Department of Business and Politics

Copenhagen Business School
HANDELSHØJSKOLEN

Department of
Business and Politics
Steen Blichers Vej 22
DK-2000 Frederiksberg
Tel. +45 3815 3585
Fax. +45 3815 3555
e-mail dbp@cbs.dk

Companies as 'Cyborgs'?

The Political Implications of Limited Liability, Legal Personality and Citizenship

Grahame Thompson

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Department of Business and Politics
Copenhagen Business School
Steen Blichers Vej 22
DK-2000 Frederiksberg
Phone: +45 3815 3585
E-mail: dbp@cbp.cbs
www.cbs.dk/dbp

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"*A* <u>*company*</u> *has the legal capacity and* <u>*powers*</u> *of an individual both in and* <u>*outside this*</u> <u>*jurisdiction*</u>." Australian *Corporation Act 2001*, Section 124.

Abstract:

This paper investigates the legal and commercial consequences of companies being considered as both an entity and a person in law – hence the notion of 'cyborg' in its title. It concentrates upon legal personhood and relates this particular feature to the issue of corporate citizenship. In turn corporate citizenship provides a link to considering the political role of companies, since in claiming citizenship they are implicitly at least claiming a particular set of political rights consequent upon that status, and announcing a particular politically constrained context associated with their operational characteristics. But what would be involved in granting companies full citizenship rights in the image of natural person citizenship? The paper explores this issue in connection to the differences between corporate social responsibility and an earlier idea of the socially responsible corporation that arose in the debate between Adolph Berle and Edwin Dodd in the 1930s, focussing on the notion of 'enterprise entity analysis' that was posed in that debate, and which has reappeared more recently.

Key words: corporate citizenship, company law, corporate legal personality, limited liability, enterprise entity analysis, property rights

Introduction

I was once speaking to a corporate lawyer during a conference and asked him what a company was in law. He replied that strictly speaking a company was nothing more than a bank account with rules about who had access to its resources. This, he suggested, was the ultimate nature of its 'corporate legal personality'. This was an unexpected but intriguing answer, and I suspected not a fully accurate one. He went on to draw the well known distinction between limited liability and legal personality saying that these were often conflated in the case of companies but needed to be considered as separate aspects of the company form.

In this paper I examine this double character of company legal constitution in the context of its implications for corporate citizenship. Subsequently, the idea of corporate citizenship is linked to its political implications: companies cannot claim to be citizens while avoiding the politically constrained consequences of this status for their organizational structure or operational characteristics. That such companies are subject to dictates of social responsibility is well know and recognized, but citizenship demands more than this it is argued. And here the article explores the contemporary position of the company as a political entity in relationship to the 1930s debate between Adolf Berle and Edwin Dodd about 'enterprise analysis' and the 'socially responsible company' (which is not the same as corporate social responsibility, as we shall see). This involves arguments about the reform of the limited liability status of companies. Finally, the current context for corporate citizenship and the political role of companies is discussed.

Of course the history of legal personality as afforded to limited liability (L-L) companies is an interesting one, and a controversial one. It is controversial because, in the USA in particular, there is a strong objection to this. This has to do with the way it seems to have been 'smuggled' into being via a landmark judgement made in the case of *Santa Clara County v. Southern Pacific Railway* in 1886. In this case Supreme Court judge Chief Justice Waite 'announced' the principle as a prelude to the commencement and judgement on the case, arguing that the Fourteenth Amendment to the Constitution (guaranteeing equal protection before the law to all persons within a jurisdiction) applied to companies as well as to 'natural persons'. Ever since there has been a dispute about both the appropriateness of this particular action by the judge and whether the US Constitution and its Amendments can indeed be legitimately extended to apply to company activity (Cerri, nd). Many continue to think not.[(1)] In addition it was a landmark case in the UK courts that inaugurated the position of separate corporate personality (C-P) for British companies: *Salomon v Salomon & Co*. (1897).

In this article I review the literature on L-L and C-P in the light of companies being considered as 'citizens'. But –- as anyone with even the slightest familiarity with the literature of C-P will appreciate -- there is a long history to this and a vast literature. It is not the intention to go over all this literature yet again. Rather I concentrate upon pertinent aspects that have to do with the question of 'corporate citizenship'. This will be selective, of course, and may not cover every point.

Legal Personhood

Although the article is mainly concerned with companies that have L-L status, it will be useful to preface these remarks with a short discussion of the general nature of legal personhood. The classic case of legal personhood applies to 'natural persons'. But this term should not be taken to imply an unproblematic naturalness on behalf of humans. A 'natural person' is a legal category: defined as a cognate being perceptible through the senses, able to rationalize and make decisions, and having an identity that persist through time: and minors and those of impaired metal capacities, or criminals are often treated as special cases for various purposes (like voting). On the other hand there is the category or 'artificial person' or 'virtual person', which applies to corporate bodies of various kinds (though see the discussion below on this terminology). These display various features, but the basic characteristic is that the entity so constituted is considered a separate one from the human persons who either own it, manage it or otherwise work for it. It has the status of a legal entity in its own right, which enables it to contract business as it sees fit (subject to the constraints of law and custom of course). In a moment I return to the kinds of persons companies can be considered to be -- which remains controversial -- and subsequently to the rights they can claim in law that are analogous to those of natural persons.

The question of legal personhood is not confined to just natural persons or corporate bodies, however. There is a debate over extending some of these features to other inanimate entities or non-sentient beings. The classic examples are trees, involving a debate initiated by Christopher Stone's (1972) suggestion that these be afforded the status of 'standing' (enabling a party to sue for damages in a court) so as to enable them to literally remain standing when under threat from logging companies for instance. 'Friends of the trees' would establish a form of legal guardianship over such trees under threat, and use the courts to seek protection for them.

This inaugurated an ongoing debate about extending such legal rights to other animals and entities (e.g. Varner 1987, Solum 1992, Teubner 2006 – the great apes come immediately to mind) [(2)], and in seeking stakeholder status for such objects in respect to corporate governance (Starik 1995). In addition, robotic entities have also been the subject of such discussion (e.g. Solum 1992), and even completely artificial agents like search engines, shopping web-site operations, and data-bases (Allen & Widdison 1996, Chopra & White 2004). Below I reflect on quite what all this might mean for the category and status of citizenship, which is one closely linked to the idea of 'personhood in law'. But just a quick comment now on the trees issue, which began this debate, and which serves to illustrate some wider concerns. The difficulty with affording the status of personhood or standing to these is where would it end? Supposing trees had this legal status, one tree could then in principle sue another tree if there were some conflict over access to the light, for instance. And why not extend the status to aphids? If they were then to attack the tree's leaves presumably the tree could sue the aphids. The possibilities are endless, but this just demonstrates where all this loose 'rights talk' might take us.

Finally, single people can also be a legal corporate body. This arises in the case of 'the corporation sole'. In Anglo-American law this is a legal entity consisting of a single ('sole') incorporated office, occupied by a single ('sole') man or woman. This allows a corporation to pass vertically in time from one office holder to the next successor-in-office, giving the position legal continuity with each subsequent office holder having identical powers to his or her predecessor. Although this capacity is usually associated with religious offices (the head of the Church of England, The Archbishop of Canterbury, is such a corporation sole), it is not confined to this office alone. The British monarch, for instance, is not just a human person (indeed, she is not just a 'natural person' either; in as much that she claims divine lineage she is also a 'super-natural person' of sorts) but has several 'corporation soles' which allow her to hold property in the name of the monarch in several different countries and jurisdictions [(3)].

To sum up, broadly speaking to have legal personality implies that a body has an existence independently of its members, i.e. it does not terminate with the death of its founders; that it can sue and be sued in a court in its own name, with respect to contracts as well as to torts and crimes, even in relation to its members (I return to torts below); and finally, that it may own property in its own name. This latter point is very important in the context of the question of who or what 'owns' a L-L company. Conventional language vests ownership in the shareholders, but strictly speaking and in a legal sense this is not quite the case. In the next section I review the position of companies as legal persons in the context of this vexed question of who or what owns them. I do this as a first clarificatory move in anticipation that this will help in a further clarificatory move associated with the relationship between the personhood of companies and their role in claiming to be 'citizens'.

Ownership and Legal Personhood

In the long dispute over corporate personhood there have been *three* basic positions. These are neatly summed up by Iwai:

> "The *corporate realists* believe that the corporation is a fully-fledged organizational entity whose legal personality is no more than an external expression of its real personality in the society. The *corporate nominalists*, in opposition, assert that the corporation is a contractual association of individual shareholders whose legal personality is no more than an abbreviated way of writing their names together for legal transactions. And both claim to have superseded the '*fiction theory*,' the traditional doctrine since the time of Pope Innocent IV, which maintained a position one might well think tortuous: that the corporation is a separate and distinct social entity, but that its legal personality is a mere fiction conceded by the state or created by law." (Iwai 1999, p.584; italics added)

According to Iwai, Maitland's 'Introduction' to Otto Gierke (1900) established the forerunner to the realist position: that on the basis of 'real' conditions on the ground and found in practice corporations are entities absolutely equivalent to natural persons (see also Laski 1916). Corporations are 'organic' bodies that display all the characteristics of natural persons (Gierke 1900). This is sometimes known as the *natural entity theory* of the corporation: that the corporation is neither a legal fiction created by the state, nor a contract among individuals, but a natural person whose existence is prior to law. In fact, the contemporary realist position distances itself from Gierke's formulations since its wants to found the 'realistic' corporation in law. Thus it distances itself from the 'physico-spiritual unity' conception of the corporate entity as an organization somehow endowed with a mysterious organicist metaphysical will of its own (Iwai 1999, p.616; Note 1982). As we will see in a moment the contemporary realist position views corporate autonomy as a consequence of interactions between human beings, both inside and outside the entity, but who address their activities in the name of the corporation itself in the first instance, rather than in terms of their own personal proclivities, inclinations or intentions.

On the other hand there is the nominalist position. Although this has a long tradition in the economics literature, it is modern agency theory and particularly the idea of the corporation as nothing more than a 'nexus of contracts' that has given it added impetus (Jensen & Meckling 1976; Williamson 1990). As a nexus of contracts the firm can be considered to be something other than the aggregation of its constituent parts. From this perspective, however, 'ownership' (in the form of possession) is rejected as an appropriate category in respect to business firms; contracts cannot be owned as possessions in the same manner as asset can (though see below). Instead, shareholders are considered as 'principals'; able to direct their 'agents', the managers and directors. But this does not go quite far enough since the modern corporation is more than this: it is a fully-fledged subject of property ownership in its own right so it too can make contracts of its own and enter into litigation: it acts beyond what can be accommodated simply by an ex-ante contractual specification (see also Parkinson 1993, chapter 6, who nevertheless supports a strict ownership model of the corporation criticized in a moment).

Finally, there is the 'fiction theory' often first attributed to German romantic F.C. von Savigny (see Rattigan 1884; Maitland's 'Introduction' to Gierke 1900; Rückert 2006). In this case the corporation is considered an artificial entity admitted as a subject in law by means of a 'pure fiction' sanctioned by the State. However, it is possible to interpret Savigny more subtly as affording legal relational status to corporations other than by State sanction, though it perhaps needs the *recognition* by the State 'in the last instance' so to speak (Iwai 1999, pp.602-03).

The difficulty in judging between these approaches to specifying the appropriate relationship between personhood and ownership arises because the corporation recognized in law is both a 'thing' and a 'person' at the same time. It is a kind of ‘cyborg’: analogous to both human and machine. The definition of a cyborg employed here is not so much one that sees it as a cybernetic organism in the form of a *network* of communication and control, but as an *entity* that shares properties of both synthetic mechanical operationality (thingness) and properties of humanness (personhood). So this is not humanness in the form of a natural person but as an artificial person. Shareholders own ‘shares’ (and stockholders own ‘stocks’) but not the assets or property of the company as such, which are invested in the company itself: in a legal sense the company ‘owns’ itself (Ireland 1999, 2010). Thus we could say that it is subject to a double ownership relation: once by the shareholder who ‘own’ shares, and once by the corporation itself which owns the company assets. Shares (pieces of paper) give shareholders certain rights (or perhaps better put, afford them certain ‘claims’, see below): they share in the surpluses generated by the company, they have voting rights in respect to the officers of the company and in terms of mergers and acquisitions, and they can sell (and buy) shares.

In this respect -- within Anglo-American legal practice at least -- the shareholder is in a very similar legal position to any other creditor *vis a vis* the company as legal subject (nb. Dodd 1932); they are both its ‘claimants’ and have no direct proprietary entitlements in the companies assets or property as such. Their interests *jointly* represent potential liabilities from the point of view of the company (Hadden 1997).

Similarly, although the managers may be (formally at least) elected or appointed by the shareholder, they are legally constrained to work in the best interests of the company in the first instance, not the shareholder: they have obligatory fiduciary duties. [(4)] Their role is to supervise the continuing organizational, financial and legal reproduction of the company – to maintain is as a ‘going concern’, to ‘keep the capital intact’, and so on. And as Brendan McSweey (2009) has drawn attention to, when actionable endeavour has been sought in the courts over what or who has primacy in terms of fiduciary duties, judgement has invariably fallen to the management rather than to the shareholders (see especially Marens & Wicks 1999; Lan & Heracleaus 2010) [(5)] .

The judgements reviewed in footnote 5 -- which form the basis for the 'business judgement rule' in the US courts (though this has been embodied in commercial law in other jurisdictions) protects the directors in the conduct of their 'duty of care' for the corporation and its employees. If the directors act in good faith, in the best interests of the corporation, on an informed basis, in a non-wasteful way and without personal interest (i.e., that they are 'duly diligent'), then the courts have protected their position. But this remains the site of the real issue: is the 'default position' in respect to company operations that they should operate to maximize profits? Is it the ultimate purpose of a firm in current business law to generate profit, any deviation from which makes the managers 'liable'? This is a complex issue which would ultimately depend upon the legal interpretations of the articles of association, but it looks as though this requirement remains an untested default position [(6)].

Some would argue however, that it is continually tested by the range of measures associated with 'shareholder protection': involving not just 'hard-case' company law but also provisions found in securities law and in the 'soft law' of codes of corporate conduct and takeover regulation (Armour, *et al*., 2008). This discussion arose from the seminal contribution of La Porta *et.al*. (1998) who advanced the proposition that there were two basic forms of 'legal origin' as far as shareholder protection is concerned: civil law societies and common law societies. They went on to claim a) that common law societies systematically provided more effective protection of the shareholder interests and, b) this stimulated more robust economic development and growth. Whilst, in their terms, there had been some subsequent convergence between these legal systems – and a growing recognition that there were other 'sub-systems' within (or around) each core grouping (like a distinctive Scandinavian grouping within the civil law tradition) -- underlying differences between the two groups of countries have continued to provide the same differential consequences along the original lines of their analysis (Djankov, *et al* 2008)[(7)].

This set of arguments has attracted a great deal of attention. Many criticisms have been made of -- and suggestions for improvements to-- the original La Porta formulation, particularly in respect of how to construct a 'correct' index of 'shareholder protection', and allocate countries in respect to this (e.g. Siems 2007; Spamann 2008; Siems 2009; Armour *et al* 2008 – Thompson & Mortensen 2009 discuss the Danish literature on this issue). Broadly this challenges the idea of two clearly defined groupings as the differentiation and hybridization of each separate legal system is uncovered. Nevertheless the basic thrust of the attempt to link legal/regulatory systems to different degrees of shareholder protection continues in these critical studies. This remains contentious however. In general, this literature and debate ignores the earlier case histories that established the 'business judgments rule' discussed above. It takes this as a given, so it is not so much concerned with the deeper questions of ownership raised earlier. But, of course, it is centrally concerned with control, though here one might need to remain cautious. There is a considerable attention to the detail of control as demonstrated in the *ex ante* sense of what laws, rules and conventions are in place to try to prevent managers/directors exercising their 'agency' at the expense of shareholders (see Armour 2008 in particular and the detail at: <http://www.cbr.cam.ac.uk/research/programme2/project2-20output.htm>). Broadly speaking this involves the collection of data on ease of challenge over 'self dealing' on the part of directors, likelihood of success if action is taken, and some attention to important case judgments. So there is some consideration of the *ex-post* outcomes when challenges have been made in the courts or other arenas of regulation. But this is always difficult to judge and tends to vary on a case by case basis. It is all very well having *ex-ante* mechanisms is place but success with proof of misdemeanours and malpractices on the occasion of litigation is another matter. In general this still takes place under the shadow of the business judgment rule – which tends to protect the managers if they exercise due diligence. And – as recent events associated with various pre-crisis financial scandals and the 2007/08 financial crisis itself have surely demonstrated – these mechanisms proved hopelessly inadequate to prevent widespread abuse of shareholder interests and potential wrong-doing in 'common law' countries in particular. The point here, then, is not to continually lament the lack of shareholder control, or to seek some further robust ultimate rule that guarantees shareholder primacy, but to recognize that – in situations of 'normal business' – despite there being enormous effort devoted to catering for shareholder interests and providing them with information about day to at operations and long term strategy, all geared up to serving shareholder value considerations, shareholders are necessarily remote from actual decision making. The emphasis, instead, needs to shift to better preparing the managers/directors for their role as the actual guardians of the company as an institution that owns itself, which is pursued below.

Obviously a different set of legal conditions hold if the company is in liquidation, creditors having a prior claim over shareholders in this instance (see Carruthers & Halliday 1998, Halliday & Carruthers 2009). But even under these circumstances neither creditors nor shareholders can seize the company's assets at will, so nor do they 'own' it is this sense . Here both shareholders and creditors are similarly constituted as 'claimants' with only a contingent title in respect to the company's assets (Hohfeld 1919).

In addition, claimants must act in accordance with due legal process. What this means in that legal rights in respect to any company are always highly specific and contingent, and what they impart to different agents are differential capacities and capabilities to undertake actions or engage in litigation. Legal rights do not exclusively or unconditionally guarantee access to 'ownership' or anything else but only arrange possibilities for undertaking litigation or initiating actionable endeavour in the courts.

This point is important in several respects, particularly in the debates about 'property rights' in economics (and by extension for the 'Law and Economics' school). These do not impart an exclusive, unconstrained or unconditional *possession* to a definite subject or agent. It is not the case, then, that any attenuation of those rights – involving a circumscription or restraint on their exercise, usually thought to be imposed by the political process or the State – necessarily represents an unwarranted challenge to those rights of possession. 'Property rights' attribute no more (or no less) than a capacity or capability to initiate something (like a claim on the assets of a firm). But that guarantees nothing in terms of outcomes. It only contingently and conditionally arranges a series of possibilities for legal disputation and action.

The more general importance of this formulation is to move away from a discourse of ‘rights’ to one about ‘claims’. Rights imply a possession by a constituted subject whereas claims only imply a contingent entitlement, one dependent upon particular circumstances (in the case here as specified by a legal framework). And this aspect of the law confirming claims rather than rights is well illustrated by bankruptcy law. Although Carruthers and Halliday’s comprehensive analysis situates bankruptcy in the terminology of rights in the first instance, it is clear from the discussion that it imparts various parties with a range of claims that must be tested in law (Carruthers & Halliday 1998; Halliday & Carruthers 2009). For instance, their Table1.1 ‘Ranking of *Claims* in Bankruptcy’, (my emphasis, 1998, p.39-40) sets out the hierarchy of claimants in the US and the UK, while ‘The Legal Constitution of Markets’ (Chapter 1, 2009) extends this approach about the potential for disputation and enforceability during bankruptcy proceedings to the Asian countries. What is clear from this extensive analysis is that there are no general ‘rights fights’ only contingent claims dependent upon the particularities of each jurisdiction, its characteristics and institutional limitations.

So with this conception there is no general public or private privileged possession of, or exclusion from, ‘ownership’. In principle the law could thus establish a set of ‘rights’ that impart capacities and capabilities to any number of stakeholders without this necessarily undermining a deeper or more fundamental ‘ownership’ relation because, as agued above, rights in law are never rendered with respect to an exclusive possession, but only in respect to a claim. Here we see the way a discussion of the nature of company law could establish the principles for the wider notion of stakeholder democracy without this necessarily compromising a ‘deeper’ set of fundamental truths (as pursed in detail in Thompson 2008a).

Limited Liability (L-L)

Let us now briefly turn to L-L. Limited liability as a ubiquitous feature of the modern business world. It was gradually introduced in the UK and the USA in the later part of the 19th Century (Plesch & Blankerburgh , 2007, pp.8-15). Prior to this development companies had unlimited liability. The idea was that such a legal limitation on shareholder losses would foster investment and the development of industrial capitalism. Subsequently it spread throughout the world. And whilst this was a clear move in terms of legislation in these countries, the status of legal personality just discussed was only afforded companies as a result of a series of landmark decisions by the courts (as already mentioned: *Santa Clara County v. Southern Pacific Railway Co*. in 1886 in the US and *Salomon v. Salomon & Co*. in the UK in 1897). And whilst it was not the original intention of company law legislation to extend the status of legal personality to companies, governmental authorities have done little to prevent its application. But is has been essentially a court led process.

What we have as a result, however, is a very privileged position for companies in the way they are allowed to operate, involving legal immunities not extended to ordinary citizens (Ireland 1999 & 2010). As a result they are often accused of having extensive rights without concomitant responsibilities. Certainly this accusation can be legitimately laid at the door of shareholders and directors, who can for all intents a purposes avoid any personal liability for misdemeanours or damages they may cause (Directors, for instance, can insure against this possibility). But shareholders can also escape liability in the case of tort actions as will be discussed in a moment.

This stacks the legal cards very much in favour of the corporate world against the rest of civil society independently of the enormous power companies can wielded because of their wealth, financial muscle and political influence. What is more, in as much as companies have been in the forefront in arguing for their release from the many shackles of the law and regulation – to free them up and let them take responsibility for their own actions -- they have single-mindedly failed to add the abandonment of limited liability to this list of demands. Thus there may be a limit to how far companies will support what might otherwise seem to be a rather self-serving neo-liberal project.

L-L is about the protection of assets and creditor confidence. It is the principle whereby a member of a company cannot be made personally liable for the debts of the company beyond the capital invested, or, in general, beyond a certain amount. Debtors or plaintiffs in any action against the company thus make their claims against the property or assets of the company, not those of its shareholders. Shareholders are only liable to their own personal creditors. Clearly, L-P and L-L are different but complimentary aspects of company form.

> "[legal personality] protects the assets of the firm from the creditors of the firm's owners, while limited liability protects the assets of the firm's owners from the claims of the firm's creditors" (Kraakman, *et al*., 2004, pp.7-8) [(8).]

Both L-L and L-P are argued to make better deals possible because they instil confidence. But L-L also reduces confidence because it limits the pool from which debts can be paid. L-L does not exist if you have to put up personal assets as guarantees. Thus L-L means you do not need to know who the other investors are, i.e. fellow shareholders – or their wealth. As a result the aptly named *société anomie* produces a bigger investment pool and greater investment.

But L-L is paradoxical in respect to confidence and risk. On the one hand it reduces risks for the shareholders. L-L and shareholding means that the shareholder knows what his/her liabilities are. He/she is not responsible for any thing other than the value of his/her share-holding. But on the other hand it might encourage companies to take on more risk than is socially justifiable, as explained in the next section.

‘Hiding Behind the Veil’ and Tort Claims

Owner-shareholders and top executives exercise immense power in society both locally and globally. But they are not immediately responsible for any damage they might cause the environment for instance. Essentially this means that if a company fails or is sued for damages, the shareholder only looses the sum of money they have invested in the company. And directors and top management – as agents of the shareholder within the company -- are similarly protected. If they cause a harm to a third party they are potentially subject to a ‘tort claim’ which are considered in the civil courts. But shareholders – and to a large extent company directors -- can escape personal liability under these circumstances because the company exists under limited liability.

In addition companies use their limited liability status to minimize their exposure to tort claims. A successful tort claim would result in seeking redress via the liquidation of company assets to pay the fine or meet the compensation. But the modern corporation is a many tiered structure with a myriad of subsidiaries and holding companies. This legal structure can be used quite legitimately to ‘hide’ assets or to limit exposure to particular risky ventures (where damage and a subsequent tort claim might arise). This is known as ‘hiding behind the veil’. Under present conditions this is quite legal, if not exactly ethical. But it also means companies can ensure against or avoid some liabilities associated with their behaviour that ‘natural persons’ like ourselves cannot. This might tempt them to take added risks and act irresponsible.

But problems arise when the creditor is replaced by the victim (involving Torts – involuntary harms). L-L thrives upon the distinction between contracting party and tort victim. Torts involve involuntary harms that are not ‘dealed’ or contracted. Shareholders can avoid liabilities to tort victims – because they are only liable up to the value of their shareholdings. As they are allowed to do this shareholders of L-L companies might take more risks than is socially justified. Companies can also arrange their structures to create subsidiaries that absorb or bear the risks but do not have enough capital (shares) to cover eventualities associated with Torts if they create harms. This means they can escape responsibilities for harms if this comes to law.

What can be done about this? Companies could insure against this eventuality – or be forced to do so. Alternatively, torts victims could be made a priority in terms of ‘claims on assets’. In effect, this would mean abandoning separate company personality and L-L in Tort cases. Finally, the ‘corporate veil’ can be ‘pierced’ – the corporate veil is when companies create subsidiaries that disguise the true risks/capital involved in different aspects of their businesses, so that they can avoid the responsibilities/liabilities if they are sued for Torts. To pierce this veil responsibilities could be shifted up the line of company structure until somewhere were found where losses could be covered. In fact, attitudes towards piercing the corporate veil vary considerably between different jurisdictions: the UK legislative system and courts are the most reluctant to countenance this possibility, the US somewhere in between (though also the most litigious), but German (and Japanese) authorities are the least hesitant in allowing such claims to be pursued (Miller 1998).

Corporations and Moral Personhood

One difficulty in the corporate citizenship debate revolves around whether companies can be legitimately considered as equivalent to ‘moral persons’. This is particularly important from the point of view of their citizenship rights since one of the attributes of ‘natural persons’ is that they are imparted with a certain moral agency: as subjects of rights they must administer those rights in the form of intentions and can be held individually responsible and subject to an accountability dimension as a consequence. In that companies are increasingly claiming to be ethical entities – undertaking public duties and paying particular attention to the moral consequences of their actions -- they are demanding concomitant rights accordingly.

This issue has generated an enormous body of literature and discussion and it is not my intention to review this all here (though see French 1979 and Wherhane 1985 for the basis of my remarks here; and also Thompson 2008b). A central issue is that the legal personhood of companies imparts them with a decision making procedure and capacity that pertains to their own activity as such. But although these corporate rules and procedures specify organizational behaviour they seldom define the ‘intent’ of those rules or behaviour. So the question arises as to whether the concept of intentionality can be appropriately ascribed to corporations at all. On the other hand it is surprising how frequently this has become part of corporate behaviour: articles of association and mission statements abound with such statements. In as much as corporate internal decision structures (CIDs) incorporate and impart these objectives into properly considered procedures that are followed through, events are re-described as corporate policy and attributions made accordingly. In effect, these become the ‘intentionality’ of the corporation independently of those of its officers. But in as much that corporate responsibility can become re-described as social responsibility does this necessarily coincide with them being morally culpable? (Wherhane 1985, p.47.)

Whilst this debate continues – and there is very much more that could be said about it – below I make an attempt to circumvent its terms by setting up corporate citizenship in a different manner: this involves asking the question of the *persona* of citizenship in a corporate context. As explored below, the idea of a persona is that this is a deliberately constructed ‘image’ involving a range of determinations that are exercised, enacted and performed rather than being moral or ethical beliefs or values held as a consequences of a subjectivity. This also goes to further disrupt the discourse of rights that saturates this and any other discussion of moral personhood.

However, before that it will be useful to examine the extent of the claims to be 'citizens' by companies, and who is addressing them as such.

How is Corporate Citizenship Being 'Made'?

This section returns to the issue of what is involved with the conception of corporate citizenship, in particular with how citizenship is being constructed both for companies and by them: how are companies (re)presenting their position? Such a discussion provides the underlying contours for a consideration of the way they are constructing their political character: their political persona.

The question to ask in this case is whether corporate citizenship is about the *public mindedness* of companies? About them recovering a spirit of humanity in *an expression of their civic virtue*? This is what companies are themselves claiming as the key aspects of their citizenship. But on the other hand is it more about the *possession of certain definite powers and capacities* derived from a certain position occupied in the domestic and international sphere? Is the source of their citizenship to be found in the *persona* of the modern corporate personality, its powers and capacities, its *attributes imagined and fostered* and not in the form of some 'ideal' of citizenship? (Burchell 1995 & 1999). Thus to ask the question of the persona of the corporation is to ask the question in a way that avoids issues of direct moral agency. Rather it speaks to a performativity and an enactment by companies themselves.

Modern personal citizenship derives its capacities from the activities of government, I would argue, not from nature. In the case of companies and GCC are these capacities derived analogously from bodies like the UN Global Compact, the WEF and the US Chamber of Commerce – each of which deliberately addresses its members as citizens? Are these the places where companies are made fit for citizenship by self-formation and self-discipline operating through the category of 'responsibilization', or rather through the practice of responsibilization (Thompson 2008b)? How is this practice acquired and fostered as a set of practical skills and routineized functioning?

This approach would emphasise the spaces of forum like the UN Global Compact and the WEF as the places where these obligations are fostered. They represent a ‘welcoming association’ for the rhetorical examination of responsibility. Similarly with company backed conferences about CSR and GCC, like those organized by the magazine *Ethical Corporation* and the US Chamber of Commerce. These spaces constitute a kind of ‘clan network’ encouraging the activity of citizenly self-cultivation by those companies attending.

And it is important that these places represent a kind of private sphere. This provides the conditions for this activity to be seen as a matter of companies expressing their freedom, away from direct governmental sponsoring or interference. Companies become the civic minded ‘burghers’ of these private associations. Having been to several of these conferences I can testify that they are full of declarations of public spiritedness by companies. An exhortatory style is in evidence that sometimes smacks of civic revivalism. So these are an occasion for a declaratory outwardness dependent upon an inward self-reflection and moral discipline.

And these conferences/meetings are important in another respect. They are places where all sorts of manuals of best practice are marketed and sold: handbooks of ‘how to do it’, describing how to be a good corporate citizen. Publishing companies like Earthscan and particularly Greenleaf market a series of these, one of the most interesting of which is *Raising the Bar* (Fussler, *et al*. 2004, which has become almost the bible of how to work the UN Global Compact, and Jonker & de Witte 2006) . These are books of conduct and civic instruction, offering technique, practical and moral guidance through the maze of risks associated with non-sustainability. They say to companies ‘examine yourself and then do this’.

Also around these conference and meetings are to be found consultants, hovering like hawks ready to swoop on any unsuspecting company representative. Risk analysis? We can do it for you! Reputation management? We can do it for you! Writing your yearly Sustainability Report? We can do it for you! These consultancy firms provide a support mechanism for cultivating a sense of corporate citizenship.

And finally endorsement by a high profile academic is also important. John Ruggie fulfils this role for the UN Global Compact (Ruggie 2005) and now in respect to the UN Human Rights Commission in its attempt to extend full human rights into the corporate world (Ruggie 2008). Michael Porter fulfils a similar role for the WEF in terms of its general programme of corporate citizenship (Porter and Kramer 2006; WEF 2008 – a discussion which Porter chaired).

Companies as Political Players

This outline of the basic attributes and dimensions of ‘corporate citizenship’ serves to introduce a wider discussion of the political role of companies, something opened up in a most interesting manner by Crane, et.al’s (2008) *Corporations and Citizenship*.

Companies have for a long while presented a problem for democratic politics (e.g. Gerencser 2005; Patton & Bartlett 1981): they have many legal rights and they claim others through their actions but what about their obligations and responsibilities? One thing the earlier discussion of company citizenship demonstrates is that companies are beginning to think about claiming a stronger status recognition for their citizenly activities associated with their pursuit of civic virtue and the performance of civic duties..

A first difficulty is that the emphasis on citizenship may obscure rather than reveal the political role of companies. Even in respect to natural persons citizenship is only one way that political activity is conducted. There are many categories of persons who are not necessarily citizens but who legitimately participate in political activity or have rights and obligations; like holders of visas or work permits, (illegal) immigrants, asylum seekers, visitors, etc. And those who can claim or are granted the ‘right of citizenship’ have changed dramatically over the years, e.g. in respect to gender and racial categories, ethnic and marital statuses, ‘blood ties’, etc. So citizenship in not a homogeneous category for natural persons, even in strict legal terms: it is contested and always subject to review.

And the same goes for companies as legal persons and what they can legitimately claim or do as analogous to persons. A sensitive matter is around the issue of ‘free speech’, particularly in the USA where this is protected by the First Amendment. This allows – indeed encourages -- citizens to actively support candidates, make donations to political parties and individual candidates for office. But how far does this stretch in respect to companies as citizens? (Patton & Bartlett 1981). The American courts have – if not so much found in favour of companies – *declared* that the First Amendment does indeed apply to companies as a result of their recognized personhood in law, so they can become legitimate political actor in this respect. In many ways they are no different to natural persons in their political capacities to influence political policies and decisions (subject to certain – highly disputable – restrictions; see Patton & Bartlett 1981 and Gerencser 2005 for the terms of this debate – as in the UK companies are not allowed to offer direct financial support to particular candidates for political office). In addition, there are several ‘legal statuses’ available to companies which affect their rights and capacities, e.g. Chapter 11 in the USA, ‘in administration’ in the UK, temporary suspension of trading on Stock Exchanges, for instance. So companies as ‘citizens’ are not homogeneous in any natural way, no more so than are natural persons.

Of course, in as much that the law treats agents similarly as citizens it treats them as 'equals': they are equal before the law. But this cannot account for the very unequal distribution of wealth, power and influence of different citizenly agents as exists outside of the law. This itself raises further complex issue about the role of companies in participative and deliberative aspects of democratic activity, but similar problems arise in respect to individual citizens as well, so companies are not unique, but they may expose these problems in a rather acute manner.

Pursuing the consequences of this form of analysis of the precise relationship between ownership and control invites a return in the first instance to the debates in the 1930s and 1940s over the original 'divorce of ownership from control' thesis, which took place mainly around Berle & Means book *The Modern Corporation and Private Property* (1932). The thesis of this book is too well known to be rehearsed in detail so I concentrate upon the way this is being currently re-interpreted (Ireland 1999, 2010; Ireland & Pillay 2009; Strasser & Blumberg 2011; Biondi *et al* 2007; Ho 2009). This has largely to do with the notion of 'enterprise entity' and 'enterprise analysis' that was widely discussed in the 1930s and 1940s (Berle 1932, 1947; Berle & Means 1932; Dodd 1932, 1935, 1941). As we will see in a moment the company considered as an entity is contrasted to it viewer as a multi-layered company with many subsidiaries and holding structures. While these separate elements may have no necessary operational significance as a matter of business reality or social expectation, the standard legal practice is saturated with them, focusing on separate subsidiary corporations and imposing legal requirement of responsible behavior only on them. The result is often poor legal decisions in respect to the requirements for corporate social responsibility.

Berle & Means posed the issue of the consequences for 'corporate governance' of the divorce of control from ownership and the growth in importance of the managers (controllers) relative to the shareholders (owners). Originally, Berle in particular was concerned to re-establish the traditional conception of shareholders as owners though later he modified his position and developed the idea of the firm as an 'entity' which needed to be considered as such in its own terms (9). But the nature of this entity is the key issue (Bratton & Wachter 2007). Under pressure from Dodd's arguments the idea of an entity not exclusively beholden to the owners/shareholders emerged. And this was the 'reality' of the way the modern company operated – so these authors adopted the corporate 'real person' conception of company personhood as outlined in Thompson (2009a). Berle recognized that the company was not just a 'bank account with rules about who had access to its resources' (as my corporate lawyer friend had suggested): it was not just a collection of corporate papers, minute books, account books, and a bank account, but a *real organizational entity* with many functions and aspects. Increasingly this organized entity was being pressured to operate socially and recognizing the need to operate in a *socially responsible manner*, mainly at the behest of outside social influences, but also, crucially, by the insider managers and directors rather than the shareholder-owners -- who were now remote from the company as an organizational entity. This was the concrete consequences of the divorce of ownership from control. So, the firm needed to be both reconfigured conceptually *and in a legal sense*; to recognize this changed nature of its existence. It needed to be reconceptualised as a 'singular entity' and confirmed in law as such. Hence the ideas of the 'enterprise entity' and of 'enterprise analysis'. Berle and Means argued that the established difference between limited liability and corporate personhood in respect to company law inhibited this 'unifying' conception: the distinction needed to be reformulated so that the cyborg nature of the firm could be overcome (it being both a 'person' and an 'entity' in law as discussed above).

Several political implications follow from this presentation. First it enables us to revisit the question of shareholder ownership. In effect the idea of an 'enterprise entity' undercuts this further. The company must be run 'for itself', by managers, who become the 'trustees' of the institutional assets (Berle 1932; Dodd 1932), taking account of a diverse range of variable social *and* commercial objectives [(10)]. And the idea of an 'internalized' trusteeship of managers nicely complements the idea of the 'externalized' corporate persona being constructed by/for the company as outlined in Thompson (2009a, see also Thompson 2012 forthcoming). Trusteeship would involve cultivating obligations to stockholders, to employees and to customers and the general public – safely, honestly, wisely, properly, and stressing the obligations of performing public duties as a good citizen (Dodd 1932, p.1154: quoting a speech by the business executive Mr.Owen D Young, 1928 – this involved the first explicit reference to the idea of ‘corporate citizenship’ that I have been able to find in the literature).

Of course quite how this form of internal trusteeship might be formed and ‘enforced’ would be crucial. Here one might appeal to the idea of civic prudence and fortitude, originally proposed as a way of constructing an impartial integrity amongst public officials (Pufendorf [1668] 1991; Hunter 2001; Minson 2006). This is predicated on a system of impersonal and jurisdictionally delimited offices cultivated by the wise and worldly application of sociality and reason. It involves neither a reliance on the higher moral values of officials as enlightened human beings nor the blind trust in the virtues of their guardianship. Rather it involves a system of practical obligatory commitments and integrity built amongst officials who relate their activities to the capacities of the office to which they are attached rather than to their own personal interests, values or proclivities. Whilst this ‘system of offices’ was originally conceived to relate to public officials, the suggestion here is to extend its applicability to the directing personnel of a new ‘quasi-civic milieu’ within the private but citizenly corporation. This would be ‘policed’ in the first instance through social entanglements and peer pressures amongst the office bearers within the corporation, and beyond – a self-disciplining via mutual scrutiny of tasks, advice giving and monitoring.

Given that – again as a matter of fact – shareholders do not contemporarily contribute much net investment resources in the aggregate for American (or British) corporations as pointed out above, any strong idea of legitimate shareholders rights in control is further undermined. What is more, enterprise analysis could in principle ‘solve’ the problem of ‘hiding behind the veil’ (Strasser & Blumberg 2011; Thompson 2009a). It would treat corporate holding companies in a group as a single ‘enterprise entity’ from the point of view of corporate law. Virtually all large contemporary businesses are organized into separate corporations – subsidiaries – which are owned in a hierarchical structure by a parent company which is in actual charge of the whole enterprise group. Standard corporate law treats each of these subsidiaries as a separate legal entity, with its own rights and responsibilities. What is more, the shareholders of the subsidiaries are not responsible for its obligations beyond the extent of their investments, even when the shareholder is the parent corporation which controls the whole enterprise. Thus limited liability means the parent may not be held responsible for the obligations of the whole enterprise. Strasser and Blumberg (2011) suggest six criteria for determining and assessing enterprise entity analysis: the extent of control between parts of company, the extent of economic integration between these parts, the extent of administrative interdependence, of financial interdependence, and of employee interdependence, and finally whether the company has a common public persona. These criteria would be used to determine whether a company and its parts comprised a single entity or not. Such an entity would then be treated as a single persona from the point of view of its legal incorporation.

Thus revisiting the idea of 'enterprise analysis' enables a reconsideration of the legal constitution of companies, and sets out an agenda for the reform of corporate law that provides a more effective way of reconciling the fact that the shareholder does not 'own' the company. It also provides an intellectual case for a wider consideration of 'stakeholder democracy' (Gerencser 2005 – see also Davies 2009).

But what of the general trajectory for companies of the future? What can we expect from both the context of corporate development and the nature of corporate engagement itself with this evolving business environment? Here we first need to sketch out what might be the macro framework for economic reform in a post crisis world and what role companies could play in this. Thus here we shift from an analysis of the legal constitution of companies to consider the consequences of the issues and problems it highlights for corporate reform in the context of how the modern corporation is influenced by the wider economic and political environment. In particular, this discussion focuses on the specifics of the post financial crisis world as providing the crucial context for the evolution of corporate activity. Of necessity this will be more speculative that the previous formulations since it look ahead towards future prospects.

POST 2009 PROSPECTS FOR THE POLITICAL REFORM OF THE COMPANY

Whist the era of strict ‘market fundamentalism’ and market hegemony may be over as a consequence of the 2007-08 financial crisis, market discipline may not be so readily dispatched. We live in a period of resigned, resentful and disaffected consent to market disciplining and will continue to do so for a long time yet. So a resort to market regulation and the celebration of the market mechanisms, with all it entails, is unlikely to go away. Since the business world knows this ground well it would probably welcome such a return to the normal routine of ‘business as usual’ as quickly as possible.

On the other hand what about the possibility of reconstructing a new framework for social democracy in the wake of the crisis? Can Keynesianism be revived for instance, in relation to which companies would have to adapt their operational trajectories? There is an important debate to be had here some of the possible contours of which have already been sketched out (Clift & Tomlinson 2006a, 2006b; Hay 2006; Crouch 2008). But whatever happens politically it is unlikely that traditional Keynesian in its ‘fine-tuning’ form could be easily revived (manipulating aggregate demand over the business cycle to achieve full employment), though some form of ‘coarse-tuning’ Keynesianism might still prove attractive and possible across the political spectrum. Indeed, this is exactly the reaction as a direct consequence of the crisis – massive stimulus packages in the USA, the UK and elsewhere (and in China in a different context) to prevent wholesale economic collapse. But whether this could be repeated again, and its full long-term consequences, remain unclear.

Colin Crouch (2008) suggests that after a period of ‘privatized Keynesianism’ – the maintenance of aggregate demand via private credit provision to stimulate consumption, which he suggests was the a characteristic feature of the ‘long moderation’ between 1995 and 2007 (something Clift and Tomlinson would challenge perhaps) [11] -- the likely alternative is to see a new, if uneasy, political *modus operandi* develop between big business and the state where companies either make public policy themselves or do so alongside governments and in partnership with them. This is an interesting suggestion and one that could easily develop serious momentum in one form or another as either neo-liberal market fundamentalism or any new social democratic Keynesianism prove insufficient to the task. Further off-loading 'public' provision of infrastructures and operational services to the private corporate sector will look like a temptation fiscally constrained governments find just too difficult to resist. The headlong rush toward fiscal austerity – enthusiastically in the UK, out of necessity in most of southern- Europe, perhaps less enthusiastically in the USA though significantly there nevertheless -- confirms that the private sector will in all likelihood step into the gap left by the state as it further abandons socially provided welfare services [12] and infrastructure developments.

And this would place 'corporate social responsibility' (CSR) back at the centre of business strategy. As mentioned above in the introductory remarks to this chapter, individually vulnerable companies are trying to bolster their position politically in various ways. One of these is to seek the protection offered by being seen as practicing 'social responsibility'. CSR, along with corporate citizenship, represents a way companies are seeking to secure their position: offering responsibility in exchange for claiming protective rights in various ways; seeking consumer brand loyalty; securing public commitments via best practice recognition of environmental and ethical standards, etc. Companies are tentatively exploring this territory, gradually feeling their way into a new politicized arena, not necessarily by seeking direct support or overt protection but by presenting themselves as agents of a public purpose, being 'good citizens', performing civic duties and virtuous deeds, etc.

But as companies are invited to take more and more responsibility for providing what were traditionally considered to be publicly provided services – or as they quietly draw these into the operational orbit – the demands for transparency and accountability for that provision will significantly increase. This would present the need to examine the possible contours of this in some detail. In this context an important distinction needs to be drawn between classic 'corporate social responsibility' (addressing mainly firm externalities); 'corporate charity' (extending and performing 'good works' in a local context), and finally; 'corporate philanthropy'; that is, the provision of public and merit goods on a much wider scale in contexts unconnected to the direct business activity of the firms involved, which is already a significant current development. And corporate philanthropy – or 'Philanthro-capitalism' as it is more grandly titled (Bishop and Green 2008) offers a tempting solution to the problem fiscally constrained governments have in maintaining the provision of 'public services'. The foundations and funds financed by billionaire philanthropists, for instance – of which there are many with billions of dollars to spend (Fleishman 2009) – are rapidly moving in to fill the gap, based upon their own assessments of 'public need' and armed with business expertise to increase efficiency as they see it. This is a major trend and one that is likely to grow. But is it legitimate to let billionaire business persons determine the agenda here, and will it improve matters (Edwards 2008)? This is a pressing issue and one that poses deep political questions about corporate objectives, their transparency and accountability – and more generally about democratic control of their activities under these circumstances. In addition to these forms of private backed initiatives we could see a renewed emphasis from this quarter on 'social entrepreneurship' and 'social enterprise' (12), which would again stress social responsibility and civic virtue in the establishment and conduct of new business ventures.

Thus we have the conditions for a revival of considerations of corporate social responsibility: the fact that private companies look set, in one way or another, to increase their activity in respect to concerns of civic virtue and therefore need to be held to account for that activity. This should put added pressure on reforming the model of the Anglo-American corporation. The idea that this is almost exclusively beholden to the interests of shareholders, and to shareholder value, was undermined by the detailed legal analysis of the company form conducted above. This opens up the case for the recognition of a wider set of social obligations, for treating the company as an enterprise entity in law, and of foregrounding a new sensibility to the centrality of ‘managerial responsibility’ in the conduct of its business.

On the other hand there is the wider challenge posed by the changed macro-environment in which companies are going to have to operate. The implications of this further splinter the notion of who owns the firm and what its purposes are. As new tasks are laid at the door of the traditional company, and new forms of company incorporation emerge, the case for reform is further strengthened. The company as an operational entity, its existence in law, its characteristic public persona, and its renewed mandate to support civic virtue should become the proper object of public policy.

CONCLUSIONS

By way of conclusion let us return to the idea of a ‘socially responsible company’ (SRC) mentioned above in connection to enterprise entity analysis. As Ireland (1999) has stressed, this is not the same as traditionally understood by CSR just described: it is much more radical in it implications, moving beyond simple amelioratory activity to encompass radical reform and corporate democracy. Such an idea of the SRC would seem to fit better with the current political conjuncture as just sketched. All the developments discussed in the previous section, for instance, pose the need for a deeper examination of the purposes of corporate behaviour and its public scrutiny. So perhaps even SRC -- let alone CSR -- does not go quite far enough to embed wider notions of company social and commercial responsibility: to provide it with a set of incentives and penalties that will ensure proper trusteeship and citizenly persona. Thus instead of treating corporate citizenship cautiously, essentially thinking of the company as not a ‘proper citizen’ but as a kind of secondary citizen (in contrast to the primary citizenship of natural persons), a very bold step would be to declare companies as ‘full citizens’ with many of the rights and obligations and responsibilities of other citizens, and enforce these rigorously through the law if necessary [(13)]. Giving companies full citizenship rights – indeed forcing them to become proper citizens -- with all the consequences that follow from this: not only to perform friendly good works and civic duties as outlined above but, for instance, also 'to come to the aid of the state when threatened' (a key responsibility of citizenship – Skinner 1993) – would itself pose a radical re-appraisal of company form and activity. But it is one worth seriously considering as companies threaten to become the new primary providers of public goods and services more generally.

Footnotes

1) This is testified to by the acrimonious discussion of the entry for 'corporate personhood' on the Wikipedia web-site; see also Keeley 1981.

2) As Teubner (2006) amply demonstrates bringing animals before the court to face charges is not a new phenomenon. For him anything that *participates* in communication (however remotely) can in principle be considered analogously as a 'person in law': this is particularly so of associations of non-human ('actuants') and human interactions ('hybrids') operating in social sub-systems.

3) This might need to be modified a little since the succession in the UK is governed by the *1701 Act of Settlement*. This limits heirs to the thrown to a Protestant line derived directly from Electress Sophia of Hanover and her descendents. Thus the matter of who inherits the crown in the UK is, strictly speaking, a legal matter not an ecumenical one or divine one. On the other hand the popular imagination is saturated with notions of the divine inheritance of the crown.

4) As Iwai comments:

> "These duties specify the standards for judging the 'trustworthiness' and 'fairness' of the managers' decisions and transactions which may conflict with the best interests of the corporation. And these standards usually include the so-called 'duty of care', the restraint on 'excessive' managerial compensations, the strict rule on the disclosure of information, and the prohibition of self-dealing, trading corporate opportunity, trading on inside information, and outright theft." (1999, p.623)

When shareholders enter the Board they too must adopt these standards and constraints.

But this idea of fiduciary duties is controversial. Despite some ambiguities, Kraakman *et al*.2004, and particularly Parkinson 1993 argue against this position. Indeed, these authors of well established textbooks remain the main contemporary ideologues for the direct shareholder ownership position.

5) McSeeney (2009, p.839) quotes from *Aranson v Lewis* 473 A.2d 805 Supreme Court of Delaware, [1984] where Justice Moore argued "A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." 8 Del.C. § 141(a). This is doubly important since Delaware is the state where most US businesses are incorporated, and is thought to have the most 'liberal' (read 'business friendly') corporate law regime. But these declarations have a longer history and apply to other jurisdictions in the USA. For instance, the idea that a company's board of directors is subject to any sort of direct 'agency' relationship with that firm's shareholders, requiring ongoing subservience to the latter's expressed interests, was dispelled in a line of cases decided by the New York courts beginning in the 1850s..

> "[t]he board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds toward his principal. In the strict relation of principal and agent, all the authority of the latter is derived by legislation from the former,…[b]ut in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated… in the sense of being received from the State in the act of incorporation." Justice Comstock inthe case of *Hoyt v Thompson's Executor*, (1859) 19 N.Y. 207 (Court of Appeals of New York), p. 216.

This line or reasoning was reiterated by Justice Chase of the same Court when he set out the basic principles of what is today known in corporate law jurisprudence as the business judgement rule: "the individual directors making up the board are not mere employees, but a part of an elected body of officers constituting the executive agents of the corporation." So that directors "hold such office charged with the duty to act for the corporation according to their best judgment, and in so doing they cannot be controlled in the reasonable exercise and performance of such duty" (*People ex rel. Manice v Powell*, (1911) 201 N.Y. 194 (Court of Appeals of New York), p. 201).

A similar legal position can be discerned in the case of UK company law, despite that fact that shareholders in the UK model are granted somewhat wider democratic powers. Moore and Rebérioux (2010) quote from Lord Justice Couzens Hardy to the effect that: "it is a fallacy to say that the relation [between shareholders and the board] is that of simple principal and agent. …I do not think it is true to say that the directors are agents. I think it is more nearly true to say that they are in the position of managing partners appointed to fill that post by a mutual arrangement between all the shareholders.' (*Automatic Self-Cleansing Filter Syndicate Co. v Cunninghame*, [1906] 2 Ch 34 (Court of Appeal), p. 45).

6) Drawing from Moore and Rebérioux (2010) once again: "'[i]f powers of management are vested in the directors, they and they alone can exercise those powers. The only way in which the general body of shareholders can control the exercise of the powers vested by the articles in the directors is by altering the articles, or, if the opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.' (*John Shaw & Sons v Shaw & Shaw* [1935] 2 KB 113, p. 134).

7) Here it is recognized that the discussion of shareholder rights remains solely within the frame of differences between legal traditions: common law versus civil law jurisdictions, and does not consider alternative explanations of how shareholder rights are constructed e.g. political explanations. The political literature in this respect is particularly instructive (see Roe 2003, Gourevitch 2003, Gourevitch & Shinn 2005, Coffi 2010 and Culpepper 2011) but a thorough discussion of these contributions would take us into a somewhat different territory. The analysis provided here concentrates on the legal literature for the good reason that a critical examination of this exposes the ambiguities and contradictions in one of the strongest justificatory discourses supporting shareholder supremacy and that champions a complacent legal reasoning.

(8) Note that Kraakman *et al* (2004) still refer to the shareholders as ‘owners’: indeed throughout their book this is the terminology used. But I would suggest that their own description and analysis reinforces the points made in the main text about this not being the case. It is Hansmann & Kraakmann 2001 that provide an argument that every legal system is moving towards their favoured model of direct shareholder ownership (a point reinforced in the second edition of Kraakman *et al*, 2009).

(9) Many years ago I discussed the nature of the corporation as a ‘dispersed social agency’ (Thompson 1982). I insisted then, as I would reiterate now in the context of this debate, that considering the firm as an ‘entity’ does not necessarily involve considering it as a ‘unity’. This should be borne in mind as the discussion proceeds in the main text.

(10) This is what Clerc (2009) terms ‘the corporate interest’ model of corporate governance.

(11) As a matter of fact, consumption as a percent of GDP did not rise between 2001 and 2007, indeed in the UK and Germany it fell slightly (Lapavitsas 2010, Figure 8). However, household debt as a percentage of GDP did increase significantly in the UK and the USA (but not in Japan or Germany), which was used mainly to finance housing. The general problem for the ‘privatized Keynesianism’ thesis is the way public expenditure also expanded in the period of the long moderation in many countries. Thus -- at a minimum – the thesis would need to examine the differences between countries where it genuinely was private lending that drove the boom (e.g., Denmark, where private household debt as a percentage of GDP had escalated to the highest level amongst OECD countries in 2008, closely followed by the Netherlands) and those countries where it was of less significance (e.g., Japan and Germany – and even the UK).

(12) Of course there is always an alternative variation waiting in the wings. In the case of the private provision of welfare services, this is not to provide theses directly via private firms, but to organize a market in welfare derivatives, one where individuals insure themselves against loss of income arising for various reasons, through the development of insurance futures and tradable derivative contracts (Hacker 2006.). This would represent a return to a kind of market fundamentalism.

(13) Hansmann (2000) explores the ownership implications of these types of enterprise in an interesting, if rather neglected, way. In the UK there are a range of

corporate forms that might be mobilized into this social enterprise agenda: traditional Industrial and Provident Societies; Company Limited by Guarantee; Company Limited by Shares and Community Interest Company. As yet these company forms do not challenge the ubiquity of the traditional limited liability company, either in terms of extent or size, but they provide a mechanism by which social objectives could be pursued and charitable objectives advanced, particularly in the context of the 'Big Society' idea currently being popularised by the Coalition Government in the UK.

(14) One might want to draw the line at allowing companies to vote in elections however, though in some jurisdictions this still happens, e.g. in the City of London. This has an unusual governmental structure made up of the Lord Mayor and The Court of Common Council which comprises Aldermen who are in part elected by City corporate businesses and commercial partnerships not just by resident individuals. (see <http://www.cityoflondon.gov.uk/Corporation/about_us/governing.htm >). In addition, Hong Kong, has special representatives of certain commercial interests who can vote in the legislature, who are not exactly elected by individual voters, but, in effect, appointed from 'functional constituencies' (see:< http://en.wikipedia.org/wiki/Legislative_Council_of_Hong_Kong>). In both cases 'citizen voters' are not necessarily natural persons. However, these tend to be marginal cases, ones either of an historical anomaly with little real power, or arrangements designed to deal with limited and unusual situations.

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