

ENTERPRISE – PURPOSE – PROFIT: A HISTORICAL INTRODUCTION

Professor Andreas Rahmatian
University of Glasgow
School of Law
Glasgow, Scotland, UK

- ▶ 1 The Historical Development of the Company in Outline
- ▶ 2 Historical Critics of the Company
- ▶ 3 The Legal and Psychological Framework for the Functioning of Companies
- ▶ 4 The Idealistic and Benevolent Idea of Corporate Social Responsibility
- ▶ 5 A Structural Remedy: Steward-Ownership of Corporate Assets

OVERVIEW

- ▶ Idea of a corporate body distinct from its members with a common interest hails back to the medieval times in the form of guilds and boroughs – Also “the King’s two bodies” (see Kantorowicz) in England
- ▶ Hume’s concept of personal identity – compared with commonwealth, republic
- ▶ Sixteenth century: most companies incorporated by the Crown: mercantilist companies (if joint stock companies: limited liability depended on the individual charter)
- ▶ Seventeenth and early eighteenth centuries: Unincorporated companies were initially not recognised by the common law

HISTORICAL DEVELOPMENT OF THE COMPANY IN OUTLINE

- ▶ Unincorporated companies: partnerships for the purpose of common law (less so in equity), limited liability sometimes recognised
- ▶ By the early 1800s limited liability meant: incorporation by Royal Charter or Act of Parliament entailed limited shareholder liability, shareholders not traders
- ▶ Joint Stock Companies Registration and Regulation Act in 1844: This enabled incorporation through registration, away from privilege – broadly same situation as companies today, except limited liability

HISTORICAL DEVELOPMENT OF THE COMPANY IN OUTLINE

- ▶ Limited liability with later Acts of UK Parliament: Companies Act 1862 (predecessor of later Companies Acts – now Companies Act 2006)
- ▶ Confirmed with *Salomon v. Salomon* (1897): Case of a sole director-shareholder company
- ▶ Banks in the UK tended to retain unlimited liability well into the later 19th century, around until collapse of City of Glasgow Bank in 1878
- ▶ Still vestiges in banking law terminology: 'A cheque is a bill of exchange drawn on a banker payable on demand', s. 73, BoEA 1882
- ▶ Object of the company → *ultra vires* doctrine

HISTORICAL DEVELOPMENT OF THE COMPANY IN OUTLINE

- ▶ 'The trade of a joint stock company is always managed by a court of directors. This court, indeed, is frequently subject, in many respects, to the control of a general court of proprietors [shareholders]. But the greater part of those proprietors seldom pretend to understand anything of the business of the company; and when the spirit of faction happens not to prevail among them, give themselves no trouble about it, but receive contentedly such half yearly or yearly dividend as the directors think proper to make to them. This total exemption from trouble and from risk, beyond a limited sum, encourages many people to become adventurers in joint stock companies, who would, upon no account, hazard their fortunes in any private copartnery [partnership] ...

HISTORICAL CRITICS OF THE COMPANY: ADAM SMITH (1776)

- ▶ The directors of such companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company.'

HISTORICAL CRITICS OF THE COMPANY: ADAM SMITH (1776)

- ▶ 'Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and are less amenable to disgrace or punishment. They feel neither shame, remorse, gratitude, nor goodwill. The principle of private or natural conscience is extinguished in each individual (we have no moral sense in the breasts of others), and nothing is considered but how the united efforts of the whole (released from idle scruples) may be best directed to the obtaining of political advantages and privileges to be shared as common spoil. Each member reaps the benefit, and lays the blame, if there is any, upon the rest.

HISTORICAL CRITICS OF THE COMPANY: WILLIAM HAZLITT (1821)

- ▶ The *esprit de corps* becomes the ruling passion of every corporate body [...]. If any person sets up a plea [...] in opposition to the rest, he is overruled, he gets ill-blood, and does no good: he is regarded as an interloper, a *black sheep* in the flock [...].
- ▶ Public bodies are so far worse than the individuals composing them, because the *official* takes place of the *moral sense*. The nerves that in themselves were soft and pliable enough, and responded naturally to the touch of pity, when fastened into a machine of that sort become callous and rigid, and throw off every extraneous application that can be made to them with perfect apathy.'

HISTORICAL CRITICS OF THE COMPANY: WILLIAM HAZLITT (1821)

- ▶ ‘Nor was it [i.e. the *banque populaire*] a bank operating for the benefit of a company of shareholders, offering the people more or less advantageous credit terms, but operating in its own interest, like the cooks’ or tailors’ company. A People’s Bank, conceived according to this principle, would have been, like all existing workers’ associations, a monopoly institution. It would have been a return to privilege, and privilege, however popular it may be, is always the negation of equilibrium, an antisocial matter.’

HISTORICAL CRITICS OF THE COMPANY: PIERRE-JOSEPH PROUDHON (1849)

- ▶ Smith: shareholders gave managing directors a free hand
- ▶ Shareholders' interest: dividends
- ▶ No personal liability: encourages risky business adventures
- ▶ Directors not personally liable: encourages corruption and negligence

THE LEGAL AND PSYCHOLOGICAL FRAMEWORK FOR THE FUNCTIONING OF COMPANIES

- ▶ Hazlitt: company separate legal personality without any compassion, but group pressure, authoritarian governance structure
- ▶ Liability detached from control
- ▶ Narcissistic sociopaths therefore perhaps the most successful business leaders: company structure provides for that
- ▶ Proudhon: no normal commercial company, but no monopoly or state entity either
- ▶ M Friedman (1970): “The social responsibility of business is to increase its profits” - still seems to be valid

THE LEGAL AND PSYCHOLOGICAL FRAMEWORK FOR THE FUNCTIONING OF COMPANIES

- ▶ What is corporate social responsibility – sustainability, e.g.
- ▶ ‘The corporate world is by far the most economically powerful and environmentally impactful bloc on the planet. Corporations always play a pivotal role in promoting CSR and realizing SDGs [sustainable development goals under the Agenda for Sustainable Development, initiated in 2015 by the United Nations]. Therefore, no matter how large or small, and regardless of their industry, all companies can contribute to the SDGs. While the scale and scope of the global goals is unprecedented, the fundamental ways in which business can contribute remain unchanged. The UN Global Compact asks companies to first do business responsibly and then pursue opportunities to solve societal challenges through business innovation and collaboration.’ (Idowu and Zu, 2023)

THE IDEALISTIC AND BENEVOLENT IDEA OF CORPORATE SOCIAL RESPONSIBILITY

- ▶ When the original corporate form and structure are retained, corporate social responsibility is unlikely to have a lasting impact
- ▶ Social responsibility (ethical environment for workers for example) cannot be enshrined in corporate governance and property structure
- ▶ Is there is a profit after the deduction of costs, especially wages and salaries, and are prices competitive? → satisfactory dividends. If the shares perform badly → sold, and financing of company difficult
- ▶ Company performs best which can pay low wages for profit, hence most of the Western manufacturing industry has been outsourced
- ▶ “Trump tariffs” will remind the USA of that mechanism

THE IDEALISTIC AND BENEVOLENT IDEA OF CORPORATE SOCIAL RESPONSIBILITY

- ▶ Criticism of economic system failure prevented through authoritarian system (historically USSR, later Russia, now increasingly USA as well)
- ▶ A forerunner of “Responsible Corporate Governance” in German Fascism?
 - ▶ Public Companies Act (*Aktiengesetz*) 1937, s. 70:
 - ▶ “The Management Board shall be personally responsible for managing the company in such a way as is required for the benefit of the company and its followers and for the common good of the people and the *Reich*”

THE IDEALISTIC AND BENEVOLENT IDEA OF CORPORATE SOCIAL RESPONSIBILITY

- ▶ Corporate social responsibility does not address at all:
- ▶ Secondary market of shares, that is, monetisation and financialisation
- ▶ What is really important is the sale of shares on the stock market and the profit one obtains because of the rise of share prices meanwhile
- ▶ Especially: high frequency trade
- ▶ It is this secondary market of speculative exchanges where the real profits are made
- ▶ That stands against any idea of social responsibility and sustainability

THE IDEALISTIC AND BENEVOLENT IDEA OF CORPORATE SOCIAL RESPONSIBILITY

- ▶ Compare monetisation rule (Rahmatian, *Credit and Creed*, 2020):
- ▶ 'The exchange (sale) creates the value, it does not realise an existing value. The value of a *res* (tangible goods, intangible property) consists and materialises in the transfer itself, not as a result of a preceding transfer (sale or 'barter'). The very event of the exchange confers on the *res* a value expressed in the price. All *res* not (yet) exchanged are dormant or potential value, and it is the constant need to exchange that confirms them as being considered as less liquid, and less desirable, forms of, ultimately, money – with money proper being the ideal, the most liquid and fungible *res* that subsists just in the very exchange itself.'

THE IDEALISTIC AND BENEVOLENT IDEA OF CORPORATE SOCIAL RESPONSIBILITY

- ▶ Steward ownership: Prevention of private wealth creation
- ▶ Asset lock (permanent non-distribution restriction): shareholders obtain salaries, but cannot receive dividends
- ▶ Shareholders obtain the repayment of their contribution (share value) on winding up of the company
- ▶ Profits are not distributed to shareholders but reinvested in the company (or donated)
- ▶ The purpose of the steward-ownership company is free (no need for purpose of public benefit like benefit corporations)

A STRUCTURAL REMEDY: STEWARD- OWNERSHIP OF CORPORATE ASSETS

- ▶ Questions:
- ▶ 1) When would potential shareholders be convinced to invest in steward-ownership companies? Why would these be attractive?
- ▶ 2) What is the relationship between ordinary companies limited by shares and steward-ownership companies: how may they divide up the market?
- ▶ 3) When and to what extent would this framework be available for operating banks?

A STRUCTURAL REMEDY: STEWARD- OWNERSHIP OF CORPORATE ASSETS

Andreas Rahmatian

Professor of Commercial Law
School of Law
University of Glasgow, Glasgow G12 8QQ, UK

andreas.rahmatian@glasgow.ac.uk

CONTACT