company law reform

BP 161511 (363)

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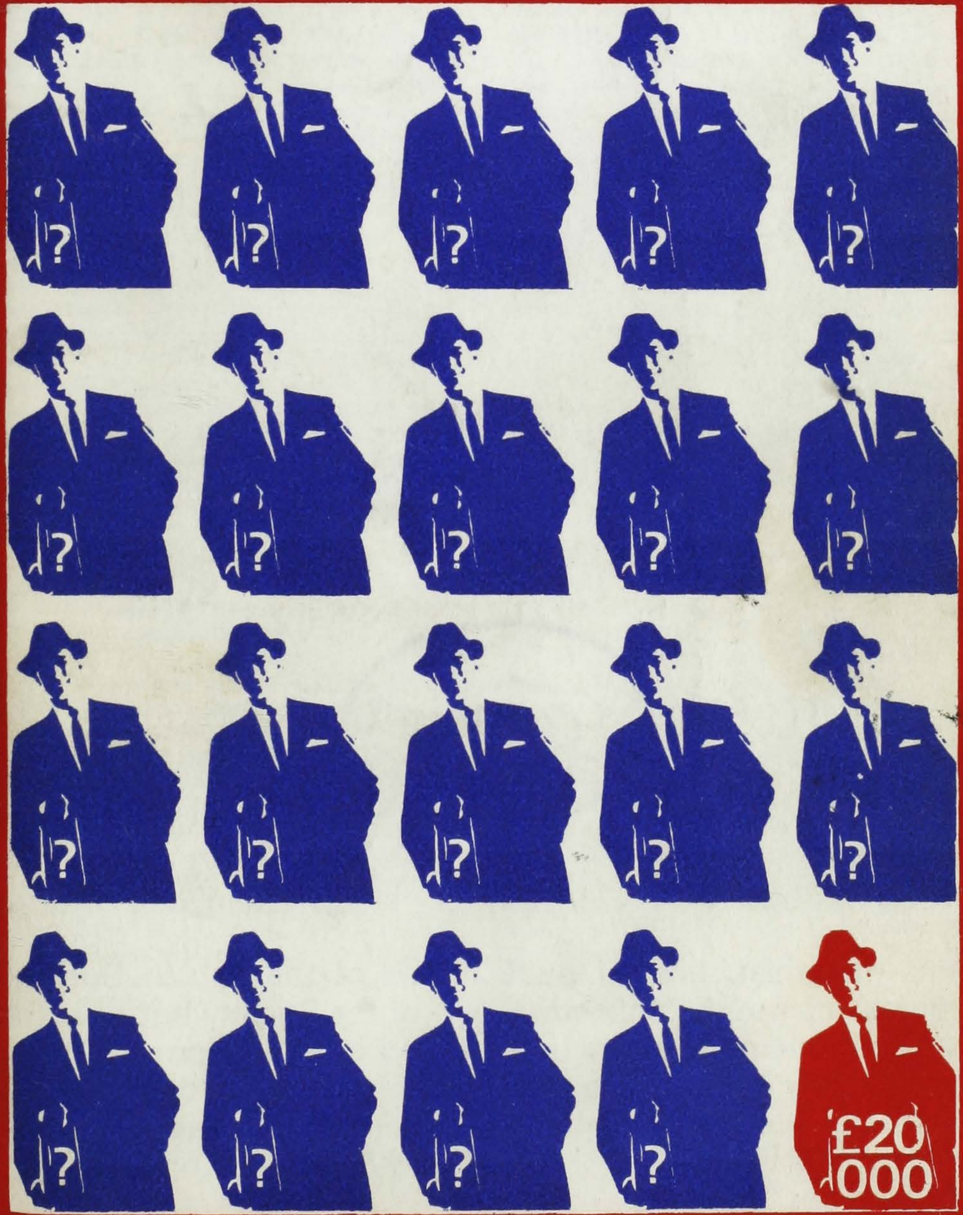

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this pamphlet, like all publications of the Fabian Society, represents not the collective view of the Society but only the view of the individual who prepared it. The responsibility of the Society is limited to approving the publications which it issues as worthy of consideration within the Labour movement. Fabian Society, 11 Dartmouth Street, London SW1. September 1965

1. the need for reform

Company law stands in need of reform. But reform of what kind? This pamphlet aims to examine some aspects, as yet inadequately discussed, of that problem. It originated in a lecture given in a series concerned with problems of government and public administration. The topic of *Law Reform and Private Enterprise* fitted into that framework, for the reasons made clear in the classic work of Berle and Means in 1932: "The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state . . . economic power *versus* political power, each strong in its own field. The state seeks in some aspects to regulate the corporation, while the corporation steadily becoming more powerful, makes every effort to avoid such regulation . . . The law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship" (*The Modern Corporation and Private Property,* p 357).

What should be our "constitutional law" for the private sector? And how should socialists approach that question?

In the immediate future Britain will experience a mixed economy. Whether, as some of us would prefer, the public sector controls the commanding heights, or whether it gropes timidly along the lower slopes of economic power, there will be a need to re-examine the legal philosophy of the *private* sector. Even those who reject the ethic of capitalism cannot evade the debate about the regulation of that sector. It is the object of this pamphlet to ask certain questions about the legal framework of whatever private sector we are to enjoy.

socialists and reform

There is an urgent need of a more radical re-examination of company law. Despite the efforts of some members, and some of the issues raised in the Notes of Dissent, such as that on "No Par Value Shares", the Jenkins Report of 1962 did not provide us with such an inquiry. Perhaps this was partly the fault of socialists and radicals, for their evidence to it was meagre. As Professor L. C. B. Gower (himself a member of the Committee) remarked in 1959, "So far as the last half-century is concerned, I think it is a cause of surprise how little impression Socialist tendencies have made on company law" ("Law of Business", *Law and Opinion in England in the 20th Century* p149).

It is true that the investigations of the Cohen Committee of 1943-5, and the Jenkins Committee of 1959-1962, were scarcely influenced either by socialist thinking or even by that of such business men as Mr. George Goyder, who seek to change the basis of our company law (*The Future of Private Enterprise,* 1951, *The Responsible Company* 1961). No challenge was offered by those Reports to the basic philosophy, and, perhaps more important, no analysis of it was even made. The joint stock company with limited liability is, of course, an essentially capitalist phenomenon. Many socialists have felt that there is no point, therefore, in trying to transmute it into something else. To some extent this is plain commonsense; it seems unlikely that a socialist society would make use of just that legal form. Perhaps, too, there is a desire on their part to keep their hands clean and not engage in the debate at all.

But it is desirable that socialist thinking should be brought to bear on a legal structure within which vast concentrations of capital are likely to operate, and express a view about the contemporary conditions which should be applied to it. Interest on all sides has quickened of late. Like it or not, the debate about company law philosophy is now on. Both in legal circles and elsewhere, disquiet has been expressed at the failure of the Jenkins Report to research into and to re-examine that philosophy. "Their report thus compares unfavourably with, say, the Robbins Report and the Buchanan Report," wrote P. S. Atiyah ("Thoughts on Company Law Philo-

sophy", *The Lawyer*, vol 8, p15, 1965). Others who have expressed the need for a better inquiry and new law range from Humphry Crum Ewing in "Better Law for Companies" (*Crossbow*, April, 1965) to Professor M. Fogarty, a prominent Liberal, in *Companies beyond Jenkins* PEP, vol XXXI, no 486).

Such concern makes especially relevant the renewal of interest among socialists. In 1962, Douglas Jay declared: "It is surely time that the Companies Act was drastically amended" (*Socialism in the New Society*, p331). On 20 April 1964, Harold Wilson told the Society of Labour Lawyers: "Substantial changes will be needed in company law". The same year saw proposals by Lord Chorley and Mr. Woolf in *Law Reform Now*, Mr. Paul Derrick in *The Company and Community* (Fabian Research Series 238) and Dr. Norman Ross in *The Democratic Firm* (Fabian Research Series 242).

Yet we still lack, it seems to me, a perspective, or strategy, for socialist proposals on company law reform. To acquire such a strategy, it is worth recognising first that the joint stock company with limited liability *is* a vehicle for capitalist investment, and, then, to seek the fundamental questions which need to be asked concerning its operation in a mixed economy.

the fundamental question

It must be asked: "What are the appropriate conditions on which the community will continue to provide legal facilities for persons to aggregate and make use of private capital under the advantages enjoyed for the past century?" Of those advantages, the two most important are the incorporation of the company (i.e., the ascription to it of legal *personality* distinct from its corporators and behind which they can hide), and limited liability for the shareholders. We must remember that the process whereby persons can avail themselves of those two advantages merely by the registration of a company is little more than one hundred years old. The first, incorporation, was permitted only in 1844; the second, limited liability, not until 1855. On the first Sir William Houldsworth (no radical in temper) wrote in 1925: "A corporation has received a privilege from the State and in return for that privilege it can be submitted to such rules as may seem necessary to protect both its members and the public" (*History of English Law*, vol VIII, p220).

As for limited liability, it was, of course, widely regarded before the middle of the nineteenth century as dangerous and wicked. A gentleman in trade was expected to back his debts with his fortune. "In the scheme laid down by Providence for the government of the world", said one writer, "there is no shifting or narrowing of responsibilities, every man being personally answerable to the utmost extent for his actions" (J. R. McCulloch, *Considerations on Partnerships with Limited Liability*, pp10-11, 1856, cited by J. Saville, *Economic History Review*, vol 8, p425, 1956). Limited liability was, however, wrung from the legislature at the height of the Crimean War after years of pressure, much of it, curiously enough, from Christian Socialists and co-operators. "The working classes should have the fullest opportunity of trying experiments", as Richard Cobden put it (*Hansard*, vol CXIX, col 679).

Those most in need of the new device were entrepreneurs and investors. Though the Limited Liability Act was styled by critics "The Rogues' Charter" (*Law Times*, 1858, R. R. Formoy, *Historical Foundations of Modern Company Law*, p120), it was a form that met the needs of the later industrial revolution.

But this form was, and was thought of as, a privilege. Today it has come to be regarded as a right, almost part of "the scheme laid down by Providence". A mixed economy society needs to reassert, at least, that incorporation with limited liability, a legal form advantageous to those who own property, is a *privilege*. That is why we are entitled and bound to inquire anew into the conditions for its enjoyment. Imposition of such conditions, far from being "State interference",

is merely the price of the boon granted. That price must be appropriate to modern needs.

conditions for limited liability

In this pamphlet the price will be considered quite apart from fiscal legislation. Tax law undoubtedly determines whether forms of corporate enterprise are more or less profitable to business men; but we are here concerned with something more fundamental than taxation, namely, the terms on which the very existence of incorporation with limited liability can be allowed.

Ever since 1844, three types of conditions have dominated the granting of incorporation and limited liability by registration. They revolve around three traditional objectives: prevention of fraud, especially on the investor; public disclosure of the company's affairs; and some administrative control, but no more than is necessary. Of these, the very keystone of company law has been disclosure, disclosure for the benefit of the public, but particularly for the creditors and investors, actual or potential.

After proper disclosure, the affairs of the company are, in the model that came to dominate the legal mind, carried on behind the corporate veil by a shareholders' democracy, a city state in which the "members", in the last resort, as proprietors control the directors who manage the business. With adequate disclosure of information in prospectuses, accounts, registers and so on, all will turn out for the best. This model is now out of date over much of the private sector. Yet it is still the model to which the Jenkins Report returns.

policy and company law reform

Before we can re-examine aspects of this philosophy, certain myths about "Law Reform" itself must be dissipated. The most fashionable myth is that law reform has nothing to do with "politics" or "policy". Ever since the House of Lords debated law reform in June, 1964, eminent spokesmen have persistently promoted the view that the Law Commissioners must have nothing to do with "policy" questions. Viscount Colyton said then that law reform could not concern itself with changes made "in the public interest"; for "what is in the public interest is a matter of politics and not of law reform" (*Hansard*, vol 258, col 1939, 11 June 1964).

In the same debate, Lord Reid (a Law Lord) opined: "I am inclined to let sleeping dogs lie provided they are doing nobody any harm; but the trouble in recent years has been that quite a number of sleeping dogs have in fact been showing serious signs of waking up and I would think that the main purpose of speeding up the process of reform is to prevent any of these topics breaking out in such a way that the public will be inconvenienced, if not worse." Law reform, he thought, "covers topics where reform can and ought to be regulated by legal principles and not by general considerations of policy". The two approaches of "policy" and "legal principle" were, he insisted, "quite different" (Ibid, cols 1071 and 1067).

This dichotomy played a part too in discussions on the Law Commissions Act, 1965. In the House of Lords debate on 1 April 1965, the Lord Chancellor warned against it by pointing to the "mixed character" of many subjects (*Hansard*, vol 264, col 1218). It has also bedevilled legal writing on company law which is otherwise of considerable illumination; for example, M. A. Pickering writing on "Shareholders' Voting Rights and Company Control" in the *Law Quarterly Review* (vol 81, p274), found it necessary to prove that questions of voting rights for shareholders concern issues of "legal *policy* rather than those of somewhat elusive legal *principle*". All legal principles have policy implications to some degree or other. There are, of course, some subjects more highly charged than others with a flavour of political controversy (trade union law is an example). But the fashionable dichotomy between "policy" and "legal prin-

ciple" is a false over-simplification that has particular dangers in company law; for by regarding the matter of company law reform as one of "legal principle" a narrow horizon can be set to the discussion. Insistence on the approach by way of "legal principle" is often nothing more than a determination to exclude certain types of policy from the reform.

The evil consequences of such an approach emerged well in the Jenkins Report of 1962. Significantly, although the Cohen Committee in 1943 had been asked to review company law and the "safeguards afforded for investors and *for the public interest*" (*Report of the Committee on Company Law Amendment*, Cmd 6659, p2) no such express mention of the "public interest" was made in the terms given to the Jenkins Committee. It was, therefore, doubly easy for the Committee to be convinced that it must avoid broader "political" questions that go to the root of the law of the private sector. The "broader economic and social" consequences of take over bids were, they said, outside their purview. Their field was "limited to the duties of directors and the rights of shareholders affected by such bids". They could not deal with, for example, the interests of redundant employees which "cannot appropriately be dealt with by amendments of company law" (though they could apparently allow themselves the luxury of acknowledging take over bids as "an essential feature of economic growth and development"). Similarly, political donations by companies are "not primarily a matter of company law", so the Report could not say anything about them (*Report of the Company Law Committee*, 1962, Cmd 1749, respectively paras 16, 265, 267 and 50). In this way the Jenkins Committee was a committee put in blinkers.

the need for a further inquiry

There is now a strong case for a further inquiry by a committee charged to investigate at any rate some of the broader aspects of the subject, where the "public interest" is directly involved with the law of private enterprise. Such an inquiry would need, as will other projects of law reform if they are to be adequate, not merely lawyers and City experts, but research teams drawn from various disciplines in social sciences. The Law Commissioners and future committees on law reform must recognise that they are *not* concerned with merely "legal principles", but with the law and all its impact on social policy.

Such a project of inquiry into company law would strike a rich field relatively untouched by either the Cohen or the Jenkins Committee. Among the many questions to be asked, it is possible here to touch on three only: firstly what adaptations should be sought in the traditional scheme of disclosure; secondly, how far can the law continue to rest upon the model of "shareholders' democracy" in days of increasingly independent management in companies of any size; and, thirdly, what modifications of the law are needed to take account of interests not now recognised by it, for example, those of employees. I have taken these three questions because each of them seems to me to be related to the others.

2. disclosure and the public interest

The traditional philosophy of disclosure for creditors and investors is currently applied in very narrow fashion. The Jenkins Report, it is true, has proposed that rather more should be demanded by law. A company should be required to give names of directors; details of activities, and changes in activities, of itself and its subsidiaries, in the directors' report; details in the balance sheet concerning fixed assets and their valuation, and the value of investments; value of stock and the manner used to compute the valuation; details about subsidiaries and other companies in which it holds 10 per cent of quoted shares. The list of proposals for the profit and loss account is longer; details of income from rents and investments; overdraft interest; amounts set aside for tax; details of turnover, including group turnover (a most important item); and a summary about the previous five financial years. But what strikes one with surprise about this list is the fact that the law does not yet demand these things.

Lord Ritchie, when chairman of the London Stock Exchange, proposed disclosure along parallel lines in his letter to chairmen of public companies in August, 1964. In some ways he went farther (e.g. by suggesting comparative figures for ten years and details of the number of employees "where this is relevant"). In other ways he did not go so far (e.g. by asking for disclosure *by* a subsidiary where Jenkins proposed disclosure of details about the "ultimate holding company" (para 380 (i) (j)). But the objectives were, in general, he thought, "attainable without difficulty" and the "minimum requirements" for disclosure by public companies must, amid the "growing volume of comment and public discussion", be raised. Such demands are surely overdue even by traditional lights.

Even those critics, however, whose object is to free the market and the profit motive from artificial restraints have not been satisfied by this approach. In a valuable analysis made from that point of view, Mr. Harold Rose has shown how further demands are likely to creep in. His standpoint is that the shareholders are "proprietors" who have "a fundamental right to information as owners", and that very full disclosure is needed "to steer real resources to the points of highest prospective return" (*Disclosure in Company Accounts,* pp30 and 14, 1963). He calls for even greater detail—as to accounting procedures: about costs, to allow for interpretation of turnover and trading profits; about the balance of different activities and sales in different branches of business within a company (according to the Standard Industrial Classification) and UK origin export sales". Even among the traditionalists, the Jenkins Report is a timid document.

American commentators, too, have been amazed at the tentative character of British law and of the Report. "Financial information in Great Britain," wrote one, ". . . still tends to be regarded as within the exclusive province of a select few—perhaps an appendage of the "club" philosophy. The public is supposed to regard access to information as a privilege, not a right" (S. Baskin, "A Securities and Exchange Commission for Britain?" *The Lawyer,* vol 7, p7, 1964). In 1963 Prof. L. Loss of Harvard called the Jenkins Report "a conservative document by American standards". He went on to reveal that Mr. Norman Thomas "a few years ago" backed the disclosure philosophy, "rather good naturedly I thought when it is considered that the New Deal incorporated so many of his ideas into our capitalist society as to drain doctrinaire socialism, even the Fabian variety, of any appeal it might otherwise have had to substantial numbers of Americans" ("The Protection of Investors," *S. African Law Journal,* vol 80, p67, 1963). Yet another authority has declared that "even if all of its recommendations were adopted the amount of required disclosure would lag behind the standards set in the US after the Federal Securities legislation in 1933 and 1934" (H. G. Guthmann, "The Jenkins Report," *Readings in Financial Analysis and Investment Management,* ed E. M. Lerner and R. D. Irwin).

Now it is true that the reasons for this transatlantic discrepancy are not simple. By its special position, the London Stock

Exchange fulfils some of the functions which in the USA are the concern of positive law. But one other factor does appear to be the overt recognition in the company law philosophy of the USA of the public interest as such The Securities and Exchange Commission in deciding, for example, whether to allow an exemption from disclosure and permit "confidential treatment" is given as a guide what is "in the public interest" (*Securities Exchange Act,* 1934, section 24 (b)).

The Jenkins Report stands in stark contrast to this, for more than once it calls for disclosure (e.g., on turnover figures) unless, in the particular case, *the directors decide that this is harmful* to the company's interests (paras 397, 379, 375 and 122). Professor Loss has called this formula a "source of danger in the English Companies Acts" (*Securities Regulation,* vol II, p531, note 154), and so it is.

If the public interest requires such disclosure (as it plainly does, for example, in the case of foreign subsidiary companies) dispensation should surely be accorded, not by the directors themselves, but by some public body which can weigh the public interest. Further, the presence of the "public interest" as a factor is now, interestingly enough, accepted even by the traditionalists and the market economists. Mr. Rose is not proposing disclosure of details on "UK origin export sales" solely for the purposes of investors and creditors. He proposes it, and rightly so, because in our economy today it is in the public interest that we should all know, openly and not just in private census returns to government departments, which companies are boosting exports.

the timidity of Jenkins on disclosure

The trouble with the Jenkins Report is that it never really makes up its mind *why* disclosure is still a good thing. Do we want disclosure merely because of the interests of the investor and the creditor? Or are there wider reasons?

In proposing the abolition of the "exempt private company" (a proposal made not before time when, in 1964, 323,000 of such "domestic" enterprises were on the register, that is 77 per cent of the eligible private companies, all free from the obligation to file accounts), the Report describes disclosure generally as "right in principle". But it hurries on with: "and necessary to protect those who trade with and extend credit to limited companies" (para 61). Later it gives as a "principal object" the provision to creditors and prospective creditors of "adequate information from which to judge (companies') credit status" (para 351). In fact, the protection of investors, but even more of *creditors,* dominates the Jenkins Report far more than it did the Cohen Report (paras 60 and 438). The increased concern for creditors need cause little surprise when one considers the rise of the finance house in the two decades concerned.

There are few exceptions to this traditional position in the Report. Whereas the Cohen Report called for disclosure of ownership of one per cent of equity shares, Jenkins calls for it by the controller of 10 per cent of equities in quoted companies. The argument does here refer to "those who . . . believe that the directors, other shareholders, *and indeed the employees*" have a right to know the identity of such persons (para 142); and to the interests of "the public at large" (para 143); but this is an exceptional passage. The only other passage in which the public interest makes any prominent appearance is that section of the Report dealing with special *exemptions* from disclosure, for example, for the banks (paras 402-404), and shipping companies (para 415). Both of these based their case on the "national interest". The shipping companies failed to convince the committee; and the Note of Dissent by five members concerning the banks is so superior in argument as to make it unthinkable to legislate in future for their total exemption.

Yet, surely, as the price of limited liability, disclosure must today be discussed throughout by reference to a multiplicity

of criteria. To the needs of creditors and investors should be added those of the national economy; considerations of efficiency and social cost; the demands of collective bargaining, the needs of consumers and employees; and the national policies on wealth and incomes. Judged against that background, the extension of disclosure demanded in Jenkins is absurdly small, and takes on the appearance, as it were, of a communique to be extracted from secret societies.

It is impossible to assess exactly what demands for disclosure might stem from an inquiry which took the "public interest" in this wide sense as its guide. Clearly, one area where Jenkins would be surpassed relates to groups of interlocking and associated companies. Although demands are made by the Report for more information, including details of the "ultimate holding company", this is weakened by the recommended redefinition of subsidiary (para 156(a)).

The effect of this would be to leave control of the *composition* of a board of directors as the sole test of subsidiary status. We need a much wider net, one that will catch groups of "associated" companies, where the policy of one board is, in effect, dictated or substantially influenced by another. The lines that link such interlocking companies, upwards, downwards and sideways, should be constantly and compulsorily exposed to the light, because that is today in the public interest.

Again, there is a powerful case for details of the origin of profits, by geographical area and by industrial classification, to be revealed clearly and for their relationship to assets employed to be explained. Even the Report "would welcome an extension of this practice, but we do not think it should be imposed by law on every company" (para 382). The market economists, Lord Ritchie, the proponents of "public interest" all agree that geographical classification would be desirable. If the Jenkins Committee had considered such urgent national questions as the drift to the south and the location of industry, it is inconceivable that it too would have failed to back up its welcome, not with pious hopes, but witih a firm recommendation for legislation.

political payments, turnover and directors' emoluments

On a rather different level, once the public interest has been taken as a focus, certain corporate disbursements become obvious candidates for compulsory disclosure. The best examples are political payments. Where the advantage of limited liability incorporation has been granted, it is surely not unreasonable for the public to know what proportion of its fruits are being used for political purposes. True, difficult questions of definition and detail would here arise; but they need not by themselves inhibit legislation any more than they have defeated the successful operation of the Trade Union Act, 1913, which demands a separate fund, and gives members a right to contract out of it, in respect of trade unions' "political" activities. There is also a very strong case for compulsory disclosure of payments made by companies for other "social" purposes—to educational foundations, to private medical institutions, and so on. All this the Jenkins Report had to ignore.

Further, the Report concludes that, even if the exempt private company is abolished, "small" companies should be exempt both from the *new* demand for public filing of figures on turnover and rents, and from the *old* demand under section 196 of the present Act for public disclosure of directors' aggregate emoluments. Only the shareholders and debenture holders need be told. These proposals are remarkable for the paucity of argument with which they are supported. It is merely suggested that such public disclosures here would be "embarrassing" to small companies. But why should this be allowed. Even on the traditional basis, disclosure of turnover can be said, first, to be in the interests of creditors (certainly of unsecured creditors) and of competitive efficiency, as Mr. Rose has argued. To ignore the creditors' proper interest in directors' aggregate emolu-

ments is uncharacteristic of the Report, and in itself breathtaking.

Secondly, the measure of a "small company" surely cannot be, as the Report suggests (para 352), one which has its shares neither quoted nor offered to the public (so long as it is not a "subsidiary" of a public company). Our experience of the "private company" since 1907, and of the "exempt private company" since 1948, proves that this cannot be the functional line drawn between big and small enterprise for the purposes of disclosure or regulation. Although it is true that 150,000 private companies make less than £1,000 a year, many others are "private" in no more than a technical sense and run huge enterprises. If a line is to be drawn (and there is an argument, though not a strong one, to mark off the very tiny concern from the most severe demands of disclosure in the public interest), it should surely relate to realistic tests, such as size of turnover and number of employees, not to the technical question whether shares have been offered to the "public" within section 55 of the Companies Act, 1948.

Thirdly, this licence for secrecy about turnover figures and directors' fees is proposed in the Report without any discussion at all of the "public interest". The memorandum submitted by the TUC had made a forceful case for disclosure of trading account items, including turnover (*Minutes of Evidence to Company Law Committee,* p991). That case did not depend upon the company's shares being quoted on the Stock Exchange. It is quite remarkable that a Report which states that it "had in mind particularly the requirement to disclose directors' emoluments" (para 351), should recommend this serious *reduction* of disclosure by the non-exempt private companies which have for years now been providing this "embrassing" information.

3. the position of management

In all but the tiny company, senior management today has a remarkably free hand, not least in regard to emoluments. Except for some independent professions, such as the Bar, this is the only group of persons in the community which can fix its own incomes policy, in cash and in "perks", without the inhibiting controls of either public accountability or collective bargaining. Of course, the income tax authorities require confidential disclosure and exercise their own control, here as elsewhere. But the public disclosure under section 196 of the Act of aggregate directorial "emoluments" (widely defined, and including benefits in kind) has been the only element of public accountability for disproportionate managerial remuneration.

Far from needing a reduction, there is an overwhelming case for an extension of disclosure of information about managerial emoluments. Disclosure should, in the ordinary case, include *individual* emoluments of directors and other top managers. The private Member's Bill introduced by Mr. Peter Shore in 1965, calling for disclosure and regulation of the individual "emoluments of top management" is only one indication that the Cohen Committee's judgment that "the traditions of this country" forbade disclosure of individual fees, is not now universally accepted. The tradition certainly has not applied to higher management in public enterprise, on the boards of nationalised industries, for example. Lord Beeching's salary in ICI is as much a question of superlative public interest now as it was in British Railways.

The whole structure of managerial reward is a matter of concern and debate. If a judge's or a civil servant's pay is sufficiently a public matter to be known, so are the salaries and expense allowances of those who control the commanding heights of the private sector; and its constitutional law should so provide. A massive case was made by Mr. Shore in the 1965 debate for individual disclosure (*Hansard*, vol 707, col 785 and 795-797, 26 February 1965). For thirty years the US Securities and Exchange Commission has, under the Act of 1934, been requiring such information. Item 7 of its form 10-K now demands the disclosure of sums paid to directors in receipt of over $30,000, and to the three highest paid officers of the corporation. Why cannot our law go that far? The vague assurances given by the government spokesmen in the debate went no further than that "the views expressed" would be "taken into consideration" in preparing new company legislation. The recent dispute in British Printing Corporation, when it was alleged that the chairman claimed to be entitled to remuneration for 1964 of £270,000, underlines the need to take them very seriously (*Financial Times*, 3 July 1965). The emoluments of each director should be individually disclosed, as should the remuneration of any other top manager who, in cash and kind, receives more than £10,000 a year.

Apart from the proposed reduction of disclosure, on these critical questions the Jenkins Report has nothing further to say, except to propose more adequate notice to members when an increase in aggregate emoluments needs a change in the articles (para 99(k)). Yet the Committee explicitly refers to cases when directors may be taking "excessive rates of remuneration", where the minority shareholder might justifiably complain of oppression or "prejudicial acts". But they leave him without any adequate means of discovering what the top managers *are* taking out of the enterprise. The shareholder, the employee, the trade union, the public, all have a legitimate interest in knowing what are the emoluments of top management in corporate enterprise whose self-determined rewards set so much the pattern of rewards in "comparable" jobs, or, more frequently, set the pace in a race where public enterprise can never hope to catch them.

directors' fiduciary duties

Remuneration and its disclosure is only one of the areas in which the oddities of our law about management appear. There is an ambivalence in the law as it relates, first to directors' duties; and secondly, to shareholders' control.

Let us take the fiduciary duties of a company director. On the one hand, he is placed under very strict duties to the company, especially strict as far as "secret profits" made from his position as director are concerned. Some of these the Jenkins Report proposes to tighten, for example, certain details of duties relating to "insider trading" with the company's shares, and disclosure of the director's own shareholdings (para 99(b)-(g)). Otherwise the Report proposes to relax such duties, for example, in regard to disclosures of a director's personal interest to the board (para 99 (l) and (m), proposals on section 199 of the Companies Act, 1948, although (m) (ii), it is true, does require disclosure of the "nature and extent" of an interest in a general notice under the section).

There is no clear line of thought in these recommendations; and they certainly would not provide an effective control over "insider trading" in shares bought and sold by directors when they know that a take-over is imminent or probable. Once again the United States Securities and Exchange Commission rules on "short swing" profits made by "insiders" within a six-month period is a more realistic, if rather arbitrary, attempt to control the practice in conformity with what is supposed to be a fiduciary role. Furthermore, the courts in the USA have used the rules to catch both insiders and their "tippees" who profit from inside information.

Asked about such purchases of shares by directors, Mr. Clore told the Jenkins Committee: "They often do. That is my experience" (*Minutes of Evidence to Company Law Committee*, p531). We need to know much more about exactly how and when such insider trading in shares takes place, and to decide just how far the public interest, as well as the interests of minority shareholders, dictates that it should be effectively controlled.

Similarly, it is possible, under the Companies Act 1948, for articles of association to provide relief from fiduciary duties in advance (See, e.g., Table A, article 84 (3)). The Report does not deal with that; nor does it even support the proposal for a "highway code" for directors to explain to them just what their rather complex duties are (para 87), although it thinks the duties so important that directorships should be confined to human beings and corporations should be barred from the office (para 84). From such confusions we may draw the conclusion that a new inquiry into directors' fiduciary duties is required; that we need to decide how far these trustee-like obligations should be placed upon the managers, or some of them, of private enterprises; and what should be done to explain and enforce those duties. Such a discussion is possible only in an inquiry which recognises the range of interests on which the questions touch, and the central place in them of the public interest.

shareholders' control

Even worse is the imprecision about shareholders' control of management. For this the reason is the fact that the old model on which company law rests just does not work over a wide area of actual company practice today. Both the Cohen and the Jenkins Committees made their proposals as if it did; and as if there were only one kind of company today.

In reality, in the tiny company, management and shareholders are often effectively combined and incorporation merely provides limited liability. In some other small companies management may be controlled by the shareholders; and in the larger company, there are occasions when the general election situation of the joint stock company—the take over—or the restiveness of large institutional investors causes such control to mean something. But, in general, as Professor Gower has put it: "What at least is clear is that the shareholders as a whole have no effective control over management" (*Law and Opinion in England in the 20th Century*, p148). For the purposes of this pamphlet it does not matter whether this is because management and controlling shareholders are all

"insiders", or because of the "divorce" between management and members on the Burnhamite pattern. Whichever view is correct for more companies—and the debate has certainly not ended—the city state model is not appropriate. The increasing absence of effective day to day shareholders' control has been matched over the last fifty years by the development of judicial doctrines that recognise management's right to independence from the "proprietors". Indeed, the doctrine, developed in cases leading to *Shaw and Sons Ltd. v. Shaw* (1935) (*King's Bench Reports,* vol 2, p113) mean that shareholders, having agreed to delegate powers of "management" cannot interfere in the directors' exercise of managerial functions.

The Companies Act, 1948, however, and the Jenkins Report too, assumes that shareholders' control can be, in general, made to work and sets out to make it work. In 1948, a section was introduced to allow an ordinary majority to dismiss any director (section 184): surely, the high point of attempts to prop up such control by legislation. In practice, this has meant little. The shareholders may not even be able to discover what it will cost the company in damages, to which the dismissed director is entitled if, in common prudence, he has secured a long term service contract with his company. Various manoeuvres can reduce any use of section 184 to naught; and in the average case a board has little to fear from a vote at a general meeting, especially when it controls the proxy machinery

The Jenkins Report tries to add to this structure by once again legislating for democracy. The directors, it says, should be made to obtain shareholders' approval for certain acts such as new issues, and disposal of substantially all the assets (para 122). As in the case of section 184, few boards will be much worried by this innovation. The directors can vote as shareholders on their own actions at general meetings as established in the case of *N.W. Transportation Ltd. v. Beatty* (1887) (*Appeal Cases,* vol 12, p589, Privy Council).

They can maintain control via pension fund shareholdings, circular ownership, pyramid companies, voting contracts with friendly shareholders, and so on. Also they can control proxies. The Jenkins proposals did not go far towards dealing with this (para 468(g) (h)); and the Securities and Exchange Commission controls in the USA are much stronger. English judges have shown recently an increased awareness of the problem. For example, in *Hogg v. Cramphorn Ltd.* (*The Times,* 19 October 1963) Mr. Justice Buckley invalidated an issue of shares by directors motivated by the desire to retain control. But such subjective tests afford little defence; and even there it seems that he would have accepted a ratification at a general meeting. Mr. Clore told the Jenkins Committee: "There are many ways of controlling a company. You can control your company very nicely and very tightly by management itself, having no financial interest in the company whatsoever" (*Minutes of Evidence to Company Law Committee,* p529).

a failure of nerve

One fascinating illustration of the Committee's failure of nerve on this topic, which is not unconnected with the omission of the public interest from its perspective, emerges from its discussion of circular ownership and crossholdings. The proposal had been made to stop Company A Ltd. voting shares acquired in Company B Ltd., if B Ltd. owns more than, say, 20 per cent of A Ltd.'s shares. The committee saw obstacles to this idea: "First we think that many cross holdings of this nature are advantageous for all the shareholders concerned and that it would not be right to prohibit them all. Secondly, there would be considerable difficulties of definition: if company A and company B simultaneously obtain holdings of 20 per cent in each other, which company should lose its voting rights?" (para 153).

Chronological complexities of this latter character, though they may dominate the ingenious mind of the Chancery lawyer,

would not impede anyone seriously concerned to check in the *public* interest auto-control by way of cross holding of shares. Simultaneous acquisition could be dealt with in a dozen different ways, none perfect but all adequate; and none of these problems need have compelled the Report, albeit "somewhat reluctantly", to the conclusion that the "complexity and arbitrary nature" of the necessary controls prevented them from recommending any action at all.

But, of course, neither the Jenkins report nor any of the rest of us (except a few, militant commentators who, if the heavens fell, would press on with their mission of "making the market work") *is* really serious about activating shareholders as an effective mechanism of control. Yet, if in the public company the shareholder cannot fulfil that role, he has become functionless as a "member". There is no reason not to equate his position with that of the well secured creditor.

Indeed, it is suggested that the new investigation into company law should take as its focal question on the shareholder whether he should *not* be equated with a secured creditor. Only in those types of company where he can be shown to fulfil in a real way the function of making management properly accountable should he retain his status as "member" or "proprietor" in which he is usually so little interested. In cases where he was equated with a creditor interesting problems about the election of directors would arise.

The Jenkins Report itself realises that for the vast majority of shareholders the function that made them in law "members" has in reality disappeared; but because it cannot reconsider the basis of the system, it has to propose amendments as if that function had not disappeared. Hence a certain note of despair creeps in: "To say that it is useless to provide investors with further safeguards which apparently they do not want and which, if provided, they will not use, is a counsel of despair. Legislation can only proceed on the footing that new powers meeting real needs will, if created, be used" (para 107).

management supervision

But the real need is for some focus on accountability for management *other* than the shareholder. Indeed, it is suggested that an inquiry into company law and the public interest should treat the shareholder in the public company *not* as a "proprietor" entitled to control. Society no longer accepts this Locke-like notion. He is an investor whose functions may include the promotion of efficiency and the control of management. In so far as he *really* does fulfil those functions the law should be moulded to assist their discharge. But what is needed is a proper study of the extent to which he does so, and in what types of companies.

However much the Jenkins Report stamps its testy foot at shareholders, it is clear that in many companies they just refuse to use the powers that are theirs. They are interested not in section 184, but in their dividends. The development in our company law of outside and administrative agencies of control has arisen partly because of the demise of control via the general meeting. The powers of the Board of Trade have increased and will unquestionably do so again in the new Act. But as was shown in its evidence to the committee, the Board of Trade is reluctant to use even its present powers. One reason for this is plainly the uncertainty that surrounds their character. If an administrative agency is to be used for effective supervision of management, the purposes of its powers must be made clearer than is the case with the flaccid reserve weapons at present wielded by the Companies Division of the Board of Trade.

An inquiry that started from this point would find itself fascinating territory, all uncharted by the Jenkins Committee. Many recent proposals would need to be considered. Is there a place for a compulsory "efficiency audit"? (see, e.g., C. D. Foster, *Labour's New Frontiers* (ed.

Hall), chap 2). Such a development might well be considered as historically a next step on the road in the remarkable story of the growth in independence and status of the financial auditor (see, e.g., H. Calvert, "Company Audit", *Malaya Law Journal*, vol 87, 1962). Is there, as Mr. Shore claimed, a special need of a public body to regulate the *remuneration* of "top management"? What of the proposal that certain places on some boards of directors should be open only to persons appointed by the Government, as was proposed in *Law Reform Now*, at least, in "Enterprises of National Interest?" (p195), where the discussion did not meet the objections raised by C. A. R. Crosland in *The Future of Socialism* (chap XVII). The accountability of management should be sought by an investigation of a variety of control mechanisms, some of which would be more appropriate in certain types and sizes of company. Shareholders' control is but one of these mechanisms, and one that is increasingly obsolescent.

4. the worker and the company

Company law does not set out to recognise the interests of the employee. Its *dramatis personae* are directors, shareholders, creditors, auditors, but not the company's workers. With trivial exceptions they find no mention in the Companies Act.

When, as they regularly do, the directors have to consider the "best interests of the company", the law demands that they consider the long term interests of the shareholders. They must not take direct account of the interests of the employees or, indeed, of the nation, though a sensible board of directors can always satisfy the law by taking "indirect" account of such factors in so far as they affect the shareholders. Both the Savoy Report of 1954 (*Report of Inspector on the Savoy Hotel and Berkeley Hotel Companies,* HMSO, 1954), and the *Daily News* case of 1962 (*Parke v. Daily News,* (1962), Chancery Reports, p927), reported in the same month as the Jenkins Report, made the point plain.

redundancy payments

In the latter case, on the sale of the *News Chronicle* the directors wished to pay a large part of the £2 million purchase price to ex-employees made redundant. The company was not being wound up; but it retained few assets, so that it could not be said that these payments would benefit shareholders by, for example, encouraging other workers who were remaining with the enterprise. A shareholder challenged the board's decision and, although a large sum was later made available to redundant workers by agreement, he succeeded in the case in having the Court stop the directors from implementing the plan.

The proposed gifts would have been *ultra vires* and invalid because the directors could not give away the company's property except to promote the interests of the company. No doubt the gifts sprang from an honest desire "to treat the employees generously beyond all entitlement". But, the judge, Mr. Justice Plowman, went on: "The view that directors in having regard to the question what is in the best interests of their company are entitled to take into account the interests of the employees irrespective of any consequential benefit to the company is one which may be widely held . . . But . . . in my judgment such is not the law . . . the defendants were prompted by motives which however laudable and however enlightened from the point of view of industrial relations were such as the law does not recognise as sufficient justification . . . The essence of the matter is this, that the directors of the defendant company are proposing that a very large part of its funds should be given to its former employees in order to benefit those employees rather than the company."

In once sense, this problem is part of the wider question how far boards of directors are entitled to make charitable gifts. As Bowen L.J. said in 1883: "There are to be no cakes and ale except such as are required for the benefit of the company" (*Hutton v. West Cork Railway* (1883) *Chancery Division,* vol 23, p672).

the exclusion of the worker

But from another point of view, the problem is especially that of the worker, and the Jenkins Report makes no proposals on him. The proposals in para 43 for "common form" powers would not deal with it. The Public Trustee seems to have proposed action to deal with redundancy payments and the *ultra vires* doctrine (*Minutes of Evidence of the Company Law Committee,* para 4761). In the ordinary case such payments would not, of course, be *ultra vires;* but the Committee should have considered the extraordinary ones, such as the *Daily News* type of case. There was a suggestion to the committee that a take over bidder should be required by law to state his intentions as regards the employment of the workers. Such an idea even appeared in the first edition of the City Institutions' *Notes on Amalgamations of British Business",* but not in any clear form, in the second edition. The

Jenkins Committee rejected the proposal. It might lead to "misleading forecasts" by bidders; and problems of redundancy "are clearly matters which may arise in many other circumstances and cannot appropriately be dealt with by amendments to company law" (para 267). Never has the divorce between blinkered company law and general social needs been better illustrated.

In the twentieth century, this surely cannot be a satisfactory resting place for company law. The system surely cannot be allowed to go on pretending that the worker is not there. On the other hand, to insist upon his recognition does not necessarily lead to the conclusion, as some writers assume, that he should be brought into the system as just another "partner" in the corporate enterprise. We may distinguish two facets to the question whether the recognition of the worker, whether in fact some democratisation of power, should now be a condition of incorporation in the private sector.

disclosure and the workers

The first point takes us back to disclosure. One of the new considerations by which a contemporary company law should be shaped is the right of employees and of their representatives who conduct collective bargaining on their behalf to information about the company. This right the law should recognise and enforce. It should see that both for works' representatives and for trade union officials there is access to such information. Those who sell labour to the company are entitled to know about its affairs.

The point almost arose for the Jenkins Committee, and the chairman's attitude can be gathered from his statement to Mr. George Woodcock, when the latter was a witness: "But when you get down to the proposition that workpeople should have a special claim to information on particular topics from employers, then it seems to me that it might be said that that travelled beyond the scope of this inquiry because that would appertain to the relationship between master and servant and would go beyond the consideration of company law" (*Minutes of Evidence to Company Law Committee*, para 4656).

The time is past when our blood can be made to run cold at the thought of crossing the wires of company law and "master and servant" law. If the creditor who lends cash to the company is entitled to disclosure, so is the employee who brings his labour and his security to the enterprise. Already, consideration of problems of redundancy has raised the question "To whom do jobs belong?" (See the discussion in K. W. Wedderburn, *The Worker and the Law*, p97). The parallel question for company law is: "To whom does information about the company's affairs belong?" The interests of the employee cannot today be ignored in such a discussion.

Furthermore, as soon as workers' interests are accepted as valid considerations, the nature and scope of disclosure needs to be reconsidered. Although our law has never enforced collective bargaining, it has taken many steps indirectly to support its extension. To compel registered companies to disclose information of a kind that would facilitate such bargaining would be completely in accordance with the traditions of British labour law. If, for example, the gap of 15 months between companies annual meetings and accounts prejudices the trade union side, this would be an additional factor for demanding interim accounts. Similar points arise in connection with subsidiaries and nominees.

Further, why should not company accounts carry additional information that would enable the bargaining to get off to a quicker start—for example an index of labour cost per unit of output; an analysis of the number and type of workers employed; details about the payroll, and so on. Whether or not these are the best examples may be open to discussion. What is surely clear is that the demand for disclosure ought today to include a regard for the needs of the

trade union in collective bargaining. Like the investor out to protect his money, in pursuit of the protection of their members, trade unions are entitled to the information that they might reasonably need in the prospectus and the annual accounts.

suggestions for workers' representation

Secondly, we are posed with the question: should the workers' interests be directly represented within the structure of company law itself? If the shareholder and management survive as controllers together of this aggregate of private capital, should the workers' representative not be added to them as a third wheel of the machine.

Proposals for workers' directors, or the like, are becoming increasingly fashionable; and that solution, or the similar plans for workers' "membership" of companies, are likely to attract support in the near future. The notion that a minority of directors should be elected by workers was supported recently by Douglas Jay (*Socialism in the New Society,* p331). The experiments with "co-determination" in West Germany has attracted attention and stimulated suggestions that a similar plan might be introduced here (M. P. Fogarty *Companies Beyond Jenkins,* PEP, vol XXXI, no 486, H. J. Spiro *The Politics of German Co-determination,* 1958). A third of each *Aufsichtsrät,* or supervisory board, is elected by workers in companies of any size, and a half in steel and coal companies.

Despite the simplicity and attractiveness of such a solution, there are, it is thought, reasons for caution before it is adopted here. First, the German Supervisory Board is very different from our board of directors. Below it stands the board of managers; and it is much more remote from the company's affairs than some of our boards. Secondly, not everyone seems to agree that the experiment has had great effect. "The 'national' or 'workers' interests as a matter of general and distinct policy soon recede and little remains but the fact that some of the members of the companies' boards are not elected in the traditional way by the shareholders but come from a different background . . . Perhaps the real test of the value of this experiment will come in times of economic depression and threat of unemployment. It is in such situations . . . that the interests of employers and workers tend to clash most sharply" (W. Friedmann, *Law in a Changing Society,* p252-3, Pelican). Certainly, in so far as the German experiment is based on a sociological view of the "enterprise" as a place where the interests of workers and management are *not* in conflict, it cannot be accepted easily. Such conflict exists and cannot be wished away by legal or constitutional drafting. Thirdly, there would be understandable opposition from British trade unions on the ground that the union position would be weakened by an introduction of workers' directors.

Certainly, the position of such directors would not be easy. Would they not be either excluded from the real discussion of policy, as has sometimes been alleged to happen in Germany, or eventually distrusted by those who elected them? Is there not, in this sense, a distinct function and interest of "management"? As Mr. Crosland put it in 1956 about *government* nominees to boards: "There is the familiar objection that government nominees on a private board must either 'go native' or remain suspect".

He applied similar objections to workers' directors, saying: "Quisling accusations always create the deepest bitterness of all" (*The Future of Socialism,* p 358 and 361). One example of such a "Quisling" problem has already been echoed in certain redundancies in Britain. Unions have been known to refuse an invitation to *select* which workers should be made redundant; that was a management function and, while they might discuss it, they did not want the odium of choosing the men (Compare the discussion in Dorothy Wedderburn, *Redundancy and the Railwaymen,* p187, CUP, 1965). While the right to hire and fire at any rate, remains with management,

the trade union view is likely understandably to remain of this character; and redundant workers would be likely to say the same to a "workers' director" as any other director—though perhaps in even more sturdy language.

Similar reasons for caution can be given concerning the ambitious proposals recently advanced by Dr. Ross for a representative council, on which shareholders and workers would be represented according to calculated contributions of equity capital and labour employed, with a board elected to represent all parties (*The Democratic Firm,* Fabian Research Series 242). The conflict of interests in such a body would not necessarily be reconciled by putting all sides on the same council. Indeed, in some forms, such arrangements could even exacerbate tension. Such plans cannot, it is suggested, be wholly rejected at the present stage of our experience; but neither can they be accepted as the first practical steps towards a recognition of workers' interests by company law.

the need for an experiment

On the other hand, a rapid democratisation of power in the private sector is bound to remain an objective of radical thought. The use of workers' councils within the enterprise, without conflating management and workers in an unreal "unity", is indicated by experiments in societies of great variety. From Professor H. A. Clegg's recent and fascinating, if strongly angled, review of "Industrial Democracy", it emerged clearly that in Yugoslavia, France, Germany, and other countries, developments of workers' councils, in one form or another, give promise for the future. "Perhaps the most compelling reason for looking with interest on the Jugoslav experiment, however," he writes, "is just the fact that it is an experiment. It is a venture into the unknown, a voyage of discovery. The Jugoslavs are not imitating anyone else. They are trying a system of industrial government which has not been tested before" (*A New Approach to Industrial Democracy,* p107, 1963. See too Frederick Singleton and Anthony Topham, *Workers Control in Yugoslavia,* Fabian Research Series 233).

The time is ripe for experiment in Britain. It is by the eventual introduction of works' councils into the very machinery of British company law in a way that integrates them not with management but with the structure of our trade unions, that we might hope to attempt a step in the direction so far described. Here, on some matters at least, there would seem to be a prospect of creating an organ for the control of management more likely to act than the indolent investors who are idle "proprietors". Certainly, such a body would be expected to take more active interest in questions of job security and the like. If it be objected that the confines of company law and labour law are here, as Lord Jenkins remarked, being made to overlap, the reply should be that no such formal obstacle need stand in the path of reform, provided the renewal of our labour law after the report of the Donovan Commission marches hand in hand with inquiry into a new company law. That is one urgent reason why the new inquiry into company law must be set in motion *now,* before the Donovan Commission forms a decided view; and why it should be integrated with the work of that Commission.

On the other hand, there is no doubt substance in the objection that to inject formal and compulsory works' councils into a system where the essence of the system of industrial relations has been voluntary and autonomous bargaining, would be a very big step, certainly a very bold first step. Perhaps it would prove to be acceptable only to those conservative spokesmen who are calling for a fully regulated system of labour law in order to clip the unions' wings. Others, whose view we may hope to influence the commission, are suggesting that, in the new structure, law will not "remain as neutral or as marginal an influence as in the past"; but that, retaining the voluntary base of the system, our new laws should concentrate on "the setting of new national standards to ensure that the pace of voluntary action is both forced

and underpinned" (Allan Flanders *Industrial Relations: What is wrong with the System?* p63; see too, K. W. Wedderburn, *The Worker and the Law* p339. 342).

a collective bargaining obligation

There is, it is suggested, one important step we could take which would conform to that spirit. *The next Companies Act should provide that one of the modern conditions for incorporation with limited liability be a willingness to conduct collective bargaining wherever a company employs a substantial number of workers.*

Such a requirement would not be wholly new or revolutionary. The public corporations of nationalised industry are all under legal obligations to seek negotiations with trade unions, though it is true that these duties are, for various reasons, scarcely enforceable in the courts. But it was thought appropriate to make collective bargaining a condition of their managing a national enterprise. Why not make it a condition for private aggregations of capital which seek the privileges described?

The technique of denying at least some of the privileges that might come from registration as a company has been used for other purposes in the past. It appears, for example, both in the Protection of Depositors Act, 1963, and in the Trading Stamps Act, 1964. These statutes deny, in slightly varying degrees, the normal advantages of the status of "private company", and especially of an "exempt private company", to any company that engages in the particular activities caught by the Acts. The status, for example, of "exempt private company" is thus dependent not merely on the conditions set out in section 129 of the Companies Act, 1948, but also upon abstention from stamp trading. In the same way, the acquisition of the corporate status giving a limited liability to shareholders should be made dependent upon acceptance of workpeople's representatives as those to whom management is obliged to talk. The ultimate sanction would be a compulsory winding up, striking from the register of companies or, possibly, a declaration by the tribunal charged with the question that liability of shareholders (and managers) was henceforth unlimited. This device would not run into the sociological problems which some theorising about the "enterprise" encounters. Collective bargaining is a phenomenon which does not deny conflicts of interest. The device could be the contemporary vehicle for bringing the worker on to the stage of company law. For, once given that Company Law insists on collective bargaining in an enterprise of any size, the earlier discussion in this paper about the nature and extent of disclosure of information by the company falls into a logical pattern. Disclosure and the requirement to bargain would go hand in hand as the conditions of corporate privileges.

Nor need the problem of enforcement of this obligation to bargain deter us. The Industrial Court has a body of experience on which we can draw. Where a lagging employer provides for his workers terms and conditions less favourable than those established in an industy's collective agreements, he can today, in the last resort, be taken before the Industrial Court, by a trade union or employer's federation, and compelled, under a procedure exceptional in British labour law, to come up to scratch (*Terms and Conditions of Employment Act*, 1959, section 8). Similarly, it has long been a condition of the receipt of certain subsidies or licences, such as that to run a passenger bus service or to run certain lorries driven by one's own drivers, that "fair", that is in effect collectively bargained, terms of employment must be observed on pain of various legal sanctions (Road Traffic Act, 1960, section 152 and 178, Road Haulage Wages Act, 1938, part II, Films Act, 1960, section 42, Sugar Industry Act, 1956, section 24, K. W. Wedderburn, *The Worker and the Law*, pp122-134). In other words, voluntary collective bargaining has in the past been propped up by support from legal machinery. Despite this, there are still employers who do not negotiate with trade unions and who do not provide

the information on which bargaining can properly take place. Why should they be permitted the advantages of limited liability incorporation?

From the point of view of labour law, the new condition for limited liability would be no more than an extension of old techniques. There would, of course, be problems. The exact procedures and method of hearing disputes about them would need further inquiry. How to define a representative bargaining agent? Should very small enterprises be exempted, and, if so, how small? But none of these looks a very formidable obstacle, once it is decided that the way in which an employer treats his workers *is*, in the twentieth century, relevant to the question whether he is to be allowed to trade in a privileged form.

It might be desirable for the statute to specify not merely a duty to bargain and consult with representative union agents, but also the areas or topics on which consultation or bargaining—and both are bound to be involved—must take place, without prejudice, of course, to the parties' right to add further items. Among these we would expect to find redundancy and dismissals generally, and workers' pension rights. The German experience may be of more value in this connection than in the matter of "co-determination", for the list of topics on which a German works council has legal rights of consultation would seem very extensive to an English employer, including, as it does, substantial closures and changes in the plant, amalgamation of the plant, new working methods, and so on. No doubt good employers in Britain do consult and bargain on these matters. But others refuse to engage in ordinary collective bargaining even over wages. Such was long the case with many banks. If the "national interest" leads *them* to argue that they ought not to disclose their reserves, how much more should it lead the legislature to argue that they must recognise ordinary trade unions for national bargaining.

The appropriate Minister could be given power to vary, after consultations, the list of required topics, just as the Minister of Labour can vary the list of matters to which reference must be made in particulars issued to workers under the Contracts of Employment Act, 1963. It is surely a responsibility of government to see that this encouragement to bargain over the range of questions appropriate to the times is given to incorporated employers.

CONCLUSION

What is being suggested, then, is a new, broad study of company law and practice to investigate its philosophy, not just the technicalities to which the Jenkins Committee was limited. In this, the fundamental question should be: What are the modern conditions appropriate in our society on which private capital in a mixed economy can be allowed the privilege of incorporation with limited liability?

The traditional condition of disclosure needs to be itself expanded. Even on the most conservative tests, more information should be demanded. The interests to which company law pays attention, however, can no longer be those merely of the creditor, investors, managers and directors. Disclosure must be framed to meet the legitimate needs, too, of the "public interest", of the consumer, of the employee, and especially of the collective bargaining machinery on which the last relies. In an era when the shareholder in a company of any size rarely fulfils the old function of controlling management, new vehicles of accountability must be sought in the private sector ; and management itself must disclose more ; for example, details about its own *individual* emoluments. Among the techniques that should be investigated is the extent to which a bridgehead of employees' rights might be established in the midst of company law itself, something which might mark a new beginning in the democratisation of power.

In particular, one modest step which could be taken *now* towards that end would be to impose as a contemporary

condition for incorporation with limited liability, at least in enterprises of any size, the obligation to engage in responsible collective bargaining. This requirement would be a reasonable and practical price to exact today for the enormous privileges which aggregations of private capital can acquire merely by registration as limited liability companies. Such notions should at least be on our agenda for a serious and speedy study into the reform of the law of private enterprise.

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He would like to thank Colin Beever, until recently of the AEU, for most useful discussions on the section of the pamphlet dealing with *disclosure and the workers.*

Cover design and typography by Geoffrey Cannon. Printed by The Walrus Press Ltd. (TU), 769 Harrow Road, Sudbury, Wembley, Middlesex.

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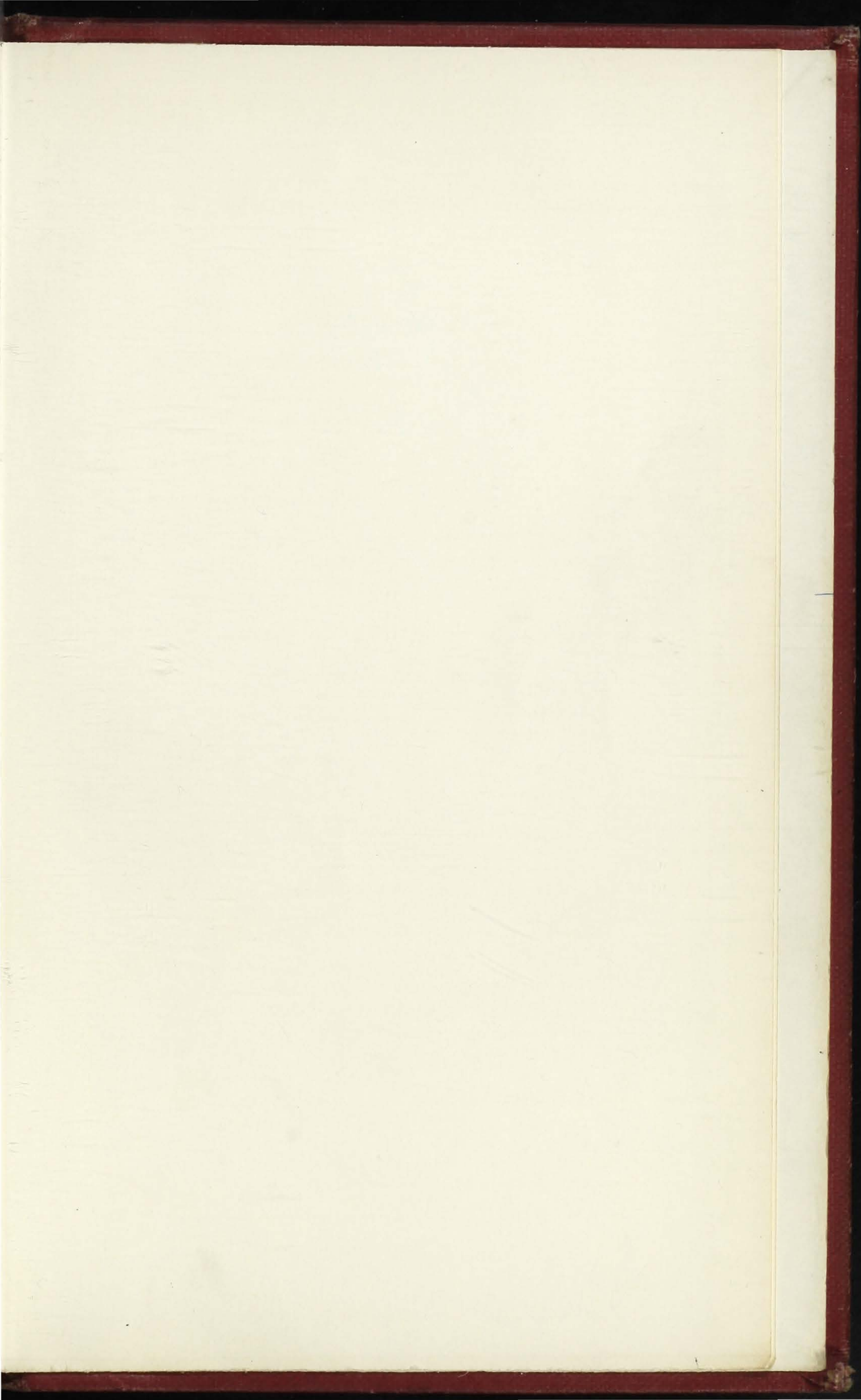

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