The juridical paradox of the corporation

Annual of International Corporate Law Hart Publishing Vol 2, 2002

Richard Tudway

Introduction and summary

As a means of giving expression to collective and associative endeavour the corporation has undergone various transmogrifications since its earliest appearance in European history. (See Gierke and Conard). It has been radically transformed as a consequence of the legislation, first in the US later in Europe, to introduce limited liability. This legislation, seen at the time as vital if rising levels of savings were to be harnessed to further advance industrial development, was a crucial transforming influence.

The passing of limited liability laws not only capped the upside liability of shareholders to the value of sums invested in shares in the corporation. It also separated traditional ownership from control. As a consequence, and with the passage of time, the power of management and its role in controlling the corporation has been fundamentally transformed. (See Chandler). The invisible hand of Adam Smith has given way to the visible hand of the corporation. Over the past 150 years the corporation has grown enormously in scale and importance. At the same time legal doctrine has been stuck in a divide between those who see the corporation as collective and concessionary legal expression of energy; and those who see it as simply a non-regulatable nexus of contracts. Section one examines these historical developments.

If the role of management has been transformed so too has legal doctrine and practice under girding the corporation. It has evolved as a subtle re-interpretation of the economic theory of the market and individualism. The earliest notions in British and American law portrayed the corporation as the personification of the individual with associated rights, duties and obligations, and a guarantor of the competitive market place. In time this gave way to recognition that the underlying corporate actor is neither the corporation nor the shareholders - who are the owners of the corporation – but management. (See Berle and Means). The doctrine of the management corporation once dominant in its sway has since the 1970's been further modified. The corporation has emerged once more as the true legal person consisting of a network of comprehensive commercial contracts. (See Coase & Jensen and Meckling). It is portrayed as a "black box"; a private institution governable only by rules of commercial law and not an appropriate vehicle for regulation. Section two explores the high ground the development of these doctrines within the legal systems of America and Britain with some comparative assessment of parallel developments in continental Europe.

This final transmogrification - sometimes referred to as the new economic theory of the firm - is now firmly established in American and British law. It marks the appearance of a final victory for methodological individualism. Section three explores these developments. The corporation as an individual in personification appears almost unassailable as an intellectual construct. The power now conferred upon the re-ified corporation ranks it, effectively, alongside the nation state without the panoply of democratic checks and balances that provide, often questionable, control and accountability of governments in constitutional democracies. (See Macmillan and Wriston). This leaves the corporation and its management operating from behind a convenient veil of chastity, but effectively wielding substantially unregulated and unaccountable power within the nation state and globally - a perplexing juridical paradox!

As the momentum of globalisation gathers pace multinational corporations are, as never before in history, in a position to negotiate as equals with states and successfully determine terms and conditions. If unchallenged this will empower corporations to circumvent individual democratic governments and the reflexive, autopoietic, social systems of which they are historically an expression. (See Teubner). The challenge is to ensure that a meaningful constitutionalism is properly and adequately reflected in a re-modelled corporate law. (See Eisenberg). These are disturbing, daunting matters. They flow from the re-ification of the corporation and its progressive legal re-definition as a nexus of contracts. (See Bratton). These developments prevent a fundamental review of corporate governance; the facade of risk-taking share ownership as being coterminous with proprietorial control; and the development of democratic principles of co-determination within the corporation and the nation state. The solution lies not in a restatement of former statist/collectivist doctrines but on developing fresh insights into the role of the modern corporation as an economic institution (See Buxbaum and Hill). Section four examines the implications of the "race to the bottom" in the context of globalisation of capital markets. It anticipates the main issues that have to be addressed if a progressive, commercially realistic and coherent policy framework is to be articulated.

Select bibliography

Otto Gierke: Political Theory of the Middle Age [translated by F W Maitland] (1900)
Alfred Conard: Corporations in Perspective (1976)
James W Hurst The Legitimacy of the Business Corporation in the Law of the United States 1780 - 1970 (1970)
A Berle and G Means: The Modern Corporation and Private Property (1968) [12th edition]
Alfred Chandler: The Visible Hand The Managerial Revolution in American Business (1977)
Ronald Coase: The Firm the Market and the Law (1988)
Michael Jensen and William Meckling: Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure J Fin Econ (1976)
Walter Wriston: The Twilight of Sovereignty (1992)
Melvin A Eisenberg: The Structure of the Corporation 1976)
William Bratton: The "Nexus of Contracts" Corporation: A Critical Appraisal Cornell L Rev 407 (1989)
E Mason (Ed): The Corporation in Modern Society (1966)
Gunther Teubner: Law as an Autopoietic System (1992)
John Micklethwait and Adrian Wooldridge A Future Perfect (2000)

Section 1
The corporation as a public enabling act

The history of the chartered corporation

In researching the history of the corporation at least two theoretical and practical preoccupations over a period of some six centuries can be identified. At one level the corporation is seen as a means whereby some ultimate or higher authority could empower, through a form of corporate charter, other lower level initiatives allowing interested parties to form appropriate associations to realise agreed beneficial objectives. At another level corporate charter status was granted by monarchs and governments that conferred privileges and rights in recognition of benefits to be derived. As we shall see these different routes have important interconnections that involve official conferment and regulation. This is sometimes referred to as the concessionist or communitarian doctrine of the corporation.

The first is associated historically with the Church of Rome. In the thirteenth century Pope Innocent IV encouraged the creation of fictional entities that by design had limited authority to execute specific approved initiatives (1). Corporations so approved could be material or immaterial; the important matter is that they had individual members and that such creations were not natural but intellectual (2). The second is often associated with the common practice in various European countries, including Britain, where the monarch approved charter status to towns and municipalities, and other types of institution such as gilds, and universities (3) apart from charters issued explicitly to support the furtherance of overseas trade and commerce and mercantilism (4). Again the notions of conferment and of regulation by a higher authority were a key feature.

Emergent capitalism in Europe

Moving forward in time we need to observe what was happening in Europe at the onset of the Industrial Revolution. The description 'powerhouse of the world' is taken from the comprehensive work by Norman Davies on Europe and its civilisation. It captures the dynamism and the turmoil of the nineteenth century (5). Throughout this period secular European governments were striving to foster conditions that would take their countries from economic 'ignition' to Rostovian economic 'take-off'. Some were more successful than others. In Britain these events were most striking. Driven by the concept of an economy as a market of competing individuals Britain's early start was followed by most of the countries of north western Europe. The promotion of down-to-earth enterprise and wealth creation in the domestic market place were of far greater importance than arcane discussions about the meaning and significance of corporate concession. Whilst limited liability law was enacted in Britain in 1856, individual proprietorship and partnerships endured for a lengthy period thereafter as the common form of commercial and legal entity. Britain's early glory was however eclipsed by developments elsewhere. By the end of the century Britain's lead had been overhauled by the

---

(1) See: Otto Gierke: Political Theory of the Middle Age [translated by F W Maitland] (1900). See also Alfred Conard Corporations in Perspective (1976).

(2) Innocentius Commentaria [the official statement or enclylical] under the sub title Universitas contains the section of text that it is believed originates the fiction theory of the corporation.

(3) See: R A G Monks and N Minow Corporate Governance Blackwell (1995) The tradition of official recognition and regulation dates back to the twelfth century. Some of the more important of the English gilds received charters from the Crown; others remained subject to control and regulation by chartered municipal institutions.

(4) An example is The Muscovy Company was established and chartered in 1553 in a bid to wrest the control of Baltic trade away from the Hanse League. Other well known chartered companies include the Barbary Company, the Turkey Company, the East Indies Company and the Royal African Company

(5) See: Europe - a History, Professor Norman Davies, 1997 Chapter 10, Dynamo, 759 - 896

superior organisation of German industrial effort and the growth of a professional managerial class (6). Germany's economic precocity also coincided with a policy mind set in Germany that favoured state intervention. The state was seen as a vehicle, which should, for example, foster domestic economic development, by selective forms of protectionism and by making heavy investment in education and infrastructure (7). This was later to earn the title 'the Prussian road to capitalism'. Needless to say this point of view was not universally shared - particularly in Britain where laisser faire liberalism relied heavily on the efficiency of markets in determining resource allocation within the economy and the role of individual actors (8).

With the industrial revolution in full swing a series of complex consequences ensued. The emergence of the money economy turned self-sufficient peasants into wage earners, consumers and taxpayers. Paper bank notes came into common usage along with deposit banking. Developments in science and technology inevitably drew invention and innovation away from its previous informal setting to more systematic sponsorship. This led to the development of banks and insurance companies with banks playing a new and important role in funding the working capital of businesses. The economies and the social institutions of Europe were fundamentally transformed during this period.

Changing patterns of growth and prosperity in Europe

Measures of growth in GDP between 1820 and 1970 and then between 1870 and 1913 provide a vivid picture of the changing fortunes of the European region. Angus Maddison estimates that the arithmetic average for growth in the fifty years between 1820 and 1870 was 0.9% pa for the countries of western Europe. This compares with an estimated world GDP growth of 0.33% pa over the three centuries between 1500 and 1820. Britain of the larger countries enjoyed the highest annual average rate of growth at 1.2% over the period 1820 - 1870 compared with 1.1% for Germany and 0.8% and 0.6% for France and Italy respectively (9). In the period 1870 - 1913 the picture changed significantly. All countries recorded improved gains with the exception of Britain whose rate of growth declined to 1% against an arithmetic average of 1.3% for all countries. Germany achieved an annual average rate of growth of 1.6% over this period.

Capital accumulation and its impact on financial markets

Capitalism brought with it new challenges and opportunities. Apart from increasing levels of prosperity, national economies began to generate much larger savings. These savings had to be deployed either domestically or overseas. Improved international communications fostered large capital outflows, particularly from Britain. Around 50% of its savings were transferred abroad. French and German overseas investments were also substantial. By 1914 British foreign owned assets were valued at one and half times money GDP. French assets, in contrast, were less at 15% greater than GDP with German assets about 40% of GDP. US assets held overseas were only 10% greater than GDP over the same period (10).

---

(6) See: The Development of the Economies of Continental Europe 1850 - 1941, P Milward and S Saul (1977) refers to British industry's Makler (or middleman) preference and the slowness of Britain to take advantage of mergers and acquisitions and the creation of a professional managerial class, preferring instead the continuation of family ownership and control.

(7) See: National System of Political Economy, Frederich List (1841)

(8) See: The Principles of Political Economy, David Ricardo (1817) the most cogent expose of economic liberalism and the theory of comparative advantage as a support to free trade

(9) See: Angus Maddison Monitoring the World Economy 1820 - 1992 OECD (1995)

(10) As a basis of comparison Maddison's calculations show that the US economy was slightly greater than twice the size of the British economy in 1914 with the French and German economies half the size of the British economy.

Most of the world moved to fixed exchange rates by adopting the gold standard. This had been practised by the British since 1821. Germany adopted the gold mark in 1871-3. Belgium, France Italy and Switzerland created the Latin Monetary Union at the same time based on the gold franc. The Scandinavian Union of Denmark, Sweden and Norway was created in 1875-6 with the Netherlands adopting the gold system at about the same time. The US adopted a fixed parity against gold in 1879.

The debate in Britain over the corporate form

Debates about the desirability of the corporate form began in earnest during the later eighteenth century. Adam Smith in 1776 saw very definite drawbacks with the proliferation of the corporate form. With telling foresight he saw that this would lead to the separation of management from stock ownership. This would ultimately weaken the power of stockowners and foster the growth of a paid management class detached from the risks associated with investment. He saw this as a wholly undesirable development. Though it took a century and three quarters - the case for the managerial corporation was, by then, well on the way to being made. Leaving aside the conceptual fudges surrounding the issue of management accountability, the concept of the managerial corporation was the central theme exalted by Berle and Means in their 1968 seminal work (11).

Adam Smith also expressed the view that the wider availability of the corporate form would stand in the way of both innovation and competition and would foster financial laxity. The British parliament had earlier passed the Bubble Act of 1719-20, to curtail the excesses of the period (12). It had the effect of holding back the development of the corporate form until its repeal in 1825. Significantly the proliferation of the corporate form in the nineteenth century and ahead of limited liability legislation reflected the view that company incorporation as a separate legal personality came as a concession from the state for certain types of commercial and industrial undertaking.

The implication was that incorporation was granted in recognition that the company would be undertaking functions beneficial to the public good, as well as the investors. This is an important understanding. Incorporation thus continued to confer upon the company, as in earlier times, a "public character" which could be used to justify state intervention to monitor public benefit.

Only when these drawbacks were remedied could the full potential of wide scale shareholding on the economic and financial system be realised. Until these reforms were introduced the role of the shareholder, as a specialised financial investor, would remain restricted along with the market for equity. These drawbacks were eventually addressed through the passing of laws on limited liability.

Pressure for institutional reforms

The growth of new savings, combined with the growing needs of industry for new productivity-enhancing capital, highlight another critically important issue. This turned around the status of shareholders and shareholding in the development of financial capitalism (13).

---

(11) See: A Berle and G Means - The Modern Corporation and Private Property (1968)

(12) See: Patterson and Reiffen, The Effect of the Bubble Act on the Market for Joint Stock Shares (1990) 50 J of Econ Hist.

(13) Financial capitalism may be defined as the institutional arrangements that enabled science and technology to be harnessed to capital with capital markets playing a key role in monitoring performance.

Pre-financial capitalism orthodoxy deemed shareholders as playing a role wider than that of putting up risk capital. Shareholders had unlimited liability for the financial affairs of the corporation. This was a fundamental drawback to channelling savings from wholesale sources into the business enterprise sector. The legislation conferring limited liability status on shareholders had two direct effects. First, it freed up the supply of equity investment capital. Second it had the effect of creating a legal fiction - the new style incorporated company. Under unlimited liability the shareholders are, in effect, the corporation and the management. They own the corporation in association. They are jointly and severally responsible for its liabilities rather as unlimited liability partners under existing law. Under limited liability a fundamental change occurs. The shareholders are still deemed to be the proprietors or owners of the corporation. They are no longer legally responsible, however, for its commercial activities. Their financial liabilities are limited to the paid up value of the shares (14). Management is employed by the corporation acting as agents of the shareholders. Herein the mystery of the corporation begins to take shape. The corporation starts to take on the existence of a Cartesian ghost in the machine. This development, designed to promote the flow of equity investment into corporations, would, by implication, involve corporations being effectively controlled by professional managers. It is also the source of much confusion since about the legal status of the corporation, and the facade of ownership and control by shareholders.

At its outset in America the first limited liability acts were approved in New York State in 1811. They were designed to promote the development of activities some of which resemble what economists refer to as "collective goods". These included railways, waterways, banks and insurance companies - all of which involved large sums of investment, where the payback period was sometimes long and uncertain. Incorporations were otherwise highly specific and restricted.

There was never a clear intention that this form of incorporation would be appropriate for all industrial and commercial activities. The "general form" of application only arrived at a rather later stage. It is perhaps significant that these crucial capital markets aspects were apparently largely secondary considerations. In reality a significant influence supporting moves to limited liability was the prospect of a large scale equity investment market. This could not occur whilst unlimited liability existed (15).

The legal doctrinal debate over the corporation

In the specific context of American law the Angell and Ames definition (16) sets the scene for the doctrinal debate over the corporation. The key issues of the American (and English) legal debate are explored in detail by Bratton (17). He helpfully compares and contrasts contributions from Chancellor Kent on American law, Stewart Kyd on British Law and Chief Justice Marshall's 1819 landmark judgement in the Dartmouth College action (18). In summing up the argument of the three learned jurists Bratton affirms that each conceives of the corporation as a re-ification realised in the actions of individual persons; each recognises the aggregate characteristics of the corporation, its concessionary origins and contractual rights, and each its public and private aspects (19).

---

(14) In continental Europe the problems of unlimited liability were addressed by the creation of limited partnership (societe en commandite) legislation. This was introduced in the early nineteenth century. It was never adopted as a corporate form in Britain or America even though it was enacted in 1908 in Britain. See: Cornish and Clark, Law and Society in England 1750 - 1950.

(15) See: F H Easterbrook and D R Fischel - Limited Liability and the Corporation 52 U Ch L Rev (1985) and The Economic Structure of Corporate Law (1991)

(16) See: J Angell and S Ames Treatise on the Law of Private Corporations Aggregate (1871)

(17) See: W W Bratton The New Economic Theory of the Firm: The Law of the Business Enterprise p141 - 143 OUP (1994)

(18) See: Bratton supra p 143

(19) See: Bratton supra p 141

The doctrine is modified as history progresses into the twentieth century. There is a gradual loss of confidence in the earlier definition. The emphasis on concession and the legal fiction of the corporation disappears. In its place the corporation begins to be characterised by the sum of the laws that govern it. Hohfeld in the early 1920's describes the corporation as 'an association of natural persons conducting business under legal forms, methods and procedures' (20). As Mark argues convincingly the legal fiction of the corporation emerges throughout the vagaries of history as a doctrinal restatement of methodological individualism. At the heart of the assertion that corporations are artificial lie the twin beliefs that private property is an individual right; and that individuals operating collectively would not manage the property of others with the same interest that each individual would for his own. This line of argument does not go unchallenged. Perhaps the most withering critique of the legal fiction theory of the corporation is advanced by Dewey in 1924. He argues that efforts to safely establish the corporation in traditional legal terms is 'logically indeterminate' and a 'waste of jurisprudential effort' (21). Either way or by whatever sleight of hand, as Mark observes, the business corporation evolved juridically to become 'the quintessential economic man' (22).

Legal theory overtaken by events

Thereafter the debate about the corporation is gradually sidelined as an issue of serious legal argument. Corporate America flourished as the twentieth century advanced driven by the exigencies of two wars in which America was involved. Berle and Means offered a ready and credible justification for the legitimacy of the new style, highly specialised, capital-intensive corporation. In it they portrayed top management playing a steadying, strategic role with line management running the business on a day-to-day basis.

It is not until the end of the 1970's that arguments originally developed by Coase (23) in the 1930's begin to re-surface as a response to the niggling problem of management accountability rather side-stepped by Berle and Means. These appeared in two distinctive contributions first by Alchian and Demsetz (24) and later in the analysis by Jensen and Meckling (25). Both approaches radically modified the managerialist approach articulated by Berle and Means (26). Once again the corporation is seen as a fiction.

This time, however, there is a difference of treatment. The corporation is portrayed as a black box", a nexus of comprehensive contracting relations among and between individual factors of production. The full force of methodological individualism is focused on eliminating once and for all any hint that the corporation is an entity with any features per se which make it an appropriate vehicle for public regulation. The corporation is contract! The thrust of development in the period since has been to tighten this conceptual framework to the point where the corporation, in all diverse roles, can be seen to be subject, exclusively, to the law of contract and tort (27). The full significance of these developments is explored in the following section.

---

(20) See: W N Hohfeld Fundamental Legal Conceptions (1923) and C B Elliott The Law of Private Corporations (1923)

(21) See: John Dewey The Historical Background of the Legal Personality Yale LJ 677 (1924)

(22) See: G A Mark The Personification of the Business Corporation in American Law 54 U Chic L Rev 1441 (1987). See also Frederick Hallis - Corporate Personality (1930)

(23) See: R H Coase The Nature of the Firm 4 Economica 386 390 - 394 (1937)

(24) See: A A Alchian and H Demsetz Production , Information Costs and Economic Organisation 62 Amer Econ Rev 777 (1972)

(25) See: M C Jensen and W H Meckling Theory of the Firm : Managerial Behaviour, Agency Costs and Ownership Structure 3 J Fin Econ 305, 310 (1976)

(26) See: Berle and Means supra 11 (27) The statutory aspects being downgraded in importance

(27) This doctrine affirms that corporations are nothing more than a collection of contracts between different parties - primarily shareholders, directors, employees, suppliers, and customers to be settled in the courts.

Section 2
The economic and political significance of the fictional corporation

Concession in furtherance of specified goals

Section one has explored the historical development of the idea of the corporation. It has portrayed the Middle Ages concept of the corporation as a concession granted in recognition of certain prospective aims and objectives. In granting the concession the group of individuals become personified in a meta or super-individual, the corporation.

The charter was granted for purposes where individual drive and initiative would not of itself be enough or where the corporation was expected to carry forward in time activities over and above those of any of the individual members. Succession was therefore an important implication of the granting of corporate status. There are no better examples than municipalities or universities. Their corporate status must have reflected the notion of long-term continuity with old members leaving and new ones joining - but always subject to the sanction of review and possible suspension.

Limited liability and the corporate ghost in the machine

The event of limited liability plays a significant role in that historic process. Limited liability is the event that caused the creation of the large-scale industrial, marketing and sales corporation. Limited liability facilitated the entry of savings into the business enterprise sector in the form of equity and the creation of markets in which those securities could then be freely traded. This contrasts vividly with the atomistic model of social and economic relations as portrayed by Adam Smith. The viability of his model was ultimately overtaken by these events. Though the social and economic world he described would soon be unrecognisable, the basic simplicity of his reasoning would continue to arrest the public imagination.

As the doctrinal debate on the status of the corporation evolves in the nineteenth and early twentieth centuries we see it being portrayed as a proxy-person or meta individual. The logic of the position reflects the concern that by some route the individuation of the corporation has to make legal sense. This is where Chief Justice Marshall's judgement in the Dartmouth College case is so important. The judgement portrays the corporation as an 'artificial being, invisible, intangible and existing only in contemplation of the law' (28). The judgement goes on to state that the corporation has only those powers conferred upon it by its charter.

The judgement is seen to justify the notion of the corporation as a legal entity with powers. Its powers have purposes; they are means to an end (29). Though the notion of the corporation as a state instrument is soft-pedalled, concession theory is still seen to underpin its origins.

The Jekyll and Hyde of corporate existence

As we move forward in historical time the power and influence of the large manufacturing corporations and utilities begins to emerge. Railways in America had boards representing not just management but also capital. Investment bankers sat on the boards of those companies. As industrial companies grew in importance and began to access capital markets, again investment bankers appeared on boards to exercise control on behalf of shareholders and protect the broader interests of capital markets.

---

(28) See: Trustees of Dartmouth College v Woodward 17 US (4 Wheat) 518, 636 (1819

(29) See: Bratton supra p 143.

There is a re-assuring sense of adaptive, competitive balance, and control. But there is also a well-documented darker side of corporate power in America in the late nineteenth and early twentieth century. The racketeering tactics of the railroad corporations in their negotiations with individual states is a chilling historical reminder of the impotence of government in the face of predatory corporate entities. Jurists, politicians and the public were rightfully fearful of what was seen as the unbridled power of corporations and their 'control over the economic and social machinery' (30). As Timberg vividly recounts the corporations in this period enjoyed a new form of corporate feudalism, having "broken free" in the pursuit of freedom of individual association (31) with the corporation being perceived 'not [as] a thing but a method' (32). This "method" was increasingly dedicated to minimising, if not eliminating or otherwise circumventing, any liabilities that might arise either to management or the corporation resulting from litigation (33).

The impact of the second war on the American Psyche

But fears about the exploitative powers of the corporation gradually began to recede. They did to the point where debate about the ultimate status of the corporation and its accountability all but dried up. This had a resonance with the commercial and economic success achieved by American big-business. The maturing of corporate America and the public perception of its statesmanlike response to issues of corporate responsibility and patriotic support of the war effort fostered a softening of hostility. This favoured finding practical solutions to practical problems. The pursuit of "will 'o the wisp" academic legal arguments about the ultimate nature of the corporation, which seemed to fall back on state regulation or other forms of political control, fell from favour.

The impact upon the public psyche of the second world war crusade against Nazism and other forms of totalitarianism also encouraged an accommodative pro-big business social response. There was a widespread sense of revulsion for the regimes that had encouraged collectivist and statist political philosophies to flourish in countries such as Germany and Italy, also Japan. The populist psychological reaction was predictable. The individual and individualism is the only safeguard, ever, against tyranny!

This reason almost more than any others explains the distinctive progress of legal doctrine in American and Britain in regard to the management corporation. It also explains why there was so little appetite for an examination of the nature and purpose of the different organs of the corporation in the context of co-determination and democratic accountability. Anything which might be remotely construed as giving licence to the "socialisation of business" was quite simply "off limits".

Individualism assumes the mantle

Wartime experience inevitably fired a new respect for liberal democracy based on a restatement of possessive individualism. Democratic societies might not have achieved the perfectibility of man's estate on earth; but they offered the next best safeguard against the tyranny of ideas whether Hegelian or Marxist in origin. The focus of academic interest in the corporation was therefore preoccupied with consolidating doctrine behind the management corporation. Berle and Means (34) addressed the reality of the management corporation by exploring how management professionalism

---

(30) See: Sigmund Timberg Corporate Fiction: Logical, Social and International Implications Columb L R 533 (1946)
(31) See: Timberg supra 30
(32) See: W O Douglas and C M Shanks Yale L J 193 (1929) Insulation from Liability Through Subsidiary Corporations
(33) See: Reiner Kraakman Corporate Liability Strategies and the Costs of Legal Controls Yale L J 98 857 - 862 (1984)
(34) See: Berle and Means supra 11

and efficiency, tempered by the discipline of efficient capital markets, both constrained management power and fostered corporate growth and profitability. A winning combination that supported well America's Great Society longings.

These developments had the effect of diverting jurist's interests away from the issue of management legitimacy. For a significant period of time there was an effective truce over the residual issues of managerial accountability. The modern management corporation saw "top management" cut apart from everyday "line management" – a new division of responsibility. Top managers were portrayed as corporate statesmen, if not senior public officials, capable of identifying and internalising public interest concerns within the corporation whilst reining-in the zeal of lower levels of management in the unbridled pursuit of commercial objectives. But residual uncertainties lay dormant.

Disquiet with the conceptual skewness of Berle and Means's portrayal of the management corporation inevitably led to the opening up of new avenues of debate. These centred on the primacy of contractual relationships at the core of the corporation which Berle and Means had otherwise portrayed as being 'part and parcel' of the management corporation. This resulted in a pendulum shift in favour of a reconstruction of the corporation exclusively in contractual terms. Drawing on the earlier work of Coase (35) the corporation was systematically reduced by Jensen and Meckling (36) and others to an exhaustive nexus of contracts - a "black box". There was nothing further to explore. The bedrock had been reached (37). The corporation is contract: the legal person no more!

Corporate governance - the European tradition

The demise of the legal person is a curious event for other reasons. Teubner (38) reminds us that in the nineteenth century the legal person was portrayed as a fiery fighter for political and economic freedom against government power and regulation. Today, according to the norms of American and British jurisprudence, the legal person has been "written out of the script". How has this arisen he asks (39). The problem Teubner explains lies in the conflict between methodological individualism and the systems theory of organisations. As we have seen methodological individualism offered a means of explaining away the legal person. Self-referential systems, in contrast, allow the legal person and its social reality to be understood. Teubner tells us that this can be achieved without invoking mystical entities like the social group, and endowing them with super-organic self-sustaining powers. It can also be defined without reference to misleading collectivist or organicist metaphors that trouble the individualist soul!

Properly understood, Teubner argues, the legal person is not a legal fiction or substratum of Gierke's corporate personality; nor merely an autonomised pool of resources (40). In this argument he also reminds us that there is no convincing social basis (the aggregate notion) for the legal person, the debate about which generated so much controversy with and between American and British jurists over such a long period.

---

(35) See: R H Coase supra 23

(36) See: Jensen and Meckling supra 25

(37) See: Bratton p 158 supra

(38) See: Gunther Teubner Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person The Law of the Business Enterprise OEP (1994)

(39) Teubner supra 38 cites this as the critique of the old Philadelphian Social epistemology. It is further addressed in Hypercycle in Law and Organisations European Yearbook in the Sociology of Law (1988)

(40) See: Gierke supra 1 p 61

So wherein, since it does exist, lies the legal person? He suggests that it is to be found in the collectivity. This he defines as a 'socially binding self description of an organised action system, a cyclical linkage of identity and action'(41).

The corporation as an autopoietic creation*

What this is taking us towards is a notion of the corporation that is the embodiment of collective and associative action. The actors (whoever and whatever they are) managers, shareholders outside directors, trade union representatives and other stakeholders give expression through the organs of the corporation that ultimately give it meaning. This logic stands the evolution of legal doctrine in America and Britain on its head. It starts with the corporation because it exists in reality, not as some fiction but as a real entity. It then tries to identify the organs through which the different corporate actors give expression to the corporation. In this way the conundrum of the corporate fiction disappears as a problem because the corporation is defined as a real organisation with real attributes and not as a mental construct of convenience. Teubner has exorcised the ghost in the machine!

The corporation is, in these terms, capable of 'self organisation and self reproduction through a capacity for action in concert' (42). Collective actions are the product of the corporate actors to which all events are attributed. Corporate actions are therefore nothing if not the collective product of the actors (43). The legal person is not however based merely on social relations but on 'a sequence of meaningfully interrelated communicative events that constantly reproduce themselves as an autopoietic social system'. We begin to see emerging a very different conception of the corporation, the corporate actors and the legal processes and principles that govern its existence.

How in other more concrete terms might these same notions be expressed? The corporation is not just the "flesh and blood" (44) of individual persons - shareholders, managers and workers. The corporation is a social entity through which these various actors express themselves. The corporation, furthermore, is not simply an expression of that association of interests. It is a systems "vehicle" through which all purposes are debated, defined and implemented. We can now begin to see the corporation as an on-going democratic expression of plural interests.

Comparing the Anglo American and Germanic models

The difference between the two models is stark. In its baldest terms the development of corporate doctrine under American and British law leaves effectively two real parties settling matters of control - management and shareholders. The corporation is a mystical entity with a legal personality that has little meaning or relevance, but massive undefined power. Management is constrained in its actions through contractual discipline and by market forces; shareholders are protected by the existence of competitive liquid capital markets. Any negative externalities arising are dealt with on an ad-hoc basis through progressive extensions of contract and tort actions that inevitably become more and more vigorously resisted - a state of affairs we have no difficulty in recognising. These are the parameters of the control relationship.

---

(41) See: Teubner supra 38 p 53

(42) See: Teubner supra 38 p 57

(43) See: Teubner supra 38 p 58

(44) See: Gierke's description in Maitland's translation of lll Deutsches Genossenschaftsrecht (1881) supra 1, page 20

According to the American model all liabilities arising from changes in the legal environment in which the corporation operates are thereby reduced to questions of commercial law and tort. The legislature is the font of authority for changes in the law. The parties in law are left to settle disputes between themselves. Law making has determined not only the parameters of debate and discussion: it has determined the legal norms, against a highly selective social and economic reality!

The German model (and models elsewhere in the European Union) has a different starting point. The corporation as we have seen is differently construed. Its organs play a unique role in the development and determination of values, priorities and decisions. It is a continual dialogue that ensures that all of the corporate actors have proper, effective and collective representation in that process. The law reflects, however, a much wider range of interests than simple management and shareholders. In so doing it has, as Teubner reminds us, become truly reflexive law.

Methodological individualism the driving ideology

We may ask how this extraordinary difference in legal conception has arisen? The answer must lie in the central preoccupation of American and British law with methodological individualism. Anglo American legal traditions flow from the individual, the basic building block in commercial law. Legal persons are either real individuals or personifications of real individuals. Before limited liability all commercial activity was carried out by real individuals per se or partnerships that were jointly and severally responsible as individuals.

The law of limited liability confronted for the first time a situation where a new party had been created. Joint and several liability in ownership disappeared with the limited liability corporation. A fictional individual entity had therefore to be "invented" to give legally consistent form to the corporation. Shareholders under limited liability are legal entities distinct from the corporation. The corporation has a singular legal identity though it cannot speak for itself. The corporation has 'no power of fiat, no authority, no disciplinary action' (45).

The corporation is nevertheless a reality even though it is veiled by legal doctrine that attributes to it an existence that is apparently no different to any other individual in the normal sense of that term. Not only is this absurd. It inevitably prompts the question - for what reason is this elaborate fiction of the corporation maintained? Why are jurists sidestepping this epistemological conundrum?

The fact is that the juridical paradox is being allowed to continue unchallenged. Though unsatisfactory the reasons for inaction are, at one level, understandable. The corporation, when defined as a nexus of contracts, offers a neat and convenient legal solution. But there is another issue. It excuses American and British jurists from examining afresh the deeper conceptual issues of power and accountability that the definition raises but seeks not to address (46). This most unsatisfactory juridical state of affairs is explored in the following section.

Section 3
The evolution of the global corporation

Some basic issues in political theory

This section will examine the dynamics of development of the corporation both as a national and multinational entity. It may be useful to begin by remembering some of the basic and unchallenged lessons of political theory in the context of the modern state. A central preoccupation of liberal democracy has been about legitimising and controlling the power of the state. The distinction

between public and private power is one of the symbols of the battle to ensure that separation of the state from the individual. The reasons for this are not hard to understand.

The state is still seen as the embodiment of the most important powers in any modern society. The theory at least is that legislatures through representative government confer accountable power upon the administrative organs of the state. It would be naive however to accept that these controls are widely accepted as being adequate in protecting the freedom of the individual. In recent years there has been a veritable onslaught against the state in a bid to make it responsive to the Rule of Law.

This has occurred against the backdrop of the collapse of communist regimes in Eastern Europe and the former Soviet Union. Whilst welcoming these developments as proof of the underlying moral and economic strength of liberal democracy (47) - these very events have occurred alongside increasing evidence of misdemeanours by states in so called mature democracies. There is increasingly a feeling by citizens of those states of scepticism regarding the effectiveness of surveillance exercised by legislative assemblies in overseeing, guaranteeing and exacting accountability (48).

The long arm of the corporation

The particular issue of corporate power and the management corporation has also emerged as a matter of increasing public concern. This again centres on control and accountability. Citizens no longer feel confident that corporate law and corporate governance issues are being properly addressed. In both Britain and America issues of corporate governance, where they arise, appear too often to be concerned narrowly with the issue of the relationship between shareholders and management. Broader issues are excluded from the frame of reference.

In Britain the Cadbury Report (49) has recommended the separation of functions between the chairman of the board of directors and the chief executive and an increased role for non-executive directors. These proposals were triggered principally by disputes over top management compensation and issues of audit. Understandably citizens who view corporate governance from other vantage points see this as "fiddling on the fringes". Where deeper issues of corporate governance, social responsibility and environmental liability are concerned corporate governance is judged to be inadequate.

Addressing specifically the issue of corporate governance British experience is instructive. In the early 1970's the Bullock Committee undertook an extensive review of policy alternatives as a response to the first draft of the Fifth EC (European Community) Directive. The Fifth Directive contained proposals modelled on German legislation (50). The subsequent government White Paper favoured co-determination with a two-tier board structure - reflecting German co-determination principles.

---

(45) See: Alchian and Demsetz supra 24 p 777 and 794

(46) See: R M Unger Law in Modern Society (1976)

(47) See: Francis Fukuyama The End of History and the Last Man (1992)

(48) The state of public confidence in government has reached all time lows in countries like Britain that has been shocked by a stream of disclosures. These seem to support the view that the state often conceals and misinforms the public about important events. The BSE or mad-cow crisis over food and issues of health-care negligence in Britain are examples. The failure of the current administration to inform the public on important matters concerning health and education and accusations of "spin doctoring" and "dumbing down" are all part of this disturbing background.

(49) See: The Cadbury Report The Financial Aspects of Corporate Governance (1992)

(50) See: Klaus J Hopt New Ways in Corporate Governance: European Experiments with Labour Representation on Corporate Boards Mich L R 1338 (1984).

The White Paper was never implemented. Its central concerns have since disappeared from the policy agenda (51). Corporate reaction in Britain towards industrial democracy and social and employment protection has been generally hostile. Under the Treaty of Maastricht the British government reserved its "opt out" rights. It has not adopted the Social Chapter. Much of the negative sentiment towards developments within the EC has been echoed by the CBI (Confederation of British Industry) and other employer organisations. The debate on co-determination in Britain has been stifled during a period in which employee and trade union rights have been curtailed.

The multinationalisation of business

This paper does not aim to address, except in passing, the phenomenon of multinationalisation. It will not examine why national businesses multinationalise their operations. What it will examine is how the issue of corporate control is affected when a business enterprise operating as a single entity within a single state becomes a multinational business. Once multinational corporate activity occurs new complex regulatory issues for states are raised. These emanate from the fact that multinational activity within a particular host state may impinge upon important economic, social and political objectives (52). Herein lie some very great if not insuperable difficulties. States find that regulatory control is limited to domestic entities headquartered within their own territorial boundaries. Attempts to regulate beyond territory can result in conflicts with neighbouring states. This arises typically in double taxation agreements. Without cross-jurisdictional enforcement mechanisms any attempt is unlikely to bear fruit.

National regulation is also hampered by the absence of a business form for corporate groups that is both nationally and internationally recognised. Regulators are faced with choosing between group recognition in law or whether to confer separate legal status on individual members of the group (53). The most developed international response to the issue of multinational enterprise is that offered by the EC. Though the EC is considering the possibility of pan-European legislation the road forward will not be straightforward. In moving down this path legislators are likely to encounter some of the many problems facing the UN in trying to control multinational enterprise (54). The framework is likely to remain highly fragmented. This benefits the larger and better-organised states with the long reach, at the expense of smaller states.

Section 4
Plotting an alternative way forward

The conceptual limitations on corporation ownership

As we have seen the status of the incorporated company as it exists today is a consequence of some highly specious developments in terms of legal theory. The main points we have emphasised are as follows. The corporation during the middle ages was certainly concessionary in nature. It was granted either by the church or reigning monarchs throughout the European region.

---

(51) See: Industrial Democracy Cmnd 7231 (1978)

(52) See: Sally Wheeler (Ed) The Law of the Enterprise OEP 1994 p 39

(53) In the case of the UK group liability has only been established to cover three areas: accounts;
company guarantees and loans to directors; and a company's purchase of its own shares. It is very restricted. See Sally Wheeler supra 52 p 40

(54) The dilemma facing the UN is well exemplified by events that followed the UN Earth Summit in 1992. The UN's own Centre for Transnational Corporations that tried to help weak nations to defend themselves against predatory companies had recommended that

businesses should be internationally regulated. The UN eventually refused to circulate the suggestion. In its place a business enterprise sector initiative The Business Council for Sustainable Development was created. They have proposed self-regulation.
Corporation status was designed to confer strength, credibility - perhaps even official approval. None of these developments had anything specifically to do with commercial activity in general; or limited or unlimited liability though it is true that obligations arising from unlimited liability could and were in some instances waived by those offering the concession. Economic activity at the time was highly fragmented with many individual buyers and sellers. Prices were largely regulated by market forces.

The deeper implications of limited liability

Limited liability as we have seen arrived first in New York State. It was designed to provide limited liability on a very restricted basis. It was enacted to allow equity on a much larger scale to be put into corporations and enable them to expand. In the case of the British debate on limited liability, four decades later, the same considerations were at the forefront of the debate. Limited liability was intended to confer a special status on certain types of undertaking which were involved in launching enterprises such as canals, railways and the like where capital investment was large and payback long.

The passing of limited liability not only spurred the development of financial capitalism. It also determined the development of a new legal entity. This new legal entity is the corporation whose profits at least are owned by its members or shareholders. Management act as agents for the shareholders in running and developing the business. The corporation otherwise assumes an unreal status. It cannot act for itself. It cannot speak for itself. Its voice must, for the most part, be that of management; sometimes, though rarely, the shareholders. Its day-to-day actions are taken by management in its name. Shareholders have little influence a fact well exemplified by a recent landmark judgement in Britain. The House of Lords has ruled that there is effectively no scope for tortious actions by shareholders against auditors since the auditors owe a duty of care to the corporation not to shareholders (55).

This awareness suggests that there is a legal fallacy, which derives from the creation of the corporation in this way. Concessionists and conmunitarians - those who believe that the corporation is in reality a creature of the state because of the mandatory laws that fundamentally govern its existence - find themselves pitted against contractarians. Contractarians claim that the corporation is but a nexus of contracts at every level in its existence. It is a private institution and not an appropriate candidate for public regulation. These points of view reflect the debate in Britain and America since the turn of the century.

A different European tradition

The European tradition reveals a very different picture. There is a tradition that sees the corporation as having customary rights, duties and obligations that are reflected through the organs of the corporation. Capital markets in Europe have played a limited role as a provider of capital or as a market device for monitoring performance. This view is at odds with mainstream, and dominant, American and British legal doctrine. This states that the corporation is owned by the shareholders and that managers act as agents of the shareholder in the pursuit of profit within a framework of rules and always subject to the discipline of the securities markets.

An effort has been made to balance and assess these starkly different interpretations. In doing so three facts are striking. First that the shareholders may be the technical proprietors but because of limited liability their ownership responsibilities are capped in financial terms to the value of their

---

(55) See: Auditor's Liability: Its Role in the Corporate Governance Debate Accountancy and Business Research Special Issue 23 (1993) and Caparo Industries Plc v Dickman

paid up capital. Is this what ownership amounts to of corporations which now play such a crucial role in global economic and political affairs? A second fact is the fiction that management are the agents of the shareholders who are the proprietors of the corporation. Shareholders inevitably have little or no control over management. The third fact is that management find ways of avoiding direct legal responsibility for the actions of the corporation. Yet we should remember: the corporation has no voice. It can enact nothing. It is all done "for and on behalf of" the corporation by management. A juridical incongruity if ever there was one!

The unresolved status of the corporation

These observations leave little doubt that a strong case can be made for a fundamental conceptual review of the corporation and its fictional legal life. As we have seen there are compelling arguments for insisting that the various organs that are part and parcel of the corporation must serve as the most meaningful and realistic point of departure. The corporation has to be seen as a vehicle of co-determination involving the various corporate actors who give expression to commercial objectives through the organs of the corporation.

If this argument is accepted as a basis on which to proceed then it appears to follow that what is so far being discussed in the name of globalisation is mistaken. Until the corporation can properly demonstrate that it meets all the conditions governing codetermination how can it possibly speak for or otherwise act for people at large or negotiate with democratically elected assemblies as foreseen in both the MAI (Multilateral Investment Agreement) and GATS (the General Agreement on Trade in Services)? (56).

The importance of an agreed framework for corporate governance

The issue of corporate governance both domestically and internationally is complex. Only when a clear and credible consensus has been reached on a legal framework which reflects the autopoietic "reality" of the corporation can the debate about globalisation be responsibly advanced. As consensus is reached at nation state level this will in turn determine the design of a new regulatory framework. If this is wisely constituted it will ensure that the global corporation can indeed act as the vehicle for global economic and technological development and the sharing of prosperity. But that process of consensus building first has to take place.

A report recently published by the WHO (World Health Organisation) and the World Bank highlights the need for this process when it comes to influencing the activities of footloose corporations. The report points out that of the 1,100 million cigarette smokers worldwide in 1995 some 80% are now in low to middle income countries. At the same time companies like Philip Morris have systematically diversified profit generation from developed to developing countries. The report also states that by 2030 some 70% of tobacco related deaths will occur in developing countries (57),

---

(56) See: OECD Policy Brief No 2-1997 that summarises the aims and objectives of the MAI and makes a fulsome case for protecting and enhancing the flows of FDI's (foreign direct investments).

(57) See: Tobacco Control in Developing Countries, World Health Organisation and World Bank, 2000. This reveals the scale of corporate irresponsibility where transnational sales, marketing and investment is concerned.

Mysteriously, as we shall see, the OECD that failed to ratify the MAI in 1998, continues to review the rules governing multinational corporations. One senior official from OECD sums it up when he states that "the mood amongst OECD countries is that the new rules [the ones being debated] have to be applied world-wide to address public concerns about the activities of multinationals and ways will be found to make sure that it works". Stout sentiments calling for stout deeds! (58)

The race to the bottom

Some ask the question - why is all of this important .... surely the most important thing is growth and prosperity? At one level this seems a not unreasonable response. But a closer look at the proposition must give cause for concern. In the name of free trade, free capital flows and effective autonomy for the largest existing global corporations - with many to follow in their wake - a particular set of arrangements is being promoted. These arrangements will leave the citizens of individual countries and the countries themselves at the disposal of those corporations on where, and the conditions under which, they will locate capital and create employment. (59). The implication is clear. Capital will be drawn to the most attractive domains. The most attractive domain (60) is likely to be one where labour costs (and other on-costs) are at their lowest. This in turn is bound to lead to competitive bidding between countries aimed at attracting footloose capital - a phenomenon sometimes referred to as the "race to the bottom" (61).

As a member of G7 Britain is perhaps an odd example to cite in this "race". It is nevertheless one that yields significant insights. As a consequence of a long standing failure by the business enterprise sector to maintain viable domestic industries capable of sustaining the levels of investment needed for them to compete effectively – a virtue has been made of necessity in a bid to promote inward investment. Because of weaker economic performance over many decades Britain, unlike any other OECD country of comparable size, has been faced with cutting back social provision on health, education, welfare and the environment amongst other prime societal objectives of so called post-industrial societies. The necessity has created the virtue. The belief that citizens can reasonably expect to see sustained improvements in public services and private prosperity has been turned on its head. If necessity dictates dependence on inward investment, frugality as a virtue must be demonstrated and sacrifices made.

The effect has been that benefits to labour have been progressively diluted. Surveys show that working people in Britain now face a longer, less well-paid working week with fewer other non-wage benefits including holidays (62). Provision for essential collective services such as health education and social provision and infrastructure has been eroded threatening the self-renewing capacity of the economy. Whilst the current administration can fairly claim to have tried to re-dress these imbalances, international statistical comparisons still present Britain in an unfavourable light when compared with other G7 countries. Domestically owned industries in key sectors of the economy have declined. One clear measure of this is the proportion of British manufacturing industry that is now controlled by foreign entities (63). Less than a quarter of British manufacturing industry is now British owned and controlled.

---

(58) See: The Financial Times Guidelines on Corporate Governance 12 Jan 2000, Kevin Brown, Industry Editor

(59) See: Fiona Macmillan Legitimating Global Corporate Power International Journal of Corporate Law 1 (2000)

(60) See: W B Wriston The Twilight of Sovereignty (1992)

(61) See: Macmillan supra 59 p 165

(62) See: Business Health and Safety Financial Times Guide October 2000 p 14

(63) More than 25,000 companies in Britain are under foreign ownership. Yet the amount of real new inward investment that is derived from this is small where it simply involves the purchase of a British firm by a foreign entity.

One inevitable consequence is that Britain is beholden, on a very significant scale, to corporate decisions being taken in other jurisdictions (64).

Though many of those investors are judged to be "benign", even friendly to British interests, the reality is that such businesses may close or relocate if the corporate parent decides that producing in Britain is no longer commercially attractive enough to do so. This has been shown most noticeably in early 2000 by the decision of BMW of Germany to suddenly abandon its ownership of and commitment to the Rover car company based in the Midlands of England. This leaves not only Rover but also a large part of the regional economy wholly dependent upon an entity judged by its erstwhile owner to be unviable. Other examples serve to illustrate the scale of vulnerability to the vagaries of effectively footloose investment. The decision of the British authorities to remain, at least during the "first phase", outside the single currency the euro has resulted in several multinational businesses declaring that they will close down British operations if sterling remains outside the euro zone. Friendly or unfriendly - depending on taste - this must be proof that businesses, quite properly under existing arrangements, will act always in their own corporate interest. Sentiment plays no part in this calculation!

Courting the international investor

Yet Britain claims to have the lowest wage costs of any major industrial nation. It also tells its own electors, often not well informed on these matters, that Britain is a natural and preferred location for international capital. The inexorable decline of British owned manufacturing, and the nation's increased reliance on inward investment, has been turned to advantage by successive administrations. It is presented as proof that international capital likes the British environment and Britain's defiant stance against costly EC social support and employment protection measures. This, the public is informed, explains the strength of capital inflows.

The British economy is thus packaged as a successful, highly de-regulated, low wage/low tax economy that attracts inward capital flows from wised-up global investors. This is presented as a key "selling point" to international investors. The various social and economic "indicators" which one way or another point to the British economy yielding one of the lowest standards of living to its citizens of any comparable OECD country, are presented as key features supporting the inward investment argument. It is difficult to avoid the conclusion that this is prima facie evidence that supports the "race to the bottom" argument.

Identifying a progressive path forward

As stated earlier the solution to the challenges of both effective corporate governance and globalisation lie not in out-moded statist solutions. Nor should solutions, from the point of view of governance, seek to equate corporate or managerial power and responsibility with that of government. Eisenberg defines the corporation as a 'profit seeking enterprise of persons and assets organised by rules' (65). He admits that it cannot be assumed that because markets are not perfect that mandatory rules would necessarily be better but sensibly urges the pursuit of more creative solutions to the interest conflicts which arise from and between market and regulatory reliance (66).

In acknowledging the illusions of the Nirvana Fallacy that the best of all possible worlds can be attained by design, this should not discourage efforts to create a framework within which legitimate concerns about industry and commerce can be democratically debated and resolved with the other corporate actors. In discussing the balance between the corporation and society Buxbaum (67)

---

(64) See: Bob Bishof Personal View The Limits of Inward Investment The Financial Times March 1999

underscores the continuing nature of the challenge that is to find 'a better match between modern market modelling and modern institutional economics'. More explicitly Hill argues that developments in modern capital markets - especially the blurring of definitions as between equity and debt - and the increasing indivisibility of labour and capital, represent a fundamental challenge to orthodox corporate legal theory (68).

The journey ahead will be difficult to chart. The solutions in terms of institutional design are not immediately obvious. Statist designs do not offer a way forward. Mainstream regulatory approaches cannot straightforwardly address the challenge of overseeing multiple jurisdictions. There is also enormous entrenched corporate inertia to overcome. First instincts will be to resist moves aimed at redressing the existing balance of freedoms by measures designed to enforce greater corporate disclosure and accountability. The debate, nonetheless, must be opened up. Inaction will heighten further hostility to globalisation and alienate, still further, multinational enterprise.

Failure to address these challenges carries another danger. It will have the effect of propagating still further the dangerous myth that globalisation is a win/win game which holds only hidden promise for all our futures. A Future Perfect (69) is a compelling and plausible apology for unleashing the huge potential benefits to be derived from globalisation. Apart from the conceptual difficulties that are embedded in the argument (70) there is no escaping the highly selective social and economic reality which has been chosen to demonstrate the argument. All of which confirms the eternal truth that 'everything said is said by an observer': what you end up approving for others depends very much on the vantage point from which you do your viewing (71).

---

(65) See: M A Eisenberg The Structure of Corporation Law The Law of the Business Enterprise 1994. It must ultimately question, however, the safety of the claim he makes that 'corporate law is constitutional'.

(66) See: M A Eisenberg The Structure of the Corporation (1976) and Columb L J 89 1461 (1989)

(67) See: R M Buxbaum Corporate Legitimacy, Economic Theory and Legal Doctrine Ohio St L J 45 (1984)

(68) See: J Hill Public Beginnings Private Ends International Journal of Corporate Law 1 (2000)

(69) See: John Micklethwait and Adrian Wooldridge A Future Perfect (2000)

(70) These are not specifically examined in this paper but centre on a collapsing of the theory of comparative advantage and the rationale of welfare being maximised through trade which results from the globalisation of footloose capital. This breaks the win/win equation embedded in the comparative advantage argument. It will lead to capital being allocated globally on the basis of absolute advantage - a game in which it can be demonstrated the winner takes all!

(71) See: Maturana and Varela, the originators of autopoietic theory, (1980) page xix.

* Autopoietic theory provides a rigorous theoretical basis for addressing, people and the social systems in which they operate. It draws on experimental work in the fields of neurophysiology and perception first published by Maturana and Varela in 1980. As a biological phenomenon autopoietic theory recognises that cognition is a consequence of circularity and complexity in the form of any system whose behaviour includes maintenance of that selfsame form. Autopoietic theory has been used extensively to explain and understand enterprise social interaction. See Randall Whitaker's Autopoiesis. Gunther Teubner defines autopoiesis in the following terms:
A system of actions/communications that reproduces itself by constantly producing from the network of its elements new communications/actions as elements. [Gunther Teubner Enterprise Corporatism The Law of the Business Enterprise OUP 1984]