there is a fundamental misconception of accountability, when it comes to corporate governance and the role of directors in it. It is a commonplace that accountability goes hand-in-hand with authority or legitimate power; but the difficulty lies in the possible misperception of the nature of the relationship between the two. It is commonly, wrongly, assumed, according to Marc Moore, that authority tends to decline as accountability, or, to put it more correctly, the mechanisms of accountability increase or improve, and vice versa.⁵¹⁰ He argues that such a “mutually offsetting” relationship between authority and accountability is not what makes the latter an important and indispensable notion in the governance of organisations. Accountability, properly and more broadly in a “sociological sense” (socio-institutional perspective), denotes an ineradicable requirement that a power holder or decision maker should give an account of their exercise of the power and decision-making to some determinable person(s).

⁵⁰⁶ Rene Reich-Graefé, n. 501.

⁵⁰⁷ Micro-theoretical approaches focus mainly on the internal relationships within the corporations, typically the contractual or the agency-theoretical perspectives.

⁵⁰⁸ Rene Reich-Graefé, n. 501, pp. 398 & 400-1.

⁵⁰⁹ Marc Moore, ‘The (Neglected) Value of Board Accountability in Corporate Governance’ (Feb., 2015) University of Cambridge Faculty of Law Legal Studies Research Paper Series No. 9/2015. Available <<http://www.law.cam.ac.uk/ssrn/>>.

⁵¹⁰ Marc Moore, n. 509, pp. 3-8.

In the corporate context, the shareholders are conventionally entitled to be accounted to by the directors. What the giving of an account of an action, including inaction, or a decision entails should be easy to understand. It could be, for example, the giving of reasons, or being prepared to give reasons for the actions, i.e., to justify actions; taking responsibility for actions – e.g. accepting blame and any appropriate sanctions, etc.

Telling in Moore's explanation of accountability in the corporate context is the minimization of the burden of oversight by the shareholders or any others over the actions or decisions of the directors. The requirement of accountability is always present irrespective of whether someone is present, able or willing to demand and enforce it; for accountability is what legitimizes the exercise of power: "...authority and accountability are ... inherently *interdependent* phenomena..."⁵¹¹

In a private-contractual approach to corporate governance, the need for a legitimization of the powers of directors has been defined as a re-balancing of a power imbalance between directors and the shareholders.⁵¹² The institutional approach sees the problem rather differently. The point is taken that the directors' decision-making implies accountability; and that these mechanisms are not counteractive to the exercise of directorial power. (The importance of deliberation (discourse) is also specifically recognised by Moore). There is, however, no significant division in the institutional perspective between private and public law. The need for legitimacy in directorial exercise of corporate power in the institutional perspective is broader or higher than the exigencies of private contractual arrangements. It is a moral imperative, and morality, in this perspective, is pivotal even to a 'legal institutionalization of corporate responsibility'⁵¹³, and indeed via the office of directorship.

⁵¹¹ Marc Moore, n. 509, p. 4.

⁵¹² See, Marc Moore, n. 509, *ibid*.

⁵¹³ Cf. Günther Teubner, 'Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility' in Günther Teubner and Klaus J. Hopt (eds.), *Corporate Governance and Directors Liability: Legal, Economic and Sociological Analysis of Corporate Social Responsibility* (De Gruyter, Berlin and New York 1985)149.

The task of corporate governance remains that of corporate social responsibility (see section 5.5). Directors carry out this task by leading in the definition of the corporate interest.

Finally, it can be noticed that the “*prolegal*” objective/purpose of corporate action referred to above, has some resonance with the goal of the public interest, in the institutional perspective of the corporation. This indefinable objective analogizes to the public interest, for being exogenous to the corporation, whose *raison d’être* ought ultimately to be something external to, and larger than itself. “In the large complex corporation, what constitutes ... a long-run benefit is not likely to be obvious. It requires an assessment more akin to defining the public interest than to any tight managerial logic.”⁵¹⁴

5.4 The Corporate Interest in its Orientation to the Public Interest

The dominant perspective on the corporate interest as a stand-in for the aggregate interests of all the participants in the corporation has a backdrop, that is, the autonomy of the corporation as a social system of production and consumption. In the corporate enterprise the directors, managers, the workforce, shareholders, consumers, regulatory authorities and the community are all engaged in social relations. The foregoing evokes our institutional perspective on the corporation.⁵¹⁵ The enormous debt for a lot of the contents of this section owed to Teubner’s explication of the corporate interest is acknowledged.

It is useful to mention that Gunther Teubner’s conception of the corporation, and hence of corporate interest, stems from a theory of legal autopoiesis.⁵¹⁶ He describes this theory, which has been pioneered by the social theorist Niklas Luhman as follows.

“Autopoiesis is a social theory which makes sense of the circularity of legal authority – that it is law that decides what is to count as law. Autopoiesis tells us

⁵¹⁴ Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press, Ltd, Berkeley 1992) 350.

⁵¹⁵ See chapter 2, pp. 41-45.

⁵¹⁶ See Günther Teubner, ‘Enterprise Corporatism: New Industrial Policy and the “Essence” of the Legal Person’ in Sally Wheeler (ed.), *A Reader on the Law of the Business Enterprise* (Oxford University Press, Oxford 1994) 51.

not to worry unduly about this, for it is a feature not only of law, but of all autopoietic subsystems of social communication.”⁵¹⁷

The depiction of ‘corporate personality’ as a capacity for social action can more easily be understood in the light of this theory. The law says that an association of individual persons (a “collectivity”) *has* capacity for action, that is, are so empowered to overcome a collective action problem. And the law makes the provisions to bring this about – i.e. recognises the ‘fact’ of corporate personality. We go with the law as we see fit.

The highly developed autonomy of the corporation as an organized social system of action renders an attempt to control it externally difficult, except, of course, through procedural means.⁵¹⁸ “External control by law makes sense only in an indirect manner as the regulation of self-regulation.”⁵¹⁹ Turning specifically, however, to the question of the social dimension of the corporation, Teubner loses faith in his legal concept of the corporate interest, that is, in the absence of an “overall social perspective”.⁵²⁰ Fortunately, we have avoided this difficulty, by having first posited the public interest as the end-goal of the corporation, on an institutional perspective, and in a political theory – abbreviated through the clarification of the quintessentially political concept of the public interest. So, having set out with a social perspective, the possibility of the interconnection between the corporate interest and the public interest becomes more transparent. With the public interest goal, the corporation obviously cannot exist for its own sake.

“Reflexive processes in an economic context require specific ‘subsystem-appropriate’ procedures and legal rules.”⁵²¹ We can here refer to the theorisation on economic/business ethics, and in particular corporate ethics, as sufficiently illustrative of the required practice of reflexion in the corporate enterprise. Teubner enquires still about the applicable criteria of corporate interest, to *make up for* the

⁵¹⁷ Günther Teubner, Richard Nobles and David Schiff, ‘The Autonomy of Law: An Introduction to Legal Autopoiesis’, in David Schiff and Richard Nobles (eds), *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (OUP, Oxford 2002) chapter 18.

⁵¹⁸ Günther Teubner, ‘Company Interest: The Public Interest of the Enterprise “in itself” in Ralf Rogowski and Ton Wilthagen (eds), *Reflexive Labour Law: Studies in Industrial Relation and Employment Regulation* (Kluwer, Deventer 1994) 38-39.

⁵¹⁹ Ibid.

⁵²⁰ Günther Teubner, ‘Company Interest’, n. 518, pp. 39-40.

⁵²¹ Günther Teubner, ‘Company Interest’, n. 518, p. 41.

conceptualization of the social responsibility of the corporation, critically, in an essentially internal organisational perspective.⁵²² To this I respond by first referring to the appraisal of the 'good faith' element as a bridging concept. We can moreover point to specific procedures and legal provisions that support and protect reflexive processes, bearing in mind that the board of directors is per excellence a centre of reflection. The disclosure obligations imposed on public companies in Companies Act 2006, requiring the publication of a Business Review with the Annual Reports are apposite. The Business Review in the case of large companies is to contain both financial and non-financial key performance indicators (KPIs), and is aimed at encouraging interested parties to factor in all relevant matters in the evaluation of the company's performance. Leader and Dine see, on the one hand, "the protection of the general public" as the goal of disqualification of directors under the Disqualification of Directors Act 1986. Alternatively, on the other hand, it is interpreted as being directed to upholding "general commercial morality".⁵²³ Judicial precedents tend towards "protecting public morality or protecting a company as a socially valuable institution."⁵²⁴ It can only be encouraging news.

On the orientation of the proceduralized concept of 'the corporate interest' towards the public dimension of the corporation, Teubner posits, as the starting point, the interest in the satisfaction of the needs of consumers, "which are communicated to the organization via market mechanisms and then converted into organizational objectives via the organization's profit motive. Finally they are converted into the economic actions of individual members via internal property rights and organizational mechanisms"⁵²⁵.

The social function of meeting the society's interest in the satisfaction of consumer needs figures prominently in the foregoing as an articulation of the enterprise interest. From the preceding sentence, interests are first converted into objectives, and then into economic actions, in an "impersonal context of action". In this way the

⁵²² See Günther Teubner, 'Company Interest', n. 518, pp. 39-40.

⁵²² Günther Teubner, 'Company Interest', n. 518, p. 39.

⁵²³ Janet Dine and Sheldon Leader, n. 461, pp. 240-241.

⁵²⁴ Janet Dine and Sheldon Leader, *ibid.*

⁵²⁵ Günther Teubner, 'Company Interest', n. 518, pp. 41-42.

“self-interest” of the corporation in its organizational integrity, as well as, the challenging issue of the pluralism of interests is transcended.

Teubner elaborates the weakness of the above approach, which lies in the too much emphasis put on satisfaction of the consumer interest, and the idealization of the profit principle. The issue is that in reality the profit orientations of corporations and the needs of consumers do not match up. It is at this point that the system theory’s concepts of ‘function’ and ‘performance’ are introduced. These, together with a third referent, ‘reflection’ constitute the reference points of a social system. ‘Function’ in the context relates to the main task of the corporation in its “relationship to the economy and society”.⁵²⁶ ‘Performance’ refers to the corporation’s relationship to its various environments, such as, the relationship to shareholders, employees, consumers, suppliers, including the relationship to other social and natural environments. “Reflection refers to the enterprise’s relationship to itself.”

Notice that the satisfaction of consumer needs belongs also to the category of ‘performance’, is in this sense only one among other things that the corporation is committed to satisfying in its relationship to its social environment. This one commitment is, then, not identifiable with the corporation’s social function.

“An economic organization is oriented towards its social function only if, apart from its output to its environment, that is the direct production of goods and services and satisfying of needs of consumers, it produces a contribution to a still undefined future guarantee for society.”⁵²⁷

The foregoing has the desirable effect of liberating the corporation from being trapped into focusing too narrowly on the satisfaction of the particular interests of shareholders, consumers or employees. The production process is instead directed also to guaranteeing the “future satisfaction of society’s needs. In practice this is realized in terms of profits, taxes and wages”.

The corporate interest is crucially not equated to the maximization of either “function” or “performance”. What is called for is a weighing of interests in order to affect mediation between the “performance” and “function” of the corporation. Very

⁵²⁶ Günther Teubner, ‘Company Interest’, n. 518, p. 44.

⁵²⁷ Günther Teubner, ‘Company Interest’, n. 518, pp. 42-43.

importantly, this mediation is possible only through *internal reflexive processes*. It should be remembered that the legal concept of the corporate interest is only definable procedurally. From an external perspective, it is solely a matter of recognising, and, possibly, influencing the conditions for the said reflexive processes (the “regulation of self-regulation”). The procedural definition of the concept has traction by being directed at fashioning the organizational structures for discourse, by which the desired balancing of the enterprise function, on one hand, and the enterprise performance on the other, is made possible.

We can draw the following conclusion from the last two paragraphs: the conception of ‘interest’ as a justifiable claim is validated; and that ‘interest’ evinces both ‘active’ and ‘passive’ sides – a procedural definition and a mediated outcome respectively. Furthermore, there is continuity between the interest of the corporation, translatable into corporate objectives and the pluralism of interests of all stakeholders.

Is *morality* still relevant, we may ask? Or, is morality a constitutive part of “internal reflexive processes” even when it is not directly referenced? I would say yes, and in what follows, I hope to show why morality cannot be left out of view either in the definition of the corporate interest or in its extension to the public interest.

In an article in which he considered morality as it applies to the question of corporate social responsibility, that is, as a regulatory mechanism, Teubner made pertinent observations, which, however, would require a further extension. Morality is considered as a “guidance mechanism” either in comparison with, or substitution for law. (Our conception of morality, in the context of the corporate enterprise is discussed in full in chapter 4). However, for the sake of elaborating Teubner’s view here under consideration, it should be plain that “internal moral controls” described as “... a kind of economic morality – “voluntarism” or a code of professional ethics – that guides management’s action toward socially responsible behaviour”⁵²⁸, has no traction with our perspective on ethics in regard to corporate responsibility.⁵²⁹

⁵²⁸ Günther Teubner, ‘Corporate Fiduciary Duties and Their Beneficiaries, n. 513, p. 158.

⁵²⁹ See chapter 4 at pp. 94-96 for a critique of professional or applied business ethics.

Teubner is right to reject the view that the ethical problem of economic activities, hence of corporate responsibility, is resolvable on the strength of “individual moral endeavours” of corporate managers. His rejection of a division between morality and law is also valid. However, his criticism of a “morally-based corporate responsibility”⁵³⁰ is not cognizant of an ethic of economic activity that can be integrative, and not merely predicated on heroic self-sacrifice or “statesmanlike” acumen and behaviour on the part of managers. Individual moral awareness and capacity is counted on; but more so, the underlying systemic and institutional structures of economic action, which ought to be under constant adjustment and adaptation to a *moral* socio-political system.

So, he asks: “Is it possible to enhance the potential of decentralized “moral” self-control by “legal” structural provisions”? My response is, in the integrative economic ethics approach to business ethics, that governmental action by laws and right policies is not disavowed, as it is made clear in chapter 4. It is often the last resort, in order for the activities of economic actors, whose motivations can never be relied on, to be aligned to the proper needs of society. Therefore, his clarification of the mutuality of law and morality in the corporate social responsibility problematic is welcome.⁵³¹

Nonetheless, the question posed by Teubner presupposes a conception of morality in economic activities. This is not immediately obvious, however, without a prior and careful elaboration of what a ‘rational ethics’ dictates: does it call for pure altruism, pure self-interest, or something in-between? Morality on the part of the corporation is, according to Teubner, for them “to take account of the social consequences of their actions”.⁵³² That said, the joint task of law and morality in realising this aim, as he admits, lacks a theoretical foundation. Economic ethics that is founded on rational ethics as discussed in chapter 4, provides, such a theoretical foundation.

Finally, our foregrounding of morality in the argument for corporate social responsibility is to underline the necessity for a change of tack. Debates about

⁵³⁰ Günther Teubner, ‘Corporate Fiduciary Duties and Their Beneficiaries, n. 513, pp.158-159.

⁵³¹ Günther Teubner, ‘Corporate Fiduciary Duties and Their Beneficiaries, n. 513, p. 159.

⁵³² Ibid.

corporate responsibility in focusing mainly on ‘micro-issues’ can often conceal the true nature of the problems in need of solutions. Therefore, a clarification of the concept of the (social) responsibility of the corporation is an urgent necessity.

5.5 Corporate Social Responsibility as the Objective of Corporate Governance

The question of the social responsibility of corporations may be addressed from a variety of angles, not least for the lack of a coherent meaning of ‘the social responsibility of corporations’. The academic discourse about corporate social responsibility (csr) is blurred into that of stakeholder theory, and with the imprecision of the latter not alleviated at all by the discordant voices of social (ir)responsibility. Different stakeholders in the corporate enterprise have different needs and claims. How to resolve the resulting conflicts is an enduring challenge to stakeholder theory. With the evidently larger theme of corporate social responsibility, it is not surprising that theorists form diverse conceptions of corporate responsibility, and speak with different voices. An easily plausible account for the multiplicity of perspectives may be the fact of a variety of academic disciplines concerned with the questions of corporate responsibility.

For example, charitable donations, sponsorships and other *voluntary* activities engaged in by companies may be the aspects of social responsibility fixed in the popular imagination. Some of these activities may be looked on, for good reasons, as sheer public relation exercises. The focus especially in the popular media on obvious good deeds, and respectively on the more egregious misdemeanours by corporate directors and managers is, to quote Philip Selznick, “justifiable given the ambiguities of corporate practice and the need for legal clarification.”⁵³³ Selznick fears, justifiably so, in my view, that corporate philanthropy diverts attention from “more fundamental concerns”, for example, the waste and despoliation of material and environment resources, and the all-too human vice of avarice, coupled with arrogance, which is starkly displayed in the mystifications of corporate officers’ self-remuneration. Focusing of attention on publicly visible, thus laudable (voluntary) actions in the name of corporate social responsibility, may detract attention from the more serious issues that are core to good or bad corporate governance.

⁵³³ See Philip Selznick, n. 514, 350.

The argument of this section is that corporate social responsibility is the objective or end-goal of corporate governance. The contention, it should be noted, parallels the main thesis, i.e., *that the public interest is the purpose of the corporation*. Paddy Ireland and Renginee G. Pillay in criticising a ‘neo-liberal csr’ situates corporate responsibility within corporate governance thus: “If CSR truly is to become something that comes from *within* corporations, rather than something which is externally imposed upon them using laws which they will constantly be trying to circumvent, dilute or change, corporate culture is in need of radical reform. The key to this is to be found in the structures of corporate governance.”⁵³⁴ The centrality of a notion of corporate social responsibility in corporate governance has also been explicitly recognised by scholars.

Arguments for and against corporate social responsibility should be familiar, but more significantly, are pitched at different levels; or perhaps to put it more accurately, are invariably inconsistently contextualized⁵³⁵, namely, against economic, political, legal or moral backdrops. It is already indicated above that the theme of csr is approached from different disciplinary perspectives. It seems clear that there can be little progress towards some consensus or enlightened understanding of csr in the absence of some common understanding of the subject-matter, which is, *the sense* of the social responsibility attributable to corporations. I contend that the question of csr cannot be answered satisfactorily without some conceptual clarification of (social) ‘responsibility’. It is as basic as that. “*Es besteht weniger ein Verantwortungsdefizit als vielmehr eine gesellschaftlich irrationale Verantwortungskonzeption.*”⁵³⁶

⁵³⁴ Paddy Ireland and Renginee G. Pillay, ‘Corporate Social Responsibility in a Neoliberal Age’ in Peter Utting and Jose C. Marques (eds), *Corporate Governance and Regulatory Governance: Towards Inclusive Development?* (Palgrave Macmillan, Basingstoke 2010) 77, 97.

⁵³⁵ See Thomas Donaldson, *Corporations & Morality* (Prentice-Hall, Inc., New Jersey 1982) 59-108 for analysis of the differentiated arguments.

⁵³⁶ Peter Ulrici, *Die Grossunternehmung als quasi-oeffentliche Institution: Eine Politische Theorie der Unternehmung* (The Large Enterprise as a Quasi-public Institution: A Political Theory of the Enterprise) (C.E. Poeschel Verlag, Stuttgart 1977) 222; also see Rebecca M. Blank and William McGurn, *Is the Market Moral?: A Dialogue on Religion, Economics & Justice. The Pew Forum Dialogues on Religion and Public Life* (Brookings Institution Press: Washington, D.C., 2004) 61. The disagreements between economists and theologians are according to W. McGurn more often than not “conceptual rather than ideological or political”.

That conceptual clarification is elementary in the disputation about corporate social responsibility is evidenced by the perceived necessity to *reframe* the problematic, that is, approach csr from a diametrically opposed angle, i.e., of delineating ‘corporate social *ir*responsibility’ (csi).⁵³⁷ However, before considering the merit or otherwise of csi, it is worthwhile mentioning only in broad strokes the customary arguments for and against corporate social responsibility.⁵³⁸ Here is not the place to be being drawn into the details of the viewpoints for or against csr. I feel justified in following the path suggested in the preceding paragraph; moreover, because some of the background questions, such as, the rationality of the economy, the possibility of corporate moral responsibility, and so on, relevant to csr, have already been considered elsewhere (i.e., in chapters 2- 4).

The arguments for corporate social responsibility can be listed as follows: (i) the economic self-interest of the corporation, that is, the familiar notion of ‘doing well by doing good’; (ii) a commitment to or at least pretensions of social responsibility, can be seen as “rational politics” by corporations, by which non-intervention by governments is secured; (iii) the limits of the law, again, from the familiar notion that ‘*morality* begins where the law ends’.

The arguments against corporate social responsibility are more numerous listed as follows: (i) ideologically, that is, the fear about socialism/for political individualism, and about institutional transformations; (ii) the alleged impossibility of social responsibility – perceived through unavoidable conflicts of interests that defy resolution; (iii) the usurpation of *the rights* of shareholders, dereliction of duties to shareholders by managers, and inefficient allocation of resources; (iv) the usurpation of social decision-making power by corporations; (v) the plague of uncertainties – concerning the extent of legal rights, obligations and the ‘rules of the game’ of socio-economic organization and production. It is clear that there are strong points on either side of the divide, which makes for the satisfactory resolution or agreement on the question of the scope of corporate social responsibility almost impossible. We

⁵³⁷ Ralph Tench et al. (eds.), *Corporate Social Irresponsibility: A Challenging Concept. Critical Studies on Corporate Responsibility, Governance and Sustainability Vol. 4* (Emerald Group Publishing Ltd, Bingley, UK 2012).

⁵³⁸ The arguable points below for and against csr are derived from Peter Ulrich’s analysis in loc. cit., n. 536, pp. 214-222; cf. Thomas Donaldson, n. 535 above.

are therefore concentrating on developing a conception of corporate social responsibility that is compatible with a 'public interest model of the corporation', the model of a 'democratically legitimate', multi-functional corporation.

5.5.1 Reframing 'Corporate Social Responsibility'

Does 'corporate social irresponsibility' advance the conceptualization of the social responsibilities of corporations? The preliminary question considered cursorily in this subsection is, in other words, whether the effort to reframe 'corporate social responsibility' by focusing instead on its apparent antithesis, corporate social irresponsibility, helps in the much desired clarification of the concept of csr. Three core models, namely, shareholder value, stakeholder value and business ethics are identified as falling under the csr rubric, which concept is said to be empty without a corresponding csi.⁵³⁹

According to the authors, csr is aspirational only: that is to say, it is not feasible, as the terms applied to describe it evidence: "over-normative and un-operational". Corporate social irresponsibility on the other hand is specifiable. "While CSR may be critically ambiguous, exploration of its antithesis provides a more specifiable construct and a corresponding continuum between CSR ... and corporate social irresponsibility...⁵⁴⁰ It may well be correct that, csi as it is claimed, is specifiable and less contentious and ambiguous. However, there is an unwarranted assumption that the opposite of responsibility is irresponsibility, especially in the context of what the public hopes and expects from corporations. Corporate social responsibility therefore can, as I hope to show, not be adequately defined by what *it* is not, i.e. csi. As against the foregoing, the authors maintain that: "Clearly, CSR would be more understandable by defining what it is not."⁵⁴¹ "What is CSR is, to the minimum extent, what is not CSI."⁵⁴²

By the above formula, not doing anything (not in the sense of other-regarding conscious self-restraint) would amount to responsibility. The corporation needs not engage in any real purposive act to be adjudged responsible. The construction of

⁵³⁹ Ralph Tench et al., 'Introduction', in Ralph Tench, et al. (eds.), n. 537, pp. 5-6.

⁵⁴⁰ n. 537, p. 24.

⁵⁴¹ n. 537, p. 8.

⁵⁴² n. 537, p. 10.

csi, with a view to conceptualize csr, does not in my view work as ‘corporate social responsibility’ cannot be operationalized as the authors seem thereby to want to do. Nor is csr admittedly fully specifiable. (It is not feasible to fully specify what is moral or immoral, responsible or irresponsible in the abstract). Corporate social responsibility, as much as corporate social irresponsibility, “is an open field without end”.⁵⁴³ It is expressly admitted by the authors that csi cannot be a precise formula, since conducts that are legal can be socially irresponsible. The counter positioning of csi to csr does not clarify the latter, because, first, for ‘responsibility’ to mean anything it requires a defined context which the bare term ‘irresponsibility’ cannot supply. Second, implicit in any notion of corporate responsibility are not only the straightforwardly opposite cases, i.e. of corporate irresponsibility, and vice versa. Responsibility or irresponsibility, it needs hardly be stated, admits of fine gradations.

The idea of “corporate moral disinterest”⁵⁴⁴ is moreover enlightening. It is instructive that the arguments for “corporate moral disinterest”, for example, the profit motive, market efficiency, etc. are, according to Thomas Donaldson, not used to negative the moral responsibilities of corporations.⁵⁴⁵ “If it could be shown that the best way to satisfy responsibilities is (ironically) to forget about them and focus on profits, then disinterest might be the optimal policy.”⁵⁴⁶

I would suggest that csr from the foregoing is akin to the public interest concept. In this view ‘corporate social responsibility’ is *both* ‘the means and end’ of corporate action.⁵⁴⁷ Corporate social responsibility *properly conceived*, therefore, cannot and should not be pursued *directly* as it is the case with ‘the public interest’ by corporations.

5.5.2 The Conceptualization of ‘Corporate Social Responsibility’

⁵⁴³ Ibid.

⁵⁴⁴ Thomas Donaldson, n. 535, p. 60.

⁵⁴⁵ Ibid; see pp. 61-70 for the arguments as set out by Thomas Donaldson.

⁵⁴⁶ Ibid.

⁵⁴⁷ Cf. Timothy Fort, *Business, Integrity, and Peace* (Cambridge University Press, Cambridge 2007) 15: a reference to the mandate on corporations to develop a *responsible* corporate culture via “reflexive models of corporate decision-making”. The objectivization of peace by Timothy Fort comports with the thesis that the public interest (social peace) is the purpose of the corporation.

The several meanings of 'responsibility' implied in social practices and institutions have been identified. The categories in a descending order of 'normative involvement' are as follows:

- (a) the sense of 'responsibility' corresponding roughly to that of causality;
- (b) 'responsibility' denoting a "role", "task" or "function";
- (c) 'responsibility' "as a synonym for *accountability* or *liability*";
- (d) 'responsibility' referring to the necessary qualities or attributes of actors, which qualities condition the possibility or desirability of holding them accountable or liable for their actions or omissions, e.g. the requisite assessment precedent to criminal liability; and
- (e) 'responsibility' used for expressing an approval, that is, a judgement that an actor in their actions or prospective actions fulfils the normative expectations on them. Here 'responsibility' is adjudged as a "*virtue*", a quality desirable in its own sake.⁵⁴⁸

We would contend that the last mentioned category, in internalizing a normative standard, corresponds with the evaluative task of 'the public interest'. We recall that 'interest' is construed as a *morally* justifiable claim; the public interest is accordingly a justifiable claim of the public. For our purposes here, however, it suffices that 'responsibility' connotes on the one hand liability or accountability, and on the other hand, a moral relationship.⁵⁴⁹ The crucial question then becomes: how are these two main notions to be made applicable in the context of the business corporations? That is to say, in regard to the socio-economic context of corporate production, the putative function(s) or purpose of the corporation, the relationships within and outside the corporation (amongst the leadership, workers, investors, affected localities, and the wider society), and the legitimate expectations on the corporation, what *should* the corporation be doing?

⁵⁴⁸ J. Van Oosterhout, *The Quest for Legitimacy: On Authority and Responsibility in Governance* (Erasmus University Erasmus Research Institute of Management Ph.D. Series Research: Rotterdam, 2001) 98-99. Cf. Christine Parker on point that responsibility extends beyond accountability: 'Meta-regulation: legal accountability for corporate social responsibility' in Doreen McBarnet et. al (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, Cambridge 2009) 213-4. An "inner commitment" or disposition to doing the 'right thing' must be present in a responsible person or institution, (aka conscience). In a corporation it resides in "its governance, management and culture", on which the board of directors has the lead.

⁵⁴⁹ See Peter Ulrich, n. 536, p. 212.

Accountability or liability with a juristic connotation demands undoubtedly compliance with existing laws; concomitantly is the susceptibility to sanctions for non-compliance. Wherever the question of moral responsibility is raised, the initial question of: ‘*why be moral*’ arises too.⁵⁵⁰ In the context of the corporation, and for simplicity sake, it can be responded that the corporation has a “social decision making power”⁵⁵¹, a social responsibility that is parallel to, or (substitutable by “political responsibility”⁵⁵²). The enormous socio-cultural influences currently exercised by such new-technology-powered corporations like Google, Facebook and Uber perhaps best exemplify the social/political power attributable to large corporations. In regard to the matters mentioned in the last sentence of the preceding paragraph, ‘accountability and responsibility’ are clarified further, as follows. (Note that there is inevitable overlap between the two conceptions; and, moreover, the several meanings of ‘responsibility’ referred to above, are implicated in the analysis of corporate social responsibility.

- i. The first level or area of responsibility relates, according to Peter Ulrich, to “the fundamental functional orientation” of the corporation. This responsibility in our view is determined by the social-institutional perspective on the corporation. Its depiction as an “external responsibility” fits in with the theme of the public interest, towards which the corporate interest orientates.
- ii. The role of directors at the apex of the corporation is construable as the secondary (“internal”) responsibility. Directors collectively, it is noted, have the duty of mediating the conflicting interests within the corporation.
- iii. Thirdly, the obligations of the executive management; in particular, its accountability to the board of directors is highlighted as “derived responsibility”.
- iv. Finally is the level of moral or ethical responsibility. Peter Ulrich underlines the *professional attitude* of managers seemingly as the bedrock of corporate moral responsibility. It may not be denied therefore that the moral socialization/ education of the members of the management cadre

⁵⁵⁰ A consideration of an adequate answer to this fundamental question is beyond the scope of this essay.

⁵⁵¹ See John Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (OUP: Oxford, 1993), p. 23.

⁵⁵² Peter Ulrich, n. 536, p. 223.

(the elite) are what accounts for the prevailing *culture*. Mention is made also of the issue of co-responsibility for the institutional rules of the game. We have nearly always the choice either to comply with rules (legal or moral), or ‘cleverly’ bypass them, or join up with others to help to improve existing rules and standards – (a co-responsibility that has been a recurring feature of a commitment to morality, as we articulate it.) The survival of this freedom, in my view, then, becomes the strongest argument and hope for corporate social responsibility.

Peter Ulrich depicts the above delineations (i-iv) as the “socially rational conception” of corporate responsibility. It represents for us the reasonably and comprehensively conceived *objective* of corporate governance. The objective is in my view plausible and, especially, in tune with the social-institutional perspective on the corporation.

5.6 Conclusion

Following the discussion on the corporate interest, and how the corporate interest is related to corporate social responsibility (the public interest), it is therefore justifiable to claim that the public interest is the purpose of the corporation. This claim is, to be sure, contrary to the shareholder value principle, as well as the stakeholder theory of the corporation.

The clarification of interest concept in chapter 3, especially the view of ‘interest’s active and passive sides’, in other words, the ‘means and ends’ connotation of the concept, has provided the conceptual underpinning that enables the interconnection between the corporate interest and the public interest. That means that the corporation in pursuing the corporate interest succeeds in reconciling the different interests of the corporate stakeholders. The corporation furthermore *is*, and more to our point, a mechanism for mediating between the goal of economic production, and the economic production’s contribution to *social peace*, including the specific tasks of satisfying consumer needs, providing guarantees for the future needs of society, bearing ‘institutional co-responsibility’, etc. This interpretation is confirmatory of the thesis that the public interest is the *raison d’être* of the corporation.

CONCLUDING REMARKS

The question addressed in this essay is: what is the purpose of the corporation? The answer elicited might at first seem trite; however, it is worth remembering that something is easily forgotten if it is obvious. The question regarding the proper purpose of the corporation remains troublesome, because there has been no reputable answer in sight. The maximization of shareholder value is the orthodoxy, because the doctrine appears to succeed in evading the thorny issue of how to resolve the inevitable conflicts of interests between stakeholders. But shareholder value or interest, by the nature of things, cannot in any real sense and lasting way, be advanced, if the interests of the other stakeholders are neglected. Moreover, it cannot do, to seek to serve the other stakeholders' interests only with a view to increasing shareholder value.

Addressing seriously the question of the purpose of the corporation requires some courage and much work. Attention is required to be paid to the socio-political context of corporate production. In other words, the social reality of the corporation must be factored in fully. Corporations influence socio-political decisions. The regulation of corporate power calls for intellectual inputs not only from economics. Ethics, it is argued, is the solution to the innate problems of the competitive market economy, which is distinct from technical problems of economic production. The recommended integrative economic ethics is a 'morality' that is internal to the operation of the economy.

The proposed public interest model of the corporation, as opposed to the prevailing shareholder value model, is a "multifunction theory of corporate purpose". The shareholder value model's assumptions are widely and generally known to be unfounded; for example, the assumptions regarding the ownership of the corporation, the principal/agent relationship between directors and shareholders; and that the market price of shares is a true reflection of real economic value. These assumptions lack empirical validity in law, economic theory and ethics. The prescription of *any* value 'maximization' is anti-institutionalist (institutions are "the congealed outcome of experience, reflection and deliberation").

It is probably the human mind's predilection for certainty, which explains the continuing dominance of shareholder primacy in corporate governance theory. Shareholder value, which is financial profit, is calculable, and thus easily graspable. The public interest goal is on the contrary far from being a certain and attainable objective. The concept of the public interest is for a start almost indefinable, but is for that in consonance with the "multifunction" or the pluralistic interest perspective on corporate purpose. To compensate for lack of certainty, the public interest goal of the corporation recognises, and adapts very well to the reality of socio-economic production and the imperatives of the political economy.

What is then the reality that corporate production must confront, and how have we dealt with that in the preceding chapters? The contention here for the purpose of the corporation, is depicted a 'model' for a reason. It is recognition of the *perceptivity* of our truths. That is to say, even if the service of the public interest has become, or *is* the acknowledged truth in corporate theory, it is still a way of looking at this troubling question. In chapter one, we began by examining the rationale of the public interest model, in order to prepare the ground for the arguments that seek to legitimate the corporation. The fact of "communal existence" is a given, and thus figures ineluctably in any legitimation of the corporation in its function of social production.

We took up the conceptualisation of the corporation in chapter two. The integrative power of the institutional perspective is underlined, as the corporation is presented as capable of satisfying divergent interests. The corporation as a social institution invokes the relevance of historical contingencies, political decisions and moral imperatives in the understanding of the corporation and its social responsibility.

We engaged in the conceptualisation of 'interest' and 'the public interest' in chapter three. 'The public interest' is the political concept par excellence. It signifies peace, law and order, which is hard to deny as the goal of politics. The understanding of the nature of 'interest' makes it easier to see how the disparate needs and expectations of the different corporate constituents can be reconciled. A conceptualization of interest prepared the ground for the explication of the corporate interest in the concluding chapter.

Chapter four examines the contexts of action of the corporation, namely, in ethics (politics/law) and economics. The aim is to bring these fields into harmony as guides to human motivation and action. The main idea is that if human beings can act, and be expected to act morally, the corporation in the function of economic production can likewise act morally. This capacity inheres in personality (autonomy). Corporations can be active and competently involved in the process of rule-making, and therefore have no good excuse for unethical behaviour.

The final chapter explores the linkages of the corporate interest to the public interest. We found that such linkages exist, where the corporate interest is made the '*direct*' objective of the corporation. The corporate interest is pursued through reflection on and deliberation about the different claims to be met, and through *legitimate* actions to meet them. In pursuit of this objective the corporation serves the public interest goal.

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