THE MANAGEMENT OF DIRECTORS' CONFLICTS OF INTEREST: A QUESTION OF PUBLIC INTEREST?

Opemiposi Modupe Adegbulu

Submitted in accordance with the requirement for the degree of

Doctor of Philosophy

School of Law

The University of Leeds

July 2019

The candidate confirms that the work submitted is her own and that appropriate credit has been given where reference has been made to the work of others.

ACKNOWLEDGMENT

I would like to express my appreciation for the opportunity to work with my supervisors, Professor Andrew Keay and Professor Joan Loughrey. Their inspiration and guidance have kept my research on track and have helped me to become a better researcher. Their support and empathy have enabled me to complete this challenging journey in a manner that has been beneficial to my well-being. Their supervision has also assisted me greatly in developing my Thesis for which I am deeply grateful. I am grateful to WROCAH and the support team for the financial assistance to undertake this degree.

I would like to thank Professor Iyiola Solanke for her persistent support and love. I am very grateful to her for her mentorship and for helping me take up space. I hope that I can do the same for some of the next generation of young black academics.

I also would like to thank my family, the Adegbulus, especially Taiwo for being my academic agony sister. I am thankful for my friends, Ph.Ders and otherwise. Thank you for their unconditional support and encouragement during the last four years. I am grateful to the Black Feminist Society for providing a shelter from the storm and the Ivory Tower of academia. They have been by my side at every step of the way, encouraging me and making me laugh. I am grateful to George Kamsi for being wonderful and loving. Finally, I am grateful for Omolola, my beloved cat. Her love and presence have helped me exceedingly during this time.

ABSTRACT

This thesis is a study of directors' conflicts of interest and the question of public interest. It examines whether directors' conflicts of interest are regulated or managed in the public interest and if so, investigates the articulation of public interest in this regulation. The study is an illustration of whether companies can or should be managed in the public interest and what such public interest means and if it can be modified to better serve wider societal needs.

After providing an introduction to the study in Chapter 1, Chapter 2 provides a background to the study as it focuses on theories of the firm to draw out possible public interest rationales for the existence of companies. Chapter 3 focuses on defining the public interest, highlighting the challenges to definition, some theories on the public interest, and their strengths and weaknesses. This chapter associates key public interest theories espoused by Virgina Held with corporate governance theories or theories of the firm to illustrate that public interest is not necessarily alien to corporate governance. The thesis also explores the definition, theories and typologies of conflicts of interest. This is documented in Chapters 4. This chapter sets out the challenges of defining conflicts of interest, the various barriers to comprehending and addressing them. Chapter 5 explores the development of companies from the 16th to the 18th centuries. It looks at the development of companies to draw out public interest rationales for regulation. It explores the dual ordering of companies; private and public ordering which played an important part in the development of British companies from the era of the South Sea bubble to the advent of limited liability. Chapter 6 considers the notion, breach of trust and the fiduciary principles which have played an essential role in the development of the regulation or management of directors' duties, particularly the duty of loyalty which is often associated with the regulation of directors' conflicts of interest. One of the aims of the chapter is to ascertain whether the development of the use of breach of trust to address directors' conflicts of interest was influenced by the need to protect societal interests in companies. Chapter 7 explores contemporary regulation of directors' conflicts of interest and the question of public interest. It shows that although public interest has evolved significantly since the South Sea Company era. It remains a motivation which has played a part in the

regulation of companies, including directors' conflicts of interest. Chapter 8 completes the thesis with a series of concluding remarks and recommendations for future research.

The main findings for this study are that there are public interest considerations for the management of companies and good governance. Being that public interest is synonymous with phrases such as 'general welfare' or 'the common good' or 'common interest', it is unsurprising that public interest has played and continues to play a role in the regulation of companies, as illustrated through the exploration of directors' conflicts of interest. Public interest is a nebulous concept which has evolved with societal needs and expectations of companies. Although private interests and shareholder-centric values have been given priority in contemporary regulation of companies, this does not have to be the case. It is asserted that the nature of public interest means that it is sufficiently flexible to encompass wider societal and social interests in the regulation of directors' conflicts and management of companies generally.

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

Conflict of interest is an elusive and engaging subject, which affects all levels of governance. Some argue that its mismanagement could lead to the distortion of decision-making processes and corrosion of trust.[1] Conflicts of interest is an elusive, diverse and engaging subject, a cross-cutting problem of governance which involves all levels of governance, including local, global, public and corporate or financial sectors. All are potentially affected because in all these areas, its mismanagement could lead to the distortion of decision-making processes, corrosion of trust and the weakening of administration.[2]

However, this thesis will limit its scope to corporate governance, and in particular company directors and the regulation or management of their conflicts of interest. This is because it is a multifaceted subject which is an excellent illustration of the complex and challenging nature of managing organisational ethics, business conduct or corporate governance.[3] The area is fascinating because it is characterised by potentially conflicting objectives and logics, which have to be linked and articulated in a productive and useful way in order to contribute to better corporate governance.

CONTEXT

1.1 CORPORATE SCANDALS, THE RECENT CRISIS AND THE CONTRIBUTORY ROLE PLAYED BY CONFLICTS OF INTEREST

It has been posited that one of the many factors which contributed to the 2007 global financial crisis was the prevalence of conflicts of interest in companies. Although

[1] Peters, A. (2012). Conflict of interest as a Cross-Cutting Problem of Governance. In L. Handschin, & A. Peters (eds.) *Conflict of Interest in Global, Public and Corporate Governance*. (pp. 3). Cambridge, CUP.
[2] Ibid, 3.
[3] Ibid, 33.

regulators and policy-makers,[4] banks and financial institutions,[5] rating agencies,[6] etc. were affected by conflict of interest scandals, weaknesses and failures in corporate governance structures of various companies such as conflicts of interest have been seen as some of the causes of the recent global financial crisis.[7]

Companies, particularly, large or international ones, are very important to society.[8] They are integral elements in the development of the global economy,[9] therefore, weaknesses in their governance have significant repercussions for the global economy.[10] This is especially so in this era of rapid globalisation and increasing polarisation of the world's resources where some companies are wealthier than many countries.[11] They consequently wield considerable influence.[12] This influence is far reaching and has social, economic and political impact. [13]

[4] Bini Smaghi, L. (2009). Conflicts of Interest and the Financial Crisis. *International Finance*, 12 (1), 93.
[5] Cioffi, J. (2010). The Global Financial Crisis: Conflicts of Interest, Regulatory Failures, and Politics. *Policy Matters*, 4 (1) 1.
[6] Salvador, C., Pastor, J. M. & Fernández de Guevara, J. (2013, 2 December). Rating Agencies during the Crisis: Usefulness, Conflicts of Interest and Regulation. *The European Financial Review*. Retrieved from http://www.europeanfinancialreview.com/?p=1268.
[7] Kirkpatrick, G. The Corporate Governance Lessons from the Financial Crisis. *OECD Journal: Financial Market Trends*, 29 (1), 61. Retrieved from http://www.keepeek.com/Digital-Asset-Management/oecd/finance-and-investment/the-corporate-governance-lessons-from-the-financial-crisis_fmt-v2009-art3-en#page3; Dallas, L. (2011). Short-Termism, the Financial Crisis, and Corporate Governance*. Journal of Corporation Law*, 37, 264.
[8] Dine, J. (ed). (2000). *The Governance of Corporate Groups*, Cambridge Studies in Corporate Law. (pp. 1). Cambridge, CUP.
[9] Keay, A. (2011). *The Corporate Objective: Corporations, Globalisation and the Law.* (pp. 3). Cheltenham, Edward Elgar Publishing Ltd; Roth, M. (2012). Conflict of Interest: compliance and its contribution to corporate governance in the financial services sector. In L. Handschin, & A. Peters (eds.) *Conflict of Interest in Global, Public and Corporate Governance*. (pp. 255). Cambridge, CUP; Bank for International Settlements (2009). *79th Annual Report 2008/2009*. (pp. 3) Basel, Bank for International settlements.
[10] Shemer, Y. (2012, 18 December). Corporations are important in modern economy. *Jerusalem Post.* Jerusalem, Israel. Retrieved from http://www.jpost.com/Business/Business-Features/Corporations-are-important-in-modern-economy; See generally Mayer, C. (2013). *Firm Commitment - why the corporation is failing us and how to restore trust in it.* Oxford, OUP.
[11]Trivett, V. (2011, 27 June). 25 US Mega Corporations: Where they would rank if they were countries. *Business Insider*. Retrieved from http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?IR=T; Chen, L. (2015, 6 May). The World's Largest Companies 2015. *Forbes.* NJ, USA. Retrieved from http://www.forbes.com/sites/liyanchen/2015/05/06/the-worlds-largest-companies/.
[12] See above n.8, 151-175.
[13] Keay, see above n.9, 4; Bottomley, S. (2007). *The Constitutional Corporation* (pp. 3). Aldershot, Ashgate.

An excellent illustration is the recent Volkswagen emissions scandal and the effect that it had on the German economy,[14] particularly in the northern state of Lower Saxony, where the group is headquartered and which holds a 20 percent stake in the carmaker. The key members of the region's state government were also on the group's supervisory board.[15] The scandal has been attributed to a deficiency in the carmaker's corporate governance and culture.[16] This included failure to adequately manage conflicts of interest.[17] For example, the regulatory body which examines the practices of the car industry, the Vehicle Certification Agency, was embroiled in a conflict of interest scandal, following the Volkswagen scandal, as it emerged that a significant part of its funding originates from the companies it investigates, such as Volkswagen.[18] This raised concerns of independence and objectivity of this regulatory body and trust in its ability to properly perform its duties.

The Volkswagen scandal created uncertainty for consumers as well as Volkswagen's employees.[19] It shook their trust in the Company, its expertise and legitimacy as well as the Vehicle Certification Agency. It is likewise an excellent and relevant example of how conflicts of interest create a deficiency in (corporate) governance, corrodes trust and can have far-reaching effects on regulators, consumers and employees alike. The actions of international companies like Volkswagen evidently have an effect on international economic development as well as social stability and security.[20]

---

[14] The Guardian. (2015, 4 October). VW scandal is 'heavy blow' for German economy, says EU's Martin Schulz. *The Guardian.* London, UK.
Retrieved from http://www.theguardian.com/business/2015/oct/04/vw-scandal-is-heavy-blow-for-german-economy-says-eus-martin-shulz.

[15] Richter, M. (2015, 24 September). Volkswagen scandal touches nerve centre of German economy. *Business Insider*. London, UK. Retrieved from http://www.businessinsider.com/afp-volkswagen-scandal-touches-nerve-centre-of-german-economy-2015-9?IR=T

[16] Bryant, C. & Milne, R. (2015, 4 October). Boardroom politics at heart of VW scandal. *FT.* London, UK. Retrieved from http://www.ft.com/cms/s/0/e816cf86-6815-11e5-a57f-21b88f7d973f.html#axzz4AX4Pe1UL.

[17] BBC. (2015, 12 October). Report queries VW chairman's role*. BBC News*. London, UK. Retrieved from http://news.bbc.co.uk/1/hi/business/4333750.stm.

[18] Telford, L., Newell, C. & Malnick, E. (2015, 11 October). Exclusive: Emissions tester paid £80m by car firms. *The Telegraph.* London, UK. Retrieved from http://www.telegraph.co.uk/finance/newsbysector/industry/11925283/Exclusive-Emissions-tester-paid-80m-by-car-firms.html.

[19] Reuters. (2015, 17 October). Volkswagen considers cutting temporary worker numbers: works council. *Reuters.com.* Berlin, Germany. Retrieved from http://www.reuters.com/article/us-volkswagen-emissions-employment-idUSKCN0SB0D820151017#JC6gSWMU6Ip5zOBC.99.

[20] Bottomley, S. (1997). From Contractualism to Constitutionalism: A framework for Corporate Governance. *Sydney Law Review*, 19 (3), 277.

Another notable example of the increasing call for the better management of the company directors' conflict of interest is the American case, *CDX Liquidating Trust v. Venrock Associates* et al.[21] Here, it was ruled that the disclosure of a conflict of interest may insulate the director from action on the conflict of interest but does not insulate a director from an action for a disloyal act, that is, breach of a fiduciary duty claim.[22] An English example is *Towers v. Premier Waste Management Ltd* where it was held that a company director had breached his fiduciary duty to the company by accepting a free equipment loan from a client without disclosing it or seeking approval for it, and it was of no consequence that the company did not suffer a loss or that the director had no corrupt motive.[23] These decisions are consistent with an increasing intolerance for company directors' unethical conduct or exploitative conduct.[24] Hence, the issue of the legal regulation of directors' conflict of interest is becoming more and more important.[25] This is evident in the rise of relevant legal provisions; corporate governance codes[26] or more stringent regulatory provisions.[27]

[21] *CDX Liquidating Trust v. Venrock Assocs., et al*., 2011 U.S. App. LEXIS 6390 (7th Cir. March 29, 2011); Unterberger, A. (2011, 2 June). Seventh Circuit Makes Life Tougher for Directors with Conflicts. *Harvard Law School (HLS) Forum on Corporate Governance and Financial Regulation*. Retrieved from http://corpgov.law.harvard.edu/2011/06/02/seventh-circuit-makes-life-tougher-for-directors-with-conflicts/#more-18318.

[22] Noked, N. (2012, 24 November). Conflicts of Interest: Requiring a Closer Governance Focus. *Harvard Law School (HLS) Forum on Corporate Governance and Financial Regulation*. Retrieved from http://corpgov.law.harvard.edu/2012/11/24/conflicts-of-interest-requiring-a-closer-governance-focus/.

[23] *Towers v. Premier Waste Management Ltd* [2011] EWCA Civ 923, [2012] BCC 72.

[24] See above n.22.

[25] Bohinc, R. *Conflicts of Directors' Interests with the Interests of the Company in the Context of Financial and Economic Crisis*. Virtus InterPress, University of Ljubljana, Slovenia. Retrieved from http://www.virtusinterpress.org/IMG/pdf/conflicts_of_directors_interests_with_the_interests_of_the_company_in_the_contex_of_financial_and_economic_crisis_a_comparative_overview_of_some_EU_countries_by_Rado_Bohinc.pdf].

[26] Financial Reporting Council (FRC). (2012). *The UK Corporate Governance Code*. Retrieved from https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/uk-Corporate-Governance-Code-September-2012.pdf.

[27] US, The Sarbanes-Oxley Act of 2002, ss. 302, 303 and 401; and the Dodd-Franck Wall Street Reform and Consumer Protection Act of 2010, ss. 951-955.

1.2 LARGE COMPANIES AND THE GLOBAL ECONOMY

Similarly, the power of large companies has been recognised by international organisations such as the UN[28] and the OECD.[29] This is made evident by the increasing calls and push for greater responsibility of these companies for environmental and social disasters caused by their corporate activities,[30] and their impact in many parts of the world. Equally, in the US, the Sarbanes-Oxley Act was passed to restore trust and public confidence in the public companies' audit process.[31] This famous piece of legislation, like other regulatory efforts made to manage conflicts of interest linked to corporate governance, in many countries focuses on values such as honesty and trust.[32] It indicates that *"investor confidence in the objectivity and independence of auditors and therefore in the truthfulness of public companies' financial statements (is) considered an important enough goal - given the huge financial (and global economic) stakes involved."*[33]

Consequently, the governance of large companies is tremendously pivotal to society as it touches upon a key aspect of the good functioning of society. In light of this, this thesis seeks to put forward the argument that conflicts of interest in corporate governance are very key concerns for society as well as companies themselves or their stakeholders. However, before analysing this issue, the definition of conflict of interest must be addressed as well as public interest. Similarly, the purpose and

[28] U.N. (2011). *Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*.
Retrieved from https://www.unglobalcompact.org/library/2.

[29] The Organisation for Economic Co-operation and Development (O.E.C.D). (2011). *Guidelines for multinational enterprises on corporate governance and responsible business conduct.* Retrieved from http://mneguidelines.oecd.org/text/.

[30] Examples are the Rana Plaza or the Child Labour and Nestlé farms scandals: BBC (2013, May 10). Bangladesh factory collapse toll passes 1,000. *BBC News*. London, UK. Retrieved from http://www.bbc.co.uk/news/world-asia-22476774; Clarke, J. S. (2015, 2 September). Child labour on Nestlé farms: chocolate giant's problems continue. *The Guardian*. London, UK. Retrieved from http://www.theguardian.com/global-development-professionals-network/2015/sep/02/child-labour-on-nestle-farms-chocolate-giants-problems-continue.

[31] Davis, M. & Johnston, J. (2009). Conflict of Interest in Four Professions: A Comparative Analysis. In B Lo & M.J. Field. (eds.) *Conflict of Interest in Medical Research, Education and Practice*, Institute of Medicine. (pp. 9). Washington, National Academies Press.

[32] France, see Loi de Sécurité Financière. (LSF) of 1st August 2003; Code de commerce, art L. 822-11; UK, see The Statutory Auditors and Third Country Auditors Regulations 2016.

[33] See above n.31, 10.

origins of companies must be tackled and underlying public interest motivation(s) for these issues must also be reviewed.

Although there has been a lot of discussion about the regulation of directors' conflicts of interest, particularly in light of the last financial crisis, sufficient attention has not paid to why and how this regulation might be of societal interest. Therefore this thesis will examine directors' conflicts of interest and rationales for regulation. It will be the first work to interrogate the rationale(s) for the regulation of directors' conflicts of interest to ascertain if the public interest has played a part in the motivation for the regulation of directors' conflicts of interest.

1.3 CONFLICT OF INTEREST IN CORPORATE GOVERNANCE

Firstly, conflicts of interest are best described generally as conflicts between one's interest and the interest of the organisation or entity for which one works or the people to whom one owes an obligation. Conflicts of interest are present in all aspects of life and in different spheres of governance, including corporate governance. They can broadly be defined as the "situation in which some interest of a person has a potential to interfere with the proper exercise of his judgement in another's behalf."[34] Nevertheless, defining what is concretely meant by conflict of loyalty or interest is difficult. For example, the definition of interest is not readily identifiable except for the obvious case which involves some form of pecuniary benefit. Therefore, conflict of interest is an elusive, ambiguous and engaging subject, a cross-cutting governance problem.[35] Yet, conflict of interest is not a wrong in itself nor is it immoral.[36]

Nonetheless, "corporate breakdowns, the global financial crisis and numerous political scandals, have been imputed to conflicts of interests besetting decision-makers"[37]. The increasing prevalence of discussion of conflicts of interest in the media seems to be a sign of political and corporate culture becoming profoundly impregnated by growing concern for justice, trust and transparency or objectivity in

[34] Davis, M. (1998). Conflict of interest in R .F. Chadwick (ed). *Encyclopaedia of Applied Ethics* (Vol.1, pp. 586). San Diego & London: Academic Press.
[35] See above n.1, 3.
[36] See above n.34, 589-595.
[37] See above n.1, 33.

decision-making.[38] This preoccupation could stem from the notion that decision-makers ought not to exploit conflicts of interest situations even in what might be considered purely private matters. That is, looking at companies from a law and economics perceptive such as agency theory, the nature of the firm and the conception of fiduciary duties under this theory. Here, society may be said to penalise agents (of the company), directors for exploited conflicts of interest because permitting such conflicts could encourage behaviour which could be economically harmful and detriment to the economy and the markets. The preoccupation with good governance could also stem from the belief that decision-makers ought to act in a manner that promotes society's general interest or act in a way that does not breach the trust invested in them. This means making sure that their decisions are not tainted by conflicts of interest.[39] This can be said to mean acting in the general interest of the public, that is, integrity in decision-making (whatever the sphere) or seeking to retain public confidence in the legitimacy of decision-makers in all spheres of governance including the management of companies. These issues will be examined in detail in chapter 2 of this thesis.

In addition, it is important to ascertain if the question of conflict of interest in the management of companies is a recent preoccupation in a scholarly/academic research.[40] While many have written about conflict of interests and their management in the public sector,[41] this is not the case for the private sector. Conflicts of interest

[38] Moore, D. A., Cain, D. M, Loewenstein, G. & Bazerman, M. H. (2005). Introduction. In M. H., Bazerman, D. M., Cain, G. Loewenstein & D. A. Moore (eds.) *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy* (pp. 3-9). Cambridge, CUP.

[39] Hejka-Ekins, A. (1998). Conflict of Interest. In J. M. Shafritz (ed.) *International Encyclopaedia of Public Policy and Administration, Vol. I: A – C.* (pp. 482) Westview Press, New York; Peters, A. (2012). Managing Conflicts of Interests: lessons from multiple disciplines and settings. In A. Peters & L. Handschin (eds.) *Conflict of Interest in Global, Public and Corporate Governance.* (pp. 358, 421). Cambridge, CUP. The notion is inherently linked with the common rationale for combating conflicts of interest, the protection of trust.

[40] Margolis, J. (1979) Conflict of Interest and Conflicting Interests. In T.L. Beauchamp & N.E. Bowie (eds.) *Ethical Theory and Business.* (pp. 361). Englewood Cliffs, Prentice-Hall.

[41] Lankester, T. (2007). Conflicts of Interest: A Historical and Comparative Perspective. *5th Regional Seminar: Conflict of Interest - A Fundamental Anticorruption Concept.* University of Oxford, Oxford. Retrieved from https://www.oecd.org/site/adboecdanti-corruptioninitiative/39368062.pdf; Davis M., & Snead, W. S. (1982). Conflict of Interest (with Commentary). *Business & Professional Ethics Journal*, 1 (4), 29; Davis, M. (1982). Conflict of Interest. *Business and Professional Ethics Journal*, 1 (4), 17; Moore, D. A, Loewenstein, G., Cain, D. M., & Bazerman, M. H. (2005). Introduction. In. M. H., Bazerman, D. M., Cain, G., Loewenstein & D. A. Moore (eds.) *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 1). Cambridge, CUP.

have largely not been addressed in the private sector, apart from specific sectors such as the pharmaceutical[42] and financial[43] industries as well as key professions.[44] This thesis seeks to assess and determine the link between public interest and the regulation of company directors' conflicts of interest, particularly, in light of the latest financial crisis. Likewise, even though many corporate law textbooks discuss company directors' conflicts of interest and their regulation,[45] they do not explore the reasons for their existence. They appear to be issues that have captured the public and media's attention and this thesis explores why this is the case.

As mentioned earlier, this thesis will be the first to examine directors' conflicts of interest, its origins, history and development of regulation in light of the public interest. It will interrogate the definition of the public interest and how it has changed over time as well as the effect of this on the regulation of directors' conflicts of interest.

1.4 RESEARCH QUESTION

In light of the above, this thesis seeks to explore the question: Is there public interest in the management or regulation of company directors' conflicts of interest?

1.5 AIMS AND CONTEXT: COMPANIES, CONFLICT OF INTEREST AND THEIR SOCIETAL SIGNIFICANCE

A company, a legal entity which is separate and distinct from its shareholders, once validly constituted,[46] and affords limited liability to its members,[47] has been an ingenious but imperfect economic innovation. It enables the facilitation of business

[42] Kassirer, J. P. (2005). Physicians' Financial Ties with the Pharmaceutical Industry. In M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.) *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 133). Cambridge, CUP; Shapiro, S. P. (2012). Conflict of Interest at the bedside: surrogate decision-making at the end of life. In L. Handschin & A. Peters (eds.) *Conflict of Interest in Global, Public and Corporate Governance* (pp. 334). Cambridge, CUP.

[43] See generally Bahar, R., & Thévenoz, L. (2007). *Conflict of Interest: Corporate Governance & Financial Markets*. Alphen aan den Rijn: Kluwer International.

[44] See generally Davis, M., & Stark, A. (eds.) (2001). *Conflict of Interest in the Professions*. New York, OUP.

[45] Hopt, K. L. (2013) Conflict of Interest, Secrecy and Insider Information of Directors - A Comparative Analysis. (pp. 6-7). *Max Planck Institute for Comparative and International Private Law and ECGI*, Law Working Paper No. 208/2013.

[46] *Salomon v. Salomon & Co Ltd* [1897] AC 22 HL; Hannigan, B. (2015). *Company Law*. (pp. 41). (4th ed.). Oxford, OUP.

[47] Companies Act 2006, Part 1 and 2.

such as the production of goods or delivery of services.[48] Companies have therefore been instrumental for economic development[49] and are seen as very important to society.[50] In fact, as already stated, some companies are now wealthier than many countries[51] and consequently wield considerable social and political influence. The UN[52] and the OECD[53] recognise this power and have called for companies to take more responsibility for environmental and social disasters caused by their activities; they also advocate better governance of companies so as to reduce their detrimental impact on the world.[54] This indicates that companies are of interest to society but to what extent is unclear. This is one of the motivations for the examination of public interest justifications for the regulation of companies in this thesis. This thesis examines directors' conflicts of interest to verify if public interest is a motivation for the regulation of the governance of companies.

Equally, some argue that the weaknesses or failures of the governance of large companies have significant repercussions for the global economy.[55] In fact, they posit that one of the factors, which contributed to the last global financial crisis, was the prevalence of corporate failures.[56] They attribute some blame to mis-managed conflicts of interest.[57] This is another reason why this thesis will be exploring directors' conflicts of interest as such conflicts of interest could contribute to corporate failures which could have huge societal consequences.

---

[48] Keay, see above n.9, 13.
[49] Ibid, 3; Roth, see above n. 9, 255; Bank for International Settlements, see above n. 9.
[50] Dine, J., (ed.) (2000). *The Governance of Corporate Groups*. Cambridge Studies in Corporate Law. (pp.1). Cambridge, CUP.
[51] Trivett, see above n.11; Global Policy forum (2010). *Comparison of the World's 25 Largest Corporations with the GDP (gross domestic product) of Selected Countries*. Retrieved from https://www.globalpolicy.org/images/pdfs/Comparison_of_Corporations_with_GDP_of_Countries_table.pdf ;
[52] U.N. (2010). *United Nations corporate partnerships: The role and functioning of the Global Compact.* Retrieved from https://www.globalpolicy.org/images/pdfs/JIU_report_on_Global_Compact_2.pdf; U.N. (2011), see above n.28.
[53] O.E.C.D, see above n.29.
[54] BBC (2013, May 10). Bangladesh factory collapse toll passes 1,000. *BBC.* London, UK. Retrieved from http://www.bbc.co.uk/news/world-asia-22476774; Corner, A. (2015, 13 October). After the VW scandal, how can we trust business to act on climate change? *The Guardian*. London, UK. Retrieved from http://www.theguardian.com/sustainable-business/2015/oct/13/how-companies-can-keep-the-faith-on-climate-change.
[55] Mayer, see above n.10.
[56] Bini Smaghi, see above n.4; Cioffi, see above n.5, 1.
[57] Kirkpartrick, G. (2009). The Corporate Governance Lessons from the Financial Crisis. OECD *Journal: Financial Market Trends,* 2009 (1), 61; Dallas, see above n.7, 264.

In addition, this thesis will be examining directors' conflicts of interest because of the significant role that directors play in the governance of companies. Mismanaged directors' conflicts of interests appear to have far-reaching consequences for the company and society. After all, companies are generally run in a way which separates the control and management of business activities. Companies task specialised experts, managers and directors with the management of their affairs and afford them considerable discretion.[58] This discretion is tempered by the duty to act in the best interests of the company.[59] The best interests of the company or the corporate objective does not have a singular meaning. These questions require thorough consideration of the role of companies in society.[60] Therefore, exploring various theories of the firm is vital as they have an impact on the justification for the regulation of companies, including directors' duties[61] as well as the existence of public interest rationale(s) for companies. Thus, this thesis will explore various theories of the firm in detail in chapter 2.

In light of the foregoing, public interest appears to be a prevalent governance issue, which is generally associated with acting in the best interests of society or "acting for the public good"[62]. Yet what it means concretely has been highly disputed.[63] Accordingly, chapter 3 of this thesis will explore the meaning of public interest, particularly in the context of corporate governance and large companies.

In addition, conflicts of interest are a conundrum.[64] They are associated with notions of divided or conflicted loyalty when acting for others,[65] and the nature of the governance of companies. Governing companies largely entails reliance on specialised agents to manage company affairs, which lends itself to conflicts of

[58] In many public companies, control and ownership are separate, as discussed in the seminal work by Berle, A., & Means, G. (1932). *The Modern Corporation and Private Property*. USA, Harcourt, Brace & World, Inc.
[59] Companies Act, 2006, s.171- 172; *Re Smith and Fawcett Ltd* [1942] Ch 304, 306; *Regentcrest Ltd v. Cohen* [2001] 1 B.C.L.C. 80, 105b.
[60] See above n.44, 1
[61] Pound, J. (1993). The Rise of the Political Model of Corporate Governance and Corporate Control. *New York University Law Review*, 68, 1003.
[62] Parkinson, J., Gamble, A., & Kelly, G. (2001). (eds.) *The Political Economy of the Company*. (pp. 23). Oxford-Portland, Hart Publishing.
[63] Keay, A. (2000). Insolvency Law: A Matter of Public Interest? *Northern Ireland Legal Quarterly*, 51, 509, 519-523.
[64] Davis, see above n.34; see above n.1, 3.
[65] The Bible, Matthew 6:24.

interest. However, conflict of interest is not a wrong in itself nor is it immoral. As already stated being 'conflicted' is not the issue but rather acting on the 'conflictedness'.[66] This complex issue permeates governance structures generally, with companies being no exception. Chapter 4 of this thesis will focus on this in detail.

Chapter 4 will therefore examine conflicts of interests generally. Although there is no conclusive research that indicates that conflicts of interests have multiplied, there has been an increase in the media coverage of the subject.[67] This could be a sign of augmenting concern for justice, trust and transparency or objectivity in decision-making.[68] The preoccupation with good governance could also stem from the belief that decision-makers ought to act in a manner that promotes society's general interest or act in a way that does not breach the trust invested in decision-makers by those who have entrusted them with acting on their behalf.[69] This seems to indicate that conflict of interest discourses have, to a certain degree, implications for societal interests. This thesis will consider how the notion of public interest leads to addressing these conflicts. It will look at how public interest is articulated in different spheres due to (societal) desire for good and proper governance of organisations in society[70] or the idea that decision-makers must be loyal to those who they govern.[71]

Equally, it is imperative to review directors' duties briefly because this thesis focuses on company directors' conflicts of interest, an aspect of directors' duties. Of special interest is the duty of loyalty as it is associated with the management of conflicts of interest.[72] The two main duties of directors are the duty of loyalty and duty of care.[73] The duty of care developed in relation to the laws on negligence.[74] The duty of loyalty

[66] See above n.57, 589-595.
[67] See above n.1, 33.
[68] Bazerman, Cain, Loewenstein & Moore, see above n.38, 3-9.
[69] Hejka-Ekins, see above n.39, 482.
[70] Ibid.
[71] Peters, A. (2012) Managing Conflict of Interest: lessons from multiple disciplines and settings. In L. Handschin, & A. Peters (eds.) *Conflict of Interest in Global, Public and Corporate Governance.* (pp. 358, 421). Cambridge, CUP.
[72] Keay, A. (2014). *Directors' Duties*. (pp. 267). (2nd ed.). Bristol, Jordan Publishing.
[73] See generally Finn, P. (1977) *Fiduciary Obligations*. Sydney, Law book Company. This thesis will limit the scope of the fiduciary duties covered here to those that are directly related to conflicts of interest. In addition, due to the limited nature of this thesis, special conflicts of interest on Takeovers, MBOs and groups of companies will be excluded from the scope of the thesis. For an overview of these issues, see Hopt, see above n.45.
[74] Day, M., Frase, R., & Helm R. (eds.) (2012). *A Practitioner's Guide to Conflicts of Interest in the Financial Services Industry*, (pp. 1-2). London, Sweet and Maxwell.

on the other hand, finds its origins in fiduciary principles developed in the courts of equity and influenced by trustees' duties.[75] This duty means that directors are held to a general standard of loyal behaviour.[76] Unconscionable, fraudulent or criminal acts are deemed unacceptable. This duty also demands that directors do not place themselves in situations where their interests could conflict with the interests of the company. This includes the exploitation of any property, information or opportunity of the company.[77] It encompasses conflict of interest issues related to company loans, the giving of credit to directors, directors' self-dealing, competing with the company, appropriation of corporate opportunities and directors profiting from their position, etc.[78]

The courts have been at pains to ensure that directors act loyally and remain accountable for their actions (and inactions) when there is any prospect of a conflict.[79] Why is this? This thesis will put forward the view that this is partly due to concern for the public interest in the good functioning and proper governance of companies, particularly in modern times where (international) companies have considerable influence and power.[80] Chapters 5, 6 and 7 of this thesis explore these issues in detail. Chapter 7 in particular, will consider and assess contemporary regulation of directors' conflicts of interest and the existence of any public interest justification for such regulation.

By exploring the issues above, this thesis seeks to argue that directors' conflicts of interest are important concerns for society as well as for companies.

The thesis will focus mainly on the UK as its corporate governance approaches are quite dominant and have influenced a number of jurisdictions due to its imperialist and colonial history. In addition, a significant number of international companies

[75] Hopt, see above n.45, 2.
[76] Davies, P. (2012) *Gower and Davies: Principles of Modern Company Law* (8th ed.). (§ 16-93). London, Thomson, Sweet & Maxwell.
[77] Companies Act, 2006, s.175 (2).
[78] Hopt, see above n.45, 2.
[79] Ibid
[80] One of the notable consequence of mismanaged conflicts of interest in corporate governance is bribery and corruption- See the Bribery Act of 2010; See above n.1, 28.

emanate from the UK.[81] This thesis will however refer to other jurisdictions where it deems useful to do so.

In addition, this thesis places emphasis on publicly listed companies and large private companies as their company directors' conflicts of interest have tangible impact on national and global economies. Also, the research will focus on privately owned companies rather than government companies which have peculiar issues that are specific to this category of companies. The limited scope of this thesis does not allow for a specific exploration of pertinent and singular issues which affect them.

1.6 METHODOLOGY

This thesis will employ theoretical and doctrinal methods. The research will be undertaken chiefly through reliance on primary sources such as pertinent laws and case-law on company directors' conflicts of interest in the UK, as well as historical and contemporary parliamentary debates and political discourses. This thesis will also rely on, and engage in analysis of, secondary resources such as journal articles and newspaper articles where appropriate.

The research will largely draw on theory-guided methodology and theoretical framework on public interest, conflicts of interest and the management of companies. Theories on public interest, the management of companies and regulation of corporate governance as well as conflicts of interest will serve as focal points of discussion. They are indispensable to building a 'grander' theory on the regulation of company directors' conflicts of interest and any existence of a public interest rationale for regulation. In addition, I will make use of exploratory and explanatory research methods in order to address the current state of affairs and the law on company directors' conflicts of interest. I will review the history of these conflicts of interest, theories of the firm and regulation of companies in order to provide a contextual background to the research subject. This is equally useful for identifying the existence of some public interest conception for companies and their regulation.

[81] The Economist. (2012, 10 July). Focus: Biggest transnational companies. *The Economist.* London, UK. Retrieved from http://www.economist.com/blogs/graphicdetail/2012/07/focus-1.

In addition, the thesis will employ hermeneutic research to interpret the law on company directors' conflicts of interest in light of public interest considerations. Since public interest is not a fixed notion, the thesis will make use of evaluative research to assess the dominant conception of public interest identified in the management of directors' conflicts of interest to ascertain if it works in practice. The thesis will analyse and critique current regulation of these conflicts of interest in light of the prevailing definition of the public interest and my chosen definition of the public interest.

The thesis will consider key concepts, public interest, regulation and conflict of interest through an interdisciplinary lens. This thesis will show that it is difficult to study public interest and conflicts of interest in a holistic manner without turning to other disciplines for different and equally important perspectives. These are namely sociology, philosophy, and critical feminist perspectives.

1.7 SUMMARY OF KEY ISSUES EXPLORED IN THE THESIS AND OUTLINE OF CHAPTERS

In order to answer the research question, this thesis will explore a number of key issues. It begins with this chapter. It explains the interest in the research topic, the context and research question. It addresses key notions of significance to answering the research question and states the original contribution to knowledge

Chapter 2 constitutes a review of key theories of the firm and the nature of the company because this facilitates an understanding of the reasons why companies exist and their purpose. It begins with preliminary discussions on public interest rationale(s) for the management of directors' conflicts of interest. Chapter 3 examines key theories on the meaning of public interest and its meaning within corporate governance, regulation of companies. It will debate if and how corporate theories articulate the public interest, subtly or otherwise. This is vital because understanding and defining public interest provides a foundation for the issues, which are at the heart of the research question. One cannot draw out public interest motivations for the regulation of directors' conflicts of interest without an understanding of what public interest signifies. Defining public interest is also imperative for an exploration of its existence in the rationale for the regulation of companies and their directors.

Likewise exploring the regulation of companies and public interest generally in chapters 4 and 5, provide insights into the role of public interest in contemporary regulation of directors' conflicts of interest but also the history of such rationale for regulation. All these enable a thorough review and exploration of the issues that relate to the research question. Similarly, these chapters examine the history, origin and typologies of conflicts of interest in order to highlight the complexities of conflicts of interest as a societal concern. This is essential to conceptualise and understand directors' conflicts of interest, a central part of the research question. Concurrently, looking at conflicts of interest generally could contribute to providing an insight into why directors' conflicts of interest are of interest to society and its concern for good governance.

Chapter 6 explores the management of company directors' conflicts of interest in light of relevant conception(s) of public interest, particularly during the 20th century. Chapter 7 explores and assesses contemporary regulation of company directors' conflicts of interest in light of relevant conceptions of the public interest. Chapter 8 is the concluding chapter. It delivers a summary of findings and the various issues addressed throughout the thesis. It provides recommendations and suggestions about the rationale for the management or regulation of directors' conflicts of interest. It suggests future further research areas and questions. It provides the final concluding remarks.

1.8 CONCLUSION

This chapter has set out the objectives of this thesis, the research question and intended contribution to knowledge. Chapter 2 turns attention to corporate theories. This is necessary to a preliminary understanding of the role of public interest in company law generally and its impact on discourses of directors' conflicts of interest.

CHAPTER TWO

THEORIES OF THE FIRM

2.1 INTRODUCTION

The aim of this chapter is to discuss and identify some significant theories of the firm and the reasons why firms exist. It is important to examine theories of the firm for a number of reasons. They provide a foundation for discussions on the (societal) role of companies, their management, the role of directors, their duties, including the regulation of their conflicts of interest. A review of key corporate theories could also begin to reveal if and why the regulation of these conflicts may stem from societal expectations about the governance of companies. This is indispensable to understanding and identifying how and to what extent, the management of directors' conflicts of interest is an issue of (public) interest to society as a whole.

This chapter will consequently explore pertinent theories such as economic analyses of the law, pluralist or progressive theories, and corporate personality theories. There are of course, other theories of the firm such as the feminist corporate theories or sociological perspectives on the firm. This chapter focuses on the dominant theories as lack of space prevents a thorough exploration of others.

2.2 ECONOMIC ANALYSES OF THE LAW AND THE FIRM

Economic analyses of the law generally rely on certain assumptions about human behaviour. One is the premise that although human behaviour cannot be compartmentalised and is complex, humans are likely to try to maximise their utility from a variety of preferences, and seek to acquire the optimal level of information and other relevant factors to facilitate this utility-maximisation.[82] A normative criterion of efficiency,[83] utility and wealth maximisation as well as consent or liberty to contract and the existence of free-exchange markets are central to economic analyses of the

[82] Becker, G. S. (1978). *The Economic Approach to Human Behavior*. (pp. 3-14). Chicago, Chicago University Press.

[83] This is defined based on efficiency-based methodologies such as Productive efficiency, Pareto-Optimality, Pareto-Superiority and Kaldor-Hicks efficiency - Coleman, J. (2002). Efficiency, Utility and Wealth-Maximization. In J. Coleman (ed.) *Markets, Morals and the Law*. (pp. 95-132). Cambridge, CUP.

law. These are correspondingly the central themes in the economic analyses of the firm,[84] which are primarily Agency theory, the 'Nexus of Contract' theory, Transaction Cost Economics as well as Property Rights theory of the firm.

2.2.1 AGENCY THEORY

Agency theory emanated from the shift from neoclassicism to institutionalism in the law and economics development. Neoclassicism was inadequate for explaining the internal working of firms because its focus was an overarching understanding of the market.[85] The desire to understand the institutions, which make up the market and their governance structures,[86] led to this shift. The quest to promote efficiency and reduce costs as well as information asymmetry between participants of the institutions also played a part in the emergence of institutionalism.[87] Agency theory thus centres on the reduction of opportunism in companies, ensuring that the managers of companies, often considered their agents, do not exploit them and their shareholders, the principals.[88] Therefore, the issue of conflicts of interest is at the heart of agency theory.

Agency theory also finds its roots in organisational theory, the nature of managerial behaviour and organisational life.[89] It assumes that humans are self-interested and that this leads to inevitable conflicts of interest in all aspects of cooperative undertakings or organisational life.[90] The relationships within companies, legal

[84] There are differences between normative and positive methodologies of economics - Blaug, M. (1980). *The Methodology of Economics: or, How Economists Explain*. (pp. 112-134). Cambridge, CUP; Friedman, M. (1953). *Essays in Positive Economics.* (pp. 3-43). Chicago, Chicago University Press.
[85] Williamson, O. (1984). Corporate Governance. *Yale Law Journal,* 93, 1197; Berle, A. (2004). The Impact of the Corporation on Classical Economic Theory. In T. Clarke (ed.) *Theories of Corporate Governance, the Philosophical Foundations of Corporate Governance*. (pp. 45-53). Routledge; Tirole, J. (1988). The Theory of the Firm In J. Tirole (ed.). *The Theory of Industrial Organization*. (pp. 50) Cambridge, MA: MIT Press.
[86] Posner, R. (2010). From the new institutional economics to organisation economics: with applications to corporate governance, government agencies, and legal institutions. *Journal of Institutional Economics,* 6 (1), 1.
[87] Ibid, 2.
[88] Berle & Means, see above n.58; Alchian, A., & Demsetz, H. (1972). Production, Information Costs, and Economic Organization. *American Economic Review*, 62 (5), 777-795; Jensen, M., & Meckling, W. (1976). Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure. *Journal of Financial Economics*, 3 (4), 305, 310-330.
[89] See generally Barnard, C. (1938). *The Functions of the Executive*. Cambridge, MA: Harvard University Press; March, J., & Simon, H., (1958). *Organization*. New York, Wiley; Eisenhardt, K. M. (2004). Agency Theory: An Assessment and Review. In T. Clarke. (ed.) *Theories of Corporate Governance, the Philosophical Foundations of Corporate Governance*. (pp. 83). Routledge.
[90] Jensen & Meckling, See above n.88, 305-360.

fictions that serve as a nexus for voluntary agreements between individuals or parties,[91] and raise a moral hazard problem, reflect this.[92] Agency theory seeks to resolve the perceived agency problem stemming from the separation of the management and ownership or financing of companies.[93] Its theorists posit that managers have substantial control rights and discretion over the allocation of the funds of company investors (shareholders), the residual risk bearers.[94] This power opens up opportunities for exploitation of conflicts of interest such as self-dealing and expropriation of funds by the managers.[95]

Agency theorists therefore contend that conflicts of interest are pervasive[96] and problematic as they could lead to losses for all involved in the company. Agency theorists consider them to be part of the agency problem and argue that parties try to reduce related costs by putting in place measures to co-align the interests of the principals and agents.[97]

Agency theory has been significant because it is a relatively simple concept. It has managed to analyse the creation of firms by linking ideas about the self-interested nature of humans with the reduction of costs in transactions and production. It provides explanations for how in spite of agency costs, large companies thrive through the alignment of interests.[98] It purports to provide an explanation for modern corporate governance and the laws on the conduct of managers or directors, including the regulation of their conflicts of interest.[99] Agency theory serves as justification for the existence of directors' fiduciary duties.[100] These elements are

---

[91] Millon, D. (1990). Theories of the Corporation. *Duke Law Journal*, 39 (2), 201, 230.
[92] Romano, R. (1993). *Foundations of Corporate Law.* (pp. 25). New York, OUP.
[93] Fama, E. & Jensen, M. (1983). Separation of Ownership and Control. *Journal of Law and Economics*, 26 (2), 302-303.
[94] Ibid.
[95] See above n.91; Jensen, M. C., & Meckling, W. H. (1994). The Nature of Man. *Journal of Applied Corporate Finance*, 7 (2), 18–19; Jensen, M., C. (1994). Self-interest, Altruism, Incentives, and Agency Theory. *Journal of Applied Corporate* Finance, 7 (2), 40–45.
[96] Jensen, see above n.95.
[97] Ibid, 43–45; Ortz, E. (1998). Shirking and Sharking: A legal theory of the Firm. *Yale Law & Policy Review*, 16 (2), 265, 275-278.
[98] Daily, C. M., Dalton, D. R., & Cannella, A. C. (2003). Corporate Governance: Decades of Dialogue and Data. *Academy of Management Review,* 28 (3), 371, 372.
[99] Ibid; Gelter, M. (2008). The Dark Side of Shareholder Influence: Toward a Holdup Theory of Stakeholders in Comparative Corporate Governance. *Harvard Olin Fellows' Discussion Paper No. 17.* Harvard Law School, Cambridge, MA.
Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1106008.
[100] Matheson, J., & Olson, B. (1992). Corporate Law and the Long term Shareholder Model of Corporate Governance. *Minnesota Law Review*, 76, 1313, 1331-1334.

important considerations for the key questions posed in this thesis because the theory draws attention to the problem of directors' (or managers') self-dealing and other conflicts of interest.

However, agency theory falls short in many regard.[101] These include its over-simplistic and pessimistic view of human nature,[102] the implicit preference for shareholder primacy.[103] Agency theory tends to place an accent on agents shirking their duties and does not extensively discuss principals abusing their position, power and influence.[104] That is, principals sharking their duties *vis à vis* agents which could equally create costs for the firm.[105] Sharking means principals taking undue advantage of their position and power vis à vis the agents and acting in an opportunistic manner to the detriment of agents.[106] This essentially means that agency theory is telling only one side of the story and neglects the effect of principal opportunism on agents and the company as a whole.[107] Also of importance to this thesis is the criticism that though agency theory explains why directors' conflicts of interest are prevalent and important to address, it does not sufficiently explain the nature or choice of existing regulation of these conflicts of interest. An example is the choice between self-regulation and the imposition of stringent legal provisions.

Agency theory simply identifies the problem of conflicts of interest between directors and companies and highlights a number of ways of reducing associated agency costs. The seemingly neutral nature of agency theory is questionable as it means that the theory does not necessarily negate or affirm the existence of public interest justification for the regulation of directors' conflicts of interest. In sum, it raises the

---

[101] Eisenhardt, see above n.89, 90; Learmount, S. (2002). Theorising Corporate Governance: New Organisational Alternatives. *ESRC Centre for Business Research*, Working Paper no. 237. (pp. 1). University of Cambridge, Cambridge.

[102] See above n.100, 1336; Boatright, J.R. (1996). Business Ethics and the theory of the firm. *American Business Law Journal* 34 217; Rock, E.B. (1997). Saints and Sinners: How does Delaware Corporate Law work? *UCLA Law Rev*iew, 44, 1009; Holmstrom, B., & Costa, J. (1986). Managerial Incentives and Capital Management. *Quarterly Journal of Economics,* 101, 835.

[103] Learmount, See above n.101, 1; Shankman, N. (1999). Reframing the Debate between Agency and Stakeholder Theories of the Firm. *Journal of Business Ethics*, 19 (4), 319-334; Rodriguez, G., Gomez-Mejia, L., & Wiseman, R. M. (2012). Has Agency Theory Run its Course? Making the Theory More Flexible to Inform the Management of Reward Systems. *Corporate Governance: An International Review*, 20 (6), 526-546.

[104] Gelter, see above n.99.

[105] Dees, G.J. (1992). Principals, Agents and Ethics. In Bowie, N. E. and Freeman, R. E. (eds.) *Ethics and Agency Theory*. (pp. 25, 49). Oxford, OUP.

[106] Ortz, see above n.97, 279-280.

[107] Ibid, 315-318.

problem but does not indicate what dimension the conflict takes. It is clear that to assess whether the regulation of directors' conflicts of interest is of public interest, a deeper exploration of the reasons for the nature or choice of the regulation of these conflicts, mandatory or otherwise, is indispensable.

2.2.2 NEXUS OF CONTRACTS

Nexus of contracts is similar to agency theory[108] as they both place emphasis on private contractual agreements and reduction of transaction costs.[109] However, nexus of contracts is a manner of defining a company as a nexus of reciprocal arrangements[110] between individuals or *"factors of production"*.[111] Nexus of contracts means each individual or constituency within the firm; that is, all who provide some input or asset into the firm with the aim of getting a gain or an output.[112] The notion includes explicit and implicit agreements as well as corporate law rules and judicial interpretations.[113] The firm is thus the connecting link in all the contracts between the factors of production.[114]

The company is consequently seen as a legal fiction, a set of contracts, which requires joint input in order to create joint output and the subsequent distribution of the fruits of the output.[115] Self-interest of those in the company motivates its use.[116] To its advocates, nexus of contracts is a concept that best characterises contractual relationships within a firm, particularly the most significant ones.[117] Essentially, it is a

[108] Jensen & Meckling, see above n.88; Alchian & Demsetz, see above n.88.
[109] Learmount, See above n.101, 4.
[110] Bratton Jr, W. (1989). The "nexus of contracts" Corporation: A critical Appraisal. *Cornell Law Review*, 74, 407, 415.
[111] Jensen & Meckling, see above n.88, 305.
[112] Boatright, J. R. (2002). Contractors as stakeholders: Reconciling stakeholder theory with the nexus-of-contracts firm. *Journal of Banking & Finance*, 26 (9), 1837.
[113] Fama & Jensen, see above n.93.
[114] Hansmann, H. (1996). *The Ownership of Enterprise*. (pp. 16, 18). Cambridge, MA: Harvard University Press.
[115] Fama, E. (1980). Agency Problems and the Theory of the Firm. *Journal of Political Economy*, 88 (2), 290
[116] Ibid; Alchian & Demsetz, see above n.88; Jensen & Meckling, see above n.88; Easterbrook, F. & Fischel, D. R. (1991). *The Economic Structure of Corporate Law*. (pp. 166). Cambridge, MA: Harvard University Press; Easterbrook, F. & Fischel, D. (1989). The Corporate Contract. *Columbia Law Review*, 89 (7), 1426.
[117] Kraakman, R. H. (1984). Corporate Liability Strategies and the Costs of Legal Controls. *Yale Law Journal,* 93 (5), 857, 862.

useful theory because it explains how an economic mechanism, the company, allows individuals to contract together and as a singular party, with external parties.[118]

Nevertheless, nexus of contracts theory has been criticised for a number of reasons.[119] These include its emphasis on the voluntary nature of contractual arrangements within companies[120] as well as its unsatisfactory explanation for non-reciprocal and mandatory corporate rules.[121] Nexus of contracts theory places a lot of emphasis on the voluntary nature of the agreement but neglects to consider that there is still hierarchy within firms.[122] Therefore, private contracting cannot adequately control conflicts of interest because of imbalances in bargaining power.

Similarly, nexus of contracts theory's lack of explanations for non-reciprocal corporate rules are of special significance to this thesis. This is because it means that this theory inadequately explains mandatory rules concerning directors' conflicts of interest. Mandatory rules are more than rules that parties implicitly would have wanted in their agreement in order to protect them and they exceed the notion that corporate law is simply facilitating a contract, which is the company, through the imposition of mandatory or default rules.[123] Mandatory rules may exist to protect the societal interests in good governance and interests of parties that the state deems necessary. Chapters 6 and 7 of this thesis will address this issue in detail.

Likewise, this theory provides no real explanation for directors' duty of loyalty, which is often associated with the regulation of directors' conflicts of interest as one cannot be loyal to a contractual agreement.[124] Even if one believes that loyalty is a default term of a relational contract, the reliance on a purely contractarian and economics analysis weakens the structure of the agreement, as some trust is necessary for the success of the agreement. In fact, some theorise that the greater the reliance on contracts as the root of such interactions, the lesser the existence of trust.[125] Nexus

[118] See above n.112.
[119] Hayden, G., and Bodie, M. (2001). The Uncorporation and Unravelling of 'Nexus of Contracts Theory. *Michigan Law Review*, 109 (6), 1127, 1129.
[120] See above n.110, 457.
[121] Companies Act 2006, S.175.
[122] Ibid
[123] See above n.119, 1142-1144.
[124] Eisenberg, M. (1999). The conception that the corporation is a Nexus of contracts, and the dual nature of the firm. *Journal of Corporation Law*, 24 (4), 819, 835.
[125] Mitchell, L. (1993). Fairness and Trust in Corporate Law. *Duke Law Journal*, 43, 425.

of contracts theory is unable to justify and explain the regulation of directors' conflict of interest adequately. This is due to its single-minded reliance on contractual arrangement as the theory's foundation.[126]

2.2.3 TRANSACTION COST ECONOMICS (TCE)

Transaction cost economics, like other economics theories on the firm, owes its origins to the development of existing theories in economics, law and organisation theory in the early 20th century.[127] TCE originates from a comparison between firms (companies) and markets through an analysis of transaction costs and an examination of the role of executives (directors) within firms.[128] TCE looks at institutions and organisations within the economic system as well as their governance structures.[129] TCE examines the frequency of the recurrence of transactions, the degree and type of uncertainty to which these transactions are subject. It does so based on the assumption that humans have bounded rationality and are opportunists. It equally focuses on the uncertainty and complexity of transactions that result in long run contracts being inevitably incomplete.[130] Therefore, offsetting and diminishing the ex-post perils of opportunistic behaviour through the ex-ante choice of a governance structure is fundamental to the TCE model.[131] The focus of TCE is the analysis of transactions as well as the related issues of conflict, mutuality and order, implicit in governance structures.[132] TCE is complementary to agency theory but it places more

[126] See above n.110, 410, 451-460.
[127] Williamson, O. (1985). *The Economic Institutions of Capitalism*. (pp. 1-14). New York, The Free Press; Llewellyn, K. (1931). What Price Contract? An Essay in Perspective. *Yale Law Journal*, 40 (5), 704; Arrow, K. (1969). The organization of Economic Activity: issues pertinent to the choice of market and non-market allocation. *The U.S. Joint Economic Committee*. (pp. 48, 59-73). Washington, DC: US Government Printing Office.
[128] Coase, R. (1937). The Nature of the Firm. *Economica*, 4 (16), 386; Barnard, see above n.89.
[129] See above n.127, 16.
[130] Williamson, O. (1991). Comparative Economic Organization: The Analysis of Discrete Structural Alternatives. *Administrative Science Quarterly*, 36 (2), 269; Cheung, S. (1969). Transaction Costs, Risk Aversion, and the Choice of Contractual Arrangements. *The Journal of Law & Economics*, 12 (1), 23.
[131] Williamson, O. (1998). Transaction Cost Economics: How it works; where it is headed. *De Economist*, 146 (1), 32; Cheung, see above n.130, 24-25; Baker, G., Gibbons, R., & Murphy, K. (2002) Relational Contracts and the Theory of the Firm. *The Quarterly Journal of Economics*, 117 (1), 39.
[132] Williamson, see above n.131, 33.

emphasis on inter-firm contractual risk hazards rather than risk bearing as is the case in agency theory.[133]

Like agency theory, TCE addresses the corporate governance problem of managerial discretion and explains hierarchy within companies.[134] Prominent TCE theorists claim that the board of directors is a tool for safeguarding the assets of shareholders (and creditors to a certain degree) because their investments are subject to unique hazards of expropriation while other actors in the firm retain their assets in their possession.[135] These academics use bounded rationality and opportunism to explain why directors might be prone to exploiting conflicts of interest or self-dealing because they contend that humans are not always trustworthy.[136] This provides some rationale for the regulation of directors' conflicts of interest.[137]

TCE has been criticised for reductionism[138] and because almost anything can be rationalised using the transaction cost analysis.[139] In addition, humans are not always rational, and we have different ethical values in accordance with social contexts and pressures.[140] Of importance for this thesis, is that TCE does not appear to support a public interest role for companies. Society is thus an externality to the company because it does not have a contractual relationship with it.[141] Correspondingly, it seems that the regulation of directors' conflicts of interest cannot be justified in light of the public interest. Nonetheless, an exploration of public interest theories in chapter 3 will reveal that economic corporate theories, to which public interest appears alien, incorporate conceptions of public interest.

---

[133] Commons, J. (1932). *Institutional Economics* (pp. 4). Madison, University of Wisconsin Press; McClelland, P. L. & O'Brien, J. P. (2011). Transaction cost economics and corporate governance: the case of CEO age and financial stake. *Managerial and Decision Economics* 32, 141.

[134] McClelland & O'Brien, Ibid; Masten, S. (1993). Transaction Costs, Mistakes, and Performance: Assessing the Importance of Governance. *Managerial and Decision Economics*, 14 (2), 119.

[135] Williamson, O. (1987). Internal Economic Organization. *Crafoord Lectures 1: Perspectives on the Economics of Organizations*. *Institute of Economic Research.* (pp. 31). Lund University; McClelland & O'Brien, see above n.133.

[136] Ibid.

[137] Williamson, Ibid, 38; McClelland & O'Brien, Ibid.

[138] Chen, P. (2007). Complexity of Transaction Costs and Evolution of Corporate Governance. *The Kyoto Economic Review*, 76 (2), 139.

[139]Posner, R. (1993). The New Institutional Economics Meets Law and Economics. *Journal of Institutional and Theoretical Economics*, 149 (1), 73.

[140] Duran, X., & McNutt, P. (2010). Kantian ethics within transaction cost economics. *International Journal of Social Economics,* 37 (10), 755.

[141] Williamson, O. (1984). Board of Directors and Fiduciary Duties. *Yale Law Journal*, 93, 1197, 1228.

2.2.4 THE ECONOMICS OF PROPERTY RIGHTS

Economic analysis of property rights, another influential theory of the firm,[142] addresses the problem of incomplete contracts inherent in the nature of companies.[143] Property rights theory complements transaction cost economics (TCE) and agency theories.[144] Its focus is on highlighting the significance of property rights and notions like transaction costs or the scarcity of property to rights allocation.[145] Property rights advocates posit that the company is a bundle of rights held by different actors.[146]

The theory considers the purpose of managers and directors within companies to be the reduction of high transaction costs[147] as well as the protection of property rights of shareholders as they hold residual control rights of the company.[148] In light of this, property rights scholars see directors' duties as intended to address issues such as directorial opportunism.[149] Hence, they interpret directors' duty of loyalty and the management of directors' conflicts of interest as ways of protecting shareholders'

---

[142] Coase, R. (1960). *The Problem of Social Costs*. *J.L. & ECON.,* 3, 1; Posner, R., & Parisi, F. (1997). (eds.) *Law and Economics*. (Vol.1, pp. XVIII). Chicago, Edward Elgar; Coase, R. (1988). *The Firm, the Market, and the Law*. (pp. 14). Chicago, University of Chicago Press; Alchian, A. (1965). Some Economics of Property Rights. *Il Politico*, 30, 816; Demsetz, H. (1967). Toward a Theory of Property Rights. *The American Economic Review*, 57 (2), 347-359; Demsetz, H. (1972). When Does the Rule of Liability Matter? *Journal of Legal Studies*, 1 (1), 13-28; Calabresi, G., & Melamed, A. D. (1972). Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*, 85(6), 1089-1128; Parisi, F. (1995). Private Property and Social Costs. *European Journal of Law and Economics*, 2(2), 149, 162; Epstein, R. (1993). Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase. *Journal of Law & Economics*, 36 (1), 553.

[143] Kim, J., & Mahoney, J.T. (2005). Property Rights Theory, Transaction Costs Theory, and Agency Theory: An Organizational Economics Approach to Strategic Management. *Managerial Decision Economics* 26, 223

26, 225; Hart, O. (1988). Incomplete contracts and the theory of the firm. *Journal of Law, Economics and Organization*, 4, 119; Williamson, see above n.127.

[144] See generally Barney, J. & Ouchi, W. (1986). *Organizational Economics*. San Francisco, Jossey-Bass; Williamson, O. (1975) *Markets and Hierarchies: Analysis and Antitrust Implications*. The Free Press: New York; Williamson, see above n.127; Jensen & Meckling, see above n.88; Holmstrom, B. (1979). Moral hazard and observability. *Bell Journal of Economics,* 10, 74; Fama, see above n.115.

[145] Ibid.

[146] Calabresi & Melamed, see above n.142, 1089; Alchian, (1965). Ibid, 816.

[147] Manne, H. (1965). Mergers and the Market for Corporate Control. *Journal of Political Economy*, 73 (2), 110.

[148] Worthington, S. (2001) Shares and shareholders: property, power and entitlement: Part I. *Company Lawyer*, 22 (9), 258, 264-266; Hansmann, H. (1990). Ownership of the Firm In L. Bebchuk (ed.) *Corporate Law and Economic Analysis*. (pp. 283-287). Cambridge, CUP.

[149] Grossman, S. &, Hart, O. (1986). The costs and benefits of ownership: a theory of vertical integration and lateral integration. *Journal of Political Economy,* 94, 691; Hart, O., & Moore, J. (1990). Property rights and the nature of the firm. *Journal of Political Economy*, 98, 1119.

interests. Thus, the theory as it stands currently does not appear to provide for a public interest conception for the regulation of directors' conflicts of interest.

The property rights theory though beneficial because it enhances the understanding of the property rights and ownership aspects of companies, has been criticised for a number of reasons. These include the failure to thoroughly distinguish between property rights and contractual rights or entitlements.[150] It fails to sufficiently define the legal scope of proprietary rights.[151] More importantly for the purpose of this thesis, property rights theory fails to provide adequate solutions to the problem of directors shirking their duties, especially the duty of loyalty. This is particularly problematic when directors exploit the information asymmetry between them and shareholders, and act on a conflict of interest. Equating ownership with residual control rights does not resolve the information asymmetry problem, and in fact, the separation of control and ownership exacerbates this.[152] Ownership does not lead to the provision of more information as directors may still conceal relevant information and exploit company opportunities and asset without being held accountable. In addition, property rights theory does not effectively address the problem of the expropriation of the company's assets, which could prove to be an obstacle to addressing directors' conflicts of interest. Such expropriation could be a form of conflict of interest.

As in the case of other economic theories of the firm, there is some room for interpretation and innovation concerning the regulation of directors' conflicts of interest and the question of public interest. Chapter 3 reviews these issues extensively.

2.2.5 ARTIFICIAL ENTITY AND AGGREGATE THEORY

In addition to examining key economic strands on the theory of the firm, it is important to discuss artificial and aggregate theory briefly because of its influence on the development of these theories. Aggregate theory emerged due to a rejection of

[150] Armour, J., & Whincop, M. J. (2007). The Proprietary Foundations of Corporate Law. *Oxford Journal of Legal Studies*, 27 (3), 429, 431.
[151] Ibid, 444; Demsetz, H. (1998). Review: Oliver Hart's firms, contracts, and financial structure. *Journal of Political Economy,* 106, 446–452.
[152] See above n.143, 228.

concession theory for numerous reasons.[153] The latter parts of this chapter focus on these reasons. Aggregate theory asserts that the company is a fiction or artificial entity, born of the association or aggregation of individual shareholders for enterprise or business by mutual agreement.[154] This aggregation of individuals is subject to a special legal regime and possesses perpetual succession privileges amongst other privileges and immunities as well as property rights, similar to those of individuals. [155] This theory emerged in rejection of the notion that companies are creatures of the state (concession theory),[156] in Anglo-American jurisdictions.[157] Some academics felt that such concession theories enabled excessive governmental regulation of companies[158] and the legislative bribery and favouritism tied to the incorporation process.[159]

Aggregate theory promotes a contractual view of the company and provides for a private law justification for limited liability of shareholders as a product of private ordering.[160] As a result, certain commentators liken managers and directors to agents or trustees of the shareholders who are the principals or beneficiaries.[161] The management of the directors' conflicts of interest is thus primarily seen as a question of protecting shareholders, reducing agency costs and monitoring directors,[162] and reducing their indolence or self-interest.[163] Aggregate theory advocates refute the idea that companies have social or moral obligations. They theorise instead that the

[153] Bratton Jr., W. (1989). The New Economic Theory of the Firm: Critical Perspectives from History. *Stanford Law Review* 41, 1471, 1484.
[154] Ibid, 1489.
[155] Morawetz, V. (1886). *Treatise on the Law of Private Corporation*. (§ 1). Boston, Little, Brown and Company.
[156] Miller, D. (2011). Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*. New York University Law Review* 86, 887, 944; Padfield, S. (2014). Rehabilitating Concession Theory. *Oklahoma Law Review* 66, 327, 336.
[157] *Bank of the United States v. Deveaux* (1809) 9 U.S. (5 Cranch) 61; Petrin, M. (2013). Reconceptualizing the theory of the firm - from nature to function. *Penn State Law Review* 118 (1), 1, 9; *San Mateo v. Southern Pac. R.R. Co.,* 116 U.S. 138 (1882) 10, 12; *Santa Clara County v. Southern Pacific Railroad Co* (1886) 118 U.S. 394; Horwitz, M. (1985-86). Santa Clara Revisited: The Development Of Corporate Theory. *West Virginia Law Review,* 88, 173, 177-178.
[158] Millon, D. (2001). The Ambiguous Significance of Corporate Personhood*. Stanford Agora: An Online Journal of Legal Perspectives.*
Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=264141.
[159] Horwitz, see above n.157; Million, see above n.91, 207-208.
[160] Ribstein, L. (1991) Limited Liability and Theories of the Corporation. *Maryland Law Review,* 50, 80, 82 -83; Horwitz, see above n.157, 185.
[161] See above n.110, 426.
[162] Million, see above n.91, 224.
[163] See above n.110, 428.

company is a legal fiction, an aggregation of individuals and so any imposition of social, moral or legal obligations would/should be borne by these individuals.[164] In light of this, aggregate theory does not explicitly consider public interest to be a valid rationale of the regulation of directors' conflicts of interest.

Aggregate theory is nonetheless beneficial because it accepts that there are various important parties within a company but it has been criticised for a number of reasons. These largely centre on its inability to provide justifications for the existence of every aspect of the corporate entity. These comprise of limited liability and separate legal personality[165] as well as the regulation of companies, which includes directors' conflicts of interest.

Some claim nevertheless that aggregate theory addresses the contribution of diverse constituents to the corporate entity because all parties contribute to the company for individual purposes and have implicit or explicit arrangements with it, and society is not excluded.[166] This means that society could be a constituent of the company because one can argue that it contributes to the company through the provision of a social licence to operate. This indicates that like other economic theories of the firm, public interest may be a rationale for the regulation of companies. Once again, chapter 3 looks at this issue in detail.

2.2.6 SUMMARY: ECONOMIC ANALYSES, LAW AND ECONOMICS MOVEMENT AND DIRECTORS' CONFLICTS OF INTEREST

All the economic theories discussed in this chapter have contributed to and influenced many aspects of legal thought and research on companies in general. Regarding directors' conflicts of interest, they have provided some reasons for their management or regulation.

[164] Petrin, see above n.157, 1, 25; Bainbridge, S. (1992). Interpreting Nonshareholder Constituency Statutes. *Pepperdine Law Review* 19, 971; Jensen & Meckling, see above n.88, 305, 311.
[165] Avi-Yonah, R. (2010). Citizens United and the Corporate Form*. Wisconsin Law Review*, 4, 999, 1005-1006; Ireland, P. (1999) Company Law and the Myth of Shareholder Ownership. *Modern Law Review*, 62(1), 32, 42, 46-49.
[166] See above n.91, 236; Summers, C. (1982). Codetermination in the United States: A Projection of Problems and Potentials. *Journal of Comparative Corporate Law and Securities Regulation,* 4, 155, 170.

The economic analysis of business and corporate law developed due to the efforts of a number of influential scholars. Manne[167] for example, argues that large companies are subject to market forces and born of enabling rather than mandatory legal rules. He contends that directors and their fiduciary duties are a substitution for the otherwise expensive task of monitoring and addressing the agency problem.[168]

Similarly, Winter,[169] a notable law and economics scholar, contends that corporate control and management centre on how to effectively and efficiently discipline managers and directors when they act in ways that exceed their powers vis à vis the company or not in the interest of shareholders. For some, this approach is synonymous with contractarianism, which focuses on a contractual analysis of corporate law.[170]

Richard Posner,[171] another notable theorist, believes that the economic analysis of the law provides an indispensable insight to the law.[172] He centres wealth-maximisation and efficiency in corporate law discourses.[173] Accordingly, the company is intended to maximise wealth for its constituents, particularly, the shareholders, as this would improve aggregate general welfare and so in turn is benefits society. Arguably, this incorporates some form of public interest justification for the regulation of directors' conflicts of interest.

[167] Manne, H. (1967). Our Two Corporation Systems: Law and Economics. *Virginia Law Review,* 53 (2), 259.
[168] Manne, see above n.147.
[169] Winter, R. K. (1977). State Law, Shareholder Protection, and the Theory of the Corporation. *Journal of Legal Studies*, 6 (2), 251.
[170] Armour & Whincop, see above n.150, 430; Easterbrook & Fischel, (1991), see above n.116; Easterbrook & Fischel. (1989) see above n.116; see generally Cheffins, B. R. (1997). *Company Law: Theory, Structure and Operation*. Oxford, OUP.
[171] See generally Posner, R. (1977). *Economic Analysis of Law.* (2nd ed.) Chicago, Little Brown and Company; Posner, R. (1979). Utilitarianism, Economics, and Legal Theory. *Journal of Legal Studies*, 8, 103; Posner, R. (1985) Wealth Maximization Revisited. *Notre Dame Journal of Law, Ethics and Public Policy*, 2, 85; Posner, R. (1987). The Ethics of Wealth Maximization: Reply to Malloy. *University of Kansas Law Review*, 36, 261.
[172] Posner, R. (1975). The Economic Approach to Law. *Texas Law Review*, 53, 757; Posner, R. (1987). The Law and Economics Movement. *American Economic Review*, 77, 1.
[173] Posner (1985), see above n.171.

Other scholars, Easterbrook and Fischel, Romano,[174] Bebchuk,[175] and Bainbridge,[176] have further developed economic analysis, particularly in reference to directors' duties, the focus of this thesis. They generally define the company based on the notions of explicit and implicit contracting between individuals to create outputs and reduce costs, which would otherwise be higher if use is made of the markets.[177] They favour differing levels of minimal state intervention. This means intervention only to reduce costs[178] and requiring legal restrictions on corporate control of companies only when strictly necessary.[179] While this appears to concede that different individuals and actors contribute different inputs to the firm, the advocates of this approach see shareholders as the most significant actors because they contribute capital to the creation of the company.

These scholars contend that the function of fiduciary duties of directors within companies is to govern agency relationships.[180] They add that delegation facilitates the acquisition of skilled actors to manage the firm and reduce transaction costs. Therefore, fiduciary duties supplement market forces in monitoring or aligning the interests of the agents with those of the company and reducing the risk of managers manipulating the company for their purposes.[181] This may be beneficial for society.

In summary, the economic analyses of the law and theories of the firm tend to support the argument that directors owe their fiduciary duties to shareholders.[182] Consequently, fiduciary duties are intended to reduce the costs of monitoring directors. It is however, significant to note that the argument preferring shareholders to other constituents of the company is weak because legal provisions do not necessarily state that fiduciary duties are owed to the shareholders.[183] Moreover,

---

[174] Romano, R. (1985). Law as a Product: Some Pieces of the Incorporation Puzzle. *Journal of Law, Economics, & Organization* 1 (2), 225.
[175] See generally Bebchuk, L. (1990). (ed.) *Corporate Law and Economic Analysis*. Cambridge, Cambridge University Press
[176] Bainbridge, S. (1997). Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship. *Cornell Law Review*, 82, 856; see generally Bainbridge, S. (2008). *The New Corporate Governance in Theory and Practice*. New York, Oxford University Press.
[177] Easterbrook & Fischel, see above n. 116, 21-22; Cheffins, see above n. 170, 249.
[178] Posner, (1977), see above n.171, 289-296.
[179] Winter, see above n. 169, 273.
[180] Easterbrook, F. & Fischel, D. (1981). Corporate Control Transactions. *Yale Law Journal*, 91, 698.
[181] Ibid.
[182] Ibid, 703.
[183] For example, UK Company Law: Companies Act 2006, s. 175, even though s.172 imposes a duty to promote the success of a company on directors for the benfit of the members as a whole. Even it

some contractarian commentators consider fiduciary duty rules to be default rules from which contracting parties can opt-out subject to mutual accord.[184] This does not provide explanations of mandatory fiduciary duties rules including the regulation of directors' conflicts of interest. This will be explored in detail in chapter 7 of this thesis.

Economic analyses on theory of the firm have helped to define and facilitate our understanding of the nature of the company by providing some reasons for issues such as corporate control, and the role and duties of directors. [185] They do not however provide holistic approaches and insights into the various relationships within companies.[186] For example, the 'nexus of contracts' theory struggles to explain the existence of mandatory corporate law rules. This theory does not account for the reality of the complexities of corporate relationships, market forces, bargaining and directors' duties.[187] As a result, these theories do not sufficiently provide rationales for the regulation of directors' conflicts of interest.[188]

It is important to note however, that these theories are not as rigidly in opposition to public interest in the nature or regulation of companies as they first appear. This will be one of the findings of chapter 3 of this thesis.

2.3 COMMUNITARIANISM AND THEORY OF THE FIRM

Communitarianism[189] focuses on humanism and its theories are influenced by values such as collaboration, solidarity, justice, civic responsibility,[190] community and the

requires them to have regard for other interests including the long-term interests of the company and company employees, etc.

[184] Butler, H., & Ribstein, L. (1999). Opting out of fiduciary duties: A response to anti-contractarians. *Washington Law Review,* 65, 1, 28.

[185] Kraakman, R., *et al*. (2004). *The Anatomy of Corporate Law*. Oxford, OUP; Armour & Whincop, see above n.150, 430.

[186] Dine, J. (1999). Fiduciary Duties as Default Rules, European Influences and the Need for Caution in the Use of Economic Analysis. *Company Law*yer, 20, 190; Bratton, see above n.110; Bainbridge, (1997), see above n.176, 871.

[187] Worthington, see above n.148, 264.

[188] Ibid, 258.

[189] Etzioni, A. (2014). Communitarianism revisited. *Journal of Political Ideologies*, 19 (3), 242.

[190] Bradley, M., Schipani, C., Sundaram, A. & Walsh, J. (1999). The Purpose and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroad. *Law & Contemporary Problems,* 62, 9, 42.

common good.[191] The civil rights movement of the 1960s influenced communitarianism.[192]

Concerning corporate theory, this school of thought grew out of perceived inadequacies within economic theories of the firm.[193] Its advocates contend that examining the economic purposes of companies alone is not an holistic way of understanding companies. They do not satisfactorily explicate legal and social purposes, and their consequences for companies.[194] Some even add that economic analyses of companies ignore the fact that, historically, companies were intended to serve some form of public interest.[195] Communitarians also reject the focus on economic analysis of the law due to the underlying assumption of human opportunistic rationality and self-interestedness. They maintain that this economic approach detaches human behaviour from its environment and fails to take into consideration family, community and other relational ties born of cultural, moral and emotional bonds.[196] Communitarians contend that humans function within and are part of communities,[197] and not simply self-interested utility-maximisers. Hence, humans may seek to promote the common good.[198] This is an important theory for the purpose of this thesis and its consideration of the public interest.

[191] Allen, W. (1993). Contracts and Communities in Corporation Law. *Washington & Lee Law Rev*iew, 50, 1395, 1397.
[192] Sandel, M. (2009). A New Citizenship: A New Politics of the Common Good. *Reith Lecture, BBC Radio*.
[193] Bone, J. (2011). Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought? *The Canadian Journal of Law and Jurisprudence*, 24, 277, 278.
[194] Ibid, 279.
[195] Blackstone, W. (1803). *Blackstone's Commentaries: with notes of Reference, to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia*, (pp. 467). Philadelphia, PA: William Young Birch & Abraham Small; see above n.193, 280.
[196] See generally Sandel, M. *(*1996). *Democracy's Discontent: America in search of a Public Philosophy.* Cambridge, MA: Harvard University Press; Taylor, C. (1985). *Philosophy and the Human Sciences: Philosophical Paper 2*, (pp. 209). Cambridge, CUP.
[197] Wagner, A. (1997). Methodology and communitarianism. *Voluntas*, 8(1), 64, 67.
[198] Sargent, M. (2004). Competing Visions of the Corporation in Catholic Social Thought. (pp. 6, 22). *Villanova University School of Law Working Paper Series No. 5*, Villanova.

Scholars such as Etzioni,[199] Sandler,[200] MacIntyre,[201] Taylor[202] and Benhabib[203] are influential communitarian theorists who have also contributed to explicitly augmenting the role of public interest in companies. Generally, they see the company as an entity with rights and responsibilities for which it ought to be accountable for the society or societies in which it operates.[204] They think that the company is born of a social licence, granted by society through the state. This affords the company legitimacy to operate and grants it the liberty to contract and to corresponding property rights.[205] The company in return, must be a good citizen.

Communitarians add that companies belong to all who invest in them and that all stakeholders invest some form of resource in the company. For this reason, these stakeholders may demand that their resources are used in alignment with their interests and values.[206] Essentially, this theory has significant links to stakeholder theory, which considers all stakeholders of the company to be crucial because creating value for them will ultimately create value for shareholders and the company itself.[207] However, this theory seems to emphasize the public interest more than stakeholderism does. Communitarianism is thus of import to this thesis and the central theme, the question of public interest and regulation of companies. Since the company ought to serve the interests of all its constituents, including society, directors owe their duties to all company constituents.[208] Consequently, communitarianism

[199] Etzioni, A. (1993). *The Spirit of Community: The Reinvention of American Society*. New York, Simon & Schuster.
[200] Sandel, M. (1984). Introduction. In M. Sandel (ed.) *Liberalism and its Critics* (pp. 4-5). Oxford; Basil Blackwell; Sandel, (1996), see above n. 196, 13.
[201] MacIntyre, A. (1984). *After Virtue: A Study in Moral Theology.* (2nd ed.). Notre Dame: University of Notre Dame Press; MacIntyre, A. (1995). Is Patriotism a Virtue? In R. Beiner. (ed.) *Theorizing Citizenship*. (pp. 209). Albany, State University of New York Press.
[202] Taylor, see above n.196.
[203] Benhabib, S. (1997). Autonomy, modernity, and community: communitarianism and critical social theory in dialogue. In A., Honneth, T., McCarthy, C., Offe, & A., Wellmer (eds.) *Cultural-Political Interventions in the Unfinished Project of Enlightenment*. (pp. 39-62).Cambridge: MIT Press.
[204]See above n.199; French, P*. (*1984). *Collective and Corporate Responsibility. (pp. 5, 13-14).* New York, Columbia University Press.
[205] Etzioni, A. (1998). A Communitarian Note on Stakeholder Theory. *Business Ethics Quarterly,* 8, 679, 680-681.
[206] Ibid, 683-685.
[207] Freeman, E.R, Wicks, A.C., & Parmar, B. (2004) Stakeholder Theory and "The Corporate Objective Revisited". *Organization Science,* 15 (3), 364-369.
[208] Millon, D. (1993). New Directions in corporate law, Communitarians, Contractarians, and the crisis in corporate law. *Washington and Lee Law Review* 50, 1379; see above n.193, 293; Etzioni, see above n.205.

allows for the possibility of public interest in the regulation of directors' conflicts of interest.

Also of significance, is that communitarians tend to welcome legal or government intervention in the regulation of companies because they believe that sole reliance on market forces is insufficient to protect stakeholders[209] and promote societal welfare and wellbeing.[210] This means that regulation in the public interest, even of directors' conflicts of interest, is feasible and acceptable.[211]

2.3.1 PROGRESSIVE CORPORATE GOVERNANCE

Progressive corporate governance is another key strand of the pluralist theories of the firm, which developed from communitarianism. Like other pluralist perspectives on the firm, its champions view companies as an integral part of our lives with significant impact on our quality of life, social policies,[212] the environment and human rights.[213] Its advocates such as Talbot,[214] Villiers,[215] Chapman,[216] Johnson,[217]

[209] Millon, Ibid, 1379.

[210]Etzioni, see above n.205; Al Mamun, A., Yasser, Q.R., Rahman, M.A. (2013). A discussion of the suitability for only one vs more than one theory for depicting corporate governance. *Modern Economy,* 4 (1), 37; Dunfee, T. W. (1999). Corporate Governance in a Market with Morality. *Law and Contemporary Problems,* 62 (3), 129.

[211] Millon, (1993), see above n.208, 1380.

[212] Freeman, J. (2000). The Private Role in Public Governance. *New York University Law Review* 75, 543, 547; Schneider, A., & Sherer, A. (2015).Corporate Governance in a Risk Society. *Journal of Business Ethics,* 126 (2), 309, 312, 315, 320.

[213] Bottomley, see above n. 13*,* 1-3; Bottomley, see above n.20, 278.

[214] Talbot, L*.* (2013). *Progressive Corporate Governance for the 21st Century*. Oxford, Routledge, introduction; Talbot, L. (2014, April 24). Progressive Corporate Governance: Still a Political Economy and Still a Political Choice. *The European Financial Review*. Retrieved from http://www.europeanfinancialreview.com/?p=115; Talbot, L. (2014). Operationalizing sustainability in corporate law reform through a labour-centred corporate governance: A UK perspective. *European Company Law* 11, (2), 94.

[215] Villiers, C. (2006). The Directive on Employee Involvement in the European Company: Its Role in European Corporate Governance and Industrial Relations. *International Journal of Comparative Labour Law and Industrial Relations*, 22 (2), 183; Villiers, C. (2014). Post-crisis Corporate Governance and Labour Relations in the EU (and Beyond). *Journal of Law and Society,* 41, 73.

[216] Chapman, B. (1993) Trust, Economic Rationality, and the Corporate Fiduciary Obligation. *University of Toronto Law Journal*, Summer, 43, 547.

[217] Johnson, L., & Millon, D. (2005). Recalling Why Corporate Officers Are Fiduciaries. *William and Mary Law Review,* 46 (5), 1597.

Solomon,[218] Greenfield,[219] and Millon,[220] theorise that the company ought to be subject to ethical values such as good governance due to the social responsibility and accountability to (all) parties involved in the company.[221] Progressive corporate governance advocates also tend to recommend sustainability based approaches to corporate governance and stakeholderism.[222] For example, some theorise that labour[223] and human welfare[224] ought to be central to modern corporate governance, particularly in the light of the recent financial crisis or post-Enron.[225]

Though this theory has been criticised for a number of reasons, in particular, its affinity with stakeholderism, and dismissed as of no practical use for companies,[226] it is of value for this thesis. This is because progressive corporate governance seems more sympathetic to public interest rationales for the regulation of companies and their directors' conduct. It embraces the notion that directors (as well as other company officers) ought to owe fiduciary duties to the company, albeit in varying degrees, in order to ensure better monitoring and accountability in corporate governance.[227] In fact, some of its theorists contend that companies ought to go beyond the pursuit of profits and incorporate or embrace notions of sustainability,[228] social responsibility[229] and citizenship.[230]

---

[218] Solomon, L. (1995). On the frontier of Capitalism: implementation of Humanomics by Modern Publicly Held Corporations - A critical Assessment. In L. Mitchell. (ed.) *Progressive Corporate Law.* (pp. 281). Colorado, Westview Press.
[219] Greenfield, K. (2006). *The failure of corporate law: fundamental flaws and progressive possibilities*. Chicago, University of Chicago Press; Greenfield, K. (2015). Sticking the landing: making the most of the "stakeholder moment". *European Business Law Review*, 26 (1), 147.
[220] Million, D. (1995). Communitarianism in Corporate Law: Foundations and Law Reform Strategies. In L. Mitchell. (ed.) *Progressive Corporate Law*. (pp. 1). Colorado, Westview Press.
[221] Gill, A. (2008). Corporate Governance as Social Responsibility: A Research Agenda. *BERK. J. INT. AW.*, 26 (2), 452, 458.
[222] Greenfield, Kent (2014). The Third Way. *Seattle University Law Review,* 37 (2), 749.
[223] Talbot, (2014), see above n.214.
[224] See above n.218
[225] Villiers, (2014), see above n.215; Testy K.Y. (2002). Commentary: Convergence as Movement: Toward a Counter-Hegemonic Approach to Corporate Governance. *Law & Policy*, 24 (4), 433.
[226] Teubner, G. (1985). Corporate Fiduciary Duties and their Beneficiaries: A Functional Approach to the legal Institutionalization of Corporate Responsibility. In K. Hopt, & G. Teubner. (eds.) *Corporate Governance and Directors' Liabilities*. (pp. 159). Berlin, Walter de Gruyter.
[227] See above n.217, 1607.
[228] McDonald, D., & Puxty, A.G. (1979). An inducement-contribution approach to corporate financial reporting. *Accounting, Organizations & Society*, 4 (1), 53.
[229] Mitchell, L. (ed.) (1995) *Progressive Corporate Law*. (Preface). Colorado, Westview Press; Wolfe, A., (1993). The Modern Corporation: Private Agent or Public Actor? *Washington & Lee Law Review*, 50, 1673, 1692; Greenfield, (2015), see above n.219, 150.
[230] See above n.218, 282.

2.3.2 CORPORATE CONSTITUTIONALISM

This theory in general embraces the notion that companies are political entities[231] and are systems of governance.[232] This has consequences for any public interest rationale for the regulation of companies, including directors' conflicts of interest. Corporate constitutionalists capitalise on the notion that companies are body politics, somewhat akin to public institutions.[233] Accountability of those in governance is vital in order to ascertain that decisions made are in the interests of the company as well as society.[234] Corporate constitutionalists consider that this is especially significant because they believe that companies embody governance systems, and are a coordination of interactions and collective members' goals rather than simply products of economic action or objectives.[235] This means that within companies, there are structures of power and hierarchies, which give birth to rights and obligations.[236]

Corporate Constitutionalism allows for the marriage of public and private interests. It accepts the significance of the economic objectives of companies, the private commercial goals of enterprise and production as well as the bargains and agreements implicit in such objectives. It also incorporates social values such as democracy, citizenship or collectivism, seeing them as inherent in relationships within companies. Unsurprisingly, its theorists believe that companies make decisions that

---

[231] Campbell, D. (1993). Why regulate the modern corporation? The failure of market failure. In J. McCahery, S. Picciotto, & C. Scott. (eds.) *Corporate Control and Accountability, Changing Structures and the Dynamics of Regulation* (pp. 103). Oxford, Clarendon Press; Fraser, A. (1983). The Corporation as a Body Politic. *Telos,* 57, 5; Bottomley, (1997), see above n. 20; Miller, A. S. (1965). Private Governments and the Constitution. In A. Hacker. (ed.). *The Corporation Take-over*. (pp. 117). Doubleday Anchor; Eisenberg, M. (1983). Corporate Legitimacy, Conduct, and Governance - Two Models of the Corporation. *Creighton L. R*., 17, 1.

[232] Bottomley, (2007), see above n. 213, 10; Eells, R. (1962). *The Government of Corporations* (pp. 11) Free Press of Glencoe.

[233] Bottomley, (2007), see above n.213, 71-73.

[234] Bottomley, (1997), see above n. 20, 292; Dine, J. (1999). Companies and Regulations: Theories, Justifications and Policing. In D. Milman (ed.) *Regulation Enterprise, Law and Business Organisations in the UK*. (pp. 295-296). Oxford and Portland, Oregon, Hart Publishing; Greenfield, (2006), see above n.219, 127.

[235] Bottomley, (2007), see above n.213, 22; Bottomley, S. (1992). Shareholder Derivative Actions and Public Interest Suits: Two Versions of the Same Story? *University of New South Wales Law Journal*, 15, 127,130-131.

[236] Latham, E. (1960). The Body Politics of the Corporation. In E. Mason (ed.) *The Corporation in Modern Society*. (pp. 218-219). Cambridge: MA, Harvard University Press; Pound, see above n. 61, 1003.

have consequences for the state and citizens alike, and so their actions are of public interest.[237]

This theory considers that the board of directors acts or ought to act in the interest of the company as a whole vis à vis its various constituents and external relations with the society and the state.[238] They add that it is currently not representative of each constituent unlike a state parliament. Likewise, although the management of the company is considered to be of public interest, it is unclear whether the society is seen as an external actor to the company or if it is one of the constituents of the company. This of course, has noteworthy consequences as to the degree of significance afforded to the public interest and if it is perceived as a crucial part in directors' duties and the management of directors' conflicts of interest.

Although this theory is critiqued and dismissed as impractical, economically and legally inefficient because serving all stakeholders may distract from the perceived ultimate corporate goal of profit-making,[239] corporate constitutionalism is noteworthy for the purpose of this thesis. It implies that public interest rationales for the regulation of companies is not implausible.

2.3.3 CONCESSION THEORIES

Concession theories and significant strands of pluralist corporate theories, view the company as a concession granted by the state,[240] to enable enterprise and trade using the corporate structure. The state does this by granting privileges such as limited liability and separate legal personality to reduce investors' exposure to risk[241] because the company is of state economic utility and promotes the wellbeing and welfare of society at large.[242] Hence, the company is considered an innovation for the

[237] Parkinson, J. (1995). *Corporate Power and Responsibility: Issues in the theory of company law* (p. 10, 23). Oxford, Clarendon Press.
[238] Bratton Jr, W. (1992). Public Values and Corporate Fiduciary Law. *Rutgers Law Review*, 44, 675, 690; Bottomley, (2007), see above n.213, 54-57.
[239] See above n.226.
[240] Bottomley, S. (1999). The Birds, the Beasts and the Bat: Developing a Constitutionalist theory of Corporate Regulation. *Federal Law Review*, 27, 243.
[241] Petrin, see above n.157, 50; Padfield, S. (2014, 23 February). The Separation of Church and for profit Corporations. *Business Law Prof Blog*.
Retrieved from http://lawprofessors.typepad.com/business_law/2014/02/the-separation-of-church-and-for-profit-corporations.html
[242] Dine, see above n.234; Padfield, S. (2015). Corporate Social Responsibility & Concession Theory. *William & Mary Business Law Review,* 6, 1, 31.

public good and so, it has social responsibilities and conscience.[243] In sum, the company is an artificial or legal entity[244] which owes its legitimacy and existence to the state[245] and thus is subject to public regulation. Concession theorists recommend public interest motivations for the regulation of companies.[246] These undoubtedly include directors' conflicts of interest.

This theory has been critiqued as out of touch with the nature and development of the modern company.[247] The idea of the company as a legal fiction often associated with concession theory, has also been called into question.[248] This is noteworthy for the purpose of this thesis because although the legal fiction argument might be useful for the discussion of the regulation of directors' conflicts of interest in the public interest, it is considered no longer relevant due to the widespread acceptance of the notion, separate legal personality of the company.[249] This detracts from the efficacy of concessionism as a valid and concrete approach to addressing the question of public interest and directors' conflicts of interest.

Additionally, just as economic corporate theories are said to be singular in their approaches, this theory suffers from the same problem, albeit from the opposite side of the spectrum. It places too much emphasis on public or social interests and goals, neglecting private interests and motivations for the creation of companies.[250]

In light of the criticism levelled at concession theory, a dual concession theory has emerged.[251] It accepts the separate personality of the company and states that this is born of permitting legitimate group of persons to pursue commercial goals with

---

[243] See above n.237, 30; See above n.50, 17; Teubner, G. (1988). Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person. *The American Journal of Comparative Law*, 36 (1), 130, 131.

[244] Stout, L., Robé, J., Ireland, P., Deakin, S., Greenfield, K. *et al*. (2016). The Modern Corporation Statement on Company Law. Retrieved from https://ssrn.com/abstract=2848833.

[245] Padfield, (2014), see above n.157, 327, 347; Hayden & Bodie, see above n.119, 1130.

[246] Yosifon, D.G. (2010). The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United. *N.C. L. REV*., 89, 1197.

[247] Bainbridge, S. (2010, 21 January). Citizens United v. FEC: Stevens' Pernicious Version of the Concession Theory. Retrieved from http://www.professorbainbridge.com/professorbainbridgecom/2010/01/citizens-united-v-fec-stevens-pernicious-version-of-the-concession-theory.html; Philips, M. (1994). Reappraising the Real Entity Theory of the Corporation. *Florida State University Law Review*, 21, 1061, 1065.

[248] See above n.50, 24.

[249] Salomon v. A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22.

[250] Bottomley, (2007), see above n.213, 44.

[251] See above n.50, 26.

contract or bargaining as the backbone to the cooperation. Dual concessionists advance that the company is enhanced or legitimised by the state, and the state regulates companies due to their impact and social power.[252] Dual Concessionism does not exclude public interest justifications for the regulation of companies but recognises that the interests of companies and the state or society may converge and diverge.[253] Consequently, public interest is seen as the assurance of proper corporate governance and companies' compliance with the law as well as respect of their social or moral responsibilities.[254] This denotes that the regulation of directors' conflicts of interest could be born of varying public interest reasons which will be explored in the next chapter and subsequent parts of this thesis.

2.3.4 POWER COALITION THEORY

Similarly, power coalition theory focuses on the social values, norms and economic context of companies, and the legitimacy that they require to exist and function. [255] This is provided through compliance with state regulation as well as social legitimacy acquired through the external involvement of the company with the society in which it is based or operates.

In contrast to dual concession theory however, power coalition theory places value on power, dependency and dominance.[256] The significant element within a company is not in fact the variety of constituents but rather the unequal bargaining power and means of the constituents of the company. These constituents undoubtedly have inconsistent goals. Also of importance is the existence of a dominant constituency group within the coalition that is, the company. This dominant group is the decision-maker with a unified goal of augmenting the company's discretion and reducing the uncertainty with which it is faced.[257] This theory is useful as it explains the unequal

[252] See above n.50, 26-28.
[253] Teubner, (1988), see above n.243, 139.
[254] See above n.50, 29-30; Teubner, (1988), see above n.243, 131.
[255] Dallas, L. (1995). Working towards a new paradigm. In L. Mitchell (ed.) *Progressive Corporate Law*. (pp. 35-50). Colorado, Westview Press Inc.; Dallas, L. (1988). Two Models of Corporate Governance: Beyond Berle and Means. *University of Michigan Journal of Law Reform* 22 (1), 19, 75-77, 107-114.
[256] Scott, W., Mitchell, T. & Birnbarum, P. (1981). *Organisation Theory: A structural and Behavioural Analysis*, (pp. 248). (4th ed.). Irwin, Homewood, Ill: R.D.; Dallas, see above n.255, 54-55.
[257] Dallas, (1995), see above n.255, 51-53.

bargaining powers of the various constituents of the company whilst taking into consideration the social aspects of the nature of the company.

On the subject of directors' fiduciary duties to the company, power coalition theorists explain why these might be translated into favouring shareholders more than other constituents due to their current dominance within the firm in comparison with other groups such as employees, for example.[258] They nevertheless allow for public interest rationale for directors' duties. Correspondingly, this includes the management of directors' conflicts of interest because the company derives its legitimacy from the state and society.[259]

2.3.5 TEAM PRODUCTION AND DIRECTOR PRIMACY THEORIES

Team production and director primacy are corporate theories that may be attributed to pluralist theories of the firm.[260] In essence, under director primacy theory, the company is conceived as a wealth-creating, production team whereby directors act as independent or impartial coordinators or platonic guardians of the firm and its various constituents.[261] Team production theory extends Alchian and Demsetz's seminal paper on production or transaction costs,[262] to examine various inputs of corporate participants in the team that is, the company, in order to achieve

[258] Scott, Mitchell, & Birnbarum, see above n.256.
[259] Dallas, (1988), see above n.255.
[260] This ranges from more director primacy oriented theories to team production models of corporate governance: Bainbridge, S. (2002). The Board of Directors as Nexus of Contracts. *Iowa Law Review*, 88 (1), 1; Blair, M., & Stout, L. (1999). A Team Production Theory of Corporate Law. *Virginia Law Rev*iew, 85 (2), 247; Blair, M., & Stout, L. (1999). Team Production in Business Organizations: An Introduction. *Journal of Corporation Law*, 24 (4), 743; Kaufman, A., & Englander, E. (2005). A Team Production Model of Corporate Governance. *Academy of Management Executive*, 19 (3), 9, 12; Alchian & Demsetz, see above n.88; Holmstrom, B. (1982). Moral Hazard in Teams. *Bell Journal of Economics*, 13 (2), 324; Marris, R. (1964). *The Economic Theory of 'Managerial' Capitalism*. (pp. 16). New York, Free Press and MacMillan; Doeringer, P., & Piore, M. (1971). *Internal Labour Markets and Manpower Analysis*. (pp. 15-16). Boston, D.C. Heath and Co; O'Connor, M. (1995). Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law distinction to enforce implicit employment agreements. In L. Mitchell (ed.) *Progressive Corporate Law*. (pp. 219, 235). Colorado, Westview Press, Inc.
[261] Ibid, Bainbridge, 31-33; Bainbridge, S. M. (2003). Director Primacy: The Means and Ends of Corporate Governance. *Northwestern University Law Review*, 97 (2), 547. He argues that the ultimate goal of the board of directors is to maximize the value of the shareholders' residual claim.
[262] Alchian & Demsetz, see above n.88, 777.

commercial goals whilst reducing transaction costs such as those caused by opportunism or exploitation by any member of the team.[263]

Various scholars such as Bainbridge,[264] Blair and Stout,[265] Holmstrom[266] have developed the two theories, focusing primarily on identifying and tackling the central control problem in corporate governance, opportunism and the issue of the free-rider problem. Ensuring that all members of the team make necessary firm-specific investments and addressing the conflicts that might arise between team members are also at the heart of these theories.

Consequently, Blair and Stout, and Bainbridge theorise that the board of directors consists of mediators who intervene and arbitrate between the interests of different members of the production team, or it consists of hierarchs or guardians who act in the best interests of the firm.[267] However, like many who argue for a pluralist perspective to corporate theory, team production advocates tend to reject the notion of shareholder primacy,[268] unlike some advocates of director primacy such as Bainbridge, who prefers 'shareholder wealth maximisation', often seen as a synonym for shareholder primacy.[269]

Team Production scholars advance instead that directors should make decisions to maximise the profits of the company, acting in an objective and impartial manner in the best interests of the company.[270] As a result, like many communitarians, directors' fiduciary duties are understood by team production scholars as owed to the company as a whole. Trust[271] and accountability[272] are considered vital to creating suitable

[263] Meese, A. (2002). The Team Production Theory of Corporate Law: A Critical Assessment. *William & Mary Law Review,* 43, 1629, 1632.
[264] Bainbridge, see above n.260.
[265] Blair & Stout, (1999), see above n.260.
[266] Holmstrom, see above n.260.
[267] Blair & Stout, (1999), see above n. 260, 276-287; Bainbridge, see above n.260.
[268] Millon, D. (1995). Communitarianism in Corporate Law: Foundations and Law Reform Strategies. In L. Mitchell (ed.) *Progressive Corporate Law.* (pp. 1). Colorado, Westview Press, Inc.; Mitchell, L. E. (1992). Critical look at corporate governance. *Vanderbilt Law Review,* 45 (5), 1263; O'Connor, M. (1991). Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers. *North Carolina Law Review*, 69(4), 1189, 1190; Johnson, L. (1992). *Individual and Collective Sovereignty in the Corporate Enterprise*. Columbia Law Review, 92, 2215
[269] Bainbridge, see above n.260, 31-33; Bainbridge, (2003), see above n.261.
[270] Kaufman & Englander, see above n.260, 10.
[271] Stout, L. & Blair, M. (2001). Trust, Trustworthiness, and the Behavioural Foundations of Corporate Law. *University of Pennsylvania Law Review*, 149, 1735.
[272] Keay, A., (2015). Board Accountability and the Entity Maximisation and Sustainability Approach Board Accountability in Corporate Governance. (ch. 4, pp. 1-2). Abingdon, Routledge.

economic and social conditions which fuel the respect of fiduciary duties as well as substantial or concrete monitoring of these directors.

Team Production advocates differ from other pluralists because they advocate the values stated above so as to ensure that efficiency, productivity and other economic goals are met. They nevertheless tend to endorse other social values such as fairness and cooperation within the framework of an economic and team production analysis of the firm.[273] For example, they are interested not only in the agency cost problem of ensuring that corporate officers, managers and directors act in the interest of the company, they are also interested in ensuring that team members make mutual investments in a manner that reduces opportunistic behaviour among them.[274]

On one hand, directors' fiduciary duties are interpreted as owed to the company which opens up the possibility for public interest rationales for the regulation of companies. On the other hand, the focus on efficiency and economic analysis of the company may present important obstacles to addressing the management of directors' conflicts of interest as public interest considerations because economic analyses tend to privilege private interests. Also, a key issue is whether society is seen as a sufficiently significant corporate participant in team production theories.

2.3.6 SUMMARY: COMMUNITARIANISM AND THE MANAGEMENT OF DIRECTORS' CONFLICTS OF INTEREST

Having explored some of the key pluralist theories of the firm, there is a clear indication that these theories are considerably broad but would ordinarily allow for some consideration of public interest in the management of directors' conflicts of interest. However there is a non-negligible divergence of opinion on important notions and elements such as shareholder primacy,[275] stakeholderism,[276] reliance or

[273] Blair & Stout, (1999), see above n.260; Blair, M. (2003). Post-Enron Reflections on Comparative Corporate Governance. *The Journal of Interdisciplinary Economics*, 14 (2), 113.
[274] Blair & Stout, see above, n.271, 1740.
[275] Bottomley, (2007), see above n.213, 8, 10; Millon, see above n.268, 24-25; Elhauge, E (2005). Sacrificing Corporate Profits in the Public Interest. *New York University Law Review*, 80 (3), 733, 797-798, 866.
[276] Leung, W. (1996-1997). The inadequacy of Shareholder Primacy: Proposed Corporate Regime That Recognizes Non-Shareholder Interests. *Columbia Journal of Law and Social Problems*, 30 (4), 587; Ireland, see above n.165, 32; Blair & Stout, (1999), see above n.260; Gilbert, M. (1972). Introduction. In M. Gilbert (ed.) *The Modern Business Enterprise: Selected Readings*. (pp. 20). Middlesex, Penguin Education.

emphasis on efficiency,[277] economic or social values,[278] and the corporate personality of the firm,[279] etc. These are significant issues. For example, reliance on stakeholderism is likely to be more favourable to a deeper consideration of the public interest in the proper governance of companies. The society or community may be perceived as part of companies' stakeholders and an entity to which companies owe their legitimacy to operate.[280] Whereas shareholder primacy as already discussed, appears to be less favourable to the consideration of public interest in corporate law and governance.

Due to the differences between various perspectives of communitarianism or pluralist theories of the firm, it is unsurprising that there are differences in the conception of directors' duties.[281] For some academics, directors' duties, such as the duty of loyalty ought to be extended to non-shareholders,[282] borrowing from public sphere notions of democracy, dialogue, self-governance,[283] intertwined with a multi-fiduciary model of corporate governance.[284] These academics consider directors' fiduciary duties, particularly the duty of loyalty,[285] to be underpinned by ethics and morality, promoting integrity, the moral accountability of directors,[286] fair dealing and an aspirational conception of these duties.[287]

---

[277] Lee, I. (2006). Efficiency and Ethics in the Debate about Shareholder Primacy. *Delaware Journal of Corporate Law*, 31 (2), 533; Blair, M., & Stout, L. (2001). Director Accountability and the Mediating Role of the Corporate Board. *Washington University Law Quarterly*, 79 (2), 403, 404-05; Elhauge, see above n.275, 739.

[278] See above n.50, 17-19.

[279] Teubner, see above n.243.

[280] Parkinson, J., Gamble, A., & Kelly, G., (2001). (eds.) *The Political Economy of the Company*. (pp. 5-6). Oxford-Portland, Hart Publishing.

[281] Wallman, M.H. (1991). The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties. *Stetson Law Review*, 21 (1), 163; Merrick Dodd, Jr., (1932). For whom are Corporate Managers Trustees? *Harvard Law Review,* 45 (7), 1145; Berle, A. (1932). For Whom Corporate Managers are Trustees: A Note. *Harvard Law Review*, 45 (8), 1365; Choudhury, B. (2009). Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm. *University of Pennsylvania Journal of Business Law,* 11 (3), 631.

[282] See above n.280; Ireland, P., (2001). Defending the Rentier: Corporate Theory and the Reprivatization of the Public Company. In J. Parkinson, A. Gamble & G. Kelly (eds.). *The Political Economy of the Company.* (pp. 141). Oxford-Portland, Hart Publishing.

[283] Bottomley, (2007), see above n.213, 12.

[284] Mitchell, L. (1997). Theoretical and practical framework for enforcing corporate constituency statutes. *Texas Law Review,* 70 (3), 579; Millon, see above n.268, 11-13.

[285] Bratton Jr, W. (1995). Game Theory and the Restoration of Honor to Corporate Law's Duty of Loyalty. In L. Mitchell (ed.) *Progressive Corporate Law.* (pp. 139). Colorado, Westview Press, Inc.

[286] Mitchell, L. (1993). Groundwork of the metaphysics of corporate law. *Washington & Lee Law Rev*iew, 50 (4), 1477.

[287] Ferrar, J. (2005). *Corporate Governance, Theories, Principles, and Practice*. (pp. 451). (2nd ed.). Oxford, OUP; Branson, D. (1995). The Death of Contractarianism and the Vindication of Structure and

These academics liken directors to trustees, voluntary possessors of fiduciary power who ought to use such power in an honourable way, resisting self-interest and temptation to abuse their power.[288] There is an emphasis on trust,[289] the stakeholder (beneficiary) dependency on directors and consequently an exploitation of a conflict of interest by a director is considered a breach of trust rather than simply a question of opportunism and financial damage to shareholders.[290] In fact, some theorists have criticised shareholder primacy because they contend that it makes shareholders the guardians of public interest. After all, shareholders have the power to bring a derivative claim against directors for a conflict of interest issue. These theorists think that this negates corporate democracy and turns a blind eye to the problems associated with shareholder derivative claims.[291]

Essentially, public interest is generally a part of these pluralist theories and it is often embedded in governance as the notion of acting in the general good of society.[292] In this thesis, this means that the management of companies ought to incorporate some consideration of decisions that would be for the good of society. This could be translated into ensuring that directors avoid conflicts of interest not only in the interest of the company but in the interest of society at large.

Pluralist conceptions of directors' fiduciary duties attempt to integrate some elements of economic considerations and social values into their definitions. They seek to go beyond the efficiency, and principal-agent dichotomy. They incorporate some form of morality as well as legal intervention in the regulation of directors' conflicts of interest. These are important for understanding public interest rationales for the

---

Authority in Corporate Governance and Corporate Law. In L. Mitchell (ed.) *Progressive Corporate Law.* (pp. 100). Colorado, Westview Press, Inc.

[288] See above n.285, 142-143; Mitchel, L. (1990). The Death of Fiduciary Duty in Corporate Law. *University of Pennsylvania Law Review,* 138, 1675, 1730.

[289] See above n.285, 144-146,165; Mitchell, L., (1995). Trust. Contract. Process. In L. Mitchell (ed.) *Progressive Corporate Law*. (pp. 185-199). Colorado, Westview Press, Inc.; Allen, see above n.191, 1402-1404.

[290] Mitchell, (1995), see above n.289, 206, 208-209; Mitchel, (1990), see above n.288, 1675; Mitchell, see above n. 125.

[291] *Foss v. Harbottle* (1843) 2 Hare 461; Boyle, A. J. (2011). *Minority Shareholders' Remedies*. (pp. 1-10). Cambridge, CUP; Ireland, see above n.276; Sullivan, D. P., & Conlon, D. E. (1997). Crisis and Transition in Corporate Governance Paradigms: The Role of the Chancery Court of Delaware. *Law & Society Review*, 31 (4), 732.

[292] Gamble, A., & Kelly, G. (2001). The Politics of the Company. In J. Parkinson, A. Gamble, & G. Kelly (eds.). *The Political Economy of the Company*. (pp. 24). Oxford-Portland, Hart Publishing; see generally Flathman, R. E. (1966). *The public interest: An essay concerning the normative discourse of politics*. New York, John Wiley; Millon, see above n.208; Elhauge, see above n.275, 852-857.

regulation of these conflicts, in this thesis, particularly communitarianism, which is generally thought to be inclusive in its approaches and flexible to change.

Notwithstanding their strengths and attractions, commentators argue that communitarian theories suffer from a number of important weaknesses. These are important to the discussion of public interest motivation for regulation of companies. First and foremost, the wide spectrum of communitarian and pluralist theories means that there are diverging perspectives on various elements of the company and corporate governance. This in turn means diverging and divisive conceptions and interpretations of public interest which could spell uncertainty and unpredictability for directors.

In general, communitarian or pluralist theories of the firm have also been criticised for being too vague and unworkable in the real world.[293] For example, some argue that the emphasis on the company being a political tool neglects the commercial focus of companies, making the idea dismissible.[294] It could create confusion about the key interests to be served by the company.[295] Critics also question the origin of the social responsibility and obligation of the company to society, and the lack of consensus on this issue is said to be another weakness of communitarianism.[296]

Another weakness which has repercussions for the exploration of public interest rationales in the regulation of directors' conflicts of interest is the ambiguity associated with the notion of public interest in communitarianism.[297] There is no clear definition of public interest. This will be addressed in detail in chapter 3 of this thesis. It is important to note that it is difficult to search for public interest rationales for the regulation of directors' conflicts of interest, if there are no identified definitions of public interest.

Similarly, the existence of a multi-fiduciary model of directors' duties is not a guarantee of consideration of the public interest; it simply increases the likelihood of

[293] Bone, see above n.193, 303; Millon, (1995), see above n.268, 13-15.
[294] Deakin, S., & Hughes, A., (eds.) (1997). *Enterprise and Community, New Directions in Corporate Governance*. (pp. 4). Oxford, Wiley-Blackwell.
[295] Friedman, M., (1970, Sept 13). The Social Responsibility of Business is to increase its profits. *NY Times Magazine.* Retrieved from: https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.
[296] See above n.50, 19.
[297] See above n.50, 23.

such consideration.[298] In any case, some critics contend that it would be difficult to hold directors accountable for abuse of power or position under this model as directors could always claim to be acting in the interest of some constituent of the company, including society or community at large, unless the abuse is flagrant.[299] They add that the multi-fiduciary model is not only untenable due to the fact that trying to satisfy all constituents is impossible, it threatens productivity and innovation as well as increases agency costs.[300]

In addition, it is added that a multi-fiduciary model would further entrench managerial paternalism rather than self-governance and corporate democracy which are desirable goals. This may contribute to the erosion of the dignity and autonomy of all constituents, including society.[301] The multi-fiduciary model may also create crises in corporate governance because it contributes to the wearing down of the reliance on shareholders as those who safeguard the public interest in good corporate governance.[302] This is because it is perceived that the existing fiduciary model is already burdened with weaknesses as shareholders have not always been able to protect their interests. Therefore, introducing a multi-fiduciary model would cause this relatively convenient yardstick of accountability and protection to be lost.[303]

Equally, communitarian theories have been criticised generally because they fail to take into consideration the hierarchy which exists within society whereby certain groups or communities are given preferential treatment.[304] Also, the consideration of

---

[298] Kelly, G., & Parkinson, J. (2001). The Conceptual Foundations of the Company: A pluralist Approach. In J. Parkinson, A. Gamble & G. Kelly. (eds.). *The Political Economy of the Company*. (pp. 130). Oxford-Portland, Hart Publishing.

[299] Sealy, L. (1987). Directors' Wider Responsibilities: Problems, Conceptual, Practical and Procedural. *Monash University Law Review,* 13 (3), 164; Millon, see above n.268, 13-15.

[300] Debow, M., & Lee, D. (1993). Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation. *Delaware Journal of Corporate Law,* 18 (2), 393, 412-413.

[301] Millon, see above n.268, 13-15; Millon, (1993), see above n.208, 1388.

[302] Sullivan & Conlon, (1997), see above n.291, 713; Dine, see above n.234, 306, 309-10.

[303] Ibid.

[304] Keeley, M., (1988). *A Social Contract Theory of Organizations*. South Bend, University of Notre Dame Press; Testy, K. (2004). Capitalism and Freedom: For Whom? Feminist Legal Theory and Progressive Corporate Law. *Law and Contemporary Problems*, 67 (4), 87, 95-96; see generally Hooks, B. (2000). *Feminist Theory: From Margin to Center.* (2nd ed). South End Press, Cambridge, MA; Caldwell, P. (1991). A Hair Piece: Perspectives on the Intersection of Race and Gender. *Duke L.J.,* 365; Crenshaw, K., (1991). Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color. *Stanford Law Review*, 43 (6), 1241, 1267-69; McCristal Culp, Jr., J. (1994). Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments

the public as a constituent does not necessarily equate interest in the proper governance of companies. After all, the public or society could be short-sighted, short-termist and act for self-interested reasons.[305]

As a result, communitarian theories of the firm could be viewed as unsatisfactory. Although, they allow for the consideration of public interest in corporate governance, these theories are plagued by various flaws. In sum, the regulation of directors' conflicts of interest may be generally thought to be of public interest under communitarianism but it fails to "articulate normative values against which corporate law and policy might be judged".[306] This could confine a thorough examination of public interest rationale for the regulation of directors' duties to books or academia only.

2.4 CORPORATE PERSONALITY AND THEORY OF THE FIRM

Corporate personality theories are theories that try to define the nature of the company so as to have a framework within which the rights and responsibilities of the company can be defined externally, for example, vis à vis society.[307] They are thus different from theories of corporate governance like team production, director primacy or shareholder primacy, etc. which focus on the internal relations of the company.[308] It can be contended that the various theories previously mentioned in this chapter developed from part of the rejection of one of the corporate personality theories. There are two main types of corporate personality theories: artificial and concession theory and real or natural entity theory.[309] The emergence and evolution of corporate personality theories of the firm may be said to correlate with the public, political perception of companies and proliferation of large companies in the western world.[310] According to Avi-Yonah, the opinions of the august American jurist, Justice Marshall, in 3 significant cases, *Bank of the United States v. Deveaux (*on aggregate theory,

Masquerading as Moral Claims. *New York University Law Review,* 69, 162; Delgado, R., & Stefancic, J. (1993). Critical Race Theory: An Annotated Bibliography. Virginia Law Review, 79 (2), 461.

[305] Donaldson, T., & Dunfee, T.W. (1999). *Ties that Bind: A Social Contracts Approach to Business Ethics, (*pp. 76-77). Boston Massachusetts, Harvard Business School Press.

[306] Testy, see above n.304.

[307] Padfield, (2014), see above n.157, 327, 331-333.

[308] Padfield, (2015), see above n.242.

[309] Ibid.

[310] Avi-Yonah, see above n.165, 999.

discussed in an earlier part of this chapter),[311] *Dartmouth College v. Woodward* (on concession theory),[312] and *Bank of the United States v.* Dandridge (on real entity),[313] is a revelation of the evolution of thought on the subject of corporate personality, the role of the state and shareholders.[314] These theories will be considered in some detail below, focusing on what they signify for the fiduciary duties of directors and the regulation of directors' conflicts of interest.

2.4.1 ARTIFICIAL ENTITY AND CONCESSION THEORY

Historically this theory was prevalent in the UK, and the US, albeit to a lesser degree, in the 19th century, particularly the artificial entity or legal fiction aspect of it.[315] The association of artificial and concession theory is not necessarily inherent and can be even be said to have nothing in common.[316] Although both are concerned with the limitation of the power of companies, artificial entity theory focuses on the philosophy that a company is all, but in name, a legal fiction[317] while the notion of concession focuses on the origin of the legal fiction, the state.[318]

However the association of both theories was made famous in Justice Marshall's opinion in *Dartmouth College v. Woodward*, where he stated that the company is an artificial being, existing solely due to a concession granted by the law.[319] He fused two elements, artificiality and concession, placing emphasis on the artificial nature of companies as well as their public origin and nature.[320] He postulated that because the company is a concession granted by the state, there is an implicit approval of state regulation. It is correspondingly suited to and creates a fertile ground for the

[311] 9 U.S. (5 Cranch) 61 (1809).
[312] 17 U.S. (4 Wheat.) 518 (1819).
[313] 25 U.S. (12 Wheat.) 64 (1827).
[314] See above n.310, 1002-1004.
[315] Bratton Jr., (1989), see above n.153, 1484; Dewey, J. (1926).The Historic Background of Corporate Legal Personality. Yale Law Journal, 35, 655, 667-678; Horwitz, M., (1985-86). Santa Clara Revisited: The Development Of Corporate Theory. *West Virginia Law Review*, 88, 173, 181.
[316] Bratton Jr., (1989), see above n.153; Morrissey, J. F. (2013). A Contractarian Critique of Citizens United. Journal of Constitutional Law, 15 (3), 765.
[317] See above n.110, 424; Petrin, see above n.157, 5, 7; Dewey, see above n.315, 665; Horwitz, see above n.157, 184.
[318] Dewey, see above n.315, 667; Watts, Jr., C. (1991). Corporate Legal Theory under the 1st Amendment: Bellotti and Austin. *Miami Law Review*, 46, 317, 377-378.
[319] *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636-637 (1819).
[320] Latham, see above n. 236.

idea of public interest rationales for the regulation of companies and deference to state regulation.[321]

Although artificial entity and concession theory is often associated with communitarian theories, it can also be seen as a contract theory.[322] *Dartmouth College v. Woodward,* illustrates this. It was opined in that case, that the state is a key contracting party of the corporate entity as the charter is seen as "a contract, the obligation of which cannot be impaired, without violating the constitution of the United States".[323] The company is thus viewed as a concession granted contractually by the state and ultimately tied to the state's constitution. As already mentioned artificial entity theory and concession theory are not necessarily synonymous. In fact, many progressive corporate theorists contend that a company is a legal person, not a fiction but in fact a universally accepted legal reality, with clear rights and privileges. It exists distinctly and independently of their directors, shareholders and other humans with whom the company interacts.[324]

It has thus been theorised that there are two types of concession theories; directive and presumptive concession theories. Directive concession theory seeks to grant unlimited right to the state to determine the rights and responsibilities of companies and regulate the corporate entity. Presumptive concession theory grants a rebuttable presumption right to the state on the regulation of companies and the determination of their rights and responsibilities.[325]

The differences between the various sub-strands of the artificial, concession or state grant theory are significant as they can lead to diverse justifications for the regulation of companies.[326] The state granting a concession to companies and its role as a key contracting party of the corporate entity, equates a significant and considerable power of regulation and insider insight, both as a regulator and a party to the corporate contract. In directive concession theory, the state has unlimited power of regulation

[321] Padfield, (2014), see above n.157, 332-339; Padfield, (2015), see above n.242; Hayden & Bodie, see above n.119.
[322] *Dartmouth College v. Woodward*, (1819) 17 U.S. (4 Wheat.) 518.
[323] Ibid, 650; Padfield, (2014), see above n.157, 332.
[324] See above n.244.
[325] Padfield, (2014), see above n.157, 333.
[326] Brummer, J. (1991). Corporate Responsibility and Legitimacy. (pp. 56-58). New York, Greenwood Press.

while in the case of presumptive concession theory, the state's regulatory powers are more limited. For the regulation of directors' conflicts of interest, in the first sub-theory, public interest will clearly be of significant and considerable importance as a rationale for such regulation. In the second sub-theory, the state remains an external party to the company. Likewise, in presumptive concession theory, public interest rationale for regulation is less significant and perhaps rebuttable.

The variations of the artificial, concession or state grant theory can pose obstacles to examining the question of public interest and the regulation of directors' conflicts of interest. There is no ready answer as to how states ought to exercise their regulatory authority with regards to companies or other concrete direction on application.[327] Yet, the state plays an important regulatory role and so does public interest as a consequence. Here it is not clear how this translates in reality. These issues will be explored in chapters 6 and 7 of this thesis.

2.4.2 REAL OR NATURAL ENTITY THEORY

This theory was born out of the dissatisfaction with artificial entity theories and the increasing awareness of the prominence of companies as dominant economic enterprises.[328] Its theorists contest the conception that the company is a legal fiction, rather than a real entity or person in its own rights. They do so due to a number of reasons such as the fact that the contracts and obligations of a company are legally seen as its own engagements, rather than a simple aggregation of those of the shareholders.[329] This is also the case for the property of the company.[330] Similarly, as stated in the famous *Salomon v. Salomon* case, the company is not an agent of its shareholders.[331] This theory is pertinent to the research question because it has the capacity to define the regulation of companies as necessary in light of their prominence and impact in society. Therefore under it, public interest rationale for the regulation of directors' conflicts of interest is feasible.

---

[327] Padfield, (2015), see above n.242, 26.
[328] Horwitz, see above n.157, 180; Freund, E. (1897). *The legal nature of corporations*. (pp. 61). Chicago, University of Chicago Press.
[329] Canfield, G. (1917). *The Scope and Limits of the Corporate Entity Theory*. Columbia Law Review, 17 (2), 128, 129-132.
[330] *Queen v. Arnaud* (1846) 9 Q. B. 806; *Button v. Hoffman* (1884) 61 Wis. 20.
[331] [1897] A. C. 22, 43.

Real or natural entity theory can be said to find its origins in the notion that companies once properly formed have real or natural personality.[332] They have a real entity which is simply recognised by the law.[333] This theory is largely attributed to Gierke, the prominent sociologist and philosopher.[334] He argued that the company is a real or organic social group with its own will and existence, separate and distinct from its members.[335] He deemed that the company is a natural part of any society and that state action simply confirms the reality of this independently existing entity,[336] by vesting it with legal capacity.[337] This real entity theory connotes that the regulation of directors' conflicts of interest in the public interest can be seen as a form of state action which ensures that companies are managed well and that directors act appropriately vis à vis society.

Alternatively, real entity theory also finds its origin in autopoietic organisation theory or social autopoiesis theory, which sees companies as social systems capable of self-organisation and self-reproduction rather than living units.[338] In autopoietic theory or systems theory, emphasis is placed on the social reality of companies as self-referencing.[339] Companies define, maintain, and reproduce themselves for continuity and evolution.[340] Companies evolve over time through their ability to transform and

[332] Machen, Jr., A.W. (1911). Corporate Personality. *Harvard Law Review*, 24 (4), 253, 256, 261-262.
[333] Worthington, S. (2001). Shares and shareholders: property, power and entitlement. Part II. *Company Lawyer*, 22 (10), 307; Freund, see above n.328, 11.
[334] See generally Gierke, O. (F.W. Maitland ed. 1900). *Political Theories of the Middle Age*. Cambridge, CUP; Horwitz, see above n.157, 179-181; Freund, see above n. 328; Blumberg, P. (1993). *The Multinational Challenge to Corporation Law: The search for a new corporate personality*. (pp. 28). New York, OUP; Brown, J. (2008). The Personality of the Corporation and the State (1905). *Journal of Institutional Economics*, 4 (2), 255, 260; Deiser, G. (1908). The Juristic Person -I. *University of Pennsylvania Law Review*, 57 (3), 131, 138; Laski, H. (1916). The Personality of Associations. *Harvard Law Review*, 29 (4), 404, 426; Machen, see above n.332, 261; Brummer, see above 326, 65-67.
[335] Philips, see above n.247, 1068; Petrin, see above n.157, 6-8.
[336] Philips, Ibid; Machen, see above n.332; Bratton, see above n.110, 423-425.
[337] Freund, see above n.328, 13-14.
[338] See generally Gierke, O. (1881). *III Deutsches Genossenschaftsrecht*. (English translation by Maitland, 1913); Teubner, see above n. 243, 134-136.
[339] Hernes, T., & Bakken, T. (2002). Introduction: Niklas Luhmann's autopoietic theory and organisation studies – a space of connections. In T. Bakken & T. Hernes (eds.) *Autopoietic Organization Theory: Drawing on Niklas Luhmann's Social Systems Perspective*. (pp. 9). Oslo, Abstrakt Liber Copenhagen Business School Press; Luhmann, N. (2002). Organization. In T. Bakken & T. Hernes (eds.) *Autopoietic Organization Theory: Drawing on Niklas Luhmann's Social Systems Perspective*. (pp. 31). Oslo, Abstrakt Liber Copenhagen Business School Press; Luhmann, N. (1988). The Autopoiesis of Social Systems. In F. Geyer & J. Van der Zouwen. (eds.) *Sociocybernetic Paradoxes* (pp. 172). London, Sage.
[340] Fuchs, C., & Hofkirchner, W. (2009). Autopoiesis and critical social systems theory. In R. Magalhães, & R. Sanchez (eds.) *Autopoiesis in organization theory and practice* (pp. 111). Bingley, Emerald; Teubner, see above n.243, 136; Luhmann, N. (1990). *Essays on self-reference*. (pp. 3). New York, Columbia University Press.

internalise (un)organised complexity (internal and external factors); the capacity to do so is what makes autopoiesis possible.[341] For the regulation of directors' conflicts of interest, it is deduced that companies take societal interest into consideration in order to continue to evolve and exist.

Another entity approach is Teubner's enterprise corporatism. It focuses on the *"collectivization of an autopoietic social system".*[342] This means the "enterprise personified as collectivity has legal capacity,"[343] with the social reality of the legal person which is the company being found in the collectivity of the organised action system, not in the people or the resources that form the company.[344] Hence, the enterprise is different from an association of its members such as its shareholders or workers.[345] The legal person consequently is responsible only for those collective actions permitted under legal mechanisms such as corporate law, agency law or employment law. These mechanisms transform action taken by individual members of the company, for example, by the directors of the company, into collective action.[346]

This theory could embrace a multi-fiduciary model of directors' duties as it does not advocate privileging individual or group members of the company over others. Teubner theorised that privileging individual groups is detrimental to the interests of the company, leading to the production of sub-optimal results.[347] Emphasis is instead placed on efficiency in the interest of the company rather than those participating in the company.[348]

At first glance, it may appear that the emphasis on efficiency may not necessarily be in favour of a public interest consideration of companies' obligations or objectives as the interests of companies are not certainly always going to be aligned with those of society. Nevertheless, in this systems theory, the company is considered much more than a self-serving and realising institution solely for the benefit of its internal groups;

[341] Hernes, & Bakken, see above n.339, 12.
[342] Teubner, see above n.243, 153.
[343] Ibid, 152.
[344] Ibid, 145.
[345] Ibid, 151.
[346] Ibid.
[347] Teubner, see above n.243, 154.
[348] Ibid, 155.

it is also an institution or system which can fulfil a bigger role in society. This is the social function of the company.[349] Thus, directors' fiduciary duties are thought to be an internalisation of external effects or aimed at the encouragement of externally stimulated internal reflexion, focusing on social interests or functions rather than the social groups (stakeholders) of the company.[350] These social groups are simply the representatives of these interests and fiduciary duties are thus owed to the "social function of other subsystems".[351]

Consequently, directors' fiduciary duty is aimed at the optimal balancing of corporate function and performance by considering the non-economic environment of the company.[352] The role of the law is to create procedural rules for an effective internal control system of companies in order to foster proper interest-weighing of various (social) interests.[353] Once again, this means that this duty is extended to societal interests rather than simply viewing society as a stakeholder because this is part of the company's social functions. So, in relations to the regulation of directors' conflicts of interest, there is an acceptance of public interest. However, the preference of procedural rules and the issue of weighing up different interests might afford directors more discretion than desirable because they effectively become the guardians of public interest in this context.

2.4.3 SUMMARY OF CORPORATE PERSONALITY AND DIRECTORS' CONFLICTS OF INTEREST

In real or natural entity theories commonly, stress is placed on the notion of the company as an entity rather than its shareholders or other constituents. Incorporation is considered a natural consequence of corporate entities and not a special grant or concession granted by the state.[354] The company is thought to have legitimacy which is innate, through its organic or autopoietic nature.[355] Real entity theorists propose that these theories are true reflections of the significance of companies in

[349] Teubner, see above n. 226, 157.
[350] Ibid, 164.
[351] Ibid, 165.
[352] Ibid.
[353] Ibid, 166-167.
[354] Horwitz, see above n.157, 184; Petrin, see above n.157, 10.
[355] Freund, see above n.328, 48; This is irrespective of the ultra vires doctrine prevalent in American Corporation Law in the twentieth century: Reese, R. (1897). *The True Doctrine of Ultra Vires in the Law of Corporations.* (pp. 26, *[§ 17*). Colorado, State Journal Printing Company.

society.[356] Real entity theories recognise a central role for directors, who are not simply the agents of shareholders or representatives of the company; in fact they act as the company itself.[357] Real entity theories therefore provide an explanation for the wide margin of discretion afforded to directors.[358] Consequently, the regulation of directors' conflicts of interest is a way of addressing the misuse of this discretion. Real entity theories also allow for the justification of this regulation in the public interest, either based on the idea that this is part of state action or that this is necessary for companies to continue to evolve.

Yet, the role of the state with regards to the regulation of the governance of companies is seen as reduced to instances where the directors exceed or abuse their power.[359] These theories recognise the political power of companies and corporate management.[360] This means that the regulation of directors' conflicts of interest in the public interest could be explained or permitted but only when it is not undue interference by the state and does not inhibit the proper exercise of directors' discretion.

Essentially, concession theory's dependence on the role of the state in the creation of companies and its resulting acceptance of state regulation makes it very receptive to public interest justifications for the regulation of directors' conflicts of interest.

Nonetheless, some theorise that none of the corporate personality theories is amply well-founded to be a solid foundation for legal or policy implications for regulation due to their many weaknesses.[361] These theories and corresponding discussions are said to "increasingly (be) sterile task of discussing legal theory in a historical vacuum".[362] Their cyclical popularity, decline, emergence and re-emergence, further complicate discussions about the nature of companies.[363]

[356] Avi-Yonah, see above n.165, 1010-1012.
[357] Horwitz, see above n.157, 214; this theory has been associated with the development of managerialism: Krannich, J., (2005). The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation. *Loyola University Chicago Law Journal*, 37 61, 81.
[358] Avi-Yonah, see above n.165, 1013.
[359] Horwitz, see above n.157, 221.
[360] Avi-Yonah, see above n.165, 1023.
[361] Philips, see above n.247, 1063.
[362] Horwitz, see above n.157, 224.
[363] Petrin, see above n.157, 53; Worthington, see above n.148, 310-311.

Although these theories have been useful for the development and emergence of the (large) company and developing a separate body of law for corporate entities, they are very vague. They are so imprecise that they allow for manipulation and are not particularly practically workable.[364] This means that as far as the management of directors' conflicts of interest goes, they cannot be relied on solely to provide the rationale for the regulation of this issue or even the probable existence of public interest rationales for it.

2.5 CONCLUSION

In this chapter, some key corporate theories have been reviewed and analysed in order to understand the nature, personality and function of companies. These theories have been significant to understanding and examining the central question that this thesis seeks to explore. They provide a foundation for understanding the rationales for the regulation of companies, including directors' conflicts of interest. These theories have equally revealed different conceptions of the societal role for companies. These range from seeing companies as tools for economic efficiency and general wealth maximisation to seeing companies as concessions of the state or real entities with the responsibility to act for the common good or to be good citizens. These afford preliminary understanding of the role of public interest in the regulation of companies and directors' conduct.

The corporate theories have likewise provided indispensable insight into the historical development and emergence of the company in the western world. They provide insight into the internal and external relationships of companies as well as interactions within the corporate entity. These are relevant to the research question because they indicate that discourses of public interest are not new and that the perceived exclusion of public interest in corporate discourses is a choice. Even the seeming rejection of public interest in economic corporate theories provides important clues about the regulation of directors' conduct.

These theories are thus essential to conceptualising the role of directors and their fiduciary duties. They shed some light on the management of directors' conflicts of interest. They reveal that the role of directors is defined according to an established

[364] Dewey, see above n.315, 669-673.

or given definition of the company and whose interests it is said to serve. If the company is seen as a nexus of contracts between different parties with the objective of wealth maximisation, the role of directors will focus on serving those who are seen as parties to the contract, that is, the company. If the company is seen as a concession granted by the state and society, directors will be expected to consider society's interests and to manage the company in a manner that ensures that it is a responsible citizen.

However, these corporate theories do not adequately address the issue of public interest and regulation. They only provide the foundation for the issues at the heart of the research question. For example, they do not define the public interest or conflicts of interest. Accordingly, subsequent chapters will focus on the examination, analysis and understanding of the rationales for the regulation of directors' conflicts of interest, particularly public interest, which is the crux of this thesis.

CHAPTER THREE

PUBLIC INTEREST AND CORPORATE GOVERNANCE: DEFINITION AND THEORIES

3.1 PUBLIC INTEREST: DEFINITION AND THEORIES

3.1.1 INTRODUCTION

Having set out the research questions and objectives of this thesis in chapter 1 and explored theories of the firm in chapter 2, attention will now turn to defining the public interest. Defining the public interest is imperative because public interest is a central theme of the thesis. An examination of public interest considerations for directors' conflicts of interest cannot be undertaken without investigating the current state of the concept, public interest generally. This is also important to define public interest in corporate governance, public interest in the regulation of companies, particularly the management of directors' conflicts of interest.

The definition of public interest must be reviewed because it is not a concept with an objective or singular meaning. It has different interpretations depending on political ideologies and philosophies underpinning it. This means that seemingly apolitical corporate or economic theories may tacitly incorporate some definition of the public interest. Hence, this chapter will reveal that public interest is not alien to corporate discourses, including the regulation of directors' conflicts of interest.

This chapter will be structured as follows. It begins with an exploration of various theories on the concept of public interest. Notions such as individual interests and welfare will be reviewed briefly as they are often discussed in theories on public interest. This chapter then explores the public interest in corporate governance, through the case study of the collapse of MG Rover. Although it was not a public company, it is a good illustration of the impact of mismanaged directors' conflicts of interest on a company (even a private company), its stakeholders such as the local community, employees and society at large. It highlights how limiting regulation in the public interest to shareholder primacy approaches can be problematic.

Attention then turns to public interest and corporate governance, what it means, the various theories and its significance (or lack thereof) will be addressed. Finally, directors' conflicts of interest and the concept of public interest are explored in an introductory manner as this will largely be the subject of chapters 5-7 of this thesis. Concluding remarks will then ensue.

3.2 THE CONCEPT OF PUBLIC INTEREST

3.2.1 CURRENT STATE OF THE CONCEPT AND ITS RELEVANCE

The term 'public interest' is used ceaselessly in political discourses, public policy discussions and social action initiatives.[365] It has been contended that no area of life is exempt from the application of or a consideration of public interest.[366] Nevertheless it remains difficult to define.

One reason is that it is used to legitimise or justify (policy) preferences,[367] *"becoming all things to all people".*[368] It does not mean the same thing to all, particularly as society is increasingly heterogeneous and diverse.[369] Likewise, scholars cannot seem to agree on whether public interest is a myth, a cloak for self-interest, an ideal or a process.[370] They are unable to determine if the concept public interest is synonymous with phrases such as (general) welfare, the common good[371] or common interest.[372]

Due to the challenges of defining the concept of public interest, some academics state that the concept is vague,[373] imprecise,[374] misleading.[375] It is essentially no more than a convenient catch-all phrase serving as a smokescreen for decision-

[365] Downs, A. (1962). The Public Interest: Its meaning in a Democracy. *Social Research*, 29, 1-2.
[366] Keay, see above n.63, 509-10.
[367] Campbell, H., & Marshall, R. (2002). Utilitarianism's Bad Breath? A Re-Evaluation of the Public Interest Justification for Planning. *Planning Theory*, 1, 163.
[368] Sorauf, F. (1957). The Public Interest Reconsidered. *The Journal of Politics*, 19 (4), 616, 618.
[369] Sandercock, L. (1998). *Towards Cosmopolis*. (pp. 197). Chichester, Wiley.
[370] Sorauf, F. (1962). The Conceptual Muddle. In C. Friedrich (ed.). *The Public Interest*. (pp. 186). New York, Atherton Press.
[371] Held, V. (1970). *The Public Interest and Individual Interests*. (pp. 2-3). New York, Basic Books, INC. Publishers; Flathman, see above n.292, 1-2, 5, 31.
[372] Barry, B. (1965). *Political Argument.* (pp. 190-191). New York, Humanities Press.
[373] See above n.368; Schubert, G. (1960). *The Public Interest: A Critique of the Theory of a Political Concept.* (pp. 223-224). Glencoe, IL, The Free Press.
[374] See above n.370.
[375] See above n.371.

makers to present their decisions in a conciliatory manner to citizens.[376] They add that public interest provides no real standard for the evaluation of decisions.[377] These opinions highlight the difficulty of formulating a unanimous and adequate definition of public interest. Due to all these issues, certain scholars have questioned its indispensability and utility.[378]

Nevertheless, some contend that just because many theorists may see the concept, public interest, as muddled and vague, does not necessarily mean that the concept itself is confusing or unworkably imprecise.[379] Furthermore, they contend that public interest is an indispensable concept which is integral and synonymous with public bureaucracy[380] and political order. It justifies public policy in the face of opposition in the form of diversity or conflict.[381] Dismissing the term, public interest, does not eliminate the issues that it attempts to grapple with or define.[382] Yet accepting that the concept is significant does not resolve concerns about its complexity and ambiguity. Hence, in order to understand the concept, public interest will be broken down as it is imperative to reflect on what is meant by 'interest' before addressing the phrase, 'public interest'.

3.2.2 KEY CONCEPTS: PUBLIC INTEREST, INDIVIDUAL INTEREST AND WELFARE

Often discussion about the public interest occurs in conjunction with individual interest. This is done to explicate and differentiate public interest from individual

[376] Barry, B. (1967). The public interest. In A. Quinton (ed.) *Political Philosophy.* (pp. 112). Ely House, London, OUP.
[377] See above n.367; Flathman, see above n.292, 4.
[378] Dahl, R., & Lindblom, C. (1963). *Politics, Economics, and Welfare*. (pp. 501). New York, Harper Torchbook; Schubert, (1960), see above n.373, 224; Sorauf, (1962), see above n. 370, 190.
[379] Barry, see above n.376.
[380] Pendleton, H. (1936). *Public Administration and the Public Interest*. (pp. 23). New York, McGraw Hill; Miller, A. (1961). Foreword: The Public Interest Undefined. *Journal of Public Law*, 10, 184, 186.
[381] Flathman, see above n.292, 13.
[382] Colm, G. (1960). In Defense of the Public Interest. *Social Research,* 27(3), 295, 306-307; Bell, D., & Kristol, I. (1961). What is the public interest? *The Public Interest*, 1, 3; Cohen, J. (1962). A lawman's view of the Public Interest. In C. Friedrich. (ed.) *The Public Interest*. (pp. 160). New York, Atherton Press; Held, (1970), see above n.371.

interest and even examine if public interest is necessarily the same as group interests.[383] So, this section will deal briefly with the notion of interest.

Interest is seen as a desire,[384] the fulfilment of a want[385] or an action which brings more pleasure to an individual than any other alternative action offered to them.[386]

Interest has been characterised as more than a list of wants and desires that might be justifiably claimed by an individual according to accepted societal standards.[387] Every interest is not a right but instead could be a claim with justification to support it.[388] Its significance can change, subject to claims and counter-claims.[389]

Interest could even mean acting in a certain way so as to encourage preference for things which ought to be desired or preferred. Essentially, a preference for higher values or acting in a manner that is in alignment with what is considered the right sort of interests, for example, reason, rationality, morality, etc.[390]

It is already evident from the brief review of the definition of interest that public interest may be viewed differently, depending on the definition of interest chosen as the lens under which the concept of public interest will be examined. It is equally apparent that it is not easy to distinguish between 'interest' in the notion of public interest and 'interest' of a person. This shows that defining public interest is challenging.

Also of importance is the notion of welfare and which definition of welfare is associated with the public interest. This is because (general) welfare is often examined by theorists when they define public interest. Like interest, welfare will be explored only in relation to public interest in this thesis. Welfare denotes the wellbeing of some element of the general public, be it economic or social. This undoubtedly has

---

[383] Held, (1970), see above n.371; Lewin, L., (1991). *Self-Interest and Public Interest in Western Politics*, (pp. 3-22). Oxford, OUP; Benn, S. I. (1959). Interests in Politics. *Proceedings of the Aristotelian Society*, 60, 123.

[384] Barry, (1965), See above n.372; Hagan, C. B. (1966). The group in political science. In R. Young. (ed.) Approaches to the study of politics. (pp. 38). Evanston, III: Northwestern University Press.

[385] Benn, see above n.383; Bentham, J. (1843). *The Works of Jeremy Bentham*, *Vol. 8.* Published under the Superintendence of his Executor, John Bowring (ed.) (pp. 290). Edinburgh, William Tait; Crimmins, J. E. (2015). Jeremy Bentham. In Edward N. Zalta (ed.). *The Stanford Encyclopaedia of Philosophy*. Retrieved from: https://plato.stanford.edu/archives/spr2019/entries/bentham/

[386] Barry, (1965), see above n.372, 175.

[387] Benn, see above n.383, 128–131.

[388] Ibid, 129.

[389] Ibid, 135.

[390] Held, (1970), see above n.371, 22-23; Flathman, see above n.292, 27.

different implications for diverse ideologies and school of thoughts within these ideologies. It can signify efficiency in the creation and maintenance of resource allocation based on consumer satisfaction.[391] It could be seen as allowing for a meeting point between public and private discourses regarding societal interests.[392] Welfare may also be seen as focusing on collective interest, the community[393] and the flourishing of humans beyond productivity and consumer satisfaction, incorporating interests or needs of future generations.[394]

Having addressed some of the key notions necessary to defining the public interest, interest and general welfare, attention will turn to some theories on public interest which have been classified into three main categories. There are other classifications of public interest.[395] Nevertheless, I have chosen the three classifications proposed by Held because they facilitate a thorough and concise division of theories of public interest, and a simple exploration of these theories in light of corporate theories. However, not all the theorists cited under the chosen categories fit neatly within them. For example, certain communitarian theorists who incorporate sustainability and future generation into the definition of public interest are not strictly within unitary theory, common interests or preponderance focused.[396]

3.3 THEORIES OF PUBLIC INTEREST AND THE 3 MAIN CLASSIFICATIONS

There are numerous public interest theories. These are grouped broadly using Virginia Held's three categories: *preponderance* or *aggregative theories*, *unitary theories* and *common interest theories.*[397] Each of these categories, she contends, can be distinguished by how they conceive the relationship between public or

[391] Niemeyer, G. (1962). Public Interest and Private Utility. In C. Friedrich (ed.). *The Public Interest.* (pp. 1). New York, Atherton Press; Musgrave, R, (1962). Efficiency in the Creation and Maintenance of Material Welfare. In C. Friedrich. (ed.). *The Public Interest.* (pp. 108-110). New York, Atherton Press.
[392] Clarke, J., Gewirtz, S., & McLaughlin, E. (eds.) (2000). *New managerialism, new welfare?* (pp. 3). London; Thousand Oaks, Calif: Open University in association with SAGE Publications.
[393] Niemeyer, see above n.391, 2-4.
[394] Lewis, C. (2006). In Pursuit of the Public Interest. *Public Administration Review*, 66 (5), 694, 698-699.
[395] Leys, W. (1962). The Relevance and Generality of the Public Interest. In C. Friedrich. (ed.). The Public Interest. (Ch. 19). New York, Atherton Press; Sorauf, (1957), see above n.368, 616.
[396] Braybrooke, D. (1962). The Public Interest: The Present and Future of the Concept. In C. Friedrich. (ed.). *The Public Interest.* (Ch. 11). New York, Atherton Press; Miller, E. (1990). Economic Efficiency, the Economics Discipline, and the "Affected-with-a-Public-Interest" Concept. *Journal of Economic Issues*, 24 (3), 719; Champlin, D., & Knoedler, J. (2003). Corporations, Workers, and the Public Interest. *Journal of Economic Issues*, 37(2), 305.
[397] Held, (1970), see above n.371, ch.3-5.

collective interests, and the interest of individual members of the public as well as their conception of interest.[398]

3.3.1 PREPONDERANCE OR AGGREGATIVE THEORIES OR CONCEPTIONS

Preponderance or aggregative conceptions of public interest begin from a subjective conception of interests.[399] Its advocates usually conceptualise public interest as being synonymous with the interest of preponderance or aggregate sum of individuals.[400] Hobbes for example, considered public interest to be an action which is either in the interest of every individual in the community or in the interest of a preponderance of members of the community.[401] Public interest is thus based on self-regarding interests common to the preponderance of individuals in a community,[402] a preponderance of force.

Some theorists such as Hume define public interest in terms of self-regarding interests of public utility to preponderance of individuals[403] but with a subjectivist approach to ethics and morality.[404] Similarly, other preponderance theories conceptualise public interest in terms of utility.[405] These theories are frequently associated with utilitarianism due to the emphasis placed on utility.[406] Utilitarianism is crudely defined as that which brings the greatest happiness to the greatest number of individuals.[407] Utilitarianism is influenced by the significance of liberty and the role of the state as defender of individual liberty and property from interference by

---

[398] McHarg, A. (1999). Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights. *Modern Law Review*, 62 (5), 671, 674; Held, (1970), see above n.371, 42-46.
[399] Ibid, 675; Held, (1970), see above n.371, ch.3.
[400] Held, (1970), see above n.371, 50.
[401] Hobbes, T. (1947). *Leviathan*. (Everyman's edition) (pp. 24, 68, 98). New York, E.P. Dutton.
[402] Plamenatz, J. (1958). *The English Utilitarians.* (pp.14). Oxford, Basil Blackwell.
[403] Hume, D. (1957). *An Inquiry concerning the principles of morals*. (pp.12, 121). New York, Liberal Arts Press.
[404] Foot, P. (1978). Hume on moral judgement. In P. Foot. (ed.) *Virtues and Vices: and other essays in moral philosophy*. (pp. 74). California, University of California Press; Hume, D. (1961). *A Treatise of Human Nature.* (pp. 423). Garden City, N.Y.: Doubleday Dolphin.
[405] Marshall, A. (1949). *Principles of Economics*. (8th ed.). New York, The Macmillan Co.; Little, I. M. D. (1950). *A critique of welfare economics*. (pp. 54-56). Oxford, Clarendon Press.
[406] ibid
[407] Warnock, M. (ed.) (2003). *Utilitarianism: and, on liberty: including Mill's Essay on Bentham and selections from the writings of Jeremy Bentham and John Austin* (pp.18-19). (2nd ed.). Oxford, Blackwell Publishing.

others,[408] and the satisfaction of individual wants through the creation of an optimum environment.[409] This means things that add to the total sum of an individual's pleasure or something that will diminish her pains.[410] Since, preponderance theorists deem that the community is a fiction, nothing more than the individuals who constitute it, public interest means the sum of the interests of these individuals.[411] This definition of public interest could signify that the regulation of directors' conflicts of interest is justified when it is of utility to a preponderance of individuals. It could also be seen as the state protecting property rights of company stakeholders from interference or exploitation by directors.

Although some aggregation theorists, particularly (welfare) economists,[412] generally believe in the self-interested nature of humans, freedom of choice[413] and see public interest as an aggregation of individual interests or preferences, they think that public interest is derived from group interests or interactions rather than individuals' preferences.[414] Emphasis is placed on the harmonisation and reconciliation of group interests to define interests of a preponderance of individuals.[415] Ideas such as representation and deliberation are seen as ways of determining the ever changing nature of the public interest. They maintain that public interest is generated as a consequence of human association that cannot be experienced or controlled directly.[416] Thus, this means that the voluntary associations of individuals through the nexus of contracts, that are companies, are of public interest. Correspondingly, the regulation of directors' conflicts of interest is of societal interest based on the freedom

[408] Ibid, 88; Locke, J. (1764). (Thomas Hollis ed.). *The Two Treatises of Civil Government.* (§6-7) London, A. Millar et al.; Fitzgibbons, A. (1995). *Adam Smith's system of liberty, wealth, and virtue: the moral and political foundations of the wealth of nations*. (pp. 55-57). Oxford, Clarendon Press; Mill, J. S., (1895). *Utilitarianism.* (ch. 1). (12 ed.). London, Longmans, Green and Co. Publishers.
[409] Niemeyer, see above n.391, 8.
[410] Bentham, J. (1948). *An introduction to the principles of morals and legislation*. (pp. 3). New York, Hafner.
[411] Ibid.
[412] Marshall, see above n.405; Little, see above n.405, 54-56; Rothenberg, J. (1961). *The measurement of social welfare*. (pp. 35). Englewood Cliffs, N.J.: Prentice-Hall; Arrow, K. J., & Maskin, E. (2012). *Social Choice and Individual Values*. (pp. 10-11). New York, Yale University Press. Arrow analysed the calculation of utility based on an assumption that utility is measurable.
[413] Lasswell, H. (1962). The Public Interest: Proposing Principles of Content and Procedure. In C. Friedrich (ed.). *The Public Interest*. (pp. 57, 64). New York, Atherton Press.
[414] Bentley, A. (1949). *The Process of Government*. (pp. 208-222). Evanston, Principia Press; Mancur, O. (1965). *The logic of collection action*. (pp. 121). Cambridge, MA, Harvard University Press.
[415] Herring, P. (1965). *The politics of democracy*. (pp. 327, 424-425). New York, Norton.
[416] Minor, W. (1962). Public Interest and Ultimate Commitment. In C. Friedrich (ed.). *The Public Interest.* (pp. 27-28, 42-43). New York, Atherton Press.

of choice and objective or impartial representation of stakeholders. Regulating directors' conflicts of interests is of societal interests because conflicts of interests impair proper representation and the process of deliberation that can lead to a determination of what is in the public interest. This is especially the case where public interest is defined as the same thing as shareholder interests, given that directors deliberate about what best serves shareholder interests. Essentially, it is in the public interest to ensure that information asymmetry is not exploited and that directors' decision-making is not impaired by mismanaged conflicts of interest.

In light of the focus on subjective preferences and rationality, preponderance or aggregative theories appear amoral as they may be seen as largely devoid of morality unless morality is outright preferred.[417] Therefore, they appear flexible and have successfully impacted many disciplines and their conceptions of the public interest.[418] Some have found these theories to be useful for the improvement of discourses on human liberty, property rights and encouragement of economic growth as well as democracy.[419] Unsurprisingly, they centre economic conceptions of interests which are significant to the society in the regulation of directors' conflicts of interest.

These theories are nonetheless subject to a number of weaknesses. One significant criticism is based on the conception of public interest which conflates it with rationality, consumer satisfaction and economic efficiency. This means that an increase in living standards or economic welfare, and higher consumer or economic satisfaction of as many individuals as possible, is equated with acting in the public interest. While such economic satisfaction might be desired, this conception of public interest is flawed because focusing solely on higher consumer or economic satisfaction and the aggregation of individual economic interests or utilities does not allow for the consideration of the true diversity and plurality of other individual interests or utilities.[420]

[417] Niemeyer, see above n.391, 1-8.
[418] Ibid, 1.
[419] Musgrave, see above n.391, 108-9.
[420] Baxi, U. (1996). "Global Neighborhood" and the "Universal Otherhood": Notes on the Report of the Commission on Global Governance. *Alternatives: Global, Local, Political, 21* (4), 525, 544.

Also an increase in the general economic welfare of a preponderance of individuals does not necessarily equate to satisfying the public interest. This could instead de-socialise individuals, reducing them simply to "market-mutated lustful consumerists".[421] Humans are in general social beings. Aggregative theories can artificially compartmentalise individual interests, excluding social interests. Likewise, these theories implicitly exclude those who do not fit neatly into the aggregation of individual (economic) utilities and corresponding definition of public interest.

Additionally, it has been commented that utilitarianism misses the mark in discussions on public interest because that which is valued is not desires or preferences themselves but the desires or preferences in the things valued.[422] Another related critique is that utility does not provide an explanation for preference and why individuals could consider something of interest or public interest based on virtue or morality.[423] Utilitarianism could consequently be used to exclude value judgement and reduce the scope of public interest to only the issues in which one is interested.[424] This could sometimes be useful for simplicity and certainty. However, it does not represent an actual picture of public interest which is composed of the interests of diverse individuals, many of them might consider some form of value judgement indispensable to the determination of public interest.[425]

Similarly, there is also the obstacle of determining the greatest possible satisfaction to a preponderance of individuals as there is no objective way of measuring the value of different interests or preferences to different individuals.[426] This approach is equally exposed to the moral flaw of sacrificing the interests of a few for the interest of a preponderance of people, regardless of the significance or merits of these few individuals' interests.[427] Here, public interest is interpreted as the interests of the majority of individuals or preferences of a majority of individuals which could be

[421] Ibid, 545.
[422] Nino, C. (1989). The Communitarian Challenge to Liberal Rights. *Law and Philosophy,* 8 (1), 37, 39.
[423] Fitzgibbons, see above n.408, 55-57.
[424] Musgrave, see above n.391, 113. This is a criticism that has been levelled at economists about their definition of the public interest.
[425] Oppenheim, F. (1981). *Political Concepts, a Reconstruction*. (pp. 144). Oxford, Basil Blackwell.
[426] Held, (1970), see above n.371, 67; Lewin, see above n.383, 7.
[427] Held, V. (1984). *Rights and Goods: Justifying Social Action*. (pp. 144). New York, The Free Press.

problematic. Some economists have proposed a no-harm criterion or Pareto-Optimality as a solution.[428] Equating public interest with individual (consumer) satisfaction and efficiency using the no-harm criterion or Pareto-Optimality seeks to make sure that no one is made worse off if some are made better off.[429] This is implicitly based on an assumption that the current societal situation or status quo is acceptable. If the status quo system is unjust and ridden with inequalities and inequities, the no-harm criterion does not lead to the improvement of welfare, economic or social. It further entrenches the oppressive societal situation as the distribution or allocation of resources will continue to favour those who already benefit under the current societal system.[430] Aggregative calculations and maximisation of interests or utility satisfaction are integrally unqualified to take into account satisfactory consideration of justice and rights.[431] Likewise, conceptualising public interest as democratic procedures of procedural fairness, compromise, reconciliation is problematic because public interest cannot be divorced from substantive considerations and doing so would once again privilege the status quo.[432]

Also of note is the critique that certain interests supersede aggregative individual interests and yet are often neglected.[433] Such interests include sustainability; particularly factors of social and environmental sustainability.[434] These are interests that are and ought to be crucial in the determination of public interest because they transcend communities, generations and even regions. If it is believed that public interest is an aggregation of interests, what if the public were not suitably informed, sufficiently prefers or interested in these issues?

Public interest defined in preponderance or aggregative terms can sometimes be in conflict with justifiable legitimate individual interests even though some individual

[428] Pareto, V. (2014). *Manual of Political Economy*. (pp. 102). Oxford, OUP; Pigou, A. (1962).*The Economics of Welfare*. (ch. 1-2). London: Macmillan and Co.
[429] Holcombe, R.G. (2009). A reformulation of the foundations of welfare economics. *The Review of Austrian Economics*, 22 (3), 209.
[430] Galston, W. (2007). An old debate renewed: the politics of the public interest. *Daedalus*, 136 (4), 10, 14; Benditt, T.M. (1973). The Public Interest. *Philosophy & Public Affairs*, 2 (3), 291, 308.
[431] Held, (1984), see above n.427, 163.
[432] Galston, see above n.430, 14-15, 17-19; Held, (1984), see above n.427, 144, 163.
[433] Galston, Ibid.
[434] Lewis, see above n.394, 698-699; Pennock, J. R. (1962). The one and the Many: A note on the concept. In C. Friedrich (ed.). *The Public Interest.* (pp. 180). New York, Atherton Press.

interests are worthy in themselves, that is, they are morally justifiable interests. They include for example, the cultural rights of minority or oppressed groups. This clearly negates the argument that public interest is simply about aggregative interests.[435] Also, the selection of an interest amongst other competing interests does not mean that it is of interest to society.[436]

With regards to the management of directors' conflicts of interest, the various flaws pose the following questions. Would it be considered in the public interest to address this issue only if a preponderance of individuals thinks that it is in their interest or of utility to them? This is a complex issue which is notoriously not well-understood by all, as will be displayed in chapter 4 of this thesis. How then can it be said that something is or is not in the interest of a preponderance of individuals? If something is in fact in the interest of a majority of individuals, how does one determine the intensity of the interest or preference? For instance, if one were to compare the management of directors' conflicts in the interest of society with other considerations such as property theory responses to corporate governance and the regulation of directors' conflicts of interest.[437] Also how does one rank interest in the management of directors' conflicts of interest amongst other competing interests?[438] Does the interest in the good management of directors' conflicts of interest supersede individual interests in the liberty to contract and enterprise? These are clearly questions which preponderance theories cannot adequately address.

In summary, preponderance and aggregative theories on the public interest focus of subjective individual preferences, collective individualism or utilitarian interests. In light of this, economic satisfaction, rationality, individual liberty and efficiency are central to their definitions of public interest. Though these are useful because they afford a facile evaluation of the public interest, they generally neglect value-based or interests born of morality. So they do not encompass other issues of interest to society. The same reflection is pertinent for a public interest rationale for the

[435] Held, (1984), see above n.427, 155-156; Dworkin, R. (1977). *Taking rights seriously*. (pp. 91). Cambridge, Mass. Harvard University Press.
[436] Sorauf, (1957), see above n.368, 630.
[437] Held, (1984), see above n.427, 147.
[438] Ibid, 148.

regulation of directors' conflicts of interest based on aggregative or preponderance theories.

Attention will now turn to unitary theories and their conception of the public interest, their strengths and weaknesses as well as utility in determining the public interest in the regulation of directors' conflicts of interest.

3.3.2 UNITARY THEORIES

Unitary theories[439] largely see public interest as a superseding interest, transcending and reconciling the interests and general welfare of individuals and sections of society. Theorists argue that public interest is based on the idea that there is a unitary structure of moral judgements which guides everyone whether they are aware of it or not. Unitary theorists consider collective judgments about actions or interests to be valid and in the public interest as opposed to (conflicting) individual claims of interests due to their conflicting nature.[440] They adopt an objective conception of interests which is derived from a universal concept of what is morally worthy; informing what individuals ought to want and that which is good for them.

Unitary theories have therefore traditionally been attributed to classic Western philosophers. For instance Plato's notion of the common good has been interpreted as significant to defining public interest. It signifies that an action in the public interest connotes its rightness or goodness, and this is the end to which all (individuals) strive or ought to strive.[441] Correspondingly, public interest, defined in light of what Plato coined interests of the community or state,[442] requires individuals to be self-interest sacrificing[443] and to aim to be just in the community or state's interest.[444] This definition focuses on unity and the identical collective welfare of the whole community.[445]

---

[439] McHarg, see above n.398, 675-676; Held, (1970), see above n.371, ch.5.
[440] Held, (1970), see above n.371, 135.
[441] Plato (1974). *The Republic.* (H.D.P. Lee, trans.). (pp.506). (2nd ed.) Baltimore, Penguin. (Original work published c. 380 BC).
[442] Ibid, 412.
[443] Ibid, 520.
[444] Ibid
[445] Ibid, 462-465.

Similarly, Aristotle conception of interest has influenced unitary theories on the public interest. He defined interest from an ideal-regarding perspective or end which is the measure of all things.[446] Therefore he thought that the common interest was that which is good, the aim of all things, actions or associations including governments.[447] Common good then equals that what is best for all in a society.[448] With regards to the regulation of directors' conflicts of interest, the focus on the common good in the definition of public interest implies that this is the basis for regulation.

In the same vein, a definition of the public interest may be drawn from Hegel's conception of the interest of the state as universal interest and the true interest of all.[449] Marx and Engels's theory on harmony of interests to attain social and unified order as well as the underlying rejection of pure self-interest[450] is another example of a unitary theory of public interest. It highlights that it is imperative to subsume individual interests in the public interest, that is, harmonise them with public interests.[451]

Other unitary theorists argue that public interest is that which is good without qualification for all, the highest ethical standard in political affairs.[452] They deem that an issue is of public interest if it is of moral significance and value. Essentially, public interest is framed as a normative standard with which individual interests cannot compete.[453] This effectively means that individual interests do not carry the same moral force as public interest.[454]

---

[446] Barker, E. (1885). Introduction. In Aristotle. *The Politics of Aristotle*. (B. Jowett, trans.). (pp. xviii). New York, OUP. (Original work published 350 BC).
[447] Ibid, 1252a.
[448] Aristotle, (1934). *Nicomachean Ethics*. (H. Rackham, trans). (Vol. 19, 1094a). Cambridge, MA, Harvard University Press.
[449] Hegel, G. (1942). *Philosophy of Right*. (T.M. Knox, trans.). (paras. 261, 271). Oxford, Clarendon Press.
[450] Marx, K. & Engels, F. (1968). *The German Ideology in Basic writings.* (T. Delaney & B. Schwartz, trans.). (pp. 255). Progress Publishers.
[451] Held, (1970), see above n.371, 149-151.
[452] Cassinelli, C. W. (1962). The Public Interest in Political ethics. In C. Friedrich (ed.). *The Public Interest.* (pp. 45-46). New York, Atherton Press.
[453] Flathman, see above n.292, 37-38, 44.
[454] Held, (1970), see above n.371, 154.

Unitary public interest theories have also been formulated in African and Asian philosophies. Menkiti[455] and Mbiti[456] are some of the scholars who have advanced unitary theories on community and the public interest. They conceptualise personhood as attained by way of ethical maturity born through community participation and social incorporation customs[457] rather than by being limited to possession of qualities such as rationality, goodwill or kindness.[458] Public interest then becomes acting with ethical maturity in the interest of the community. Menkiti rejects a definition of personhood or individualism which requires unrestricted freedom as such freedom ignores the role of the community and its significance in the lives of individuals. He added that, individuals have different roles within society in accordance with their (ethical) maturity and so emphasis ought to be on duty rather than rights and choice.[459] This implies that the regulation of directors' conflicts of interest is born of the public interest in encouraging directors to act in an ethical, mature manner when managing companies.

Likewise, it can be argued that Confucianism embraces a unitary theory approach to defining public interest. The focus on filial piety and human heartedness;[460] *ren* and *li* in the *Analects* as key values reveal the significance of moral socialisation based on customs and respect. These values which are primarily about self-cultivation and love for humanity[461] are often seen as transcending all other values.[462] Although the Confucian approach places emphasis on the correct way for individuals to behave, there is nevertheless latitude for people to learn and grow to choose the right way through chagrin and learning from others.[463] Confucianism appears to advocate equality for all and deems that humans are moral agents who are capable of caring

[455] Menkiti, I. (1984). Person and Community in African Traditional Thought. In R. Wright (ed.) *African Philosophy: An Introduction*. (pp. 171). Lanham, MD: University Press of America.
[456] Mbiti, J. (1970). *African Religions and Philosophies.* (pp. 141). New York, Doubleday and Company.
[457] See above n.455, 176.
[458] Ibid, 172.
[459] Ibid, 179.
[460] Harbsmeier, C. J. (2015). On the Nature of Early Confucian Classical Chinese Discourse on Ethical Norms. *Journal of Value Inquiry,* 49 (4), 517.
[461] Liu, Q. (2003). Filiality versus sociality and individuality: on Confucianism as 'consanguinitism'. *Philosophy East & West*, 53 (2), 234, 235.
[462] Wong, D. (2017). Chinese Ethics. In Edward N. Zalta (ed.). The Stanford Encyclopaedia of Philosophy. Retrieved from https://plato.stanford.edu/archives/spr2017/entries/ethics-chinese/.
[463] Chan, J. (1999). A Confucian Perspective on Human Rights for Contemporary China. In J. R. Bauer & D. A. Bell (eds.) *The East Asian Challenge for Human Rights*. (pp. 212). New York, Cambridge University Press.

for and sympathising with others.[464] In fact, *ren*[465] encourages reciprocity and mutual love.[466] Confucianism theorists have argued that it affords the liberty to be good[467] or to develop one's true self or humanity but affection does not extend to the liberty to be bad.[468] Also, rights may not be used as an excuse to indulge in moral decay.[469] Some Confucian thinkers nevertheless contend that morality ought not to be coerced but it is better to encourage a sense of shame in people and a desire for moral enlightenment, and emulation of leaders who lead by example.[470] The Confucianism definition of the public interest consequently links kinship solidarity and human heartedness to being a responsible citizen who participates in looking after the community's welfare.[471] Consequently, the regulation of directors' conflicts of interest in the public interest can be described as encouraging directors to be responsible citizens who look after the community's welfare through good corporate governance.

Other scholars define public interest based on the notion of transcendence of individual interest and ultimate value system linked with religious values.[472] They focus on what they believe to be the ultimate and sole objective of humankind; the destiny of the human soul and the higher calling of rationality and reason.[473] In light of these, public interest is defined based on the ethical foundations of altruism and goodwill or goodness[474] underpinned by mature, responsible and intelligent adult choices married to Christianity, particularly Catholicism.[475] Public interest is seen as

---

[464] Hsieh, Y. (1967). The status of the individual in Chinese ethics. In C. E. Moore (ed.) *The Chinese mind.* (pp. 307-309). Honolulu, HI: East–West Center Press.
[465] MENG 7B14.
[466] Chan, see above n.463, 219, 223-224.
[467] See above n.464, 308.
[468] Ibid, 313.
[469] Chan, see above n.463, 232.
[470] Ibid, 233.
[471] Foust, M. A. (2008). Perplexities of filiality: Confucius and Jane Addams on the private/public distinction. *Asian philosophy*, 18 (2), 149.
[472] Colm, G. (1962). The Public interest: Essential Key to Public Policy. In C. Friedrich (ed.). *The Public Interest.* (pp. 118). New York, Atherton Press.
[473] Niemeyer, see above n.391, 4-5.
[474] Cassinelli, see above n.452, 45-46, 53.
[475] Griffith, E., (1962). The ethical foundations of the public interest. In C. Friedrich (ed.). *The Public Interest.* (pp. 20-21). New York, Atherton Press; Lutz, D. (2009). African "Ubuntu" Philosophy and Global Management. *Journal of Business Ethics*, 84 (3), 313; Miller, see above n. 396, 719; Sison, A., & Fontrodona, J. (2011). The Common Good of Business: Addressing a Challenge Posed by "Caritas in Veritate". *Journal of Business Ethics*, 100 (1), 99; Sison, A., & Vaccaro, A. (2011). Transparency in Business: The Perspective of Catholic Social Teaching and the "Caritas in Ventate". *Journal of Business Ethics*, 100 (1), 17; Sison, A. (2007). Toward a Common Good Theory of the Firm: The Tasubinsa Case. *Journal of Business Ethics*, 74 (4), 471.

an embodiment of values which are vital for enlightened people.[476] Public interest thus defined means that it demands a special precedence amongst interests. This means that public interest such as environmental protection is seen as having grander significance and importance. It therefore does not necessitate recognition by the majority or preponderance of individuals as it can be chosen by a group of wise and enlightened "men".[477] Equally, public interest conceived as a moral imperative, means determining societal interests based on natural law and belief in a higher moral code.[478] It is absolutist in its vision requiring compliance and a rational, disinterested and benevolent comportment.[479]

Unitary theories are generally commendable because they incorporate morality and value judgment which are often lacking in preponderance or aggregative theories. They afford a richer understanding of the complexity of human motivations, values and preferences. Unitary theories embrace elements of equality whilst taking into consideration interests that may not be popular but that are necessary such as sustainability.[480] They allow for the circumvention of the freeloader issue as every member of society is taken to agree with and contribute to these unitary (absolutist) values.[481] Unitary theories create a unified awareness of the ultimate value and definition of public interest.[482]

In light of the unitary theory definitions of public interest above, it is deduced that concerning directors' conflicts of interest, they provide singular and absolute rationales for regulation. These theories simplify the duty of directors in this regard but incorporate moral imperatives for the management of directors' conflicts of interest.

---

[476] Bailey, S. (1962). The Public Interest: Some Operational Dilemmas. In C. Friedrich (ed.). The Public Interest. (pp. 106). New York, Atherton Press.
[477] Sorauf, (1957), see above n.368, 619-621.
[478] Ibid, 622; Lippmann, W. (1955). *Essays in the Public Philosophy*. (pp. 42). Boston and Toronto, Little, Brown and Company.
[479] Lippmann, Ibid.
[480] Griffith, see above n.475, 20-21.
[481] Cassinelli, see above n.452, 46, 53.
[482] Bailey, see above n.476, 106.

Unitary theories are nevertheless imperfect in a number of ways. They are similar to the aggregation theories because the identification of public interest is treated as conclusive in the determination of social choices. Yet attention is given to transcending individual interests as well as reconciling any apparent conflict that may arise between different individual interests or preferences.[483] Unitary theories do not explain how one navigates and chooses between competing absolute moral standards which are all higher moral imperatives and determining which ones are valid and when they are as well as when they are to be defended by the state.[484] Therefore, even though unitary theories could facilitate the explanation of moral imperatives in the regulation of directors' conflicts of interest, they arguably do not indicate which ones are incorporated into the regulation of these conflicts by the state.

Likewise, unitary theories do not concretely address how one identifies and measures superior interests in contrast to other interests.[485] This is in reality a very subjective exercise because there is no singular, universal accepted definition for superior notions or ideals such as wisdom or goodwill. Implementing a unitary definition of the public interest becomes a paternalistic, condescending or even authoritarian imposition.[486] It implies that individuals are not the best judges of what they want or need. Public interest may become something which is unknown or even unrecognisable to the public which is supposed to hold it.[487] Also, the reliance on customs and in certain cases (familial) solidarity could lead to favouritism, nepotism and corruption which are undoubtedly not in the public interest.[488] If public interest thus defined is applied to the regulation of directors' conflicts of interest, it could signify the primacy of certain interests in the regulation of these conflicts. This could be problematic and could entrench the status quo of shareholder primacy. Though some might suggest that this is not necessarily a bad thing, this thesis contends that this conception of the public interest is too restrictive and singular.

[483] McHarg, see above n.398, 675-676.
[484] Sorauf, (1957), see above n.368, 629.
[485] Ibid, 626.
[486] McHarg, see above n.398, 676; Held, (1970), see above n.371, 155; Barker, see above n.446, 1.
[487]Sorauf, (1957), see above n.368; Liu, see above n.461, 246.
[488] Hsu, F. (1998). Confucianism in Comparative Context. In W. H. Slote & G. A. De Vos. (eds.). *Confucianism and the Family.* (pp. 63). Albany, State University of New York Press.

In cases where unitary theories advocate rationality, intelligence, reason as well as being civilised or enlightened people as prerequisites for participation in the definition and determination of public interest,[489] they embrace exclusionary practices which undermine the claim of equality and respect for human dignity and the value of human life. They implicitly uphold societal systems of inequities and entrench discrimination against oppressed peoples, for example, those with impairments. They could lead to the coercion and the restriction of the liberty of "children, insane and primitive people".[490] Apart from being potentially dangerous, these theories are unrealistic and impractical because they forget or wilfully ignore that conflicting interests are inherent in society. They negate the utility of disaccord, compromise and conflict resolution as societal issues can be complex because society is evolving constantly and so are its mores.[491] Also, these theories could align public interest with the interest of powerful groups in society leading once again to the exclusion of minority groups or interests because in reality, an application of unitary theories would mean being reduced to either the rule of the majority or the powerful. With regards to directors' conflicts of interest, public interest defined in this unitary manner could simply focus on one singular interest or rationale for regulation. This does not afford a nuanced understanding of the rationales for the regulation of directors' conflicts of interest.

As a result of these flaws in unitary public interest theories, these theories appear unworkable for justifying the regulation of directors' conflicts of interest. As is the case for unitary public interest theories generally, they appear to be extremely problematic as one is reduced to some form of preponderance theory of public interest or imposition of certain values. This is not necessarily a cause for concern but it leads to the questioning of the utility of unitary theories for defining public interest in the context of the regulation of directors' conflicts of interest.

In summary, unitary theories focus on transcending and superseding interests which serve society. These theories are centred on notions of the common good and moral values, which could be born of religious or philosophical consideration. However, the focus on unitary or non-conflicting interests has an impact on the utility of these

[489] Bailey, see above n.476, 106.
[490] Griffith, see above n.475, 20-21.
[491] Held, (1970), see above n.371, 156.

theories. It makes them unworkable, exclusionary or problematic for the regulation of directors' conflicts of interest. This is because it is difficult to argue that directors' conflicts of interest are regulated simply to serve the common good as this negates economic or private interest rationales for the regulation of these conflicts.

Attention will now turn to common interest theories and their conception of the public interest, their strengths and weaknesses as well as utility for determining the public interest in the regulation of directors' conflicts of interest.

3.3.3 COMMON INTEREST THEORIES

Common interest theories are generally based on a conception of public interest which focuses on interests that are common to all. They are distinct from interests of specific sections of society, largely placing emphasis on non-conflicting interests rather than deciding between conflicting interests as is the case for aggregative theories.[492]

Rousseau's approach to the concept of common good and the general will, that is, allowing each individual to seek that which is collectively good, has been influential in common theories' conception of public interest.[493] Public interest thus defined is the will of all in common.[494] This gives legitimacy to the general will and interest pursued.[495] Public interest is essentially derived from unanimity of interests at one point even if a later decision is made based on a majority vote. Public interest must thus have been agreed upon as a favourable decision through some form of unanimity.[496] Public interest defined in this manner would mean that the regulation of directors' conflicts of interest is justified as an interest common to all. It may demand a sacrifice of private and individual interests for public happiness.[497]

---

[492] McHarg, see above n.398, 676-678; Held, (1970), see above n.371, ch.4.
[493] Rousseau, J. (1947). *The Social Contract*. (Charles Frankel, Ed.) (Book II, chapter III, pp. 26; Ch. I, pp. 23). New York, Hafner. (Originally published in 1762).
[494] Arendt, H. (1977). Public Rights and Private Interests: in response to Charles Frankel. In M. Mooney & F. Stuber. (eds.) *Small comforts for hard times: Humanists on public policy*. (pp. 104). Columbia University Press, New York.
[495] Rousseau, see above n.493, 23.
[496] Rousseau, see above n.493, Book I, chapter III, p.13-14; Held, (1970), see above n.371, 104-106.
[497] See above, n.494, 106.

Some advocates of the common good theory have extended it to Pareto's criterion of optimality. They declare that to make at least one individual better off with no one worse off is in the common interest of all.[498] This is applicable to the justification for the regulation of companies. Some theorists would therefore consider the common interest in such regulation to be based on the notion that the public interest is not separate from individuals' interests in the community.[499] Furthermore, such regulation might be seen as leading to the maximisation of individual utility, reduction or removal of transaction costs which individuals would otherwise have incurred or borne in seeking to gain profits or maximise other interests through the company.[500]

As was the case for unitary theories, African philosophies have also contributed to common interest theories on the public interest.[501] Gyekye[502] and Gbadegesin[503] have emphasized the significance of community in defining public interest.[504] They contest that community is derived from individual interactions and relationships.[505] This is a pragmatic and derivative conception of public interest which allows for individual autonomy, choice and self-determination but marries these with the idea that communities provide shared values and obligations. These values include the right to freedom, security or economic development, dignity and satisfaction of basic needs.

Nonetheless, advocates of this community-centric approach advance that rights be tempered with community-centric values such as solidarity, reciprocity and a sense of obligations and responsibilities by members of the community.[506] Contributions

---

[498] Mischan, E. (1964). *Welfare Economics.* (pp. 17). New York, Random House.
[499] Barry, (1965), See above n.372, 190; Lasswell, see above n.413, 57.
[500] Buchanan, J., & Tullock, G. (1965). *The Calculus of consent*. (pp. 7). Ann Arbor: University of Michigan Press.
[501] Wiredu, K. (2004). Introduction: African Philosophy in Our Time. In K. Wiredu. (ed.). *A Companion to African Philosophy*. (pp. 17). Oxford, Blackwell Publishing House; Masolo, D. (2004). Western and African Communitarianism: A Comparison. In K. Wiredu (ed.) *A Companion To African Philosophy*. (pp. 488-9). Oxford, Blackwell Publishing; Gyekye, K. (1997). *Tradition and Modernity: Philosophical Reflections on the African Experience* (pp. 35). New York, Oxford University Press; Wiredu, K. (1996). *Cultural Universals and Particulars: An African Perspective* (pp. 159). Bloomington, Indiana University Press.
[502] Gyekye, Ibid.
[503] Gbadegesin, S. (1996). *African Philosophy: Traditional Yoruba Philosophy and Contemporary African Realities*. (pp. 58). (2nd ed.). New York, Peter Lang Inc., International Academic Publishers.
[504] Wiredu, (2004), see above n.501, 17.
[505] Gyekye, see above n.501, 39.
[506] Ibid; Bewaji, J. (2004). Ethics and Morality in Yoruba Culture. In K. Wiredu (ed.) *A Companion to African Philosophy*. (pp. 396–403). Oxford, Blackwell Publishing; Senghor, L. (1964) *On African Socialism*. (M. Cook, trans.) (pp. 93-94). New York, Frederick A. Praeger.

made by every member of society is key to this definition of public interest as humans are dependent on their communities to meet their organic needs; physical and social developmental needs, moral and conceptual needs.[507]

This definition of public interest is all-compassing, incorporating individual liberties and interests as well as collective community values, unlimited or fettered by regional boundaries.[508] This definition is robust enough to explicate the regulation of transnational companies, the individual needs of their various stakeholders as well as the communities in which they operate. This means that it could provide justifications for the regulation of directors' conflicts of interest in society's interests based on notions of corporate responsibility and social obligation as well as regulation on the basis of the protection of other stakeholders' rights in the company.

On a similar note, certain Confucianism scholars have also conceptualised the public interest in terms of common interests and the significance of community. At the heart of this community-centric definition of public interest lies individual welfare, individual good or interests and the common good which are inseparably intertwined.[509] This conception of public interest is based on the foundation of freedom of choice in pursuit and identification of common interests which are compatible with moral values of human dignity, inclusivity and rights.[510] This makes the distinction between public and private interests fluid.[511] Consequently, it is possible for other governance structures in the private and public spheres or individuals to perform acts that are in the public interest.[512] In the case of company directors, this could denote that their conduct and actions can be considered of public interest.[513]

[507] Wiredu, (1996), see above n.501; Masolo, D. (2010). *Self and Community in a Changing World*. (pp. 247). Indiana, Indiana University Press; Masolo, (2004), see above n.464, 494; Hyden, G. (1997). The Economy of Affection Revisited. *African Rural and Urban Studies*, 4 (2), 19.
[508] Gbadegesin, see above n.503, 61-66, 77-78, 81-82.
[509] Wong, D. (2004). B., Rights and Community in Confucianism. In K. Shun & D. Wong (eds.) *Confucian Ethics: A Comparative Study of Self, Autonomy, and Community*. (pp. 31, 39-40). Cambridge, CUP; Wong, see above n.462; Ihara, C. K. (2004). Are Individual Rights Necessary? A Confucian Perspective. In K. Shun & D. Wong (eds.) *Confucian Ethics: A Comparative Study of Self, Autonomy, and Community.* (pp. 11, 24-25). Cambridge, CUP.
[510] Lasswell, see above n.413, 64, 69.
[511] Lasswell, see above n.413, 65-67, Colm, see above n.472, 125.
[512] Bodenheimer, E. (1962). Prolegomena to a Theory of the Public interest. In C. Friedrich (ed.). *The Public Interest.* (pp. 210-211). New York, Atherton Press.
[513] Sison & Fontrodona, see above n.475; Sison & Vaccaro, see above n.475, 17.

In general, the various common interest theories reveal the essential role which public interest plays in the justification of regulation. In the case of companies, this provides a justification for governmental regulation as well self-regulation to restrict individual or group liberty and corporate activities.[514] Thus, this definition of public interest could provide robust justifications for the regulation and prohibition of directors' conflicts of interest.

Common interest definitions of the public interest could be advantageous because they afford flexibility. They allow public interest to be based on rationality, efficiency and an individualistic conception as well as communitarian conceptions of interests.[515] They allow for the possibility to embrace seemingly opposing ideologies and approaches to theories of the firm under the umbrella of common interests.

Nevertheless, this category of theories on public interest is not without its flaws. Held has argued that, like unitary theories, it is difficult or nigh impossible to have unanimous agreement when looking at interests of significance to society.[516] Similarly human egoism, self-interest and obstinacy to unanimity are non-negligible challenges to identifying the common ground concerning the public interest.[517] These factors could create real opposition to unanimity and are not necessarily invalid reasons to thwart unanimity.[518] In fact, some put forward that if an activity were universally accepted or accepted by most as being of public interest, debate, and compromise would be redundant as would be the need to secure public support as it has already been had without controversy.[519] Since it is almost impossible to have a consensus or universal agreement on all interests, public interest may become interests of a preponderance of individuals.[520] Therefore, they are subject to similar limitations as

[514] Colm, see above n.472, 123.
[515] Ibid, 119-120.
[516] Held, (1970), see above n.371, 118-119, 156; Coleman, J. (1966). Foundations for a theory of collective decisions. *The American journal of sociology*, 81 (6), 616.
[517] Arendt, see above n.494, 105.
[518] Buchanan & Tullock, see above n.500, 69; Barry, (1965), see above n.372, 246.
[519] Although he was discussing Confucianism specifically, this can be generalised to the community-centric theories discussed in this chapter: Wong, see above n.509, 40.
[520] Sorauf, (1957), see above n.368; Benditt, see above n.430, 308.

preponderance theories and have similar consequences for the regulation of directors' conflicts of interest.[521]

In the same vein, the reliance of certain common interest theories on the no-harm criterion or Pareto-Optimality is problematic in the same way as it is under aggregative theories. Although common interest theories might incorporate much more than individual preferences or interests, these theories may entrench the status quo and do not sufficiently address issues that exceed the maximisation of individual utilitarian preferences.[522]

Of equal importance is the conflation of public and private interests, which might be applauded at first glance but a closer examination reveals that it can create some difficulty in defining the public interest. Such definition becomes unworkable because all responsibility for all areas of (in) action could potentially be seen as within the remit of the government.[523] Thus, this conception of public interest could result in a big intrusive and coercive state or an overburdened and failing state which would both be counter-productive to the interests of society and companies. It is also important to note that governmental intervention is no panacea for all social ills.[524]

Similarly, the lack of distinction between public and private interests inflates public interest so much that it includes everything to be achieved in politics, mixing provision for vital needs, resource allocation and individual preferences together, potentially creating confusion rather than guidance on issues in the interests of society.[525] This definition of public interest conflates various interests with the public interest in the regulation of directors' conduct and does not afford nuanced understanding of the rationales for regulation. This could make the definition of no practical use.

Common interest theories generally have been critiqued as being of limited applicability because individuals in society disagree about the goals or objectives that

[521]Held, (1970), see above n.371, 108-109; Arendt, see above n.494, 106-107.
[522] Held, (1984), see above n.427, 147.
[523] Cohen, see above n.382, 158.
[524] Coase, (1960), see above n.142, 16-17.
[525] Braybrooke, see above n.396, 129.

society ought to adopt and when they agree on these, they may disagree on how best to achieve these goals. Common interest theories are nevertheless useful because they reveal the significance attributed to collective goals in society but they also indicate how identifying these goals, is a complex endeavour. Besides they make a case for the designation of certain goals to be the public interest if they are universalisable interests.[526] Essentially, these goals though may not personally be shared by all but all may benefit from them or they may be set out in constitutions, reducing discussion to how they will be achieved. This slightly objective definition of public interest allows society to delegate the achievement of these goals to people with expertise in these areas. Of course, care has to be taken to ensure that they do not abuse their power or act ultra vires. There is arguably a need for accountability. Could the management of a company be seen as one of the areas delegated to people with expertise in it? What does this mean concretely for the management of directors' conflict of interest? Would the mismanagement of such conflicts be considered an abuse of power *vis à vis* society? These are some of the questions which will be explored in later parts of this chapter and latter chapters of this thesis.

In summary, common interest theories generally conceptualise public interest in a pluralist manner, embracing individual-regarding and community-centric interests alike. This affords varied public interest justifications for the regulation of directors' conflicts of interest. The pluralist nature of this definition leads to criticisms that they lead to unworkable or non-nuanced justifications for the regulation of directors' conflicts of interest. Yet, common interest theories seem to be the most appropriate for addressing the research question in this thesis because their broadness makes defining public interest sufficiently flexible and dynamic enough to address and draw out possible public interest justifications for the regulation of directors' interests. This will be considered throughout subsequent chapters of the thesis.

Attention will turn to a consideration of public interest and corporate governance. The collapse of MG Rover will be discussed briefly, to illustrate the utility of public interest rationales for the regulation of companies and directors' conduct, especially directors' conflicts of interest. Even though, the company was a privately owned entity, it was a

[526] Lewin, see above n.383, 16; McHarg, see above n.398, 678.

large company and the alleged mismanagement of its directors' conflicts of interest contributed to its failure. Also the collapse of MG Rover had a negative impact on the British society as well as its other stakeholders. Then, using the categories of public interest theories mentioned above as a rough guide, various theories of the firm will be re-explored in order to identify public interest considerations for these approaches. They will also be reviewed in light of the management of directors' conflicts of interest and identifiable public interest considerations for regulation.

3.4 PUBLIC INTEREST AND CORPORATE GOVERNANCE: CASE STUDY OF THE COLLAPSE OF MG ROVER

The collapse of MG Rover, arguably Britain's last large volume carmaker, in 2005, is an example of how corporate governance, particularly the management of directors' conflicts of interest in international companies, is an issue of public interest. It is also an indication of the flaw in assimilating shareholder primacy and profit maximisation with acting in the best interests of a company. In the report completed by the Department for Business Innovation and Skills (hereafter BIS), it was highlighted that the collapse of MG Rover was attributable to many issues, particularly the deficit in corporate governance, one of which was the mismanagement of the directors' (and sometimes, managers or advocates-accountants'[527]) conflicts of interest.

Briefly, what began the MGRG saga was that its then owner, BMW sold Rover due to its large debts, to local businessmen in a management buyout,[528] for £10. These businessmen formed the Phoenix Consortium, also known as the Phoenix Four (John Towers, Nick Stephenson, John Edwards and Peter Beale). The Phoenix Consortium through Techtronic acquired MGRG, including the parts business of the company for a nominal sum of £10.[529] BMW made a contribution of £75 million of loan notes[530]

[527] Press association. (2015, 13 April). Deloitte appeal over MG Rover collapse sees £14m fine cut to £3m. *The Guardian.* Retrieved from https://www.theguardian.com/business/2015/apr/13/deloitte-appeal-over-mg-rover-collapse-sees-14m-fine-cut-to-3m

[528] UK Department for Business Innovation & Skills (BIS). (2009). *Report on the Affairs of Phoenix Venture Holdings Limited, MG Rover Group Limited and 33 Other Companies Volume I.* Chapter 3: The sale of Rover. (pp. 20). Retrieved from https://webarchive.nationalarchives.gov.uk/+/http:/www.bis.gov.uk/files/file52782.pdf.

[529] Ibid.

[530] Ibid, 31.

and lent them £427 million in addition, on an interest-free basis for up to 49 years.[531] BMW then undertook that MGRG should have net assets of at least £740 million; and the members of the Phoenix Consortium invested £60,000 each in Techtronic shortly before the completion of its acquisition of MGRG.[532] MGRG's debts nevertheless remained. Also even though BMW deprived Rover of some of its successful range of vehicles which it either sold or retained,[533] many believed that MGRG could have been a viable company.[534]

The Phoenix Consortium was not only supported by BMW, it found support with different stakeholders such as trade unions, suppliers, the general public as well as the local and national government.[535] There was a belief that the Consortium was acting for the public good, preventing the loss of thousands of jobs and the minimising damage to the local economy where the Rover plants were situated.[536] These stakeholders arguably afforded the Consortium a social licence to operate, that is, societal acceptance to take on this business.[537]

During the negotiation to acquire MGRG, the plan was to distribute shares between those directly involved with or affected by the company: directors, employees, dealers, thus, giving them the chance to be real parts of the company.[538] The directors later decided that although stakeholders such as employees, dealers and executives were to have shares in the holding company, their rights would be limited to the "economic value of Rover" and that their voting rights needed to be "dressed up" so that their shares did not give them control of the company.[539]

The directors held the ownership and control of the Group as they held shares with tangible voting rights.[540] This was clearly a deviation from the original plan of actively involving various stakeholders in the ownership of the company and running it in the interest of various stakeholders. It is questionable if this decision was in fact in the

[531] Ibid, 323.
[532] Ibid, 43, 47.
[533] Ibid, 25.
[534] Ibid, 29-30.
[535] Ibid, 26-27.
[536] Ibid.
[537] Ibid, 27.
[538] Ibid, 72.
[539] Ibid, 74.
[540] Ibid, 86.

interest of MGRG. Had this been public knowledge, would the directors have retained their social licence which had arguably led to their successful management buyout bid for MGRG? It is highly probable that this would have affected the societal and political accord and trust in their ability to operate and manage the company properly.[541] This could have led to the directors' loss of social licence, negatively impacting their reputation, perhaps led to fewer sales and fewer contracts with sub-contractors. All of these issues would have shaken or impacted their legitimacy to control the Company, sent alarm signals to its many stakeholders before it became too late.

However, the directors 'held all the cards' because they primarily had ownership and control of MGRG. They could have held all parties hostage by threatening to liquidate and made every party involved refrain from taking any action. This is an example of the flaw in both shareholder primacy and director primacy. It indicates that shareholders and directors do not necessarily always have the best interests of a company at heart, regardless of efforts made to align their interests with those of the company (and its other constituents).

On several occasions, from the buyout process to the restructuring of the Rover Group, the directors acted in ways that were contrary to the best interests of MGRG. For example, Parker, one of the former (non-executive) directors of Techtronic, the company through which the Phoenix Four acquired MGRG, acted in breach of his fiduciary duty to the company before he left his role. Parker was said to have asked for and received through Landcrest Developments Limited, a property acquisition and development company for which he was a director and majority shareholder,[542] a commission from St. Modwen Properties Plc (hereafter, SMP) a town centre regeneration specialist property company, for introducing it to MGRG. He was allegedly paid the commission due to the belief that he could influence MGRG to enter into a transaction with SMP.[543] One can argue that the receipt of such payment was in breach of his fiduciary duties as a director of Techtronic and agent to the Group (Phoenix consortium, Techtronic and MGRG) for which he was dealing with property

[541] Ibid, 73.
[542] Ibid, 107.
[543] Ibid, 117-8.

matters.[544] Also MGRG was made aware of SMP's decision to pay Parker the commission by SMP rather than being informed directly by Parker himself.[545] There was no proof of prior informed consent given by MGRG, the principal, as is required under English agency law.[546] It may be contended that Parker's receipt of the payment was improper because it was from a third party with whom his principal was dealing and it was allegedly received without said principal's consent.[547] This may also be seen as a case of commercial bribery,[548] a type of directors' conflict of interest.[549]

Similarly, looking at the UK government's investigation into the failure of the Company, the Phoenix Four may be said to have wrongly profited from their position as directors on several occasions[550] and ignored the no conflict rule[551] as well as the no secret profit rule.[552] For example, they did not declare their personal interest in many transactions[553] and even voted on these transactions.[554] They also sometimes took up opportunities of which they became aware due to their position as directors of MGRG. For instance, the directors were able to acquire Rover Financial Service[s] (GB) Limited ('RFS') because of their position as directors of MG Rover Holdings Limited. They also failed to account for any profits derived from the acquisition of RFS by a company in which they are interested.[555] These examples highlight ways in which the directors did not act bona fide in the interest of MGRG. These mismanaged

[544] Ibid, chapter VI.
[545] Ibid, 113-114.
[546] Ibid, 113-115; *Logicrose Ltd v. Southend United Football Club Ltd* [1988] 1 WLR 1256.
[547] *Imageview Management Ltd v. Jack* [2009] 1 BCLC 724 [6, 8]; *Hurstanger Ltd v. Wilson* [2007] 1 WLR 2351, [38] which states that sufficient disclosure and the principal subsequent informed consent might mitigate against this potential conflict of interest.
[548] *Hurstanger Ltd v. Wilson* [2007] 1 WLR 2351, [39-40]; See above n.528, 119; Bribery Act 2010, sections 2-3.
[549] Peters, see above n.1, 30; It was a breach under common law at the time: *Regal (Hastings) Ltd v.* Gulliver [1967] AC 134; *Boulting v. Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606; *Aberdeen Railway Co v. Blaikie* 1 Macq 461. It is now a breach of section 176 of the Companies Act 2006.
[550] See above n.528, 165, 173-175, 213-214.
[551] *Aberdeen Railway Co v. Blaikie Bros* (1854) 1 Macq. 461, 471-2.
[552] *Regal (Hastings) Ltd. v. Gulliver* and Others [1967] 2 AC 134; *Parker v. McKenna* (1874-75) L.R. 10 Ch. App. 96, 118 and now s.175 (1) of the Companies Act 2006.
[553] See above n.528, 165, 213-214.
[554] Ibid; this was contrary to the company's articles of association (Article 83).
[555] See above n.528, 165, 173-175; *Chan v. Zacharia* (1984) 154 CLR 178; *Don King Productions Inc v. Warren* [2000] 1 BCLC 607.

conflicts of interest contributed to the eventual collapse of MGRG which went into administration in 2005, owing creditors nearly £1.3 billion.[556]

An investigation by the UK government revealed that the directors manipulated the assets and income streams of MGRG through the use of companies in which they, rather than the creditors of MG Rover had an interest, allowing them to benefit from large salaries, dividends and profits.[557] The directors were held accountable and subsequently disqualified.[558]

The collapse of MGRG is important because it is an excellent example of how bad corporate governance, particularly the mismanagement of directors' conflicts of interest, can be detrimental to society. MGRG's deficit of over £1 billion, negatively impacted the lives of creditors, employees, suppliers, sub-contractors and as well as the local economy, and even the wider British economy as over £16 million was spent on a report to understand why the company failed.[559]

The MGRG saga also typifies the failure of board accountability, an important aspect of good corporate governance.[560] It highlights flaws in agency theory, discussed in chapter 2 of this thesis. Even though the interests of the (primary) shareholders, the principals[561] and the interests of the directors, the agents, were aligned in this case, actions taken were not necessarily in the best interests of the company, and the directors were not properly subject to any real board accountability.[562] Although they maximised the interests of the significant shareholders, themselves, they engaged in self-dealing and other conflicts of interests to the detriment of the company and

[556] Department for Business, Innovation & Skills. (2011). *MG Rover's Phoenix Four disqualified as directors*. Retrieved from https://www.gov.uk/government/news/mg-rover-s-phoenix-four-disqualified-as-directors.

[557] Ibid.

[558] Ibid.

[559] Marsh, P. (2011, 8 May). Former MG Rover managers barred. *Financial Times*. Retrieved from https://www.ft.com/content/98c37b04-79af-11e0-86bd-00144feabdc0.

[560] Department of Business Innovation & Skills. (2010). Corporate *Governance*. Retrieved from http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/whatwedo/businesslaw/corp-governance/page15267.html; Keay, A. (2015). Assessing the accountability of boards under the UK Corporate Governance Code. *Journal of Business Law*, 7, 551, 553.

[561] Alchian & Demsetz, see above n.88; Jensen & Meckling, See above n.88.

[562] Keay, A., & Loughrey, J. (2015). The framework for board accountability in corporate governance. *Legal Studies*, 35 (2), 252, 263.

caused harm to other stakeholders of the company.[563] The lack of proper accountability here[564] demonstrates the problem of having authority without the counter-balance of accountability.[565] It exemplifies how the negative externalities of the contract which forms the company according to the nexus of contract theory for example, could be borne by those who did not benefit from it.

Additionally, the MGRG case illustrates a flaw in shareholder primacy. Shareholder primacy could allow dominant shareholders to act unseemly. This means actions that are clearly not in the best interests of the company and contrary to good corporate governance practice of focusing on the viability and survival of the company,[566] particularly if it is experiencing financial difficulties.

When MGRG collapsed, 6000 jobs were lost, the local economy of the region where the plants were based was severely affected, and the state spent a substantial amount of money to investigate the reasons why the Company failed.[567] Over a decade later, many of these workers have struggled to find better jobs.[568] This undoubtedly had a detrimental effect on their families and the community.[569] The government, local authorities and other public bodies allocated and spent over £170 million to cover the one-off costs of the support package for former MG Rover employees, suppliers and dealers and the wider community.[570] In this case, British society largely bore the cost of the collapse of MGRG. Its failure was of public interest.

---

[563] They did not act accountable under other rationales such as mediator or stewards for the corporation: Blair & Stout, (2001), see above n.277, 403, 440; Davis, J., Schoorman, F., & Donaldson, L. (1997). Towards a Stewardship Theory of Management. *Academy of Management Review*, 22, 20, 24-25.

[564] Loughrey, J. (2013). *Directors' duties and shareholder litigation in the wake of the financial crisis*. (pp. 53). Cheltenham, Edward Elgar Publishing Limited.

[565] Moore, M. (2013). *Corporate Governance in the Shadow of the State*. (pp. 31). Oxford, Hart Publishing.

[566] Financial Reporting Council (FRC). (2016). *The UK Corporate Governance Code*. (pp. 5). Retrieved from https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-April-2016.pdf

[567] Rover report: At a glance. (2009, 11 September). *BBC News*. Retrieved from http://news.bbc.co.uk/1/hi/business/8250252.stm

[568] MG Rover collapse: 10 years on. (2015, April 9). *BBC News*. Retrieved from http://www.bbc.co.uk/news/uk-england-birmingham-32220981; National Audit Office. (2006). *The Closure of MG Rover*. Retrieved from https://www.nao.org.uk/report/the-closure-of-mg-rover/.

[569] Ibid.

[570] National Audit Office, see above n.568, 3.

In light of these issues, it is deduced that the economic approaches discussed, reveal that the contractarian and agency theories of the firm are fallible and imperfect, even when based on the notion of board accountability, a key tenet of these theories.

The MGRG saga is also an illustration of how the management of directors' conflicts in international or large companies is of public interest. Linking this back to the definitions of public interest explored in the previous section of this chapter, it shows that defining the public interest in terms of presumptions of self-regarding nature of humans is problematic. It shows that assuming that the public interest will be satisfied through self-regarding action is unsatisfactory because it does not in fact satisfy the presumptions of preponderance theory. In this scenario, though the actions of the directors were self-regarding, they were not in the interest of a preponderance or aggregation of individuals. In light of this, the directors' mismanaged conflicts of interest were contrary to public interest. That is, the (economic) interests of all shareholders, creditors and other pertinent stakeholders.

Likewise, the MGRG saga also failed to incorporate a unitary conception of public interest as adequate consideration is not given to unifying moral values, trust and honesty or acting in the common good, when managing the company. The MGRG saga shows that leaving directors unregulated in their management of the company and conflicts of interests will mean that a unitary conception of the public interest will not be protected. The directors did not have regard to considerations that were needed in order to promote a unitary theory of the public interest. If (unitary definition of) public interest had been taken into consideration by the Phoenix Four, they might have been more inclined to thoroughly consider the interests of all MGRG's stakeholders, including society. It could have been of little significance that the directors were dominant shareholders with voting rights.

Equally, even if a common interest definition of public interest was applied to explicate the actions of the directors, it would have likely required them to consider interests common to all in society when managing their conflicts of interest and managing the affairs of the Company generally. It is reasonable to conclude that this version of the public interest was absent or not protected through the directors' actions. All in all, it

is evident that regardless of which definition of public interest is analysed, the directors arguably failed to adequately manage the affairs of MGRG. There is of course, a difference between arguing that directors have to have regard to the public interest when acting for the company and saying that there is a public interest justification for regulating directors. The former could be controversial but the latter shows that no version of the public interest is necessarily protected if we leave directors with unregulated discretion and that therefore there is a public interest in such regulation.

This MGRG case study also illustrates that the definition of public interest in corporate governance, particularly the management of directors' conflicts of interest, is subject to different interpretations. This will be explored in the next section of this chapter. More importantly, it highlights that all definitions of the public interests can be used to justify regulating directors because directors may fail to act in ways that satisfy any of these.

3.5 CORPORATE GOVERNANCE AND PUBLIC INTEREST

3.5.1 INTRODUCTION

Over the years, public interest has customarily been used to signify some form of commonality between and among citizens or individuals within society as stated earlier in this chapter.[571] This has unsurprisingly affected the definition and development of theories on corporate governance, both directly and indirectly. This will be explored in this section of the chapter.

Accordingly, looking at public interest in corporate governance and its implication for corporate governance is a necessity. This is essential because it could provide a deeper insight into understanding the existence or lack thereof of public interest rationales in corporate governance and consequently, the management of directors' conflicts of interest.

[571] King, S. M., Chilton, B. S., & Roberts, G. E. (2010). Reflections on Defining the Public Interest. *Administration and Society*, 41, 954, 957.

3.5.2 ECONOMIC PERSPECTIVES ON CORPORATE GOVERNANCE AND PUBLIC INTEREST

Economic and contractarian perspectives on the firm and corporate governance tend to advocate an economic understanding of companies. This is often based on the idea that the company serves the purpose of reducing the transaction costs of contracting, increasing efficiency in production and better allocation of resources, as stated in chapter 2 of this thesis. There are nonetheless identifiable public interest rationales at the heart of these theories.

Economists generally conceptualise public interest as *the commons*,[572] demonstrating a distinction between private and public goods. The commons are thought to be public goods which afford benefits to a large number of people, paid for through taxation and other relevant societal endeavours required or imposed by the government and for which the government acts as a trustee for the benefit of society.[573] Correspondingly, public interest is often considered by economists and advocates of economic analyses of the law, to be a utilitarian concept, born of liberal democratic systems and ongoing organic political activities, informed by individual interests and interest groups. Essentially, public interest evolves with societal mores and political climate. It is thus a concept devoid of morality or ethics but simply a fruit of utilitarian or pragmatic (political) calculations in society.[574]

Consequently, public interest is thought to be largely restricted to the public sphere, the commons or public goods, in a manner that serves a preponderance of individuals, providing utility to the greatest number of individuals.[575] As a result, the focus is on individual interests and preferences rather than collectivism per se. Hence, economic perspectives on corporate governance and the public interest are easily associable with preponderance theories of public interest. The focus on utility and the rigid notions of public goods, explicates the significance of voluntary

[572] Hood, C. (1986). *Administrative Analysis: an introduction to rules, enforcement and organizations*. (pp. 2-12). New York, St. Martin's Press.
[573] See above n.571, 958.
[574] See above n.571, 960; Harmon, M. (1969). Administrative Policy Formulation and the Public Interest. *Public Administration Review*, 29 (5), 483, 484-485; Chilton, B.S., & Woods, J. (2006). Moral Justifications on the Rehnquist Court Hercules, Herbert, and "Druggies" Under the Fourth Amendment. *Criminal Justice Policy Review*, 17 (3), 343.
[575] Warnock, see above n.407, 188-190.

arrangements between individuals and the idea that the company exists because it is of utility to them. Economic theories of the firm also tend to favour economic and liberal individualism, focusing on self-actualisation, property rights, entrepreneurial and economic liberty, which are central to preponderance or aggregative public interest theories. This means that while economic individualism and economic analyses of the firm give the impression that they are the anti-thesis of public interest, this is not the case. To paraphrase Bozerman, they are the forest in which many a great public policy tree grows.[576] So individualism and public interest run together in many a context, one of which is corporate governance.

Economic corporate theories such as agency theory, transaction cost theory, nexus of contract theory, discussed in chapter 2, tend to focus on individualism and related notions of self-interest, utility maximisation[577] and economic efficiency.[578] They advocate minimal state intervention in companies and their governance.[579] Its scholars highlight the liberty (to contract and enterprise) without unwarranted governmental or other state interference.[580] They advance and commend notions of individual freedom without state coercion even in the face of economic inequality[581] coupled with the protection of clearly defined property rights.[582] Many of their proponents, such as Coase, consider that firms exist to meet a societal need of reducing transaction costs in production and contributing to the reduction of social costs.[583] This is central to their theses as firms are thought to be efficient for the economy and contributory to the improvement of general social welfare.[584] Champions of economic corporate theories add that an improvement of general economic and social welfare results from shareholder value.[585] They contend that the

[576] Bozeman, B. (2007). Public Values and Public Interest: Counterbalancing Economic Individualism. (pp. 40). Washington, Georgetown University Press.
[577] Thaler, R. (2000). Homo Economicus. *Journal of Economic Perspectives*, 14 (1), 133.
[578] Posner, R. (1983). *The Economics of Justice*. (pp. 88-119). (2nd ed.). Cambridge, Harvard University Press; Becker, G.S. (1976). *The Economic Approach to human behaviour*. (pp. 14). Chicago, University of Chicago Press; Coleman, see above n.83.
[579] Ibid.
[580] Hayek, F. A. (1960). *The constitution of liberty*. (pp.22-38). Chicago, University of Chicago Press; Hayek, F. A. (1944). *The road to serfdom*. (pp. 72-87, 103-107). London, George Routledge and Sons.
[581] Hayek, (1960), Ibid, 87-88, 146.
[582] Hayek, (1960), Ibid, 118; Friedman, M. (1962). *Capitalism and Freedom*. (pp. 34, 37-38). Chicago, University of Chicago Press.
[583] Coase, (1960), see above n.142.
[584] Gelter, see above n.99, 9.
[585] Ibid; Coleman, see above n.83.

company has led to better coordination of mass production, in a manner that is seemingly more efficient than markets and bureaucracies.[586]

In effect, these scholars believe that companies ought to focus on shareholder primacy and profit maximisation. They add that shareholders are an aggregation of (self-interested) individuals coming together to find and exploit opportunities for mutually beneficial exchanges,[587] working towards their goals of utility maximisation and are residual risk-bearers of the company.[588] Other individuals or actors of production within the company are not residual risk-bearers as they continuously are able to maximise their utility, so the company ought to be run in a manner which prioritises shareholders' risk-bearing and grants them supremacy. Basically, these theorists argue that shareholders have the most to lose when a company collapses and so they would be the most invested in its governance.

It is of course, not surprising that, enthusiasts of economic analysis of corporate law and corporate governance would generally reject maximum state interference. This implies state intervention that exceeds some regulation of competition to ensure fairness and regulations which exceed the facilitation of contractual relationships between actors of the company. They prefer to limit the role of the state to assuring the competitiveness in the markets,[589] efficiency in companies, meaning, contracting and financing of the same.[590]

Whilst, some aspects of these economic theories have been useful to understanding the company and its nature, these theories do not present an accurate representation of reality. Firstly, the reliance on a potent mix of economic individualism, utilitarianism and liberalism to define the public interest, and the belief that corporate governance unfettered by state intervention creates more competitive companies, wealth

[586] Bratton Jr., (1989), see above n.153, 1488 -1489.
[587] See generally Miceli, T., & Baker, M. (eds.) (2014). *Economic models of law.* Edward Elgar Publishing.
[588] Learmount, See above n.101.
[589] Calabresi, G. (1961). Some thoughts on risk distribution and the law of torts. *Yale Law Journal*, 70 (4), 499. This differs from Pigou's theory on welfare economics which considered and portrayed the state as all powerful and benevolent social welfare maximiser which could correct market failures efficiently. See Pigou, see above n.428, ch.1.
[590] Easterbrook & Fischel, (1981), see above n.180, 700.

maximisation and efficiency in production which are beneficial for society, is reductionist. It makes into a public value and the public interest, the interest of a small preponderance of individuals.[591] For example, scholars of property-rights theory of the firm,[592] amongst others,[593] focus on how centring these rights equate more efficiency in companies without adequate examination of alternatives. Profit-seeking may not always be in the interest of society just as it is not always the main objective of companies. It does not always lead to better production of goods or services and sustainable efficiency.[594] Correspondingly, giving control rights to shareholders and affording them more primacy does not signify better scrutiny of the governance of these companies, neither does it reduce debilitating decision-making conflicts between stakeholders.[595]

Secondly, agency theory and its focus on efficiency of transactions and the issue at the heart of corporate governance, reducing agency costs, may be underpinned by implicit consideration of the public interest but it is still flawed as a theory of public interest. Agency theory may be viewed as stating that it is in the interest of society that companies are organised through contracts and the economic alignment of interests rather than resorting to state intervention. Its advocates argue that making use of this markets approach is more efficient than bureaucracies due to the difficulty of monitoring agents and the corresponding costs of doing so.[596] However as discussed in chapter 2 of this thesis, agency theory is not without its flaws which include principal sharking and the corresponding costs associated with this.[597]

Likewise, in these economic theories, corporate law is seen as providing a template contract which sets out significant aspects of the company, particularly, corporate governance, and the role of directors and their duties vis à vis the company.[598] It

[591] Bozeman, see above n.576, 23, 53-54.
[592] Alchian & Demsetz, see above n.88; Alchian, (1965), see above n.142; Demsetz, (1967), see above n.142 ; Demsetz, (1972), see above n.142.
[593] Berle & Means, see above n.58.
[594] Bozeman, see above n.576, 23, 54-56.
[595] Rajan, R. and Zingales, L. (1998). Power in a theory of the firm. *The Quarterly Journal of Economics*, 113 (2), 387, 425.
[596] Clarke, T. (2004). Introduction: Theories of Governance – Reconceptualizing Corporate Governance Theory after the Enron Experience. In T. Clarke. (ed.) *Theories of Corporate Governance, the Philosophical Foundations of Corporate Governance*. (pp. 5). Routledge.
[597] Ortz, see above n.97, 265.
[598] Easterbrook & Fischel, (1991), see above n.116.

facilitates the organisation of companies and thus reduces the transaction costs which could otherwise be incurred if these company statutes did not exist. This is deemed beneficial for society and provides the value of facilitating and organising of production.[599] As such it serves the public interest of mitigating obstacles to production.[600]

On the subject of directors' conflicts of interest, it is evident that the management of these conflicts of interest is considered to be undertaken in the interest of the company and shareholders, specifically due to the principle of shareholder primacy and maximisation. This would be seen by shareholder primacy advocates as indirectly in the public interest. Minimal intervention in corporate governance is regarded as vital in light of the values of economic individualism, the protection of liberty and the property rights of residual claimants (shareholders). The public interest is then dependent on the management of such conflicts being in the interest of a preponderance of individuals or which provides the greatest utility or happiness to a large number of individuals, in this case, directly, shareholders and indirectly, other constituents of the company and society.

Consequently, the management or sanctioning of such conflicts of interests is regarded as undertaken mainly to protect the interests of shareholders because it is important that their property rights are protected and that they are protected against the self-dealing and shirking of agents of the company.[601] This is perceived indirectly as in the interest of society. Such protections maintain the fundamental principles of liberty and entrench the protection of the pursuit of individual goals and reinforce ideas about the protection from governmental intervention in private contracts and private orderings. Corporate law including laws regulating directors' conflicts of interest intervenes only when necessary to set out key issues in corporate governance to protect certain clearly defined rights (of shareholders) but not to interfere with the discretion afforded to directors.

[599] Lee, I. (2012). The Role of the Public Interest in Corporate Law. In C. Hill & B. McDonnell (eds.) *Research Handbook on the Economics of Corporate Law.* (pp. 106). Palgrave.
[600] Ibid, 8; Halpern, P., Trebilcock, M., & Turnbull, S. (1980). An Economic Analysis of Limited Liability in Corporation Law. *University of Toronto Law Journal*, 30 (2), 117, 136.
[601] It is noteworthy that many jurisdictions allow board approval of conflicts of interest. For example, in the UK in s.175 of the Companies Act 2006.

Even though economic corporate theories and their definition of the public interest may be critiqued as unbalanced, they reveal that public interest is not the antithesis to economic theories of the firm and corporate governance. They embrace it in a manner that is altogether more subtle and implicit but nonetheless present. This is apparent in discussions of the management of directors' conflicts of interest in various economic analyses of corporate law and placing shareholders rights at the centre. Although centring on shareholders' rights is a very important aspect of understanding and addressing directors' conflicts of interest, in light of public interest, it is insufficient because it does not guarantee good corporate governance. It also does not adequately protect the best interests of the company or in the interests of other stakeholders who may not be protected by other areas of law. Economic corporate theories generally are not reflective of the evolving global economy. They fail to recognise the changing role and nature of companies, from a tool for the facilitation of mass production and organisation or reduction of transaction costs, into powerful alternative modes of global power, governance and influence. These theories likewise neglect to reflect the interdependence of public and private spheres.[602]

The collapse of MGRG which was discussed earlier in this chapter is an excellent illustration of the problem caused by limiting the management of directors' conflicts of interest to the protection of shareholders, especially dominant ones. This is because the shareholders with voting rights were also the executive directors of the various holding companies within MGRG. This meant they could act in their own interests, misaligning the interests of shareholders with those of the company. They exposed other stakeholders and society, particularly the local community in Birmingham, England to the negative externalities caused by the breakdown of the "nexus of contract" that was MGRG. The MGRG saga rather than contribute to aggregate social welfare, detracted from this. It was thus even not in the public interest as defined in economic analyses of corporate law.

[602] Mahoney, J.T., McGahan, A.M., & Pitelis, C.N. (2009). The interdependence of Private and Public Interests. *Organisation Science*, 20 (6), 1034, 1035.

Attention will now turn to pluralist and concession theories on corporate governance to examine if they provide more balanced understanding of the public interest.

3.5.3 PLURALIST THEORIES, CORPORATE GOVERNANCE AND PUBLIC INTEREST

Pluralist and concession theories are generally associated with public interest because it has often played a significant part in the development of the theories. Concession theory, discussed in chapter 2, considers the company to be a concession granted by the state. In order for a company to retain legitimacy and the social licence to exist, it must act in a manner that is in the interest of society, at least to a certain degree. Incorporating concepts such as representation of various constituencies, legitimacy and accountability in the governance of the company are portrayed as public interest considerations which are indispensable to good corporate governance.[603]

Concession theory can be said to embrace a unitary conception of public interest as a superseding interest, transcending and reconciling the interests of individuals and other sections of society, including companies. This definition privileges ideals of common good to which all ought to strive. This concession theory approach strongly advocates and emphasises the validity of governmental regulation and implication in corporate governance to ensure that the ideals of morality and common good are upheld.[604]

However, as stated in chapter 2, concession theory fell out of favour with corporate governance theorists. They instead asserted that individuals would have come together to devise ways of facilitating production regardless of sovereign or state interference. This reduced the impact of politics which had been closely bound up in the definition of concession theory. The focus became the pre-eminence of individual energy and endeavour in the form of corporate life.

[603] Bratton Jr., (1989), see above n.153, 1497.
[604] Flathman, see above n.292.

However, the fruit of individual energy and endeavour has been characterised as being of public interest whilst respecting the private character of these efforts. In this sense, the energy and endeavour invested in the management of companies though significant and entitled to a degree of discretion, remains subject to the contention that it ought to be controlled or regulated so as to prevent abuse.[605] Adherents of approach tend to be concerned with limiting the power and discretion afforded to company directors because they consider that like decision-makers in the public sphere or government, the actions of these decision-makers have substantial impact that far exceeds their sphere of governance and ought to be subject to clearly defined legal controls.[606]

Some theorists suggest curtailing directors' self-interested conduct so as to maintain objective decision-making in the interest of companies and society. They argue that directors like decision-makers in public offices, are subject to duties similar to those of trustees.[607] These theorists contend that directors ought to act in ways that respect the different views and interests of various stakeholders, taking these sometimes conflicting views into consideration in their decision-making by employing fairness and impartiality in their decision-making. Directors are held to a high standard of conduct, and the ideals of trust and accountability are set as interests. These supersede and transcend the private interests of directors and even companies. This means that they ought to respect the firm-specific investment made by all constituents of the company and not simply focus on shareholders or profit maximisation.[608]

Additionally, certain theorists have interpreted the notion of public interest in the management of companies to mean participation in governance, deliberative decision-making so as to increase and create value for companies.[609] This means that the management of directors' conflicts of interest ought to be executed in light of the principles and moral ideals of impartiality and other ideals associated with

[605] Bratton Jr., (1989), see above n.153, 1497-1498.
[606] Ibid.
[607] Sealy, L. (1967). The Director as Trustee. *Cambridge Law Journal*, 25 (1) 83.
[608] Blanpain, R., Bromwich, W., Rymkevich, O., & Senatori, I., (eds.) (2011). *Rethinking Corporate Governance: From Shareholder Value To Stakeholder Value*. (pp. 337). Alphen aan den Rijn, Kluwer International.
[609] Ibid, 332-333.

procedures of governance and enhancing objective decision-making. The flaw in this approach is that while it places emphasis on the need to scrutinise managerial discretion, it does not address the complex inner layers of directors' conflicts of interest. For example, in cases where directors are also shareholders, if the focus is simply on procedures directors could say that they have managed their conflicts of interest appropriately and in the public interest, even in cases where they have reduced the duty to a simple box-ticking exercise.

For other pluralist theorists, public interest in corporate governance signifies better alignment of a company's interests with society's interests.[610] They state that this signifies making sure that there is protection of the interests of all of a company's stakeholders, including society. After all, society is often the subject of the systemic and negative externalities of companies. Similarly, companies cannot be said to exist to reduce transaction costs or enhance efficiency if society ultimately bears the cost of their mishaps and inefficiencies.[611]

This pluralist approach to public interest does not necessarily decentre or negate shareholder primacy but it does demand greater managerial stewardship.[612] It also contends that shareholder primacy should be tempered with a greater consideration of other constituents of the company. In particular, it contends that directors ought to be required to engage in a balancing act of considering the interests of society in their governance decision-making.[613] Scholars reason that this restriction of directors' discretion should be subject to governmental review and enforcement.[614] They add that this restriction ought to be a public governance duty.[615] They also advocate the alignment of the interests of directors with those of the public.[616] This entails a

[610] Schwarcz, S. L. (2016). Misalignment: Corporate Risk-Taking and Public Duty. *Notre Dame Law Review*, 92, 1, 29-30.
[611] Ibid.
[612] Johnson, E. (1986). General Motors Corporation, Its Constituencies and the Public Interest. *Journal of Business Ethics*, 5 (3), 173.
[613] See above n.610, 46.
[614] Ibid, 48-49.
[615] Lee, see above n.599.
[616] Schwarcz, S. L. (2015). Excessive corporate risk-taking and the decline of personal blame. *Emory Law Journal*, 65 (2), 533, 543, 560-561.

broadening of the notion of directors' conflicts of interest to include acting in a manner which conflicts with the interest of the public, in the governance of a company.[617]

This above approach centres an understanding of society's needs for the reduction of excessive corporate risk-taking which can create systemic externalities.[618] This means that the regulation of directors' conflicts of interest could be explained as shareholder-centric with a public interest focus of contributing to the reduction of excessive risk-taking in corporate decision-making. After all, removing or reducing the moral hazard problem of agents, implies that they are less likely to engage in such risk-taking as some of the temptation to do so is to increase their (personal) financial interests.[619] Hence, theorists posit that the reduction of companies' systemic externalities and their impact on society are of public interest. They are interests common to all because they cause harm to the public, the local and wider community and economy.[620]

The externalities of companies are equally of public interest because they do not appear to be able to be internalised by them. Thus, society cannot protect itself directly as it is not a direct party to the contract, that is the company.[621] These systemic externalities can create a tremendous level of harm, including damage to local communities' economy, increase in unemployment, and poverty and reduce social as well as economic welfare.[622] These are interests which transcends individual concerns as they impact society as a whole. In light of these concerns, some scholars maintain that state intervention might be necessary to restrict the freedom to contract in order to prevent and reduce the effect of the aforementioned externalities.[623] Once

[617] See above n. 610, 53-54.
[618] Lutz, see above n.475, 315.
[619] See above n.610; Schwarcz, See above n. 616, 533.
[620] Ibid, 34.
[621] Morrison A, (2015). *Autonomy, Meta Contracting, and Regulation: A Liberal Theory of the Firm*. Unpublished Manuscript. (pp. 1, 22–3). University of Oxford. Retrieved from http://www3.law.ac.uk/denningarchive/news/events_files/Morrison_9_May.pdf; Butler, H. & Macey J. (1996). Externalities and the Matching Principle: the Case for Reallocating Environmental Regulatory Authority. *Yale Law & Policy Review*, 14, 23, 29.
[622] Schwarcz, S. (2008). Systemic Risk. *Georgetown Law Journal,* 97, 193, 207.
[623] Moore, see above n.565, 236; Butler & Macey, see above n.621, 29; Schwarcz, S. (1999). Rethinking Freedom of Contract: A Bankruptcy Paradigm. *Texas Law Review*, 77, 515, 520-21, 534-36, 551.

again, the regulation of directors' conflicts of interest could be explained as fruits of unitary public interest in the reduction of externalities of companies.

It is noteworthy that this theory implies that whichever shareholder centric or stakeholder theory is favoured, the focal point is the public,[624] rather than sections of society. This approach though appears to embrace unitary definition of the public interest, could also be interpreted as indicative of a common interest theory of public interest. This is due to the focus on non-conflicting interests in society as well as the centrality of economic interests and social values to it.

Pluralist theories are able to be associated with common interest theories on the public interest. They attempt to address numerous interests, individual self-regarding interests and collective ideal-regarding interests such as integrity and honesty in governance. Likewise, pluralist theories like common interest public interest theories, place emphasis on the fluidity between public and private sphere and significance of state regulation.

Even, the disadvantages of pluralist corporate theories and common interest public interest theories are similar. For instance, they are critiqued as unworkable and impractical due to the conflation of individual and collective interests within public interest. Both categories of theories are also criticised because the emphasis placed on state intervention, could potentially accord all responsibility for areas of actions to the state. This could create an overburdened and consequently failing state or an intrusive dictatorial state.

In the same manner, managerialist conceptions of corporate governance such as the team production[625] and director primacy theories,[626] discussed in chapter 2 of this thesis, appear to adhere to common interests theories of public interest. The general premise is that directors will act or ought to act in a manner that takes into consideration the common good,[627] with some placing special focus on shareholders'

[624] See above n.602, 111.
[625] Blair & Stout, (1999), see above n.260; Kaufman & Englander, see above n.260, 12; Alchian & Demsetz, see above n.88; Holmstrom, see above n.260; Marris, see above n.260, 16.
[626] Bainbridge, see above n.260.
[627] Meese, see above n.263, 1632; Blair & Stout, (1999), see above n.260, 276-287; Bainbridge, see above n.260.

interests.[628] Like common interest theories on public interest, emphasis is on the evaluation and balance of different conflicting and legitimate interests of diverse constituents of the company. This implicitly demands excellent management of directors' conflicts of interest. In order for the various constituents of the company to rely on the expertise and legitimacy of the directors as objective and trustworthy decision-makers, they must show that they are not easily influenced or even susceptible to the temptation of other interests which would interfere with the exercise of their official duty. The directors rely on a stock of trust from the different constituents and if their judgement is considered tainted by a conflict of interest, it reduces their legitimacy to act as omnipotent objective and moralistic mediators.[629] The demand for trustworthiness in governance and representative democratic practices are indications of a facile association between director primacy theories and common interest theories of the public interest.

Although, the various theories discussed above incorporate elements of public interest under different interpretations and appear to associate public interest loosely with the best interest of the company, this is in reality, open to debate. This is because public interest is not necessarily synonymous with the best interests of the company.[630] These interests can be compatible to a certain degree. The protection of property rights, reduction of transaction costs, addressing the agency problem and corresponding moral hazard or even the reduction of excessive risk-taking in view of the long term interests of a company and its impact, etc. can be of societal interest.[631] However, there are many cases where the interests of a company and society may be incompatible. These include environmental protection, protection of employment rights and respecting the local communities in which a company operates.[632]

---

[628] Bainbridge, Ibid, 31-33.

[629] Moore, see above n.565, 31-41; MacDonald, C., & Norman, W. (2010). Conflicts of Interest. In G. Brenkert, G., & T. Beauchamp (eds.). *The Oxford Handbook of Business Ethics*. (pp.463-464). Oxford, Oxford University Press.

[630] Lee, see above n.599, 110.

[631] Ibid, 113; Schwarcz, see above n.616, 540, 543.

[632] It is nonetheless argued by certain scholars that companies must be concerned with the protection of these issues as they will benefit both voluntarily and involuntarily if these protection are not imposed. In fact, commitment to these sort of protection could enhance company (entity) overall position and value. – Keay, see above n.9, 201-202; Thomsen, S. (2004). Corporate values and corporate governance. *Corporate Governance: The International Journal of Business in Society*, 4 (4), 29, 37-38.

While, directors enjoy significant managerial discretion to govern companies in their bona fide interests, this does not allow them to act in ways which could be deemed not in the interests of the company. In fact, some academics contend that acting in the best interests of a company does not extend beyond communities where the companies operate.[633] This is less than the entire society. [634] Others who make a business case for corporate responsibility, often state that companies ought to have regard for the public interest as this is beneficial for their long term interests and their constituents.[635] For instance, companies may even sacrifice profit-making if this would beneficial to the public interest in environmentally or socially sustainable practices.[636] The public interest advanced here, is arguably based on a common interest definition which attempts to incorporate and balance diverse interests so as to ensure that companies are well managed with honesty and integrity so that they are good but economically stable citizens.

In spite of the fact that certain scholars contend that directors have the (practical) discretion to place public interest above other interests in the governance of a company,[637] there is very little evidence to suggest this is permitted by corporate law.[638] Nevertheless, some of these scholars advance the view that due to the increasing blurred lines and interdependence of public and private spheres, directors ought to manage companies in the best interest of the public and not simply a nation's public interests but in the interest of the global community.[639] The impact of the recent financial and economic crisis has been used to illustrate the extent of (transnational) companies' power, reach and impact.[640] This has been used to highlight the far reaching effects of bad corporate governance on the global economy and community.[641] Academics argue that companies ought to incorporate global

[633] Blair & Stout, (1999), see above n.260.
[634] Ibid; Blair & Stout, (2001), see above n.277, 403.
[635] Elhauge, see above n.275.
[636] Ibid.
[637] Elhauge, see above n.275, 852-857; Mahoney, McGahan & Pitelis, see above n.602, 1035, 1038.
[638] Companies Act 2006, Section 171; Lee, see above n.599, 113.
[639] Mahoney, McGahan & Pitelis, see above n.602, 1040.
[640] Hutchinson, A. (2005). *The Companies We Keep: Corporate Governance for a Democratic Society*. (pp. 9). Toronto, Irwin Law; Dodd, (1932), see above n.281, 1157; Coase, (1937), see above n.128, 388; Friedman, (1972), see above n.582; Schwarcz, see above n.616, 536-537, 563-564.
[641] Mahoney, McGahan & Pitelis, see above n.602, 1038.

sustainable value creation into their governance practices.[642] This is a form of common interest notion of the public interest.

As mentioned earlier in chapter of this thesis, critics argue that these approaches to corporate governance (and public interest) are impractical and unfeasible. This criticism may be extended to the regulation of directors' conflict of interest. These approaches could create opportunities for directors to abuse their managerial discretion under the guise of focusing on the public interest. They could also create regulatory fatigue which would not encourage compliance and may even cause setbacks to adequate and effective regulation.

In light of these issues, attention will turn to corporate entity theories and the definition of public interest. This section will examine with which public interest theories they may be associated and what this means for any corresponding public interest consideration for the management of directors' conflicts of interest.

3.5.4 CORPORATE ENTITY THEORIES AND PUBLIC INTEREST

Gierke's real entity theory was based on the idea that when individuals come together in groups to create a collective entity, and there is a trade between individual interests and collective interests. [643] The individuals choose to make a sacrifice of their interest in order that the group acquires its own interests and goals but these do not fluctuate based on membership changes to the group. The group becomes a real entity and legal recognition is not necessary to establish its real existence. It has its own will and property, and individuals such as directors are simply its organs which carry out its will. Gierke's real entity theory consequently, has been used to support managerialist conceptions of corporate governance[644] and pro-state interventionism or anti-state interventionism in the governance of companies.[645]

[642] Ibid, 1043-1045; Lewis, see above n.394, 698-696.
[643] Gierke, (1900), see above n.334, xxi, xxvi; Dignam, A., & Galanis, M. (2009). *The globalisation of corporate governance*. (pp. 13). Ashgate.
[644] Bratton Jr., (1989), see above n.153, 1490-93.
[645] Hager, M. (1989). Bodies Politic: The Progressive History of Organizational Real Entity Theory. *University of Pittsburgh Law Review,* 50 (2), 575, 630-632; Dignam & Galanis, see above n.643, 14.

Gierke believed the company to have a public character but his conception of public and private spheres was a spectrum or continuum rather than polar opposites.[646] He thought that private law dealt with the external contractual interactions of the company while public law dealt with the internal working and relationships within it as a social body, being that the state is an all-encompassing social body. Correspondingly, the inner workings of a company, including the management of directors' duties and directors' conflicts of interest, fall under the ambit of the state.[647]

Other advocates of this approach, Laski[648] and Deiser,[649] affirm that the state ought to be involved in the management of companies, that the law has everything to do with the inner workings of companies, even the character of those running them. They argued that this was necessary because business affairs have ceased to be merely a matter of private interests as these affairs were bound to affect the public and it is left to the state to protect the interest of the public. [650] Deiser in fact added that when companies go on to have increasing influence on people's daily lives, regulating their lives, companies have to be made responsible for their actions, particularly when they threaten the wellbeing of the community.[651] This could of course be taken to mean actions that are against the collective common interest in public interest.

In fact, Merrick Dodd in the seminal article, *For whom are corporate managers trustees?*[652] put forward a theory based on the expansion of corporate realism to include corporate social responsibility. He argued that the company is a real being and citizen with real responsibilities.[653] Its interests are not purely economic ones or shareholder interest maximisation. These interests include social goals for which the

[646] Gierke, (1900), see above n.334.
[647] Ibid, Hager, 630-631.
[648] Laski, H. J. (1919). The Theory of Popular Sovereignty: I. *Michigan Law Review*, 17 (3), 201, 213-214.
[649] Deiser, see above n.334, 131, 139.
[650] Laski, H. J. (1916). The basis of vicarious liability. *Yale Law Journal*, 26, 105, 111-112.
[651] Deiser, see above n.334, 649.
[652] Dodd, (1932), see above n.281; Kerr J.E. (2007). Sustainability means profitability: the convenient truth of how the business judgment rule protects a board's decision to engage in social entrepreneurship. *Cardozo Law Review*, 29, 623, 635-639; Berle, (1932), see above n.281.
[653] Millon, (1990), see above n.91, 220.

company is accountable to its stakeholders, including society.[654] According to him, the company is a social entity which is distinct from its shareholders.[655]

Corporate entity theories are not without flaws, as already noted in chapter 2 of this thesis.[656] For instance, corporate entity theories defined in the manner above, are similar to pluralist theories. Therefore, they may be subject to the same critique that their concept of corporate responsibility is unworkable and vague.[657] They are also subject to an important flaw of trying to do too much and may lead to nothing being done in reality due to the difficulty of enforcement or monitoring. In the case of directors' conflicts of interest, conceptualising companies as citizens with responsibilities could mean that directors could become even more self-regarding. They could pursue goals of interest to them which could potentially negatively impact the longevity of the company. This approach could make it very difficult to hold managers accountable when they act in such manner.

Equally, corporate realism theories appear to embrace unitary conceptions of public interest. For instance, Gierke's real entity theory indicates that there is a superseding interest which transcends the interests of individuals who come together to form the company. He added that companies have a moral responsibility to act in the interest of society from which they derive their legitimacy and to which they are accountable.[658]

Yet, Laski and Deiser's theories could be assimilated into common interest conceptions of public interest. They assert that the state ought to be involved in the inner workings of companies for the common interests of society as they claim that the far-reaching effect of companies' actions ought to be regulated by the state. [659]

[654] Dodd, (1932), see above n.281, 1161.
[655] Berle and Means conceded that pluralist approach might be desirable even though they identify a weakness due to managerial power and how to hold it accountable - Berle & Means, see above n.58, 356.
[656] Dignam & Galanis, see above n.643, 13-17.
[657] Berle, see above n.652; Berle, A. (1931). Corporate Powers as Powers in Trust. *Harvard Law Review*, 44 (7), 1049, 1074.
[658] Gierke, (1900), see above n.334.
[659] Laski, (1919), see above n.648; Deiser, see above n.334.

However, one key issue with the real entity conceptions of public interest in corporate governance is that they do not clearly define the ambit of the application of public interest in corporate governance. Although they appear largely to be restricted to national boundaries due to the strong reliance on government regulatory intervention, this could be extended to international regulations. These could include corporate governance and the management of directors' conflicts of interest. The concept of corporate citizenship does not have to be limited to national or international boundaries. This is an important question as answers to it completely changes the nature of the responsibility to manage conflicts of interest with respect to any underlying public interest consideration. This could potentially mean that companies are global corporate citizens. Directors could be held accountable for acting contrary to the obligation of citizenship and for not respecting their responsibilities to act in relation to the global public interest.

The real entity approaches are unique and differ from other corporate entity theories such as autopoietic theory. As discussed in chapter 2, the nature of an autopoietic conception of corporate governance is the belief that companies are self-referencing social sub-systems and that law is not necessary to regulate society.[660] Law itself is a social system.[661] Companies are thus the organised domain of the economic system rather than being part of the markets, the spontaneous domain of the economic system.[662] This separates them from markets.[663]

The conception of the company as autopoietic means that it is operationally closed and somewhat autonomous in its environment which means that its shareholders as well as other stakeholders are part of said environments.[664] The law therefore cannot directly control the company as it is self-referencing and reproducing. All it can do is

[660] Johnston, A. (2010). *EC Regulation of Corporate Governance*. (pp. 221). Cambridge, CUP.
[661] Luhmann, N., Ziegert, K., Kastner, F., Nobles, R., Ziegert, R., & Schiff, D. (2004). *Law as a Social System*. (ch. 3).Oxford, OUP; Lourenço, A. (2010). Autopoietic Social Systems Theory: The Coevolution of Law and the Economy. (pp. 10). *Centre for Business Research, University of Cambridge Working Paper* No. 409.
Retrieved from https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp409.pdf.
[662] See above n.660, 222.
[663] Teubner, G. (1993). *Law as an Autopoietic System*. (pp. 133). Oxford, Blackwell; Teubner, see above n.243, 137-138.
[664] Teubner, see above n.243, 130.

put in place procedural regulation to encourage it to act in a manner that is morally right.[665] This leaves the process of the company's organisational autopoiesis untouched which is in the interest of society and for the betterment of future generations. It guarantees the satisfaction of human needs for such organisations.[666] The aim is consequently to ensure that companies are more responsive to wider society as this is essential for the reflection and reproduction of these social sub-systems.[667]

The notion that companies' sole goals are profit maximisation and shareholder primacy is rejected in this theory as is any other corporate goal which favours sections of the corporate constituencies only.[668] It is maintained instead that emphasis ought to be given to the main social task of a company. This is its contributions to different aspects of social life, in order to determine the corporate interest in light of the public interest. This corporate interest is determined based on notions such as power, legitimacy and democracy rather than political stakeholding theories.[669]

It is added that individual human or natural interests and the artificial interests of companies are all social constructs. As a consequence, the fixation on individualism ought to be broken down. This means that attention can turn to companies and ensure that they continue to remain responsive and sensitive to their environment. This is vital for the preservation of their social identity and self-reproduction, power, autonomy and resources.[670] This essentially implies an association with unitary interest conceptions of the public interest as autopoiesis posits that companies are social systems. They serve the purpose of meeting human needs for better production, communication and organisation. Yet, companies have a transcending and unifying interest in aligning their interests with that of society so as to continue to remain responsive and attentive to their environment.[671]

---

[665] See above n.660, 222-224.
[666] Teubner, see above n.243, 153.
[667] Teubner, G. (1994). Company interest: the public interest of the enterprise 'in itself'. In R. Rogowski & T. Wilthagen. (eds.) *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation*. (pp. 33). Deventer: Kluwer Law and Taxation Publishers.
[668] Ibid, 31-32.
[669] See above n.667, 134-135.
[670] Ibid, 33-34.
[671] See above n.660, 224-225.

In relation to the regulation of directors' conflicts of interest,[672] this signifies that the focus is on a moralistic notion of common good transcending the interests of certain sections of society, such as shareholders. However unlike some of the approaches expressed in pluralist theories, the focal point of discussion is the best interests of the company. So any consideration of public interest is aimed at contributing to the company's ability to respond to its environment, to self-reproduce and to self-reference. This means that ultimately there might be conflicts between the interests of society and those of the company. In such cases, directors' loyalty is to the company. As such, any management of their conflicts of interest is undertaken in the interest of the company first and foremost, and then in the interest of society because the company must respond to and interact with its environment. This only allows for a limited role or consideration of public interest in corporate governance and the management of directors' conflicts of interest.

Autopoietic corporate theories also share similar flaws with unitary public interest theories. For instance, they both can be very single-minded and inflexible in their objectives. The focus on superseding interests can denature the interests of those who make up the collective, that is, the company or society. This could mean that these interests do not reflect the interests of the company's or society's constituents.

Having explored public interest, its definitions and theories as well as how they fit with corporate theories, a conclusion will be drawn.

3.6 CONCLUSION

The exploration of the notion of public interest reveals that it is a nebulous but adaptable and dynamic concept. This could be useful for understanding the rationale for the regulation of companies, in particular, directors' conflicts of interest. The different public interest theories and the manner in which they are articulated in corporate governance theories indicate that public interest is flexible. It displays how no corporate theory is exempt from a consideration of the public interest.

[672] Ibid, 225-227.

This are of course, differences in the conceptions of public interest embraced by the diverse corporate theories, and importantly, the kinds of interests that they protect. Economic corporate theories tend to centre the public interest in efficient companies and a healthy economy. They are thus easily affiliated with aggregative or preponderance theories as these favour self-regarding interests of utility to individuals and conventional economic satisfaction. Pluralist corporate theories, particularly those which advance corporate citizenship, tend to emphasize collective ideal-regarding or other-regarding interests as well as economic, self-regarding interests. This means that their conceptions of the public interest are more readily able to accommodate and incorporate environmental or social sustainability as well as other non-economic interests. They are thus easily affiliated with unitary or common interest theories as these favour ideal-regarding values and notions of collective societal objectives. Likewise, corporate entity theories tend to be associated with unitary or common interest theories. They either advance corporate citizenship or argue that the company must be responsible to remain a responsive, legitimate social system in society. This means that they incorporate conceptions of the public interest which make them flexible or open to protecting non-economic and economic interests alike, in order to assure the company's viability or meet its responsibility to society.

Looking at the MGRG case, in light of the various theories of corporate governance and their approaches to public interest, exposes a number of issues. One of which is the flaw of limiting the management of directors' conflicts of interest to being in the interest of shareholders as this does not always prevent directors from acting in a conflicted manner. It also does not necessarily lead to the protection of the interests of the company or all its constituents. It is an indication that it is naïve to believe that shareholders are best placed to protect the other interests of the company. Although it can be argued that MGRG case is somewhat unique as the directors and dominant shareholders were the same people, the critique about directors' mismanaged conflicts of interest and the role of shareholders could still be applicable to (publicly listed) companies. This is because directors may hold significant numbers of shares in the company or have another source of conflict of interest, such as personal ambitions or remuneratory bonus for the attainment of certain company objectives.

This chapter indicates that it is important to examine the notion of public interest in corporate governance but such effort must not be undertaken uncritically.[673] This chapter also reflects the idea that when looking at public interest in corporate governance, it is imperative to go beyond apparent incompatibilities. These may include incompatibilities between corporate goals and societal goals. This is vital to addressing the challenges in defining public interests, and help to identify relevant issues.[674]

Having defined public interest, conflict of interest will be explored in the next chapter of this thesis. This is because it is vital that conflicts of interests are defined and thoroughly explored in order to understand directors' conflicts of interest and why their management might be of interest to society.

[673] See above n.667, 32.
[674] Ibid.

CHAPTER FOUR

CONFLICTS OF INTEREST: DEFINITION, HISTORY, ORIGIN AND THEORIES

4.1 INTRODUCTION

Having examined the notions of public interest and theories of the firm, it is now important to explore the complexities of the term, conflicts of interest. This is essential in order to understand and comprehend directors' conflicts of interest, an illustration of conflicts of interest in general. It also helps to illustrate how conflicts of interest might impact on the public interest. Conflicts of interest like public interest, is often used but hardly ever defined. Defining conflicts of interest is crucial to understanding directors' conflicts of interest and why they can be problematic both for the company as well as why they might be of public interest. In order to define conflicts of interest, it is imperative to start at its history and origin. These could indicate why the issue is of societal interest. Likewise, exploring theories on conflicts of interest would enable one to situate directors' conflicts of interest within types of conflicts of interest and what impact the typology might have on the public interest.

This chapter will begin with a section on the origin and history of conflicts of interest in general. There is a special focus on the evolution of the notion after the World Wars as the term gained considerable significance during that era. Diverging theories on conflicts of interest will also be explored to illustrate the complexities of defining it. Similarly, the psychological barriers to understanding and defining conflicts of interest will be considered as they add another layer of complexity and difficulty to comprehending these conflicts. Finally, the typology of conflicts of interest will be scrutinised as this will provide a background to understanding the different conflicts of interest with which directors are faced in the management of companies. This is essential as it begins to draw out societal interest in the regulation of directors' conflicts of interest.

The history and definition of directors' conflicts of interest will be addressed in chapter 6 of this thesis. The present chapter however focuses on analysing the definitions of conflicts of interest in general, and the challenges and obstacles to defining it. This

chapter is an important part of the thesis because it looks at the notion of conflict of interest itself, separately from directors' conflict of interest. This is useful in order to ascertain if in the history, origin and development of conflict of interest, public interest has been present implicitly or explicitly.

4.2 ORIGIN AND HISTORY OF CONFLICTS OF INTEREST

4.2.1 THE 'BIRTH' OF CONFLICTS OF INTEREST

Although the essence of the term 'conflicts of interest' has existed since the advent of public administration,[675] the term itself is relatively new. Most societies may have had some rules which those in public administration had to respect. In fact, the essence of conflict of interest can be traced back to Sasanian Iran or early Tang China, where public officials were expected to act purely in the state's or its leader's interests.[676] In the same manner, in pre-colonial Yorubaland, public administrators such as the *Eso*, military officers, were expected to be noble in act and deed, placing the interests of the kingdom above personal agendas.[677]

In fact, the criminalisation of the failure of public officials' to uphold integrity is old and dates back to the 12th century. In the nineteenth century, Garofalo, one of the founders of (European) criminology considered the failure to uphold the duties of honesty to be a natural crime.[678] From the 18th century in England and Germany, conflict of interest (in public administration) became significant due to their imperialistic ambitions.[679] These examples illustrate that the management of conflicts of interest was considered a key aspect of good public administration.

Likewise in the private sphere, the notion of conflicts of interest has had a long history linked to the "proscription against serving two masters".[680] For example, the principles of equity and the laws on fiduciary duties are at the centre of common law's response to conflicts of interest, including directors' conflicts of interest.[681] In fact, these

[675] Lankester, see above n.41, 1.
[676] Ibid.
[677] Johnson, S. (1921). *The history of the Yorubas*. (pp. 74). Lagos, CMS (Nigeria) Bookshop.
[678] Muller Y. (2012). Le droit pénal des conflits d'intérêts. *Revue Droit Pénal*, 1.
[679] Lankester, see above n.41, 1.
[680] Helm, R., F, D., & Day, M. (2012). *A Practitioner's Guide to Conflicts of Interest in the Financial Services Industry*. (pp. 1-2). London, Sweet & Maxwell.
[681] Ibid, 2.

principles make implicit reference to the notion of stewardship.[682] Stewardship essentially refers to the position and duties associated with the role of a person acting as the surrogate of other(s) by managing their property, estate or finances.[683]

However, in the private sphere, conflict of interest does not appear to have been considered very significant as an independent issue until the nineteenth century.[684] It was often associated with the notion of breach of trust in corporate governance.[685] The term, conflict of interest did not appear in decisions until 1941 and when it did, it was coined conflicting interest.[686] Conflicting interests here symbolized situations in which a fiduciary's duty to a client or trust is compromised by commitments to another client or trust. At the time, conflicts of interest and conflicting interests were used synonymously, with conflicting interests seeming to be the earlier version of the term but conflicts of interest being more commonly used in the past few decades. [687] The term, conflicts of interest was absent from the Dictionary of the English language until 1971 with a definition emphasizing only the governmental use of the term.[688]

In light of the examples cited above, it is clear that the essence of the notion of conflicts of interest has had a longer history than the term itself. Nevertheless, conflicts of interest as we know it became more established during the advent of the industrial era under the belief that public officials and politicians ought to act solely in the interests of the state.[689] Conflicts of interest therefore were deemed a governance concern due to the public interest in good administration and governance, and in society's common good. In a way, its development is indicative of a unitary or common interest definition of the public interest, discussed in chapter 3 which centres on values or ideals such as honesty and integrity.

---

[682] Old English *stīweard*, from *stig* (probably in the sense 'house, hall') + *weard* 'ward'. The verb dates from the early 17th century. Oxford dictionary. Retrieved from http://www.oxforddictionaries.com/definition/english/steward.
[683] Dictionary.com. Retrieved from http://dictionary.reference.com/browse/stewardship.
[684] *Aberdeen Rly Co v. Blaikie Bros* (1854) 1 Macq. 461, 471-472.
[685] *The Charitable Corporation v. Sutton* 26 ER 642; Breach of trust will be discussed in detail in chapter 5 and 6 of this thesis.
[686] *Woods v. City National Bank and Trust Co. of Chicago*, 61 S. Ct. 493, 312 U.S. 262, 85 L. Ed. 820
[687] Luebke, N. (1987). Conflict of Interest as a Moral Category. *Business and Professional Ethics Journal*, 6 (1), 67.
[688] Ibid, 66-81; MacDonald, & Norman, see above n.629, 444.
[689] Lankester, see above n.41, 1.

Conflict of interest was historically a part of the development of (public administration) and governance. It really gained pre-eminence in the 19th and 20th centuries. It was generally related to values such as honesty, loyalty and stewardship. This provides a good rationale for the regulation for conflicts of interest but it neglects to explain the psychological aspects of conflicts of interest. In light of this, it is important to briefly discuss the evolution of our contemporary society which now relies on the interconnectedness and expertise of a few to govern in key areas or spheres, and the effect on the evolution of the term, conflicts of interest. These are important elements to understanding conflicts of interest because they serve as real and tangible barriers to the management of conflicts of interest. This will be discussed later in this chapter. It is also useful to examine why there was no formal recognition and consecration of the term in the past, and why conflict of interest has become a significant governance issue, present in codes of conduct and legislation in many jurisdictions.

4.2.2 CONFLICTS OF INTEREST AND POST-WORLD WARS

A. MOVE FROM TRADITIONAL THEORIES ON ETHICS AND THE IMPACT OF PROFESSIONS

The first thing to ask is: why was there no apparent formal recognition of the term, conflict of interest which is now so significant in various codes of conducts, both in the private and public sectors, before the latter half of the twentieth century?[690] It is advanced that traditional theories on ethics were inclined to assert that the only morally relevant prescriptive advice on conflicts of interest situations was to teach the 'conflicted' person to resist temptation, maintain objectivity and carry out their duties.[691] The definition and management of conflict of interest were largely left to individuals to decide based on honour or morality.

However, it became apparent that conflicts of interest could not be left solely to individuals to manage as research on bias provided some illumination on this. Research revealed that individuals' interests can and do interfere with the judgement of even the most righteous person in the exercise of their duties.[692] This has

[690] MacDonald & Norman, see above n.629, 461; Friedberg, E. (2012). Conflict of Interest from the Perspective of the Sociology of Organised Action. In A. Peters & L. Handschin (eds.) Conflict of interest in global, public and corporate governance. (pp. 47-49). Cambridge, CUP.
[691] MacDonald & Norman, see above n.629, 461.
[692] Ibid, 459.

contributed to a shift from traditional approaches to looking at conflicts of interest at micro-level to macro-level and the incorporation of institutional approaches to defining conflicts of interest.[693] For example, the United States of America's government began to put in place institutional solutions to address conflicts of interest after the First World War.[694]

Similarly, since the industrial revolution but more particularly after the World Wars, there has been a growth of professions and reliance on them, increasing influence of market forces as well as society's dependence on them.[695] Professions such as medicine, accounting and law, enjoy special status and privileges as well as autonomy in their activities.[696] It became clear that it was not always possible to regulate all aspects of their activities as they require a certain level of discretion. Yet the interplay between their activities, the financial incentives and their special status meant that those of these professions are exposed to conflicts between their interests and those of their clients or society.[697] This has led to institutional level (profession-level) management of conflicts of interest in order to retain expertise and legitimacy in the eyes of society and engender continued dependency on them. This has contributed to the development of conflicts of interest as a separate discipline from values or notions such as honesty and integrity.

Accordingly, conflicts of interest became an independent subject worthy of scholarship due to its impact on society. This illustrates the long history between the notions, conflicts of interest and public interest.

B. PROFESSIONS, FIDUCIARIES AND SOCIETY: A STORY OF DEPENDENCE

Another factor which led to the shift from the traditional approaches to addressing conflicts of interest to macro and institutional approaches is society's increasing

[693] Stark, A. (2000). *Conflict of Interest in American Public Life*. Cambridge, Mass: Harvard University Press.
[694] Lankester, see above n.41, 7.
[695] MacDonald & Norman, see above n.629, 460-462.
[696] Buchanan, A. (1996). Is there a Medical Profession in the House? In R. Spece, D. Shimm & A. Buchanan (eds.) *Conflicts of interest in Clinical Practice and Research*. (pp. 109). Oxford, OUP.
[697] MacDonald & Norman, see above n.629, 461.

dependency on fiduciaries.[698] In P.D. Finn's seminal work, *Fiduciary Obligations*,[699] a fiduciary is defined as someone who has undertaken to act for or on behalf of others in certain matter(s).[700] Although the fiduciary duty to avoid conflicts of interest, including directors' conflicts of interest, can be traced back to 1854,[701] increased reliance on fiduciaries has meant that society had to take conflicts of interest in which fiduciaries might find themselves seriously.

Again, regulated professions, fiduciaries and agents themselves were concerned about conflicts of interest not only because of the fear of causing harm but because they rely on a crucial stock of trust from clients and society at large.[702] In fact, this stock of trust was coined "capitalised reputation" by Greenspan.[703] This is part of the capital of a profession and the legitimacy of organisations, firms and institutions depend on it. These entities have long understood that without trust and legitimacy, their status might be stripped away and their ability to operate might be compromised or affected detrimentally because conflicts of interest, even where wrongly perceived, (could) affect their legitimacy.[704] This knowledge has contributed to the development of theories on conflicts of interest. It is similarly indicative of public interest in the comprehension of conflicts of interest.

4.2.3 CONFLICTS OF INTEREST AND THE ERA OF TRANSPARENCY

A. TRANSPARENCY IN GOVERNANCE

A factor that has led to the development of theories and research on the management of conflicts of interest is the demand for transparency in governance, an issue of public interest.[705] This era of social media and mass media (aided by the internet) has coincided with, and augmented, the preoccupation with transparency and

[698] Boatright, J.R. (2007). Conflict of Interest. In R. Kolb (ed.) *Encyclopedia of Business Ethics and Society*. Thousand Oaks, Calif., Sage; Davis, (1982), see above n.41, 17; MacDonald & Norman, see above n.629, 463; Shepherd, L. (1981). *The Law of Fiduciaries*. (pp.18-20). Toronto, Carswell.
[699] Finn, P. D. (1977). *Fiduciary Obligations*. Sydney, Law book Company.
[700] *Aberdeen Rly Co v. Blaikie Bros* (1854) 1 Macq.461, 471-472
[701] Ibid.
[702] MacDonald & Norman, see above n.629, 461.
[703] Greenspan, A. (2004). Capitalising reputation. Financial Markets Conference of the Federal Reserve Bank of Atlanta, Sea Island, Georgia. Retrieved from http://www.bis.org/review/r040423a.pdf.
[704] MacDonald & Norman, see above n.629, 463.
[705] Florini, A. (2002). Increasing Transparency in Government. *International Journal on World Peace,* 19 (3), 3; United States Mission to the United Nations, UN Transparency and Accountability Initiative. Retrieved from http://usun.state.gov/about/2196/6657.

accountability in governance.[706] Transparent governance is often assimilated with the idea of good governance as it is thought to encourage accountability and reduce corruption. This has had an impact on the preoccupation with conflicts of interest. This is because nowadays a whiff of corruption or abuse of privilege can easily be uncovered and disseminated on a mass scale.[707]

Additionally, the expectations of society for more propriety in governance as well as demands for more representative governance and less deferential behaviour of society to those governing in large institutions are important.[708] In both the public and private spheres, these have contributed to the development of the importance of managing conflicts of interest. The understanding of the importance of the notion of conflicts of interest has developed hand in hand with the public's concern and interest in transparency and accountability in governance. It increasingly began to occur to those who govern institutions that a lack of transparency and accountability reduces the public's trust in them and this erodes their power to represent or serve the public. Thus, to retain the legitimacy to govern and the power of representation, they have to appear to act in the interest of the public (and/or their clients). Hence it was vital to theorise on and understand conflicts of interest.

B. SHIFT TO INCREASED REGULATION

Another factor that has contributed to the development of theories on conflicts of interest and its management is the shift to increased regulation. The post-world wars period was the first time when almost every sector of the economy became more regulated in many countries. This led to an increasing awareness within businesses, NGOs and professions, that if they are perceived by the public to be abusing their positions of trust or privilege, there was a credible threat of renewed or increased and/or tighter state regulation.[709]

In the UK and the US, the legislation relative to the management of conflicts of interest in the public sphere were enacted after the World War I.[710] In the UK, for example,

[706] Klein, P. (2011, 12 July). Transparency: Social Media Is Forcing You to Tell the Truth, *Forbes*. Retrieved from http://www.forbes.com/sites/csr/2011/07/12/transparency-social-media-is-forcing-you-to-tell-the-truth/#626008da436b; MacDonald & Norman, see above n.629, 463.
[707] MacDonald & Norman, see above n.629, 461-463; Friedberg, see above n.690, 39.
[708] MacDonald & Norman, see above n.629, 463.
[709] Ibid.
[710] Lankester, see above n.41, 6.

The Honours (Prevention of Abuses) Act 1925 was enacted to outlaw the misuse of public position for personal gain.[711] In the US, in the 20th century, in the efforts to cleanse public life of abuses, more explicit public sphere conflicts of interest legislation were enacted in the latter part of the 20th century.[712] These include the bribery and illegal gratuities statute[713] and criminal conflict of interest statutes.[714]

In France, conflict of interest laws were introduced in the post-war period. For example, Article 23 of the French Constitution of 1958 prohibits ministers from exercising any other activity. Even though there are no conflict of interest disclosure requirements in the laws *per se*, there is a requirement to disclose assets and income.

In the private sphere, the post-world wars period equally brought about a shift to more stringent regulation. This included regulation on the management of conflicts of interests, particularly for those considered to be fiduciaries. In the US, (for the private sphere) the Securities Act 1933 was introduced by President Franklin D. Roosevelt to reinforce *"the time honoured principle that those who were charged with looking after the money of other people should be held to the old standards of stewardship."*[715] Similarly, the cases of *Woods v. City National Bank and Trust Co. of Chicago*[716] and *Re Equitable Office Bldg. Corp,*[717] dealt with "conflicting interests". In these cases, the term was used in a synonymous fashion with the current term, conflicts of interest.

Likewise in French Company law, it is stated that:

> *"Any agreement between a company and one of its directors or executive directors should be subject to the prior approval of the Board of directors. The same conditions apply to agreements in which a director or chief executive officer is indirectly interested or in which he deals with the company proxy. The agreements entered into between a company and any other company if a director or executive*

[711] Honours (Prevention of Abuses) Act 1925.
[712] Lankester, see above n.41, 9.
[713] United States, Bribery of Public Officials and Witnesses (18 U.S.C. § 201).
[714] United States, The Criminal Conflict of Interests Laws (18 U.S.C. §§ 201-209, 216).
[715] See above n.680, 1, 174.
[716] 1941, 61 S. Ct. 493, 312 U.S. 262, 85 L. Ed. 820.
[717] 1949, D.C.N.Y., 83 F. Supp. 531.

directors of the (former) company is the owner, partner with unlimited liability, manager, director, executive director or board member of the (latter) company, are also subject to prior authorization."[718]

It is evident from these examples that the shift to increased regulation included the management of conflict of interest in the public and private sectors. This was a move from the traditional and individualised approach to conflicts of interest to a macro and institutionalised regulation of the issue. Likewise, they display the various difficulties encountered when addressing conflicts of interest. For instance, they show that the history of the concept has been long and complex. They equally reveal that conflicts of interest are institutional governance problems.[719]

The history and origin of conflicts of interest also display how public interest played a part in the development of theories and scholarship concerning this governance challenge. The quest for better governance that serves society, both in the public and private sectors, led to the evolution of conflicts of interest as an independent ethical concern.

It is common knowledge that identifying the origin, root and history of an issue enables one to better tackle it. The lack of concrete answers and clarity on the origin and history of conflicts of interest have generally contributed to its miscomprehension. This of course, has an impact on addressing and understanding directors' conflicts of interest. It is imperative that conflicts of interest are properly understood before looking at them through a corporate governance lens. In light of these challenges, some of the diverging theories on conflicts of interest and psychological barriers to addressing it will be discussed. This is vital to unravelling the complexities of the concept and exploring what these theories mean when addressing conflicts of interest in general.

4.3 DIVERGING THEORIES ON CONFLICTS OF INTEREST

Before examining some of the theories on defining conflicts of interest, it is appropriate to address key forms of conflicts of interest; apparent, actual, perceived

[718] Article 101 *et seq.* of the Law of 24th of July, 1966 (originally article 40 of the Law of 1867), now Article L. 225-38 of the French Commercial Code; Muller, see above n.678.
[719] Friedberg, see above n.690, 46.

and potential. This is because they present and play an important part in defining conflicts of interest in general.

An actual conflict of interest is often considered to be situational in nature. This implies situations in which a person has a financial, familial, or other personal interest and its very existence poses an impermissible conflict with the official interest which they have a duty to uphold due to their role or position.[720] This conflict exists in the present and does not require any action or inaction to cause it to exist.[721] An example is a person who is both a director of company A and a significant shareholder of company B, which is in partnership with company A.[722] The director might be seen as financially interested in transactions that company A enters into with company B because she has a financial interest in Company B. This conflict might require action as this conflict may be seen as inconsistent with acting in the best interests of company A, and if the conflict exists, the director has a duty to avoid such conflicts.[723] The finding of an actual conflict of interest requires immediate action.[724]

These conflicts are similar to apparent conflicts of interest. They are existing situations or relationships that could reasonably appear to create or involve conflicts of interest, to other parties. They create an appearance of a conflict.[725] An example of an apparent conflict of interest is the *Chesapeake Energy* case. Chesapeake Energy is a petroleum and natural gas production and exploration company. The Company's CEO, Aubrey McClendon, co-owned and actively invested in a hedge fund which invested in commodities produced by the Company. Chesapeake allowed the CEO to take personal stakes in every well it drills as part of his compensation package. In order to pay for stakes in some new wells, he borrowed money, using his stakes in existing wells as collateral from a company to which Chesapeake was trying

[720] North Carolina State Ethics Commission (2006). *"Actual" vs. "Potential" Conflicts*. N.C. Board of Ethics, 9 (3), 1. Retrieved from http://www.ethicscommission.nc.gov/library/pdfs/NewsLetters/news09i3042006.pdf.
[721] New Zealand Government Procurement, Quick guide: conflicts of interest. Retrieved from https://www.business.govt.nz/procurement/pdf-library/suppliers/quick-guide-conflicts-of-interest.pdf.
[722] Rogers, K. (2008, 11 November) Directors Duties – Conflicts of Interest: Conflict of Interests and The Related Authorisation Process. *Cripps*. Retrieved from http://www.cripps.co.uk/directors-duties-conflicts-of-interest-2/; *Industrial Development Consultants Ltd v. Cooley* [1972] 1 W.L.R 443.
[723] Section 175 (1) of the Companies Act 2006.
[724] See above n.720.
[725] Kaplan, J. The problem with apparent conflicts of interest. *Conflict of Interest Blog*. Retrieved from http://conflictofinterestblog.com/2013/10/the-problem-with-apparent-conflicts-of-interest.html.

to sell some assets. McClendon also arranged for personal loans from an investment firm that provided capital for investments in Chesapeake's subsidiaries.[726] Investors complained that these actions had the appearance of a conflict of interest. They argued that Chesapeake might have sold its assets to the company because it agreed to lend the CEO some money to buy new stakes in Chesapeake's wells, rather than because it was in the best interests of the Company to sell the assets to the company.[727] This is a good example because it illustrates that apparent and actual conflicts of interest can overlap. Hence, the *Chesapeake* case could be seen as an example of an actual or apparent conflict of interest.

Potential conflicts of interest are conflicts which are capable of occurring but do not yet exist.[728] They are therefore possible conflicts, born of some financial, familial, or personal situation and can be seen as neutral conflicts. This implies conflicts that are innocuous and do not harm the person or entity to whom a duty of no conflict is owed. So, when a person has a potential conflict of interest, they must exercise appropriate and proportionate caution to ensure that the unrealised, potential conflict does not grow or develop into an actual conflict. This would be in violation of the person's official duty or responsibility as a decision-maker. For instance, directors could have a potential conflict of interest, in the form of an association with an advisor to the company for which they act (e.g. audit, tax, legal, etc.).[729]

Perceived conflicts of interest are not dissimilar to potential or apparent conflicts of interest. They are conflicts where other parties might reasonably think that a person has been compromised due to a (potential) conflict of interest.[730] For example, a shareholder might believe that a company director has competing financial interests in another company. This could be due to being an indirect supplier of the company for which she is a director, and in reality there is no conflict of interest. Perceived

[726] Scharfman, J. (2012, 6 June). For Chesapeake and Dartmouth, are conflicts of interest really worth it? *Pensions & Investments*. Retrieved from https://www.pionline.com/article/20120606/ONLINE/120609953/for-chesapeake-and-dartmouth-are-conflicts-of-interest-really-worth-it.
[727] AP. (2012, 27 April). Chesapeake Finally Ends Absurd Conflict In Which CEO Invests Personally In Company Wells. *Business Insider.* Retrieved from http://www.businessinsider.com/chesapeake-finally-ends-absurd-conflict-in-which-ceo-invests-personally-in-company-wells-2012-4?IR=T.
[728] *Industrial Development Consultants Ltd v. Cooley* [1972] 1 W.L.R 443, per Roskill J.
[729] See above n.722.
[730] See above n.721.

competing financial interests might also be thought to stem from a director's membership in a trade union or professional entity.[731] Perceived conflicts of interest can arise based on the same facts as potential conflicts of interest. However, potential conflicts of interest look at the matter from the position of the conflict holder and perceived conflicts of interest look at it from the perspective of an outsider observing the situation. Perceived conflicts of interest concern instances in which no competing interest actually exists, but the potential for some financial or other personal gain as a result of such association could give other parties the impression that a conflict of interest exists.[732] This could be negative because the perception of conflicts of interest could be detrimental to the trust placed in decision-makers, their expertise and legitimacy of their actions.

It is evident from the definitions above, that conflicts of interest situations are not so clear cut, they sometimes overlap. There might be cases where the line is blurred between apparent, perceived and potential conflicts. What might appear to be an actual conflict of interest may also be seen as a potential conflict of interest to different parties.[733] The perception of the conflicted person is critical, as is what situation she finds herself but so is the perception of outsiders about the conflict.

In fact, two issues that stand out is the perception that conflicts of interest affect the judgement of decision-makers, and the effect that a suspicion of a conflict of interest can have on those for whom decisions are made. This includes cases where the supposed conflicts of interest were intended for a benign purpose such as the alignment of directors' interests with the company through profit-based remuneration packages.[734] The suspicion of a (mismanaged) conflict of interest could contribute to the erosion of trust in the conflicted person and their objective decision-making.

This has implications for the public interest in the regulation of directors' conflicts of interest. This indicates that even perceived or potential conflicts of interest may be

[731] See above n.722.
[732] Clarke, M. (2008, 7 February). Perceived and actual conflicts of interest. *Nautilus.* Retrieved from http://blogs.nature.com/nautilus/2008/02/post_19.html.
[733] See above n.725.
[734] Handschin, L. (2012). Conflict of interest related to management and board payments - profit-based remuneration systems make things worse. In A. Peters & L. Handschin (eds.) *Conflict of interest in global, public and corporate governance.* (pp. 288). Cambridge, CUP.

regulated simply to reinforce the fact that directors ought to act objectively in a company's interest. The regulation may also reinforce the protection of the public from the effect of mismanaged companies.

Having briefly explored these terms, attention will turn to theories on conflicts of interest. This is another challenge to defining conflicts of interest, including directors' conflicts of interest, because of the multiplicity of theories on the concept. To illustrate these issues, some key theories on the concept will be explored.

4.3.1 CONFLICTS OF INTEREST AND CONFLICTING INTERESTS

Contemporary philosophical debate on conflicts of interest can be traced back to an article of Joseph Margolis, *Conflict of Interest and Conflicting Interests*.[735] It was the first in business and professional ethics to raise the theoretical problem of conflicts of interest.[736] Margolis distinguished between conflicting interests and conflicts of interests. He argued that conflicting interests occur in any situation where competing considerations are assumed to be legitimate while conflicts of interest are cases where individuals occupy dual roles which ought not to be performed simultaneously due to the potential for abuse.

Consequently, an example of competing legitimate interests is a situation whereby a company director takes into consideration various stakeholders' interests in managing the company.[737] Another example of a conflict of interest is a (scientist) researcher on a particular drug with a financial interest in the pharmaceutical company seeking to commercialise the drug.[738] Here, the conflict of interest is related to the public interest in public health because the financial interest might interfere with the researcher's objectivity in ascertaining that the drug is truly safe for public use and beneficial to public health. This theory's focus on the distinction between conflicting (competing) interests and conflicts of interest though useful for clarity on the elusive concept, that is, conflict of interest, is flawed. It neglects to recognise that conflicting interests could become true conflicts of interest if sufficient attention is not

[735] MacDonald & Norman, see above n.629, 444; Margolis, see above n.40; Shepherd, see above n.698, 18-20, 339-344.
[736] Davis & Snead, see above n.41, 17-27, 29-32.
[737] See above n.1, 5.
[738] Margolis, see above n.40, 361.

paid to them and due care is not taken. For example, a director's need to recognise different interests could be compromised if the director's interests are too aligned with one particular interest and this might ultimately not be in the best interests of the company.

Also managing conflicting interests could be an excuse to camouflage acting on a conflict of interest as no one can see into the director's mind. Therefore, the distinction between conflicting interests and conflicts of interest could lead to the exclusion of certain situations which are rife with conflict of interest. These are at the "*confluence of conflicting spheres of actions generating conflicting interests."*[739]

4.3.2 CONFLICTS OF INTEREST AND JUDGEMENT VERSUS CONFLICTS OF INTEREST AND TRUST

A. CONFLICTS OF DUTIES, INTEREST AND JUDGEMENT

Michael Davis, in his 1982 article, *Conflict of Interest,* sought to bring legal analysis and conceptual definition to the notion. He criticised Margolis's theory on the distinction between conflicting interests and conflicts of interest. He felt that it was confusing because it does not connect conflicts of interest with the essential element, undermined judgement within a given role. The definition instead places emphasis on conflict between roles.[740] Davis instead advanced a legal analysis of conflicts of interest based on the American Bar Association's Code of Professional Responsibility. He stated that,

> *"on a standard view, person X has a conflict of interest if, and only if, (1) X is in a relationship with another requiring X to exercise judgement in the other's, Y's behalf and (2) X has a special interest tending to interfere with the proper exercise of judgement in that relationship."*[741]

Furthermore, he argued that the crucial terms in the definition of conflicts of interest are therefore, relationship, (proper exercise of) judgement and examining the interest

[739] Friedberg, see above n.690, 41.
[740] Davis & Snead, see above n.41.
[741] Davis, M. (2001). Introduction. In M. Davis & A. Stark (eds.) *Conflict of Interest in the Professions*. (pp. 3). New York, Oxford University Press.

of the two parties.[742] This definition focuses on actual conflicts of interest which affect the exercise of judgement and action of the conflicted individual. This is important to understanding conflicts of interest but neglects to focus on actual conflicts of interest which are situation based. For instance, imagine a company employee who also serves on a public commission which may discuss issues of interests to her employer. This could be seen as a case of situational incompatibility conflict of interest but may not necessarily affect the employee's exercise of judgement or action. Correspondingly, like the first theory on conflicts of interest, it offers an inadequate definition of conflicts of interest.

The different theories mentioned above also have different interpretations of notions like interest, relationship or the emphasis they place on exercise of judgement or fulfilling a duty.[743] These have an impact on theorising on the conflicts of interest. For example, some contend that conflicts of interest occur when an individual or institution has an ethical or legal obligation to act in another's interest but a personal or institutional interest of the individual or institution affects the ability to act in the (best) interest of this party.[744] This definition focuses more on acting in another party's interest and the central element of fulfilling a duty rather than the concept of judgement. Hence, the focus of this definition is more on action and the fulfilment of a duty rather than the psychological element of the exercise of judgement which places more significance on deciding, ruling, making a choice, etc. For instance, a director may enter into a transaction for his company, believing that he is acting in good faith in the interests of the company as required under section 172 of the Companies Act 2006. When in fact unknown to him, his judgment is affected by a conflict of interest such as personal non-financial interest in the company with which his company is entering into a transaction. He would not be in breach of section 172 so this conflict of interest theory would not catch him as it would not recognise or highlight the problem.

Likewise, another theory though not in explicit opposition to Davis's definition, states that a conflict of interest can arise in cases when an individual holds an interest that

[742] Davis & Snead, see above n.41; MacDonald & Norman, see above n.629, 445.
[743] MacDonald & Norman, see above n.629, 445.
[744] Boatright, J. R. (2001). Financial Services. In M. Davis & A. Stark (eds.) *Conflict of Interest in the Professions*. (pp. 219). New York, Oxford University Press.

could lead to undue partiality in the execution of her professional and/or fiduciary duty owed to another (the principal).[745]

These different definitions spell different meanings for the notions of actual in contrast to potential conflicts of interest. Focusing on acting on another's behalf and the fulfilment of a duty is useful for differentiating between actual and potential conflicts of interest. It focuses on actions and inactions, whereas a focus on the exercise of judgment makes the distinction more difficult as it is more intangible.

B. CONFLICTS OF INTEREST AND THE VIOLATION OF TRUST

Certain theorists like Luebke define conflicts of interest, focusing on conflicts and their potential to undermine trust. The potential violation of trust on the part of the party with the potential or actual conflict of interest and reliance of the other is what is seen as problematic. This is because the other party is not properly informed of the situation so as to decide whether to withhold or limit their reliance. Essentially, conflicts of interest are a breach of trust. Therefore, the quality of judgement, affections, desires and use or misuse of information are not really significant, except incidentally.[746] This definition is useful for the distinction between many forms of conflicts of interest because it could include all types of violation of trust. It is nonetheless problematic. This is because the lack of proper consideration of affections, use or misuse of information reduces the types of conflicts of interest that are recognised or counted significantly. It excludes conflicts of interest born of loyalty, familial or relationship ties and information asymmetry. This includes conflicts between directors and companies due to the fact that shareholders do not always trust directors. This was discussed briefly in chapter 2.

Likewise, conflicts of interest are also defined in terms of opportunistic exploitation and the violation of trust.[747] The distinction between 'conflicting interests' and 'conflicts of interest' are not seen as necessary to defining conflicts of interest.[748] The

[745] Stark uses fiduciary here to mean the higher standard of responsibility that is typically expected in professional roles. Stark, A. (2005). Why are (some) Conflicts of Interest in Medicine so uniquely vexing? In. M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.) *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 152-153). Cambridge, CUP.
[746] See above n.687, 67.
[747] Friedberg, see above n.690, 47.
[748] Margolis, see above n.40, 361–372; See above n.1, 6.

crux of the matter is the detrimental effect that mismanaged conflicts of interest have on decision-making.[749] This is because they could affect trust in the decision-makers, through the distortion of objectivity and independence in decision-making.[750] These conflicts could occur on all levels of governance and have the capacity to influence decision-making in the management of companies and state institutions alike. These lead to inappropriate outcomes and undermine the proper-functioning of both public institutions and private institutions or companies.[751]

This definition is convincing because decision-makers, irrespective of the sector, especially in this era of global power and globalisation, depend on trust by the principal or trustor[752] in the decision-maker's expertise.[753] This is the capacity for the decision-maker to be knowledgeable about the subject-matter on which the trustor expects her to make a decision, coupled with the ability to make such decision impartially.[754] In fact, the desire to retain and build trust has become heightened so much so that even 'unexploited' conflicts of interests are seen as worrisome, be it in government, NGOs, professions or companies.[755] This is because as discussed earlier, decision-makers rely on a stock of trust which is in peril when and if people suspect that decision-makers, who are inherently hard to monitor, are in a position to improperly gain from their privileged status as decision-makers.[756] If the trust is imperilled, the expertise could be imperilled too because the decision-maker's capacities are questioned. Consequently, these conflicts can corrode trust and shake the foundations of the legitimacy of a decision-maker.

4.3.3 CONFLICTS OF INTEREST, CORE IDEA THEORY AND SPECIAL KINDS OF CONFLICTS

Another theory on conflicts of interest focuses on ascertaining the core idea at the heart of it. This implies getting past what is considered the normative and institutional

[749] See above n.1, 3.
[750] Molfessis, N. (2011). *Les mouvements du droit face aux conflits d'intérêts.* (pp. 1). Paris, LexisNexis.
[751] See above n.1, 3-38.
[752] See above n.1, 13-18.
[753] See above n.703.
[754] Uruena, R. (2012). Conflict of Interest in Global Governance In L. Handschin & A. Peters (eds.) *Conflict of Interest in Global, Public and Corporate Governance*. (pp. 93). Cambridge, CUP.
[755] MacDonald & Norman, see above n. 629, 464.
[756] Ibid, 464.

aspects associated with the nature of a profession or professional obligation to clients or the state.[757] An archetypal example of a conflicted professional is a doctor confronted with a situation of financial conflict of interest. This is her interest in a pharmaceutical company which funds the dissemination of her research which conflicts with her duty to prescribe the right medication for a patient. This is because one of options of medication available to the patient includes a new drug commercialised by the pharmaceutical company in which she has (financial) interests. This drug is good for the treatment of the ailment but not necessarily the best for the patient and is more expensive. The doctor might feel obliged to prescribe the drug due to her financial interest. After all, it would still treat the aliment. Looking at this example, it is advanced that conflicts of interest are different from generic principal-agent problems of shirking. Here, the doctor does not shirk her duty of treating the patient and providing adequate medical care. However, she is not acting in the best interest of her patient if she prescribes the drug without informing the patient of (cheaper) alternatives, and her interest in the commercialisation of the drug.

In light of the example above, it is surmised that in the core idea theory, a person has a conflict of interest because of the situation in which they find themselves rather than simply due to the actual state of their desires, interests, and motives. This makes the distinction between actual and potential conflicts of interest purely situational. This can be problematic as it excludes the very crucial psychological aspects of addressing conflicts of interest. It also ignores human limitation due to bounded ethicality and bounded rationality, to be discussed later in this chapter.

4.3.4 CONFLICTS OF INTEREST AND THE ECONOMIC MODEL OF RATIONALITY/AGENCY THEORY

The economic model of rationality has influenced definitions on conflicts of interest. This theory states that it is not the interests itself that is problematic but what is important is when one is expected to act for others and instead one centres one's interests.[758] This denotes that the problem is not the fact that the principal (client) and agent (individual) have egoistical preferences but rather that they have different

[757] Ibid, 447.
[758] Gauthier, D. (1986). *Morals by Agreement*. (pp. 7). Oxford, Clarendon; Hausman D. M., & McPherson, M. S. (1996). *Economic Analysis and Moral Philosophy*. (pp. 52-53). Cambridge, CUP.

preferences and interests which are not aligned or compatible.[759] This may be associated with agency theory which concerns how individuals manage situations involving goal incompatibility between multiple persons,[760] and trying as much as possible to align the goals of the principal(s) and agent(s).[761]

Essentially, it has been argued that conflicts of interest exist only in fiduciary relationships.[762] Fiduciary finds its origin from the Latin *fiducia*, meaning trust or faith. This signifies a person (trustee) with the power and obligation to act for another (often called the beneficiary) in circumstances which require total trust, good faith and honesty. Fiduciaries are held to a standard of conduct and trust above that of strangers or in casual business dealings. Consequently, they must avoid self-dealing or other forms of conflicts of interest. The best interest of the principal must always be primary, and absolute openness is required of the fiduciary in dealings with the principal (beneficiary).[763]

Using the trust or agency theory analogies (without taking the formalistic legal approach that distinguishes both notions)[764] privileges the relationship element in defining conflicts of interest. There appears to be a continuum between agency and trust as both notions are useful for describing the fiduciary relationship between the fiduciary and the person or entity for whom he is acting. These relationships are present in many spheres of law; corporate, public, and international law. In these relationships, a conflict of interest encountered by an individual may materialise in cases where they exceed the limits of their mandate, authority or power, and act *ultra vires.* This is because the individual is pursuing her own interests, so it is not the ultra vires act that creates the conflict of interest. It is instead the conflict of interest that creates the ultra vires act. The problem could also stem from the fact that the individual is using her power in a manner which is contrary to the official interests that she ought to be upholding.

[759] Heath, J. (2009). The Uses and Abuses of Agency Theory in Business Ethics. *Business Ethics Quarterly,* 19 (4), 497, 502.
[760] Dees, see above n.105.
[761] Ibid; see above n.759.
[762] See above n.1.
[763] *Bristol & West Building Society v. Mothew* [1998] Ch 1, CA; EWCA Civ 533.
[764] See above n.1, 14.

These types of actions may be considered illegal or unacceptable actions, acknowledged and regulated in corporate and public law in many legal systems.[765] For example, the Organisation for Economic Co-operation and Development (OECD)[766] issued some guidelines on conflicts of interest, *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences*. In these guidelines the theory of fiduciary relationship between public officials and citizens is addressed.[767] This is done implicitly in the conceptualisation of office-holders as the state's and citizens' trustees.[768] These office-holders are encouraged not to exploit their office for their own ends.[769]

In the private sphere, fiduciary relationships and ensuing obligations are particularly potent in the management of companies. Here the members of the board of directors' general obligation is to act in the best interests of the company, exercising a duty of care and duty of loyalty *vis-à-vis* the company.[770] There are legal ramifications for directors acting in a manner which can be seen as overstepping their authorisation to act on behalf of the company or for abusing their powers. This will be discussed in greater detail in chapters 5-7 of this thesis.

From the various definitions, one thing is clear, conflicts of interest can occur at all levels of governance,[771] and in all areas of human relationships.[772] In addition, variations in the understanding of the concept of conflicts of interest illustrate some of the challenges to defining it. Each theory fails to adequately or solely explicate conflicts of interest. Yet they disclose that conflict of interest is not a straightforward

[765] Ibid; Peters, A. (2012). Managing Conflict of Interest: lessons from multiple disciplines and settings In L. Handschin, & A. Peters (eds.) *Conflict of Interest in Global, Public and Corporate Governance*. (pp. 366-368). Cambridge, CUP.
[766] The Organisation for Economic Co-operation and Development (OECD), Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences. Retrieved from www.oecd.org/gov/ethics/conflictofinterest.
[767] Ibid.
[768] See above n.1, 14; See above n.765; See generally Craig, P. P. (2012) (7th Ed). *Administrative Law*. London, Sweet & Maxwell; Section 40 (1) of the English Companies Act 2006.
[769] See above n.765, 361.
[770] See Article 717(1) of the Swiss Civil Code: IV. Duty of care and loyalty – "The members of the board of directors and third parties engaged in managing the company's business must perform their duties with all due diligence and safeguard the interests of the company in good faith." See above n.1, 14; See above n.765, 361.
[771] See above n.1.
[772] See above n.1, 6; Argandona, A. (2004). Conflicts of interest: the ethical viewpoint. University of Navarra. IESE Business School. Working Paper 552. Retrieved from https://media.iese.edu/research/pdfs/DI-0552-E.pdf.

moral issue. It requires a great deal of subjective understanding. It is subject to varying perceptions and perspectives in interpretation. It is evident from these conceptual discussions that conflicts of interest are unique and peculiarly difficult to grasp as a substantive and normative concept. This is fundamental to understanding and coming to terms thoroughly with directors' conflicts of interest. It is clear that defining conflicts of interest is fraught with challenges and particularities, as was the case with public interest.

4.4 PSYCHOLOGICAL BARRIERS TO UNDERSTANDING AND DEFINING CONFLICTS OF INTEREST

4.4.1 CONFLICTS OF INTEREST: BEHAVIOURAL PROBLEMS

A. MISGUIDED INTUITIONS ABOUT UNDERLYING PSYCHOLOGICAL PROCESSES

Another significant challenge to defining and understanding conflicts of interest is linked to the erroneous intuitions about underlying psychological processes.[773] This is associated with acknowledging the existence of these conflicts. This is an essential first step to addressing these issues.[774] Conflicts of interest are essentially behavioural problems.[775] They have not always been perceived this way. The pervasive nature of (mismanaged) conflicts of interest is a subject that has unfortunately not been thoroughly grasped by policy makers or regulators. Some theorists point out that one of the reasons conflicts of interest has been so pervasive is that many people consider succumbing to a conflict of interest as a matter of corruption whereas it is more likely to occur from unconscious and unintentional processes.[776] This includes influential decision-makers such as U.S. Supreme Court Justice Scalia who made the choice not to recuse himself from a case involving his

[773] Bazerman, Cain, Loewenstein & Moore, see above n. 38, 3.
[774] See Tenbrunsel, A.E. (2005). Commentary: Bounded Ethicality and Conflicts of Interest. In M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.) *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 102). Cambridge, CUP.
[775] Friedberg, see above n.690, 46.
[776] Banaji, M. R., Bazerman M. H., & Chugh, D. (2005). Bounded Ethicality as a Psychological Barrier to Recognising Conflicts of Interest. In M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.) *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 74-91). Cambridge, CUP.

friend as he believed that he could not be "bought so cheap."[777] This is an indication of the prevalence of conflicts of interest and the lack of understanding surrounding it.[778]

B. UNCHECKED PSYCHOLOGICAL PROCESSES

It can be said that although human decision-making is subject to numerous limitations of unrestricted psychological processes[779] and irrationality,[780] people are inclined to consider their own ethicality to be unbounded. In fact, humans, particularly (key) decision-makers, are psychologically encouraged to sustain and preserve a high esteem of themselves. They think that they are ethical, knowledgeable, competent, deserving, and thus, resistant to ethical challenges.

Individuals consider their resistance to temptation to be stronger than any conflict of interest situation in which they might find themselves due to the belief in their moral competency. They see any gains as appropriate because of their competence and they consider themselves to be deserving of such gains. This presents a tangible barrier to recognising and addressing conflicts of interest. This rose-tinted view that decision-makers have of their own ethicality results in less than ideal ethical decisions. This has consequences for the definition of conflicts of interest. It also impacts on finding appropriate solutions to recognising and comprehending conflicts of interest when they appear or occur.[781]

On one hand, a person faced with an actual conflict of interest concerning hiring a family member might believe that there is no need to inform the company of this situation. She might believe that she can make an objective decision in choosing the

[777] Mears, B. (2004, 6 May). Scalia won't recuse himself from Cheney case. *CNN International.com*. Retrieved from http://edition.cnn.com/2004/LAW/03/18/scalia.recusal/; Bazerman, Cain, Loewenstein & Moore, see above n. 38, 3.
[778] See above n. 776, 75.
[779] Ibid, 74.
[780] See generally Simon, H. A (1957). *Models of Man*. New York, Wiley; Simon, H. A. (1983). *Reason in Human Affairs*. Stanford, Stanford, University Press.
[781] See above n.776, 90; Miller, D.T. (2005). Commentary: Psychologically Naïve Assumptions about the Perils of Conflicts of Interests. In M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.) *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 126-129). Cambridge, CUP; Davis, M. (2012). Empirical research on Conflict of interest: a critical look. In L. Handschin & A. Peters (eds.) *Conflict of Interest in Global, Public and Corporate Governance.* (pp. 55-60). Cambridge, CUP; McMunigal, K. (1992). Rethinking Attorney Conflict of Interest Doctrine. *Georgetown Journal of Legal Ethics*, 5, 823; MacDonald & Norman, see above n. 629, 456-459.

right person for the role as she is a good, moralistic and competent person. Such decisions underestimate the pervasiveness of conflicts of interest and how family ties could act as a genuine pull on the person's objective decision-making. She might believe that she chose her family member because he is the best person for the job. This neglects the fact that the emotional pull and interest in helping this family member have played an important role in her decision-making.

On the other hand, being over-zealous and rejecting the family member's job application without considering it can also be problematic. She might do so in order to avoid being seen as playing into favouritism. This action indicates an underestimation of the pervasiveness of the conflict of interest. This is because in this scenario too, it has influenced the objective decision-making of the person.

4.4.2 CONFLICTS OF INTEREST: BOUNDED ETHICALITY

A. PSYCHOLOGICAL BARRIER OF BOUNDED ETHICALITY

Another repercussion of the psychological barrier of bounded ethicality in decision-making (which is not limited to conflicts of interest) is a resulting lack of understanding of the impact of self-interest. This is because an individual might not thoroughly understand the pervasive nature of conflicts of interest and the impact on their behaviour. This is particularly of concern in conflicts of interest in organisational settings[782] or affecting other collective action.[783]

B. AMBIGUOUS AND RELATIVE NATURE OF CONFLICTS OF INTEREST

Bounded ethicality is amplified by the abstruse and relative nature[784] of conflicts of interest as they are inevitable aspects of social human interactions. They can be profitable for an organisation or individuals when properly managed. They can also be tremendously detrimental and damaging for an organisation, individuals or society

[782] Tyler, T.R. (2005). Managing Conflicts of Interest within Organizations: Does activating social values change the impact of self-interest on Behaviour? In. M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.) *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 13-14). Cambridge, CUP; Dawes, R. (2005). Commentary: On Tyler's "Managing Conflicts of Interest within Organizations". In. M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.) *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 36-40). Cambridge, CUP

[783] Friedberg, see above n.690, 39.

[784] See above n.776, 74.

at large if mismanaged. Often, there is a fine line between both sides. This ambiguity creates complexities in individuals' minds.[785]

Like the human tendency to act self-interestedly or to believe that one is above temptations, the ambiguous nature of conflicts of interest, creates a dangerous underestimation of the detriment that a mismanaged conflict of interest can cause.[786] An excellent example is the case of a business advisor or consultant for a company requiring consultation services on entering a market. The business advisor is paid using fixed and variable remuneration. This means that a certain amount is paid for undertaking the task and a bonus amount is paid for successfully helping the company to enter the market. Here, the interests of the business advisor and the company coincide but there is a potential conflict of interest. In this case, the potential conflict of interest is somewhat inevitable and neutral at this stage. It may be positive or negative for the company. It can be profitable for the company as the business advisor is motivated by financial incentives to succeed. It can also be detrimental to the company if the business advisor lets his self-interest get out of hand, whereby he is willing to do whatever it takes to succeed including taking actions that may not be in the long-term interest of the company. Such actions could include paying a bribe to public officials in order to get access to said market.[787] This is applicable to company directors too and is one of the reasons why directors' remuneration is a controversial issue.[788]

In the above examples, these actions could also constitute a conflict of interest but the conflict of interest is still relatively ambiguous until acted upon. It could lead to a satisfactory result or it could be disastrous. This highlights the relativity and ambiguity of conflicts of interest.

[785] Friedberg, see above n.690, 49.
[786] Barker, B. A., Cameron, K. S., & Caza, A. (2004). Ethics and Ethos: The Buffering and Amplifying Effects of Ethical Behaviour and Virtuousness. *Journal of Business Ethics*, 52 (2), 169.
[787] Bribes often create conflicts of interest as the bribed person has an interest in the receipt and retention of the bribe. See above n.1, 30.
[788] See above n.1, 23; see above n.43, 8.

4.4.3 CONFLICTS OF INTEREST AND DISCRETION

Another related psychological obstacle to understanding conflicts of interest is the issue of discretion which is afforded to many individuals in decision-making roles. Discretion allows for possibilities of opportunistic exploitation of the operational potentialities of a given position.[789] It appears to be inherently part of the *"structural ubiquity of conflicts of interest"*.[790] The question therefore is how to control discretion. How can discretion be effectively controlled when the execution of tasks associated with a role can be set only partially? The executive of such tasks often depends on the willingness, engagement and diligence of the jobholder to muster and utilise her intelligence in a virtuous manner. Herein begins the problem of conflict of interest.[791] Notions such as ethical or virtuous conduct, measuring the willingness, goodwill, engagement or commitment, and diligence are all intangible issues which must be addressed in order to deal with some of the psychological aspects of conflicts of interest.

4.4.4 CONFLICTS OF INTEREST: INTRA-PERSONAL CONFLICTS AND CONFLICTEDNESS

By the same token, the motives or intention of a decision-maker in contrast to the effects and processes or the results of conflicts of interest are significant. This is because conflicts of interest are similar to intra-personal conflicts. Being conflicted is considered a state of mind of the person invested with the power to make decision on behalf of others. Of course, this state of mind can only be inferred externally. It is thus difficult to verify from the outside if a conflict has had a decisive impact on the decision-making process, and whether it was a causal factor in the ensuing decision.[792] This is difficult to know as is evident from the example of the person who employed her relative, mentioned earlier in this chapter.

Also a doctor facing a potential conflict of interest situation concerning the care of a particular patient can only be inferred to be in a conflicted state of mind. One cannot verify that the potential conflict has caused him to be conflicted or that the conflict has

[789] Friedberg, see above n.690, 47.
[790] Ibid, 45.
[791] Ibid, 46.
[792] Peters, see above n.765, 363.

had a decisive impact on his decision with regards to the best possible care for his patient. Accordingly, this notion of conflictedness contributes to the psychological barrier to comprehending conflicts of interest. Only the person facing the issue has a direct knowledge of the true extent of the impact a conflict of interest has on the decision to be made. And of course, not even they may be aware of this, due to psychological biases. Nevertheless, being aware of this conflictedness generally means that there is a better understanding of conflicts of interest. This is an awareness that is sophisticated and allows for regulation without the burden of appearing able to resist temptations.

In light of the foregoing, it is clear that there are several psychological challenges to understanding conflicts of interest. The notion, conflicts of interest, has been revealed to be subject to many interpretations. It requires comprehension and proper estimation of the numerous psychological barriers in order to effectively deal with the issue.[793] These challenges confirm the assertion that conflicts of interest in general are novel issues. They require multi-disciplinary study in order to face the challenges and obstacles to better managing the issue. This applies to directors' conflicts of interest. One discipline or theory on its own cannot provide a thorough and mature response to conflicts of interest as it is a cross-governance issue.[794]

Having an awareness of these psychological barriers to addressing and tackling conflicts of interest reinforces a more robust approach to looking at conflicts of interest. This is significant when looking at directors' conflicts of interest, even when their management is seen as being of public interest. This is because it stops the issue from being seen in a moralistic and naïve way. Instead, conflicts of interest are seen, rightfully, as inherent in human relationships and interactions. This pragmatically highlights and normalises the limitation of humans.

Therefore, the focus of the discussion and exploration of conflicts of interest shifts from a guilty-ridden self-flagellation inducing exercise to a more pragmatic problem-solving discussion. For directors, the focus then is how to ensure that their conflicts of interest are better managed and in the best interests of those for whom these conflicts ought to be managed. This may include the company and its stakeholders,

[793] MacDonald & Norman, see above n.629, 459.
[794] See above n.1, 6.

including society.[795] One thing that can be drawn out from the diverse aspects of the development of conflicts of interest is that public interest is implicitly incorporated in the discourse. This includes the history, the theories and psychological barriers to addressing conflicts of interest.

Nevertheless, in order to further examine directors' conflicts of interest, it is essential to reflect broadly on different types of conflicts of interest and what they mean.

4.5 CONFLICTS OF INTEREST: TYPOLOGY

Conflicts of interest can be divided into 3 types.[796]

1. Conflicts between due and undue interests, subdivided into:
    - Undue personal interests;
    - Undue financial interests; and
    - Undue non-personal interests.

Other types of conflicts of interest are[797]:

2. Multiple roles,
3. Multiple principals (also known as "principal–principal conflict").

4.5.1 THE CONFLICT BETWEEN DUE AND UNDUE INTERESTS[798]

Undue interests are conflicts between due and undue interests are evident in various provisions. They are also known as improper influence. The word, 'due' here is taken to mean legitimate interests. For example, in the OECD's aforementioned *Managing Conflict of Interest in the Public Service*, the distinction between due and undue interests is addressed. Conflicts of interest in the public sphere are defined as conflicts that arise when public officials have private capacity interests,[799] "which could improperly influence the performance of their duties".[800]

---

[795] This will be the objectives of the discussion in chapters 5-7 of this thesis.
[796] There is no particular consensus on the three main types of conflicts of interest- Palazzo, G., & Rethel, L., (2008). Conflicts of Interest in Financial Intermediation. *Journal of Business Ethics*, 81 (1), 193; Section 4 of the Canadian Conflict of Interest Act (Statues of Canada, ch. 9, s. 2); Boatright, J. R. (1992). Conflict of Interest: An Agency Analysis In. N. E. Bowie & E. Freeman. (eds.) *Ethics and Agency Theory*. (pp. 187). New York, OUP.
[797] See above n.1, 28.
[798] Margolis, see above n.40, 362; See above n.1, 19.
[799] See above n.1, 19.
[800] See above n.766, 7; Article 12 of the Council of Europe Criminal Law Convention on Corruption, ETS n°.173 (27 January 1999).

Likewise, the Council of Europe, a European advisory international organisation on human rights, combatting corruption and terrorism, makes a similar contribution. In its Convention of 1999 (Criminal Law Convention on Corruption) aimed at combating corruption, it distinguishes between due and undue interests.[801] Article 12 of the Criminal Law Convention on Corruption criminalises influence peddling. This signifies the exertion of improper influence by any person on the decision-making of an officeholder, public or private. Undue interests or influences are generally seen as alien to a particular decision to be taken.

The examples indicate that regulators identify a source of conflicts of interest as the conflicts between proper and improper influences on decision-making in the interest of society. This highlights that public interest plays a role in the typology of conflicts of interest.

One can also identify this conflict of interest typology through an application of the agency theory.[802] The principal's interest is often seen as the primary interest which ought to be at the forefront of the decision-making whereas the agent's interest is seen as secondary to the primary's interests.[803] The interfering secondary interest includes all influences, loyalties, financial interests, other personal benefits, be it social, political, psychological, etc.[804] Protection of private interests have also played a role in the typology of conflicts of interests. This shows that defining conflicts of interest is a governance issue affecting public and private interests alike. The significance of conflicts of interest for private and public interests has an impact on the comprehension and regulation of directors' conflicts of interest. This will be revealed in chapters 5 and 6 of this thesis.

This leads directly to the subdivisions of undue or improper interests.

[801] Council of Europe Criminal Law Convention on Corruption, ETS n°o.173 (27 January 1999).
[802] See above n.1, 20.
[803] Davis, see above n.781, 54.
[804] See above n.69, 485; U.S. Securities and Exchange Commission. (2014, 20 May). SEC Charges Former Deloitte Chief Risk Officer for Violations of Auditor Independence Rules. Retrieved from http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541865277.

A. UNDUE PERSONAL INTERESTS

Undue personal interests are the personal interests of an officeholder acting for another and who allows such interests to influence or affect the making or outcome of the decision.[805] A typical example is a director who allows his membership or affiliation with particular groups to influence his decision-making for the company for which he is a director.[806] This could include family, business or social connections.

B. UNDUE FINANCIAL INTERESTS

Undue financial interests[807] are cases when a decision-maker is tempted to allow a (personal) pecuniary interest to have an impact (in a detrimental fashion) on a professional or official decision.[808] Such conflicts exist in financial arrangements and compensation schemes.[809] An example is an auditor or audit firm which might be inclined to beautify or embellish a negative audit prediction, especially if it is a small firm and the client is long-standing.[810] It might do so due to the expected benefit of consulting fees. Another example of undue financial interest is a director engaged in self-dealing[811] or exploiting a corporate opportunity.[812]

C. UNDUE NON-PERSONAL INTERESTS

Undue non-personal interest[813] refers to situations in which other non-personal interests such as public or professional ones (as opposed to purely personal interests) may in a legitimate decision-making context be considered undue.[814] An excellent example is a commercial arbitrator or a judge making a decision on a case

---

[805] See above n.1, 22 ; French financial regulator (AMF)'s decision : Décision de la Commission des sanctions du 16 mai 2014 à l'égard de MM. Joseph Raad, Charles Rosier, Abraham Benhamron et Thomas Xander.

[806] See above n.766, 7; See above n.69, 481.

[807] Rankin, J. (2013, 9 September). Deloitte fined £14m for conflict of interest over MG Rover. *The Guardian*. Retrieved from http://www.theguardian.com/business/2013/sep/09/deloitte-record-fine-mg-rover-deal/print.

[808] See above n.1, 23; Neate, R. (2011, 22 August). Ratings agencies suffer 'conflict of interest', says former Moody's boss. *The Guardian*. Retrieved from http://www.theguardian.com/business/2011/aug/22/ratings-agencies-conflict-of-interest.

[809] See above n.43, 8.

[810] See above n.1, 24-25; Knahr, C. & Reinisch, A. (2012). Conflict of Interest in International Investment Arbitration. In L. Handschin & A. Peters (eds.) *Conflict of Interest in Global, Public and Corporate Governance.* (pp.103). Cambridge, CUP.

[811] *Aberdeen Rly Co v. Blaikie Bros* (1854) 1 Macq. 461, 471-472; Hopt, see above n.45, 7.

[812] *Furs Ltd v. Tomkies* (1936) 54 CLR 583.

[813] Section 4 of Canadian Conflict of Interest Act, (Statues of Canada, ch. 9, s. 2).

[814] See above n.1, 25.

and where there is evidence (i.e. media statements) indicating that his opinion has already been formed prior to looking at the case.[815] This cuts across the need for neutrality and impartiality on his part.

4.5.2 THE CONFLICT BETWEEN MULTIPLE ROLES

The second type of conflicts of interest is that between multiple roles.[816] This type of conflict arises in cases where a decision-maker concurrently fulfils two or more official roles and wears multiple hats at the same time.[817] This could be problematic. An example is a university lecturer at a university who must grade her students, but also write recommendations for them to push them on to the job market. The lecturer's grading might be influenced by the desire to attract students to the university, the course or module taught as well as the desire to get more funding for the particular course or module.[818] This could be seen as a potential conflict.

Similarly, a director's secondary role as a trustee on a charity board might be problematic. This is the case if the charity is seeking corporate sponsorship and donations. The director could also be a trustee of a charitable organisation which has influence on government policy which could also be problematic due to the conflict of interest between multiple roles.[819] Another example is a member of a company's board of directors or executive committee who at the same time has financial interests in a huge creditor of that company.[820]

The *Bsirske* case is a tangible example of an actual conflict of interest of multiple roles. Frank Bsirske was the chairman of VERDI. It is a powerful trade union in Germany which collectively represents employees in financial institutions, public services, health services, tele-communications, etc. He was also the employee representative of the supervisory board of Lufthansa Corporation. It was successfully

[815] Kleiman, E. (2011). Arbitrage et conflits d'intérêts : une année mouvementée. Les mouvements du droit face aux conflits d'intérêts. *La Semaine juridique*, *Edition Générale* 52 (6), 26.
[816] See above n.1, 26.
[817] Stark, A. (2001). Comparing Conflicts of Interest across the Professions. In. M. Davis & A. Stark. (eds.) *Conflict of Interest in the Professions.* (pp. 336-341). New York, OUP. ; Shapiro, S. P. (2002). *Tangled Loyalties: Conflict of Interest in Legal Practice*. (pp. 4-5). Ann Arbor, University of Michigan Press.
[818] See above n.1, 26-27.
[819] See above n.722.
[820] See above n.1, 27.

argued in court that he was in a conflict of interest involving multiple roles when Lufthansa's employees were called on to strike by VERDI. This led to the award of millions of euros in damages to Lufthansa.[821]

4.5.3 THE CONFLICT BETWEEN MULTIPLE PRINCIPALS

The third type of conflicts of interest involves cases where a decision-maker serves two different principals. This is sometimes seen as an impersonal conflict of interest or principal-principal conflict. Decision-makers are faced with clashing interests of the different principals for whom they act.[822] In this case, the interests of both principals are primary as they are central to the fiduciary relationships. Yet, they raise a concern because the conflict between both interests makes it more difficult for the agent to be objective in evaluating both interests.[823] This is further complicated by cases where the agent is driven by the desire to obtain personal gains (undue personal interests).[824]

An excellent example is a lawyer who acts for both adversaries in litigation. There are many examples in the public sector of public officials with simultaneous private/public sector involvement.[825] In corporate governance, a good example is the case of non-executive directors holding multiple directorships in companies in the same, similar or related sectors. The *Brsirske* example mentioned above is also an example of conflict of interest between multiple principals, the company and the trade union.

4.6. CONCLUSION

An examination of the history and theories of conflicts of interests, psychological barriers as well as exploration of typologies have served to unveil the challenges to defining conflicts of interest. They highlight the complexity of defining conflicts of

---

[821] Du Plessis, J. J., Großfeld, B., Luttermann, C., Saenger, I., Sandrock, O., Casper, M. (2012). *German Corporate Governance in International and European Context* (pp. 170). Springer-Verlag Berlin Heidelberg; Hopt, see above n.45, 6.

[822] Palazzo & Rethel, see above n.796, 12; Boatright, see above n.796, 193-194.

[823] See above n.1, 27; Hicks, S. R. C. (1995). Conflicts of Interest. In. J. K. Roth. *International Encyclopaedia of Ethics* (pp. 183). London & Chicago, Fitzroy Dearborn Publishers.

[824] See above n.1, 27.

[825] Bogaert, A. (2013, 18 February). Deux ans après le Médiator, ces experts toujours en conflit d'intérêts. *Terraeco.net*. Retrieved from http://www.terraeco.net/Experts-les-lecons-du-Mediator-ont,48227.html; Campbell, D. (2013, 14 March). GPs' links to private healthcare firms spark fears of conflict of interest. *The Guardian*. Retrieved from http://www.theguardian.com/society/2013/mar/14/gps-clinical-commissioning-groups-private/print.

interest in general. They are revelatory of some of the difficulties of comprehending directors' conflicts of interest.

Theories incorporating the economic model of rationality such as agency theory also reveal that conflicts of interest are of private interests. Yet, conflict of interest theories such as fiduciary theory and notions of trust and opportunistic exploitation indicate that conflicts of interest are equally of societal interest. Hence, conflicts of interest are a cross-governance issue. These theories provide a background to exploring directors' conflicts of interest. They provide an insight into how conflicts of interest, including directors' conflicts of interest might be of public and private interests. The next chapter of this thesis will focus on reviewing these interests. This will be undertaken through an analysis of the development of companies, the regulation of directors' conflicts of interest and underlying rationales.

CHAPTER FIVE

PUBLIC ORDERING AND PURPOSE IN THE DEVELOPMENT OF COMPANIES IN THE UK: SIXTEENTH TO NINETEENTH CENTURIES

5.1 INTRODUCTION

Corporate entities[826] and their governance have been the subject of very important societal considerations for many years and certainly as early as the 16th century. Although it is often argued that companies are/were primarily born of private ordering,[827] this is a correct but incomplete observation. In this chapter, I will argue that corporate entities are/were also subjects of public ordering. It is therefore more correct to state that they are/were subject to dual ordering; public and private.

This chapter contends that public ordering has played an important and often complementary part in the development of companies in Britain. I would add that public ordering of companies is/was due to the public purpose or interest in companies. Public interest motivations such as the reduction of fraud and stability of the economy and companies as vital for economic prosperity. These motivations have influenced the legislator, the government and the judiciary even during the era of early corporate forms. I argue that even though public interest and public ordering have evolved over time, they remain important parts of the development of companies in Britain. Consequently, though private ordering is often the focal point of discussions on the emergence of the corporate form, it is imperative to highlight the public interest or public ordering of companies. This is because the development of companies is not mono-causal, purely evolutionary or reactionary. It is instead influenced and characterised by a number of factors such as the role of the state, changes in societal attitudes and socio-political evolution.[828] The state's attempts to balance the interests of various groups as well as inter and intra class conflicts are also important factors which influenced the ordering of companies.[829]

---

[826] They would have been termed corporations then, more specifically corporations established by Royal Charter or by Private Act of Parliament. Dari-Mattiacci, G., Gelderblom, O., Jonker, J., & Perotti, E. C. (2017). The emergence of the corporate form. *Journal of Law, Economics, and Organization*, 33 (2), 193, 193-4.

[827] Jensen & Meckling, See above n.88, 305; Easterbrook & Fischel, see above n.116.

[828] Sugarman, D., & G. R. Rubin. (1984). (eds.) *Law, economy and society, 1750-1914: essays in the history of English Law*. (pp. 1, 10-11, 69, 70-71). Abingdon, Oxon., Professional Books Limited.

[829] Ibid, 64-65.

Therefore this chapter will review the historical development of companies to draw out public ordering in the regulation of companies. The aim of this exercise is to reveal that companies are subjects of dual ordering. This has an impact on the societal role of companies and the purpose which they might be said to serve. By revealing that the ordering of companies is both private and public, it will be shown that regulation in light of public interest is a familiar aspect of the development of companies.

By looking at public ordering of companies in this chapter, it is demonstrated that public interest in the regulation of companies is not a new phenomenon. It will be shown that public interest has been present in the running of companies even in their very early days. There were mandatory provisions governing directors' conduct and in particular, regulating conflicts of interest.

In light of this, the chapter will be divided into the following sections. The chapter will begin with an examination of public ordering and corporate entities in the 14th to 17th centuries. The South Sea Bubble and the Bubble Act of the 18th century, and other public ordering of companies and directors' conduct will then be explored. The subsequent repeal of the Bubble Act and company law development from 1825-1856 will be reviewed. Likewise, public ordering after the development of company law in 1856 will be analysed. Some concluding remarks will ensue on public ordering and the regulation of companies, particularly directors' conflicts of interest.

For the purpose of this chapter, corporate entity will be used to signify both incorporated[830] and unincorporated business entities.[831]

[830] There were a variety of corporations – ones incorporated by private act of parliament and those incorporated by Royal Charter. Those are quite different to the vehicles used since 1855 which allowed incorporation under statute.

[831] Dubois, A., B. (1938). *The English Business Company after the Bubble Act, 1720–1800*. (pp. 86-88). New York, Commonwealth Fund. There is no consensus on the distinction between incorporated business entities and unincorporated companies in the 18th and 19th centuries: Ireland, P. (1996). Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality. *Journal of Legal History* 17 (1), 41, 44-45; Ireland, P., Grigg-Spall, I., & Kelly, D. (1987). The Conceptual Foundations of Modern Company Law. *Journal of Law and Society*, 14 (1), 149, 149-151.

5.2 CONTEXT AND BRIEF HISTORY OF COMPANIES: FOURTEENTH TO SEVENTEENTH CENTURIES

In England, commercial associations, organisations and partnerships have been in existence as early as the fourteenth century.[832] Although the law focussed on boroughs, municipal corporations and ecclesiastical corporations which existed in abundance during this period,[833] the law did not neglect business entities. Partnerships and trusts provided forms of business organisations and were used for business purposes.[834] Joint stock (capital) a pragmatic entrepreneurial tool, created to facilitate raising capital and ease of transferability of stock, appeared during the 16th century. It borrowed elements of business partnerships and incorporated these into corporations, trusts and other unincorporated companies.[835] Joint stock became important for business associations, their development, and their reception in society.

Corporations served a number of purposes as indicated above, this included largely public as well as other purposes.[836] From the latter half of the 16th century to the 17th century, the corporation, also known as body corporate or body politic began to be used largely for commercial purposes.[837] It was understood that the state granted corporations the privilege of incorporation.[838] It was an indispensable part of their development.[839]

Corporations were subject to the ordering of the state even during the early days of the development of business corporations in England when the corporation took two forms.[840] These were the regulated corporation and joint stock corporation. Regulated corporation was built on the traditional conception of the corporation at the time. This

---

[832] Davies, P. & Gower, L. C. B. (1997). *Gower's Principles of modern company law*. (pp. 18). (6th ed.). London, Sweet and Maxwell.
[833] Harris, R. (2000). *Industrialising English Trade*. (pp. 19-35). Tel- Aviv University, CUP; Holdsworth, W. S. (1922). English Corporation Law in the 16th and 17th Centuries. *Yale Law Journal*, 31 (4), 382; Williston, S. (1888). History of the Law of Business Corporations before 1800 I. *Harvard Law Review,* 2 (3), 105, 105-110.
[834] Harris, Ibid, 16-22.
[835] Ibid, 24-25.
[836] Dubois, see above n.831, 86-88.
[837] Harris, see above n.833, 39; Cooke, C. A. (1950). *Corporation, trust and company: an essay in legal history*. (pp. 19). Manchester, Manchester University Press.
[838] Mackie, C. (2017). A tale of unintended consequence: corporate membership in early UK company law. *Journal of Corporate Law Studies,* 17 (1), 1, 9, 13.
[839] Holdsworth, see above n. 833, 382; Williston, see above n.833, 109-110.
[840] Harris, see above n.833, 40, 42-45; Turner, J. D. (2018). The Development of English Company Law before 1900. In H. Wells. (ed.) *Research Handbook on the History of Corporate and Company Law*. (pp. 125-6). Cheltenham, Edward Elgar.

was a lay, aggregate or civil entity for business purposes and profit maximisation. It had access to certain privileges and capacities afforded by the state. Regulated corporations were also of public ordering and interest. In addition to being granted the privilege to exist through incorporation, the state made them gate-keepers of the regulated markets in which they operated. This meant that they not only regulated and disciplined their members; they collected fees on entrance, annual payments as well as custom duties on behalf of the state.[841]

The joint stock corporation, on the other hand, was very much like other corporate forms in the 16th century, with the exception that it possessed joint stock capital which meant that it could raise capital and transfer stocks.[842] Like the regulated corporation, its aim was profit maximisation, it had a legal personality but its members traded on one account rather than individually as was the case for regulated corporations.[843]

Both forms of corporations were largely involved in foreign trade and most of them were incorporated for this purpose. It afforded them a number of privileges and protection such as trade monopoly over English trade within a given foreign territory[844] and the power to self-enforce said monopoly.[845] This indicates that corporations were subjects of public ordering. They were also of public interest because they undertook a number of responsibilities on behalf of the state such as trading in overseas regions.[846] There was a societal interest in England in the good functioning of their governance.

Similarly, royal charters granted to corporations are good illustrations of this. Royal charters are letters patents or charters bestowed by the Crown to confer trading privileges on merchant adventurers for trading in other regions overseas. Such corporate entities were essentially mercantile corporations enjoying the Crown's protection of their monopoly from foreign traders.[847] In fact, early business corporations contributed to public revenue as they collected customs payments from

[841] Harris, see above n.833, 32-33.
[842] Ibid, 24-25; Mackie, see above n.838, 1-3.
[843] Ibid; It had legal personality but true legal personality separate to that of its members only truly emerged under the 1862 Act.
[844] Harris, see above n.833, 32-33.
[845] Ibid, 41.
[846] Cooke, see above n.837, 34; Turner, see above n.840. Here, public interest may be defined as unitary interests (of the state), as discussed in chapter 3 of this thesis.
[847] Ibid.

their members on behalf of the State.[848] Charters were necessary for successful trade because they granted members of the commercial entity the right to assembly or gather as well as the licence to trade abroad.[849] It is said that they had "a public purpose latent in private economic advantage."[850] This is a theme which runs throughout the development of business corporations in the 17th and 18th centuries.[851]

In fact, the majority of these commercial entities not only derived authority to trade from the Crown; they derived authority to create bylaws to govern their internal affairs.[852] This enabled them to create hierarchical managerial structures and even separate ownership from management.[853] This implies that public ordering enabled the private ordering of these entities. These corporations could organise their governance structures and internal rules binding them so as to facilitate profit maximisation for their members.[854] The corporations were thus invested in the public ordering because it afforded legitimacy to their private interests and ordering. The state, on the other hand, authorised these corporations to exist and trade due to public interest. These interests included the development of the nation's overseas trade and increasing contribution to the public finance through taxation and other payments for grants of monopolistic privileges.

These corporations also contributed to the reduction of the state's expenses with regards to its exploitation of foreign regions.[855] In fact during the 17th century, corporations played an important role in the expansion of England's economic interests; particularly in commerce, trade, control and colonisation.[856] In domestic trade, they served the purpose of regulating and managing trade sectors. They ensured that entry into sectors was subject to a certain level of expertise and they contributed directly to public finance through payments for corporate privileges.[857]

---

[848] Harris, see above n.833, 42-43.
[849] Freeman, M., Pearson, R., & Taylor, J. (2013). Law, politics and the governance of English and Scottish joint-stock companies, 1600–1850. *Business History*, 55 (4), 633, 634; Kyd, S. (1793). *A Treatise on the Law of Corporations*. (Vol. I, 41-7). London, Butterworth.
[850] Cooke, see above n.837, 54.
[851] Blackstone, W. (1753).*Commentaries on the Laws of England Volume I*. (ch.18, pp.455-456). A Project of Liberty Fund, Inc.
[852] Kyd, see above n.849, 294-298; Pettigrew, W. A. (2007). Parliament and the Escalation of the Slave Trade, 1690–1714. *The William and Mary Quarterly*, 64 (1), 3.
[853] Turner, see above n.840.
[854] Kyd, see above n.849, 165-6.
[855] Harris, see above n.833, 40-43.
[856] Ibid, 45.
[857] Kyd, see above n.849, 294-298.

These companies reflected societal tolerance of trade.[858] They also showed a burgeoning change in societal attitude towards corporate privileges such as limited liability, and freedom of trade.[859]

Sir Josiah Child, an influential political commentator of the era, thought that corporate entities served the public good through the management and regulation of trade. He was particularly in favour of joint stock entities in comparison to other business forms, including regulated corporations.[860]He contended that trade ought to be managed through joint stock entities for the public interest because other forms were ambivalent to the idea of serving the public good.[861] He added that joint stock entities enable various people to contribute to the prosperity of trade which serve their individual interests as well as wider societal interests in the development of trade.

The dominance and apparent success of the three main corporations of the era was a testament to this. On one hand, these companies, East India Company, the Bank of England and the South Sea Company, were significant for the nation's economy.[862] Joint-stock corporations generally gained in popularity as they allowed the public to participate in the stock market.[863] On the other hand, in *the Case of Sutton's Hospital*,[864] Lord Coke stated that having lawful authority to incorporate was essential for corporations.[865] This reiterates the public ordering of the corporation[866] as it indicates that incorporation was a privilege, granted by the state as early as the 17th century. It supports the idea that corporations relied heavily on the state for their existence and protection while the state relied on them as a source of public finance.[867]

---

[858] Harris, see above n.833, 46-52.
[859] Fitzgibbons, see above n.408, 100-101; *The Case of the Ipswich Tailors* (1615), 11 Coke, Rep. 53, 54; *Child v. Hudson's Bay Company* (1723) 2 Peere Williams 207; Kyd, see above n.849, 131.
[860] Child, J. (1693). *A new discourse of trade wherein is recommended several weighty points relating to companies of merchants : the act of navigation, naturalization of strangers, and our woollen manufactures, the balance of trade, and the nature of plantations, and their consequences in relation to the kingdom, are seriously discussed and some proposals for erecting a court of merchants for determining controversies, relating to maritime affairs, and for a law for transferrance of bills of depts., are humbly offered, Small treatise against usury*. (pp. 102-104). London, John Everingham.
[861] Ibid, 104.
[862] Cooke, see above n.837, 58-60; Harris, see above n.833, 55-59.
[863] Hunt, B.C. (1936). *The development of the business corporation in England*, 1800-1867. (pp. 3). Cambridge, Mass, Harvard Economic Studies, Vol, LII, Harvard University Press.
[864] *The Case of Sutton's Hospital* (1612) 10 Coke Reports 1a.
[865] Ibid, 29b; Kyd, see above n.849, 10.
[866] Freeman, Pearson & Taylor, see above n.849, 636.
[867] Harris, see above n.833, 45-53.

In contrast, unincorporated (joint stock) companies appeared to have been tolerated until the 18th century.[868] By no means did this toleration mean that their existence and development were not subject to the will of the state. This will be made evident in subsequent discussion of companies in the 18th century and the effect of the Bubble Act.

The financial boom of the early 18th century led to easier access to the stock market. Unincorporated joint stock companies democratised the process of contributing to a capital fund.[869] These indirectly served the national interest and fed the nation's economy. These companies were therefore not completely devoid of public interest. It was recognised and acknowledged that joint stock companies and corporations were valuable for the promotion and development of new industries and contributed to the nation's finance.[870]

Yet, it was becoming apparent that corporate entities could also be instruments of financial and economic disasters as they could be used for fraud due to their propensity to induce reckless speculation.[871] It was in this context that the South Sea Company came into existence. This Company and its ensuing collapse would mark a turning point in English company law and the public ordering of (joint stock) companies. [872] It also marked a change in how public interest interacted with the development of companies.

5.3 THE EIGHTEENTH CENTURY, THE SOUTH SEA BUBBLE, BUBBLE ACT AND THE CRISIS OF 1772

5.3.1 THE SOUTH SEA COMPANY AND THE BUBBLE

The South Sea Company, a joint stock corporation, emerged as a way of refinancing Britain's national debts.[836] The British government entered into negotiations with Spain in order to be permitted to trade in South America which was essentially a trade monopoly of Spain.[837] The Company was created with the (genuine) objective of

[868] Ibid, 31.
[869] Hunt, see above n.863
[870] Ibid; Williston, see above n.833, 111-112.
[871] House of Commons Journal Volume 11: 26 October 1696. In Journal of the House of Commons: Volume 11, 1693-1697. London: His Majesty's Stationery Office, 1803. 568, 595. British History Online. Retrieved from http://www.british-history.ac.uk/commons-jrnl/vol11/pp568-569.
[872] Hunt, see above n.863, 6.

alleviating the national burden of debt in exchange for the prospect of large profits from the South Sea trade. Nevertheless, it was undeniably flawed.[838] For instance, the directors were opportunistic and engaged in self-dealing.[839] They kept stock prices high and on the increase by any means and for their own interests.[840]

The hopes of trade with South America however never materialised and the Company was engaged in a massive swindle, using cash from new stocks issued to raise dividends.[841] This was undoutedly an early form of a Ponzi scheme.[842]

The Company directors engaged in commercial bribery and public officials' bribery to facilitate their market manipulation and other market abuses; effectively creating a bubble.[843] The South Sea Company's scheme paved the way for a number of other fraudulent companies.[844] This had an impact on societal interest in companies.[845]

5.3.2 THE BURST OF THE SOUTH SEA BUBBLE IN 1720

Unsurprisingly, the Bubble burst in 1720.[873] A piece of legislation was enacted by a panic stricken Parliament seeking to protect the South Sea Company from the encroachment of small bubble unincorporated joint stock companies.[874] It was also an effort to address the nation's financial instability and economic decline.[875] Through public ordering, Parliament sought to regulate corporate entities, their ability to promote company subscriptions and combat frenzied speculation.[876] The piece of legislation was "*An Act for better securing certain Powers and Privileges, intended to be granted by His Majesty by Two Charters, for Assurance of Ships and Merchandizes at Sea and going to Sea, and for lending Money upon Bottomry; and for restraining several extravagant and unwarrantable Practices therein mentioned*". It is commonly known under the moniker, Bubble Act.[877] The statute made it an offence to act as a corporation or use an existing charter for unauthorised purposes,

[873] Dale, R. (2004). *The First Crash, Lessons from the South Sea Bubble*. (pp. 17-19). New Jersey, Princeton University Press.
[874] Harris, see above n.833, 62.
[875] Harris, R. (1994). The Bubble Act: Its Passage and Its Effects on Business Organization. *The Journal of Economic History*, 54 (3), 610, 610-615.
[876] House of Commons Journal Volume 19: 31 May 1720. In Journal of the House of Commons: Volume 19, 1719-1721. London: His Majesty's Stationery Office, 351. British History Online.
[877] 6 Geo. I, c.18

thus prohibiting the creation/use of (new) companies without express parliamentary authorisation.[878]

In essence, the Act made all business undertakings purporting to be corporate bodies and raising and transferring stocks without lawful or legal authority through incorporation (which needed to be obtained primarily by Royal Charter or an Act of Parliament) illegal and void.[879] This was also the case for wrongful use of existing charters. These meant using charters not intended for a corporate body to use for transferring stock or raising capital.[880] The motivation for this prohibition was preventing "common grievance, prejudice and inconvenience of His Majesty's Subjects… in their Trade, Commerce and other lawful affairs".[881] Although the Act was effective in eliminating and reducing bubble companies, it had a domino effect in relation to the South Sea Company. Many subscribers of this Company's stock had borrowed money to fund their subscription in smaller bubble companies. Their sudden collapse left stockbrokers and subscribers unprepared and unable to suitably protect themselves and thus suffered heavy losses.[882] They then sought to recover their loss by selling their worthless shares in the Company and other companies, to no avail. The bubbles effectively burst.[883]

Public ordering of corporate entities during this era was born out of fear of speculation and mistrust of joint stock companies as well as the desire to punish directors who had mismanaged these entities. Parliament declared the South Sea Company's directors guilty of notorious fraud and breach of trust, particularly those who had secretly sold their own shares.[884] The imposition of public ordering here manifests the public interest being associated with the financial crash of 1720. Firstly, the South Sea Company, like other corporations, was intended to contribute to public finance by alleviating some of the national debt burden. The Company instead was an ill-judged public debt conversion scheme entrusted to a sham company, run by

[878] Section 18, also see Sections 19-23 of the Bubble Act, 6 Geo.1 c.18; Greif, A. (2005). *Rules of Law and Economic Realities: an Historical Reconsideration*. (pp. 10). University of Chicago, Law School, Fulton Lectures; see above n.873, 135.
[879] Section 19 of the Bubble Act, 6 Geo.1 c.18.
[880] Ibid; Harris, see above n.875, 614.
[881] Section 18 of the Bubble Act, 6 Geo.1 c.18.
[882] See above n.873, 136.
[883] Ibid, 111-118.
[884] Erleigh, K. C. (1933). *The South Sea Bubble*. (pp.142, 149). London, Peter Davies; Kindleberger, C. P. (1978). *Manias, Panics and Crashes*. (pp. 89). USA, John Wiley & Sons Inc.; Greif, see above n.878, 10.

unprincipled self-serving directors which led to the ruin of many people in British society.[885] Secondly, the burst was of great concern to society because of its impact on the nation's corporate and financial sectors, thus the economy.[886] It shook and affected public trust and confidence in governance, in both the political and corporate spheres.[887]

The South Sea Bubble had a lasting impact on the development of unincorporated companies and corporations which spanned centuries. It indicates that the regulation of companies/corporate entities including their governance remains within the powers of the state. It could revoke privileges afforded to mismanaged corporate entities or those who had contributed to the economic decline of the nation.[888] Parliament's implication in the reprimand of the directors of the Company also indicates that the regulation of those directors' conflicts of interest was of public ordering and interest.[889]

5.3.3 THE BUBBLE ACT

The Bubble Act had an impact on the history of British companies.[890] Whilst the Bubble Act was essentially a dead letter because it was generally not enforced, it created fear in those who sought to organise their business ventures using joint stock companies.[891] The Bubble Act therefore shaped corporate law for over a century and entrenched societal and regulatory hostility to joint stock companies.[892]

The Preamble of the Act stated that it was aimed at reducing the exposure of investors to "fraud traps".[893] It was an illustration of change in societal perception of joint stock companies. They were no longer seen as instruments of economic progress and creation of wealth. Instead they were thought to be mechanisms used for the

[885] Erleigh, Ibid, 113-116.
[886] See above n.873, 178.
[887] Erleigh, see above n.884, 117, 129-130, 165; Greif, see above n.878, 1-3; see above n.873, 1, 181-182; Hutcheson, A. (1723). *Some Paragraphs of Mr. Hutcheson's Treatises on the South-Sea Subject; which Relate to the Relief of the Unhappy Traders in South-Sea Stock, and to Publick Credit. And the Reason of His Reprinting Them at this Time*. (pp. 17). London; Harris, see above n.875, 610.
[888] Balen, M. (2008). *A very English deceit: the secret history of the South Sea Bubble and the first great financial scandal*. London: Fourth Estate.
[889] Cooke, see above n.837, 74-76; *Charitable Corpn. v. Sutton* (1742) 2 Atk. 400.
[890] Harris, see above n.833, 73-81.
[891] Dubois, see above n.831, 24-27, 71; Anon. (1750). *The fisheries Revived or Britain's hidden treasure*. (T.808 (10) G.L.P.C., XVIII-50-3). London, British Museum Pamphlet Collection.; Hutcheson, see above n.887, 11, 17.
[892] Greif, see above n.878, 10
[893] See section 18 of the Bubble Act; Greif, see above n.878, 10; Davies, see above n.832, 24-28.

perpetration of fraud and propagation of over-speculation. The state in response, took on a paternalistic approach to defending the public interest in protecting the nation's economy and citizens from exploitation through speculation and fraud.[894] The state's response could also be seen as defending the common good in values such as honesty and integrity of decision-makers, and trust in those who manage companies.

In the period immediately after the enactment of the Bubble Act and the burst of the South Sea Bubble, companies, incorporated and unincorporated ones alike, developed tentatively in the shadow of the Bubble Act. This period was characterised by governmental mistrust and hostility to (joint stock) companies because the Act affected joint stock companies, incorporated and unincorporated alike.[895]

The Crown's officers were generally extremely critical of petitions for incorporation and even hostile to charter applications, which envisaged creating stocks of transferable shares. There was fear that such corporate entities would lead to the creation of bubbles and unfettered speculation.[896] Parliament was also reticent to grant petitions for incorporation.[897] In cases where charters were granted, they were often restricted.[898] Public ordering of corporations led to their restriction because of the impact that they could have on the public interest in maintaining the nation's economy. Although unincorporated companies were not actively creatures of the state, they were not less under the scrutiny of the state as they were technically courting illegality.[899]

Parliament was so reticent to grant petition for incorporation[900] that in cases where it was granted, the transferability of shares was restricted.[901] This created a challenging environment for companies, unincorporated and incorporated ones alike. Unincorporated companies struggled to acquire incorporation or put in place

[894] Dubois, see above n.831, 71.
[895] Ibid, 12-20.
[896] (UK) Colonial Office Papers, 388/23/R.33; (UK) Colonial Office Papers, 388/25/39
[897] House of Commons Journal Volume 20: 21 February 1723. In Journal of the House of Commons: Volume 20, 1723-1724. London: Cobbet, Parliamentary History, 380.
[898] Dubois, see above n.831, 13-17; also see the Act that incorporated the Free British Fishery (for the encouragement of British White Herring Fishery) in 1750, 23 George II, c.24.
[899] The Bubble Act of 1720, 6 Geo.1 c.18.
[900] See above n.897.
[901] Dubois, see above n.831, 13-17; see for example the Opinion of Attorney General, Philip Yorke - Attorney General's report. (1728, 24 February). *Parliamentary Archive*s. HL/PO/JO/10/6/409, fo. 6 on granting the Charitable Corporation for the Relief of the Industrious Poor authority to increase its capital. This was a reflection of the times.

mechanisms which would assimilate features of incorporation as much as was legally possible. Incorporated companies were restricted in a number of significant ways such as raising capital.

The unincorporated joint stock company though in existence long before the Bubble Act, became more popular after initial reservation in the decades following the Bubble Act.[902] Yet, lawyers and entrepreneurs successfully found some ways to circumvent aspects of the incorporation barrier to enterprise through Deed of Settlement companies. They used the trust device to hold the company's property and articles of association, and its constitution to organise its internal affairs.[903] This was an imperfect solution. There were still difficulties bringing and defending actions by these types of companies.[904] Also it was difficult to replicate corporate privileges like limited liability.[905]

Therefore, even though the Deed of Settlement was used to replicate corporate personality which was only available through incorporation, the fact that in the eyes of the law it was seen as a partnership was a significant disadvantage. This meant that members of unincorporated companies were personally liable for their obligations without limitation of liability, so there was no limited liability.[906] When a company was sued or suing, the property of its members was in danger of being affected by the possible outcome of the case. Also it was uncertain if the Deed of Settlement could afford true and complete share or stock transferability.[907] Due to the weaknesses of this business form, members of unincorporated joint stock companies applied for charters despite the existence of the Deed of Settlement alternative.[908] Incorporation granted a number of privileges not readily available to Deed of Settlement companies. Thus, private ordering played a role in the organisation of unincorporated corporations but in the shadow of the state.

Equally, for corporations, there was awareness that their mismanagement could lead to the possibility of being investigated by a Parliamentary Committee. This was the

[902] Dubois, see above n.831, 216.
[903] Ibid, 216-220.
[904] Ibid, 220-221. Reliance on arbitration made this issue less significant.
[905] Mackie, see above n.838, 11.
[906] Ibid
[907] Gower, L.C. B. (1953). The English Private Company. *Law and Contemporary Problems*, 18, 535, 543.
[908] Harris, see above n.833, 140-147.

case for the South Sea Company's directors and the directors of the *Charitable Corporation*.[909] This undoubtedly had a sobering effect on directors of incorporated companies in the execution of their responsibilities and duties. Public ordering and finding of corporate abuses could lead to the confiscation of their estates and property.[910] Also apart from the intervention of the courts and Parliament, the internal affairs of incorporated corporations were subject to review by different governmental boards and departments to which the affairs of these corporations were sometimes referred.[911]

In the same manner, there was a growing culture of audit and inspection of company books in corporate entities which is evidence of private ordering of companies and the desire for responsible governance.[912]

As already mentioned, the courts contributed to public ordering of all corporate entities in a number of ways. Even though, corporate entities generally appeared infrequently before the courts, the Chancery Court played an important role in the settlement of business disputes and it contributed to the restraint of corporate power abuses and directors' misconduct.[913] In a way, the Chancery Court recognised the unincorporated form of business entities, even though they were technically unlawful.[914]

---

[909] Dubois, see above n.831, 122.
[910] House of Commons. (1733). *Report from the Committee to whom the Petition of the Proprietors of the Stock of the Governor and Company for Raising the Thames Water in York Buildings was referred*. House of Commons Papers, I, 581, 655; House of commons. (1733). *Report from the Committee of the House of Commons on the Charitable Corporation for the relief of the Industrious Poor*. House of Commons Papers, I, 537.
[911] The Petitions by the York Buildings Company concerning the misdeeds of the late governor, Sir John Meres - 'House of Lords Journal, Volume 23: May 1728, 21-30. In Journal of the House of Lords Volume 23, 1727-1731 (pp. 273-290). London: Her Majesty's Stationery Office. British History Online. Retrieved from http://www.british-history.ac.uk/lords-jrnl/vol23/pp273-290; Redington, J. (1889). (ed.) Calendar of Treasury Papers Volume 6, 1720-1728, Volume 259: April 6-August 23, 1727. (pp. 449-465). London: Her Majesty's Stationery Office, British History Online. Retrieved from http://www.british-history.ac.uk/cal-treasury-papers/vol6/pp449-465.
[912] Freeman, Pearson & Taylor, see above n.849, 643-5.
[913] Dubois, see above n.831, 125; *Charitable Corpn. v. Sutton* (1742) 2 Atk. 400; *Sir Alexander Murray of Stanhope v. York Buildings Company* (1733) Mor. 3780; *The Case of the York-Buildings Company* (1740) 26 ER 432; House of Commons. (1803). Further report from the committee to whom the petition of the company York buildings was referred, referred by Mr Vyner, *Reports from committees of the House of Commons: which have been printed by order of the House, and are not inserted in the journals; reprinted by order of the House, Volume 1.* (pp. 689-693). House of Commons, London.
[914] Bubble Act of 1720, 6 Geo.1 c.18.

The role of the Chancery Court here though similar to cases when courts resolved various types of disputes such as disputes over contracts which are considered private matters only, is nevertheless different. The Chancery Court applied notions of trust law to deal with directorial irresponsibility in corporate entities. This required the application of elements of public law. In fact, a catchword for directors' powers and responsibility in the 18th century was 'trustee'. This denotes that directors were treated as trustees of the company and/or its members.[915] This will be discussed in detail in chapter 6.

Likewise, the Chancery Court came to the aid of the unincorporated association on a number of issues concerning their internal organisation or governance as they protected the investment of entrepreneurs and investors from directorial opportunism.[916] As Whincop stated, the courts showed a pragmatic understanding of the changes in society. They married this with the need to protect citizens including those who invested in unincorporated companies, operating in the shadow of the Bubble Act.[917]

In the mid and latter parts of the 18th century, (societal) hostility to joint stock companies had not changed very much and there were still considerable obstacles to incorporation.[918] There was nonetheless an increasing tolerance of unincorporated companies.[919] In 1783, for example, the charter application for the Phoenix Fire Office was rejected but with the Attorney General's encouragement to the promoters that a 'voluntary partnership' would be an 'easy method' of proceeding.[920] Unincorporated joint stock companies grew in number. Through the equitable use of trust, they were able to assimilate some of the qualities associated with incorporation.[921] They often used a Deed of Settlement, marrying aspects of trust law with partnership, to circumvent the effects of the Bubble Act.[922] However, the unincorporated joint stock

[915] Dubois, see above n.831, 293-295; *Charitable Corpn. v. Sutton* (1742) 2 Atk. 400
[916] Dubois, see above n.831, 227-228; *Hollis v. Childe*, Chancery, June 25, 1756. The National Archives, Chancery Equity Suits 1558-1875, 12/807/22.
[917] Whincop, M. J. (2001). *An Economic and Jurisprudential Genealogy of Corporate Law*. (pp. 33-4). Aldershot: Ashgate.
[918] Dubois, see above n.831, 26.
[919] Dubois, see above n.831, 29-41; Harris, see above n.833, 103-106.
[920] Freeman, Pearson & Taylor, see above n.849, 640; Trebilcock, C. (1985). *Phoenix Assurance and the Development of British Insurance. Volume I.* (pp. 72). Cambridge, CUP.
[921] Cooke, see above n.837, 86-87.
[922] Gower, see above n.907, 535; Shepherd, see above n.698, 348-349.

company form was problematic and subject to a number of weaknesses, as aforementioned in this chapter.

Nevertheless, the tolerance of unincorporated joint stock companies revealed a slowly changing attitude to joint stock companies towards the end of the 18th century because another competing public interest was emerging. This was the development and growth of domestic business enterprises which were involved in the industrial development and improvement of the nation. They were seen as necessary to facilitate commerce.[923] Yet, the British society was still concerned with the need to prevent disasters such as the South Sea Bubble.[924] Consequently, private ordering was allowed to germinate in the shadow of public ordering. This suggests that there was an attempt to strike the right balance between the public interest in protecting the public from fraud and the public interest in encouraging commerce.[925]

In sum, although the Bubble Act was a dead letter,[926] it nevertheless reflected societal and political attitudes to joint stock corporate entities.[927] The Act contributed to the belief that joint stock corporate entities led to a perversion of industry, commerce and order in social life.[928] Still, the advantages of joint stock corporate entities as means of raising and organising large amounts of capital as well as mobilising trade and commerce, were becoming public interest considerations for the nation.[929]

Adam Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations* (hereafter, Wealth of Nations) explicates popular societal attitude to joint stock

---

[923] Cooke, see above n.837, 88-92.
[924] Dubois, see above n.831, 28-32.
[925] Ibid, 126; *R v. Dodd* 9 East 516; 103 ER 670; *Buck v. Buck* (1808) 1 Camp. 547, 170 ER 1052*; R v. Stratton* (1809) 1 Damp. 549n, 170 ER 1053n; *R v. Cawood* 2 Ld Raymond 1361; 92 ER 386; Baron, P. (1992). Bringing Back the Bubble - Regulation of Corporate Abuse by an Action in Public Nuisance. *University of Tasmania Law Review*, 11 (2), 149, 151, 154; Gower, see above n.907, 535; Harris, see above n.833, 247-249.
[926] There was only one real prosecution brought under (Section 19 of) the Act: *R v. Cawood* (1723) 2 Lord. Raymond. 1361, 92 E.R. 386; also see *Stent v. Bailis* (1724), 2 P. Wms, 217.
[927]Hunt, see above n.863, 7-9.
[928] Ibid; Baston, T. (1758). *Thoughts on Trade, and a Publick Spirit. Consider'd Under the Following Heads, Viz. I. Companies in Trade. II. Stock-jobbers. III. Projectors. IV. Corruptions in the Law and Public Offices. V. Of a Public Spirit. Humbly Dedicated to All Lovers of Their Country*. (pp. 3). (2nd ed.). London; Weekly essays (1732), (1758). *The London magazine: or, Gentleman's monthly intelligencer.* Volume I, (pp. 4) and (pp. 467-468). Volume XXVII.
[929] House of Commons (1802). Journal of House of Commons. Volume 29, 1764. London, British History Online. (pp. 785). Retrieved from http://www.british-history.ac.uk/commons-jrnl/vol1; McColloch, W. (2013). *A Shackled Revolution? The Bubble Act and Financial Regulation in 18th Century England*. (pp. 11-12). University of Utah, Department Of Economics Working Paper Series, Working Paper No: 2013-06; Hunt, see above n.863, 10-11.

companies during this era. In fact, he appeared to have guided societal attitude to companies, especially joint stock ones in the 18th century.[930] He stated that companies/ corporate entities have been useful for the introduction of branches of commerce because they took on the risk and expenses of such endeavours.[931] He added that joint stock corporate entities were of public interest in certain circumstances by serving as business forms for banking, insurance, canals, etc.[932] Smith thought that these entities served the public interest by taking on commercial risks and promulgating commerce which in turn contributed to the growth of the economy. However, he felt that the management of joint stock company entities was inefficient and contributory to the restraint of trade and competition and thus, could be contrary to the public interest in the freedom of trade.[933]

Smith's attitude reflected the state intervention and interpretation of the Bubble Act in the 18th century.[934] The state acted to protect society from fraud traps[935] and was reticent to grant incorporation because it sought to protect the economy. The failure to thoroughly enforce the Bubble Act indicates that the state was pragmatic. It saw the public utility of joint stock corporate entities but also knew that joint stock corporate entities could be detrimental to the nation's economic development. This suggests that the state permitted private ordering to further public purpose and utility of joint stock corporate entities.[936]

5.4 REPEAL OF THE BUBBLE ACT AND DEVELOPMENT OF JOINT STOCK CORPORATE ENTITIES IN THE EARLY NINETEENTH CENTURY

At the turn of the 19th century, joint stock corporate entities, particularly unincorporated companies, gained in popularity due to the growth in the nation's economic activity. These entities' presence was extended to all areas of trade and commerce.[937] With the popularity and excitement brought by this development, came

[930] Hansard. (1824, 28 May). House of Commons Debate. Volume 11, cc920-33; Hansard. (1855, 29 June). House of Commons Debate. Volume 139, cc310-58.
[931] Smith, A. (1776). *An Inquiry into the Nature and Causes of the Wealth of Nations*. (pp. 255-280). University of Chicago Press, UK Edition (February 15, 1977).
[932] Ibid.
[933] Ibid.
[934] Kindleberger, see above n.884; Ireland, (1996), see above n.831, 62-63.
[935] The Preamble of the Bubble Act, 1720.
[936] Whincop, see above n.917, 31; Niemeyer, see above n.391, 1-8; Musgrave, see above n.391, 108-109; Harris, see above n.875, 617-627.
[937] Hunt, see above n.863, 14-15; Harris, see above n.833, 106-109

the familiar concern and mistrust of these corporations and fear of financial bubbles.[938] The state imposed greater public ordering in the guise of prosecutions of unincorporated joint stock companies under the Bubble Act of 1720, from 1807 to 1812.[939] During the next decade, the shadow of the Bubble Act was still present.[940]

Incorporated joint stock companies were also not safe from hostile opinions and it continued to be prodigiously difficult to acquire incorporation or limited liability.[941] This was equally reflected in public opinion.[942]Therefore, promoters, investors and other advocates of the joint stock corporate entities began a more robust defence of this corporate form in the estimation of the public.[943] They refuted claims of nefarious purposes linked with joint stock companies. They argued for freedom of (commercial) association and fair competition, stating that granting unincorporated joint stock companies the legality to exist and incorporate fully was beneficial for the nation's economy.[944] This thesis deduces that advocates of joint stock corporate entities motivated by the limits of private ordering, sought to influence public ordering of corporate entities so that these companies could exist freely.

In fact, the speculation frenzy of 1820 which was born of an increase in foreign loans and opportunities to invest in new South American countries positively impacted societal attitudes to joint stock corporate entities.[945] However, the Parliament and Government were once again alarmed, resisted and restricted legislative incorporation.[946] The joint stock corporate entity was similarly not well received by the

[938] Baily, F. (1810). *An Account of the several Life-Assurance Companies, established in London; with a comparative view of their respective merits and advantages*. (pp. 19). London; The Morning Chronicle. (1807). (pp. 324-329, 334-338). *The Spirit of the Public Journals for 1807*.
[939] Harris, see above n.833, 236–41, 245–9; Hunt, see above n.863, 16-21; *R. v. Dodd*, (1808) 9 East 516; *Buck v. Buck* (1808) 1 Camp. 547; *Rex. v. Stratton*, (1808) 1 Camp. 549; *Sir Theophilus Metcalf, Bart. v. B*ruin (1810) 12 East 400; *King v. Webb* (1811) 14 East 406; *Pratt v. Hutchinson* (1812) 15 East 511; *Brown v. Holt* (1812) 4 Taunt. 587.
[940] *Ellison v. Bignold* (1821) 2 Jacob & Walker 503; *Josephs v. Pebrer* (1825) 3 B. & C. 639; *Kinder v. Taylor*, 3 Law Journal Reports, 68.
[941] Hunt, see above n.863, 22, 23-29.
[942] Letter from a plain dealer. (1807, 16 November). *The Morning Chronicle*; The Times. (1824, 25 May). London, UK. The Times. (1824, 6 November). London, UK.
[943] Day, H. (1808). *A defence of joint stock companies: being an attempt to shew their legality, expediency, and public benefit*. (pp. 1-3, 42-45). London, Longman, Hurst, Rees, Orme, and Brown.
[944] Hunt, see above n.863, 18-19.
[945] Clay, W. (1825). *Remarks on joint stock companies by an old merchant*. (pp. 45). London, John Murray.
[946] Hunt, see above n.863, 33-36; The Earl of Lauderdale in Hansard. (1824, 25 May) House of Lords Debate. Volume 11, cc856-7; Huskisson in Hansard. (1824, 10 May). House of Commons Debate, Volume 11, cc609; The Earl of Lauderdale in Hansard. (1824, 15 June). House of Lords

judiciary, particularly by Lord Chancellor Eldon. He was very concerned about the exploitation of investors.[947] He thought that joint stock corporate entities, especially unincorporated companies, would hinder and restrict competition in trade which could be detrimental to the nation's wealth and dangerous for public finance.[948]

Nevertheless, pressure was mounting on the Parliament to repeal the Bubble Act and to address the judicial decisions which were antagonistic towards joint stock companies.[949] These judicial decisions had a negative impact on unincorporated joint stock companies which were now increasingly accepted and even encouraged by society.[950]

The government began to be more in favour of free trade as it was seen as crucial to economic growth and joint stock corporate entities were seen as beneficial to this economic development.[951] A number of parliamentarians such as Attwoood and Gurney advocated about the societal utility of joint stock companies.[952] Baring, another parliamentarian, best expressed the dilemma of checking the hysteria in the stock market without stopping the spirit of enterprise.[953] Peter Moore, another MP, proposed the bill which went on to be the repeal of the Bubble Act. He argued that unincorporated joint stock companies contributed to public revenue, encouraged industry and employment and ought to be protected by the law.[954] Hence, the change

---

Debate, Volume 11, cc1339, The Lord Chancellor in Hansard. (1824, 18 June). House of Lords Debate, Volume 11, cc1456-7 expressed concerns about protecting the public from injury or mischief caused by joint stock companies; The Lord Chancellor in *Kinder v. Taylor*, 3 Law Journal Reports, 68, 76, 78.

[947] Cooke, see above n.837, 87.

[948] Harris, see above n.833, 256-7; Hansard. (1824, 21 May). House of Commons Debate, Volume 11, cc791-792; Hansard. (1825, 3 February). House of Lords Debate, Volume 12, cc31. Hansard. (1825, 7 February). House of Lords Debate, Volume 12, cc127-8; *Kinder v. Taylor*, 3 Law Journal Reports, 68.

[949] The Morning Chronicle. (1825, 9 & 12 February; 30 March & 1 April); Taylor, J. (2006). *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture, 1800-1870*. (pp. 109). London, Royal Historical Society; Hunt, see above n.863, 40-41; Hansard. (1825, 29 March). House of Commons Debate, Volume 12, cc1279; Hansard. (1825, 2 June). House of Commons Debate, Volume 13, cc1018-23; Harris, see above n.833, 256.

[950] Ibid.

[951] Hansard. (1825, 25 March). House of Lords Debate. Volume 12, cc1195; Turner, see above n.840.

[952] Hansard. (1825, 16 March). House of Commons Debate. Volume 12, cc1060, cc1066-69; They were influenced by George, J. (1825). *A view of the existing law, affecting unincorporated joint stock companies*. (pp. 66-73). London, S. Sweet; Clay, see above n.945, 95-98.

[953] Hansard. (1825, 16 March). House of Commons Debate. Volume 12, cc1063-1064.

[954] Hansard. (1825, 29 March). House of Commons Debate. Volume 12, cc1279-1280. He had a vested interest in the repeal of the Act because he was a director of several companies.

in public ordering of joint stock companies was influenced by the public utility and interest of joint stock corporate entities including unincorporated companies.[955] This supports the argument that unincorporated joint stock companies operated in the shadow of the law. Yet they sought state intervention because it was beneficial for their development and access to certain corporate privileges. The active seeking of state intervention and regulation by highlighting the public interest that these companies served is important. It indicates the incompleteness of arguing that joint stock companies and the development of companies generally is subject primarily or solely to private ordering. Private ordering could not afford these companies privileges such as limited liability and its advocates were aware of this. Thus, they lobbied for change in regulation.[956]

The Bubble Act was repealed in June 1825.[957] The Attorney-General argued that it was an "unintelligible act of parliament".[958] He added that,

> *"From the year 1720, the year in which it was passed, down to the present time, Joint-stock companies had been formed for the most useful and laudable purposes and many of them still existed. Some of them had been the means of acquiring great wealth to the individuals connected with them, and also advantageous to the public*."[959]

It is clear that the repeal of the Act was motivated by the public utility and interest in joint stock corporate entities.[960]

---

[955] Cooke, see above n.837, 87.
[956] Harris, see above n.833, 262-263.
[957] An Act to repeal so much of an Act passed in the Sixth Year of His late Majesty King George the First, as relates to the restraining several extravagant and unwarrantable Practices in the said Act mentioned; and for conferring additional Powers upon His Majesty, with respect to the granting of Charters of Incorporation to trading and other Companies, also commonly known as the Repeal of the Bubble Act, 1825, 6 Geo. 4 c.91.
[958] Hansard. (1825, 2 June). House of Commons Debate. Volume 13, cc1018-23.
[959] Ibid
[960] Davies, see above n.832, 29-33; *R v. Dodd* (1808) 9 East 516; *Buck v. Buck* (1808) 1 Camp. 547; *R v. Stratton* (1809) 1 Camp. 549n; Cooke, see above n.837, 87; Bubble Act, 1825, 6 Geo. 4 c. 91; Repeal of the Bubble Act: Hansard. (1825, 02 June). House of Commons Debate. Volume 13, cc1018-23.

5.5 THE REPEAL OF BUBBLE ACT IN 1825 AND COMPANY LAW FROM 1825-1856

The 1825 Act[961] was an important development in English company law because it signalled the State's formal recognition that the Bubble Act was a hindrance to the development of joint stock companies which were now seen as important business forms. Nevertheless, there was still resistance to the rights and privileges of joint stock companies.[962] It was accepted that joint stock companies were important for the nation's economic progression as "the interests of commerce required the proper encouragement and protection of joint-stock companies".[963]

Although the fear of fraud, a parliamentary and public concern was still lingering,[964] there was an increasing belief in the laissez-faire ideology. This underpinned the idea that subscribers to joint stock companies entered into such agreements of their own free will and self-reliance ought to be encouraged.[965] Therefore any loss incurred was their fault and state intervention was only warranted in cases of fraud or through equity.[966] Yet, there was also awareness of increasing separation of the management and ownership of joint stock companies. In light of this development, unlimited liability was thought to be an obstacle to the development of these companies because it militated against economic progress.[967] It deterred investment in joint stock companies as investors did not want to shoulder the responsibility of others' mismanagement.[968]

The 1825 Act was therefore introduced to facilitate incorporation of unincorporated joint stock companies and contribute to reassuring investors.[969] The Act aimed to encourage company promoters to use the incorporated company form but failed due to strict regulatory application by government authorities.[970] Ultimately, granting full

[961] See above n.957.
[962] Cooke, see above n.837, 110-111.
[963] Hansard. (1825, 02 June). House of Commons Debate, Volume 13, cc1021.
[964] Hansard. (1824, 18 June). House of Lords Debate, Volume 11, cc1456-7.
[965] Hansard. (1825, 28 February). House of Commons Debate, Volume 12, cc717-8.
[966] Ibid, cc718-719.
[967] Cottrell, P. L. (1983). *Industrial Finance 1830–1914: The Finance and Organization of English Manufacturing Industry* (pp. 54) London, Methuen.
[968] Hansard. (1826, 10 February). House of Commons Debate, Volume 14, cc165, 209, 243; Prof. Austin's observations in House of Commons. (1844). *First Report of the Select Committee on Joint Stock Companies together with the minutes of evidence* (taken in 1841 and 1843). (appendix and index, pp. 261) (119) vii.
[969] Ibid.
[970] Hunt, see above n.863, 41-55.

limited liability and incorporation to unincorporated joint stock companies was thought to be unwise.[971] Parliamentary reticence to act does not indicate that these companies were entirely left to private ordering. In fact, some academics contend that limited liability was granted sporadically and rarely, only to corporate entities with large capital, likely to be of public utility and benefit.[972]

Parliamentarians were influenced by political economists such as David Richardo[973] and Adam Smith[974] who advanced that free trade and opposed protectionism in their articulation of public interest and companies. Yet, the distrust of joint stock corporate entities was still rampant. The financial crisis of 1825-1826, once again led to an extremely cautious attitude to joint stock corporate entities, especially unincorporated ones.[975]

The courts also treated unincorporated joint stock companies with caution.[976] In fact, in *Durvergier v. Fellowes*, the courts chose not to protect those who were engaged in the joint stock company. Here, it was stated that such companies were fraud-traps which were injurious to the public and their formation was considered an indictable offence at common law.[977] The courts subsequently changed their attitude in reflection of the pressures of economic development, and an understanding that declaring unincorporated joint stock companies illegal was not "creditable to the commerce of the country".[978] Here, the re-evaluation of public ordering of joint stock companies was due to the grudging acceptance of their public utility.

---

[971] Harris, see above n.833, 265; Hansard. (1825, 02 June). House of Commons Debate. Volume 13, cc1018-1020.
[972] Mackie, C. (2011). From privilege to right: emergence of limited liability. *Juridical Review*, 294, 296; Hadden, T. (1997). *Company law and capitalism*. (pp. 11). London, Weidenfeld & Nicolson.
[973] Richardo, D. (1817). *On the principles of political economy and taxation*. (ch.19). London: John Murray, Albemarle-Street; Mill, J. S. (1804-1808) *Selected Economic Writings*. Winch, D. (ed.) (pp.179-188). Edinburgh: Oliver Boyd for the Scottish Economic Society; Lauderdale, M. (1814). Pamphlets on the Corn Laws. *Eclectic Review*, Vol. II, 1-17.
[974] Fitzgibbons, see above n.408, 60.
[975] Harris, see above n.833, 268.
[976] *Duvergier v. Fellowes* (1828) 5 Bingham 248, 260, House of Lords Journal, Volume 64: 3 July 1832. In Journal of the House of Lords Volume 64, 1831-1832 (pp. 346-350). London, His Majesty's Stationery Office. British History Online. Retrieved from http://www.british-history.ac.uk/lords-jrnl/vol64/pp346-350; *Walburn v. Ingilby* (1833) Myline & K.61, 69; *Blundell v. Winsor* (1835) 8 Sim. 601, 607-608. The courts subsequently became more lenient with companies in 1843: *Garrad v. Hardey* (1843) 5 Man. & Gr. 471, 482-484; *Harrison v. Heathorn* (1843) 6 Man. & Gr.81, 106-108.
[977] *Durvergier v. Fellowes* (1828) 5 Bingham 248, 266.
[978] *Harrison v. Heathorn* (1843) 6 Man. & Gr.81, 106-107.

By the late 1820s, societal attitude continued to shift to reflect society's interest in the free development of joint stock companies.[979] Public interest in protecting society from ruinous speculation in bubble (joint stock) companies by outlawing and deterring the development of joint stock companies was shifting. It was being largely replaced by the public interest in protecting investors and the public through the registration of companies.[980] Essentially, joint stock companies, incorporated and unincorporated ones alike, were now accepted as a necessity for economic development.[981] In light of this, public ordering focused on the liability and privileges of these entities and those invested in them.[982]

Numerous legislative attempts were made from 1825 to 1837[983] to attempt to grant full incorporation to unincorporated companies. These included limited liability[984] and other corporate privileges for these companies.[985] These failed due to restrictive rules[986] applied by the Board of Trade which was charged with the administration of the Acts.[987] Although it was accepted that joint stock corporate entities were of public

[979] Hunt, see above n.863, 54; Cooke, see above n.837, 110-112.
[980] Cooke, see above n.837, 127; Redford, A. (1973). *Manchester Merchants and Foreign Trade, Volume 1*. (pp. 213). Manchester, Manchester University Press; First Report, see above n.968, 245; Johnson, P. (2010). *Making the Market: Victorian Origins of Corporate Capitalism*. (pp. 120-121). Cambridge, CUP; Hansard. (1825, 02 June) House of Commons Debate, Volume 13, cc1018-23.
[981] Austin influenced John Stuart Mill - Austin, J. (1826). *Joint stock companies. Parliamentary History and Review: containing reports of the proceedings of the two houses of parliament during the session of 1825: --6 Geo. IV, with critical remarks on the principal measures of the session.* London: W. Wilson*;* First Report, see above n.968, 261; Cooke, see above n.837, 133.
[982] Hansard. (1836, 19 April). House of Commons Debate. Volume 32, cc1187-1189; Cooke, see above n.837, 124-126, 132-133; Corbet, T. (1841). *An inquiry into the Causes and Modes of the Wealth of Individuals, or Principles of Trade and speculation explained*. (pp. 99-100). London, Smith, Elder & Co.
[983] See The Repeal of the Bubble Act, 1825; Trading companies Act of 1834, 4 & 5 W. IV, c. 94: An Act to enable His Majesty to invest trading and other Companies with the Powers necessary for the due Conduct of their Affairs, and for the Security of the Rights and Interests of their Creditors; Chartered Companies Act of 1837, 7 Wm. IV & 1 Vict. c.73: An act for better enabling Her Majesty to confer certain Powers and Immunities on trading and other companies. See pertinent sections: 2, 4-5, 11-12, 16, 21 and 24.
[984] Hunt, see above n.863, 56-89,116-144; Cooke, see above n.837, 114-126, 129.
[985] Hansard. (1834, 18 July) House of Commons Debate, Volume 25, cc192-4; Section 5 of the Chartered Companies Act of 1837.
[986] Sections 16 and 21 of the Chartered Companies Act of 1837.
[987] Davies, see above n.832, 36-38; Gower, see above n.907, 536; Slaney, R. (1850). *The Report from the Select Committee on Investments for the Savings of the Middle and Working Classes Together With the Proceedings of the Committee, Minutes of Evidence, and Index*. (Question 521). (Henceforth, The Report of 1850). London, House of Commons. The report confirms the unwillingness of the Board of Trade to grant charters due to fear of improper speculation; Cooke, see above n.837, 130; Hunt, C. (1935). The Joint-Stock Company in England, 1830-1844. *Journal of Political Economy*, 43 (3), 331-336; Harris, see above n.833, 268-273. Mr Thomson, the President of the Board of Trade's observations in 1836 exemplified the conflicting public interest considerations. On one hand, he bemoaned speculation and advocated prudence and caution with regards to joint stock companies. On the other hand, he considered that joint stock companies had been

utility and interest, there was a lack of concerted acceptance by the state due to fears of fraud and speculation associated with joint stock companies.[988] Although, public ordering was not neglected, its re-evaluation failed arguably due to the existence of a competing public interest in reducing society's exposure to fraudulent companies.

The Joint Stock Companies Act of 1844[989] and Companies Clauses Consolidation Act of 1845[990] were more successful. They led to the introduction of key principles, which are still significant in contemporary English company law. They include the distinction between private partnerships and joint stock companies, provision for simplified incorporation through registration rather than a special Act or royal charter and full publicity of the incorporation of companies to combat fraud such as those evidenced during the South Sea Bubble.[991] These are examples of public ordering, which sought to strike a balance between protecting the public from fraud and facilitating the growth of joint stock companies, both incorporated and unincorporated.

The 1844 Act was particularly significant because it allowed unincorporated associations to be incorporated if they were registered.[992] It gave them several characteristics akin to incorporation except full limited liability.[993] It however marked a move toward private ordering as deliberate permission by the state was no longer required for incorporation. Of course, public ordering through the introduction of the Statute facilitated this.

The significance of this Act has been questioned. In fact, Kershaw, a prominent corporate law scholar, argues that the Act is an indication of the fact that incorporation was not a huge legal leap but rather a formal recognition of an existing stage in the development of companies.[994] However, the conditions for complete registration highlight that a company's incorporation was nonetheless a privilege not simply

---

instrumental in most of the great undertakings of that era. He advocated limited liability and registration as a way of reducing fraud - Hansard. (1836, 06 May). House of Commons Debate, Volume 33, cc688-692.

[988] Ibid, The Report of 1850; Cooke, see above n.837, 130; Ibid, Hunt; Harris, see above n.833, 268-273.

[989] An Act for the Registration, Incorporation and Regulation of Joint Stock Companies, also commonly known as the Joint Stock Companies Registration and Regulation Act (1844) 7 & 8 Vict c.110.

[990] 1845, Ch. 16 8 and 9 Vict.

[991] Davies, see above n.832, 36, 38-46; Gower, see above n.907, 536.

[992] Sections of 4-7 and 58 of the Joint Stock Companies Registration and Regulation Act, 1844.

[993] Section 2 of the Joint Stock Companies Registration and Regulation Act, 1844.

[994] Kershaw, D. (2012). The Path of Corporate Fiduciary Law. *New York University Journal of Law and Business*, 8 (2), 395, 407.

formal recognition of an existing phenomenon. This implies that public ordering continued to play a role in the organisation and development of companies or corporate entities even during the 19th century.[995]

Corporate entities still relied on the state for their regulation[996] and formation. Unincorporated joint stock companies actively sought after these privileges.[997] Section 27 of the Act indicates why this was the case. It made it lawful for the directors of any joint stock company registered under the Act to conduct and manage the affairs of the company according to its provisions and subject to the Act as well as the Deed of Settlement. The Act also included very early examples of mandatory regulation of directors' conduct, including conflicts of interest. It made it unlawful for directors to lend company's money and sell or purchase shares of the company to any director, officer of the company without the authority and sanction of the general meeting of shareholders.[998] Section 28 of the Act created a pecuniary qualification condition for directors. They had to have a share in the company in order to hold office or manage it. This condition was imperative irrespective of any Deed of Settlement or other instrument and lack of compliance exposed the director to a fine.[999] Similarly, Section 29 imposed a condition on directors that they recuse themselves from acting on a contract with or on behalf of the company for which they were acting, if they were directly or indirectly interested. They are also precluded from voting on such contracts. These were instead subject to submission at the general or special meeting of shareholders summoned for this purpose, requiring the approval and confirmation of the majority of shareholders.[1000]

It is thus evident from the foregoing that the protection afforded by the law was one of the main reasons why investors were willing to subject themselves to and even demand state regulation of joint stock companies.[1001] It is clear that joint stock companies were not simply left to private ordering even in the regulation of their

[995] Cooke, see above n.837, 140-142; Sections 23-26 of the Joint Stock Companies Registration and Regulation Act, 1844.
[996] Cooke, see above n.837, 138, Sections 26-30, 34-42 of the Joint Stock Companies Registration and Regulation Act, 1844.
[997] Harris, R. (1997). Political Economy, Interest Groups, Legal Institutions, and the Repeal of the Bubble Act in 1825. *The Economic History Review*, 50 (4), 675; Harris, see above n.833, 282-285.
[998] Joint Stock Companies Registration and Regulation Act, 1844.
[999] Ibid.
[1000] Ibid.
[1001] Sections 30-32 of the Joint Stock Companies Registration and Regulation Act, 1844.

internal organisation. This means that while the 1844 Act did codify some of the rules applied by Deed of Settlement companies, entrenching the private aspect in the ordering of companies,[1002] the inclusion of mandatory provisions are illustrations of the public ordering of companies.[1003]

Likewise, the registration requirement in the 1844 Act is indicative of public interest due to the Act's focus on disclosure requirements for companies.[1004] For instance, Mr Gladstone, Vice President of the Board of Trade, who had written a report on prevention of fraud and joint stock companies,[1005] stated that the 1844 Act (then Bill) was for the registration of joint stock companies, conferring certain privileges of corporate bodies on them and the prevention of the establishment of fraudulent companies.[1006] The regulation of joint stock companies, facilitation and improvement of legal and equitable remedies in reference to these companies were also aims of the Bill.[1007] He added that the ability to sue and be sued was useful not only for joint stock companies but also the public. This means that these companies could be sued for corrupt administration. These corporate privileges protected the innocent from ruinous loss as well as protect shareholders and provided legal and equitable remedies against recalcitrant managers and directors.[1008] These indicate that the public ordering was intended to protect competing public interests. They were namely common interests of good governance of companies and the reduction of fraud, and the protection of economic interests of investors and the nation.

The Act was a pragmatic attempt to balance these public interests on one hand by extending the privileges afforded to companies so that they could develop freely which could enhance the nation's economic growth.[1009] On the other hand, the Act sought to grant incorporation by registration of companies subject to the publicity of

[1002] Sections 2-3, 7 of the Joint Stock Companies Registration and Regulation Act, 1844.
[1003] Section 28 of the Joint Stock Companies Registration and Regulation Act, 1844.
[1004] Sections 16, 20-24, 30, 36-37 of the Joint Stock Companies Registration and Regulation Act, 1844; Registration was also advocated by Mill as a solution to fraud – Mill, J. S. (1848) *Principles of Political Economy with some of their Applications to Social Philosophy*. Ashley W. (ed.) (Bk. I, Ch. IX., 13, Bk. V., Ch. IX, 9.17, 19-20). (1909, 7th ed.). London: Longmans, Green and Co.
[1005] First Report, see above n.968; Section 65 of the Joint Stock Companies Registration and Regulation Act, 1844, focusses on the prevention of fraudulent companies as they had inflicted great injury on the public.
[1006] Hansard. (1844, 02 April). House of Commons Debate, Volume 73, cc1755.
[1007] Ibid.
[1008] Ibid, cc1755-1757.
[1009] Harris, see above n.833, 285; Hansard. (1844, 03 July). House of Commons Debate, Volume 76 cc277.

relevant information so as to protect the public and investors by helping them to distinguish between good and bad companies.[1010] The entry barrier to incorporation put in place prior to the 19th century in response to speculation and fraud in the market, associated with joint stock companies, was thus replaced with registration and disclosure in the 19th century. This provided ways of dealing with joint stock companies and over-speculation or fraud because speculation was now accepted as a necessary part of economic activity.[1011]

However, the fear of speculations and ruin due to bubbles caused by joint stock companies had not disappeared altogether. There were legislative efforts to balance the desire to reduce state interference in companies' affairs with protecting investors and society from financial ruin due to unscrupulous corporate directors and promoters.[1012] These considerations were likely at the heart of the Joint Stock Companies Act 1844 and the Limited Liability Act of 1855. They set out limited safeguards to protect public and private interests. This included directors being personally liable if they paid out dividends knowing that a company was insolvent.[1013] This is arguably evidence of private ordering as it protected existing shareholders and not prospective investors. This is nonetheless revelatory of public ordering and public interest in the regulation of companies or corporate entities because it reinforced the protection of (existing) investors.

Limited liability was a seen as a way of removing impediments to the free development of industrial resources in England. The development of these resources was thought to be conducive to the nation's general prosperity.[1014] Similarly, advocates of social and economic reform argued that granting limited liability to joint

[1010] Harris, see above n.833, 277-278.
[1011] Hansard. (1844, 02 April). House of Commons Debate, Volume 73, cc1754-8; First Report, see above n.968, 7; Harris, see above n.833, 285.
[1012] Hansard. (1844, 03 July). House of Commons Debate, Volume 76, cc278-282; Foreman-Peck, J., & Hannah, L. (2015). *UK Corporate Law and Corporate Governance before 1914: a Re-interpretation*. EHES Working Paper 72, 1, 10.
[1013] Gower, L. C. B. (1969). *The Principles of Modern Company Law*. (pp. 48). (3rd ed.). London, Stevens; Bolodeoku, I. O. (2005). Contractarianism and Corporate Law: Alternative Explanations to the Law's Mandatory and Enabling/Default Contents. *Cardozo Journal of International and Comparative Law*, 13 (2), 433, 489; Hunt, see above n.863, 128; Cooke, see above n.837, 139-140; Sections 1-2, 25-27of the Companies' Winding up Act 1844, 7&8 Vict. c.111.
[1014] Great Britain. (1854). *First Report of the Royal Commission on the Mercantile Laws and Amendments to the Law of Partnership*. (MLC). British Parliamentary Papers, Volume XXVII, 170. (Henceforth, Report of 1854); Hunt, see above n.863, 117,168; Newspapers Archives, The Circular to Bankers, (1855, 3 February) cited by Hunt, see above n.863 123.

stock companies would contribute to economic reform. They added that it would benefit the working classes and the poor as it would permit them to aspire to make investments and engage in industrial undertakings.[1015] The arguments in favour of limited liability were a request for change in public ordering due to the public interest in the advancement of the nation's economy as well as social and economic reforms.[1016] Speculation was no longer seen as synonymous with imprudent undertakings but a form of entrepreneurialism and possible means of eradicating poverty.[1017]

The Vice President of the Board of Trade in 1855-6, Robert Lowe,[1018] thought that there ought to be no legal impediment to competition. He felt that unlimited liability of joint stock companies was an impediment to free competition for those without considerable capital. Unlimited liability deterred people from investing in companies due to fear of losing their investment and everything. Unlimited liability made investing in companies an extremely risky endeavour, which was available only to wealthy individuals. He added therefore that unlimited liability also impeded entrepreneurship and investment in inventions that may serve the public interest.[1019] This of course has overtones of the contemporary argument that shareholder primacy is good for society

[1015] Hunt, see above n.863, 119-126; Smith, G., Stephen, L., & Sidney Lee, S. (1897). Robert Slaney, *Dictionary of National Biography, From the Earliest Times to 1900*. (Volume 52, 387-388). Oxford, OUP; Hansard. (1850, 16 April). House of Commons Debate, Volume 110, cc420-4; Hansard. (1852, 17 February). House of Commons Debate, Volume 119, cc668; Mr Cobden in Hansard. (1852, 17 February). House of Commons Debate, Volume 119, cc679; The Report of 1850, see above n.987; Lalor, J. (1852). *Money and Morals: A book for the times*. (pp. 203-4). London, John Chapman; John Stuart Mill in The Report of 1850, see above n.987, questions. 837, 852, 847; House of Commons. (1851). *Report from the select Committee on the Law of Partnership: together with the proceedings of the Committee, minutes of evidence, appendix and index*. (pp. vi). London, HardPress; Hansard. (1855, 29 June). House of Commons Debate, Volume 139, cc310, 356-357. Of course, it can be argued that poor and working class people could not realistically aspire to invest in companies due to structural inequalities during that era.

[1016] Ibid; This was also the case for opponents to limited liability who argued against it using the familiar concern with over-speculation and fraud linked with joint stock companies since the Bubble of 1720 which would ultimately spell disaster for the nation's economy and notions of natural justice - Hunt, see above n.863, 123, 126, Report of 1854, see n.1014, 5-8, 93, 105,195; Hawes, J. (1854). *Observations on Unlimited and Limited Liability; and suggestions for the improvement of the law of partnership*. (pp. 5, 16). London, Saville.

[1017] Hansard. (1855, 29 June). House of Commons Debate, Volume 139, cc327-328.

[1018] Hansard. (1856, 01 February). House of Commons Debate, Volume 140, cc110-130. Lowe also thought that existing legislative restraints did not prevent fraud but acted as obstacles in the way of honest companies and granted protection to the public which can protect itself.

[1019] Ibid; Hansard. (1855, 29 June). House of Commons Debate, Volume 139, cc329; The Economist. (1854, 1 July). Limited or Unlimited Liability. (pp. 698-701). London; The Times: (1855, 28 July 28). London, UK. The Times Digital Archive.

and in the public interest as the public benefits ultimately.[1020] Limited liability was now seen favourably by society and this led to a change in public ordering of corporate entities in the 1850s.[1021]

5.6 PUSH AND PULL: THE DEVELOPMENT OF COMPANIES, REGULATION OF DIRECTORS' CONDUCT, 1856-1900, PUBLIC INTEREST AND PRIVATE INTERESTS

Public interest played another important part in the public ordering initiatives of 1855 and 1856. In fact, the 1855 Act incorporated safeguards to protect the public. This included requiring companies to disclose in their names that they will be of limited liability and other regulatory requirement concerning registration, for which non-compliance exposed directors to penalties.[1022]

The Act of 1856 simplified the registration and incorporation of joint stock companies.[1023] It was a statute, a form of public ordering, which facilitated the attainment of limited liability.[1024] Once again, the Act included conditions and formalities of registration to which companies had to adhere.[1025] Registration served the purpose of affording the public a measure of protection as it encouraged transparency and disclosure of some joint stock companies' affairs.[1026]

Similarly the courts also reinforced private ordering of companies through the strict interpretation of what was considered *intra vires* and *ultra vires* actions of directors. This included the acquisition of shares in another company without authorisation from

[1020] Hunt, see above n.863, 131, 138; The Economist. (1858, 15 May). Limited Liability in Banking. (pp. 530-1). London; Grantham, R. (1998). The Doctrinal Basis of the Rights of Company Shareholders. *The Cambridge Law Journal*, 57 (3), 554, 578-582.
[1021] Sections 2-4 of the Limited Liability Act 1855, 18 & 19 Vict. C. 133; Section 4 of the Act was repealed and replaced in section 3 of the Joint Stock Companies Act, 1857, 20 & 21 Vict. c.14; The 1855 Act was repealed and incorporated into the Joint Stock Companies Act 1856; Joint Stock Banking Companies Act 1857, 20 & 21 Vict. c. 49 and Joint Stock Banks Act 1858, 21 & 22 Vict. c. 91 and insurance companies in the Companies Act 1862, 25 & 26 Vict. c.89.
[1022] Section 1 (1) & (2), 4 & 5 of the Limited Liability Act, 1855; Gower, see above n.1013, 49.
[1023] Ibid, section 3; also see the effect of the Memorandum of Association but even this is subject to conditions of a prescribed form. Sections 5-6, Schedule A and sections 9-10 of the Act.
[1024] Hunt, see above n.863, 135; Hansard. (1856, 01 February). House of Commons Debate, Volume 140, cc134.
[1025] Sections 4, 28-31, 39 of the 1856 Act.
[1026] Hansard. (1856, 01 February). House of Commons Debate, Volume 140, cc131; Sections 16 ,17, 20, 23 of the Act; Hunt, see above n.863, 134-135; Cooke, see above n.837, 169; Sections 27- 28 of the Joint Stock Companies Act, 1857 made it implicitly mandatory for companies existing before 1856 to be registered because without registration such companies could not sue, could not pay dividends and its directors were subject to a pecuniary penalty.

the company.[1027] The courts enforced the contract contained in the constitution of companies but also made it clear that directors had to pay attention to the public purpose or utility of companies which they managed. In *Salomon v. Laing* and *Maunsell v. Midland Great Western (Ireland) Railway,* it *was* held that directors were bound to act for the purposes directed and provided by the Act of Parliament which incorporated them.[1028] The courts' decisions were arguably influenced by the public purposes which these companies served. In addition, they were influenced by the desire to protect the private interests of shareholders. In both cases, the directors sought to acquire shares in another company without prior authorisation of shareholders. It was held in both instances that, since these companies had been incorporated for public purposes; any surplus after performance belonged to the shareholders.[1029] In these cases, corporate property was protected through public ordering. The directors' discretion was equally restricted by public ordering to protect public interest in these companies as well as the private interests of shareholders.[1030]

Additionally, as highlighted by Gower, the word "limited" was included in legislation to draw the public's attention to the danger of the new and revised characterisation of the company and its possible impact.[1031] In the same way, in Table B of the Act,[1032] directors' powers and qualification are addressed, albeit in a non-mandatory and enabling manner. This shows increasing protection of private interests. Yet, like in the 1844 Act, directorial powers were limited as they were subject to legislative provisions in addition to companies' Articles of Associations. Therefore, directors were subject to public ordering on issues such as self-dealing. Other misconduct were sanctioned and remained grounds for disqualification and liability.[1033] This is evidence of the push and pull between private and public ordering of companies.[1034]

[1027] *Salomon v. Laing* (1850) 12 Beav 339; *Maunsell v. Midland Great Western (Ireland) Railway Company* (1863) 71 ER 58.
[1028] *Maunsell v. Midland Great Western (Ireland) Railway Company* (1863) 71 ER 58, 66.
[1029] *Maunsell v. Midland Great Western (Ireland) Railway Company* (1863) 71 ER 58, 69.
[1030] Ibid; *Salomon v. Laing* (1850) 12 Beav 339, 352-3.
[1031] Gower, see above n.1013, 50; Hansard. (1856, 01 February). House of Commons Debate, Volume 140, cc130.
[1032] Joint Stock Companies Act, 1856, Table B, 46-47.
[1033] Also of importance are the sections 5 to 8 of the Fraudulent Trustees Act 1857 and sections 81 to 84 of the Larceny Act of 1862 which criminalised directorial fraud, fraudulent appropriation of property and embezzlement, following the joint stock banks crisis of 1857 and concern for the nation's commercial morality. Taylor, J. (2013). *Boardroom Scandal: The Criminalization of Company Fraud in Nineteenth-Century Britain*. (pp. 111-112). Oxford, OUP; Hunt, see above n.863, 141.
[1034] Dicey, A. V. (2008). *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*. Wetering, R. V. (ed.) (pp. 248). Indianapolis: Liberty Fund; Maitland, F.

Attention must now turn to the 1862, Companies Act to illustrate this. The Act of 1862 has been coined the 'Magna Carta' of English company law. It was largely a consolidation piece of legislation but it marked the state's full acceptance of (unincorporated) joint stock companies.[1035] Like the legislative efforts of the 1850s, the Act led to the growth of joint stock companies and even the financial crisis of 1857 did not hold back their growth.[1036] This Act marked public ordering ceding more place to private ordering.

The Companies Act 1862, like its predecessors focussed on the formation, registration and limited liability of companies and thus included very few provisions on directorial misconduct.[1037] The statute did, however, create space for private ordering of limited liability. It enabled individuals to incorporate a company with limited liability but left it to the incorporators, under the company's constitution, to specify how limited liability would work within that company. For instance, if limited liability means that the member's liability is limited to any amount outstanding on their shares, the incorporators determined the price of the shares and the level to be paid-up in advance.[1038]

However, contrary to Kershaw's argument concerning the private ordering of companies, the courts were not left on the *"sidelines with no role to play apart from determining whether the parties had complied with the stipulation in the articles*."[1039] The courts retained an important role in the regulation of companies because the fear of judicial scrutiny with tangible penalties induced directors to act in the interests of the company they managed. [1040]

Public ordering, though reduced, was not inexistent. Although, the 1862 Act was a testament to the increased liberalisation of public ordering of company law, it did not strip the courts of the power to examine directors' misconduct.[1041] In fact, it

(1911). T*he Collected Papers of Frederic William Maitland, Volume 3*. (pp. 393). Fisher, H.A.L. (ed.) Cambridge, CUP; Mill, see above n.1004, bk. v, ch xi, 960-964; Cooke, see above n.837, 179.

[1035] *Salomon v. Salomon* (1897) AC 22, 47, per Lord Macnaghten.

[1036] Hunt, see above n.863, 144, 145-153.

[1037] There were however provisions to protect creditors (sections 39-48 of the Companies Act 1862). In sections 49 to 61 of the Companies Act 1862 are provisions to protect members of the company which included publicity requirement and examination of the company's affairs by inspectors.

[1038] Kershaw, see above n.994, 411-412.

[1039] Ibid, 435.

[1040] *Charitable Corpn. v. Sutton* (1742) 2 Atk. 400.

[1041] Ibid; *Duvergier v. Fellowes* (1828) 5 Bingham 248, 260; House of Lords Journal Volume 64: 3 July 1832. In Journal of the House of Lords: Volume 64, 1831-1832. (pp. 346-350). London, His

strengthened the courts' powers to address directors' impropriety and breach of trust. In *Re Mercantile Trading Company (Stringer's Case)*, the Court of Appeal exercised the summary power granted by sections 101 and 165 of the Companies Act 1862, to order directors to repay dividends declared and paid under a fraudulent balance sheet.[1042] Hence, contrary to Kershaw's contention, the Act provided more than "public gloss on existing private activity".[1043]

In fact, the crisis of 1866 triggered by the failure of Overend, Gurney Ltd,[1044] shook but did not destroy the belief in limited liability and joint stock companies.[1045] It instead strengthened public ordering of these companies. The House of Commons Select Committees of 1862 and 1867, appointed to look into existing Companies Acts rather than reject limited liability, advocated more disclosure. They also advocated stringent publicity and registration provisions, as ways of protecting society, particularly prospective shareholders.[1046] These Committees reiterated that joint stock and their limited liability were granted by a concession of the state because of the perceived public interest in the free development of joint stock companies.[1047]

The courts in a number of cases concerning *The Overend Gurney Company* reflected these beliefs.[1048] The courts stated that investors or shareholders ought to be more prudent about speculating because it is a hazardous affair.[1049] Essentially, once legal

---

Majesty's Stationery Office. British History Online. Retrieved from http://www.british-history.ac.uk/lords-jrnl/vol64/pp346-350; *Benson v. Heathorn*, (1842) 62 ER 909, 1 Y. & C.C.C. 326, 341-3; Farrar, J. & Watson, S. (2011). Self-Dealing, Fair Dealing and Related Party Transactions—History, Policy and Reform. *Journal of Corporate Law Studies*, 11 (2), 493, 502, 507.

[1042] (1868-69) L.R. 4 Ch. App. 475.

[1043] Kershaw, see above n.994, 414.

[1044] The Spectator. (1866, 16 June). The causes of the failure of Overend, Gurney, and Co., (pp. 3) London, UK. Retrieved from http://archive.spectator.co.uk/article/16th-june-1866/3/the-causes-of-the-failure-of-overend-gurney-and-co; London Daily News. (1866, May 12). The Financial crisis in the City. (pp. 6). London, UK. Retrieved from https://newspaperarchive.com/london-daily-news-may-12-1866-p-6/.

[1045] Hunt, see above n.863, 153-155; Hansard. (1867, 05 March). House of Commons Debate, Volume 185, cc1370-87.

[1046] House of Commons. (1867). *Report from the Select Committee on Limited Liability Acts; together with the proceedings of the committee, minutes of evidence, appendix, and index*. (Henceforth Report of 1867).

[1047] Hunt, see above n.863, 157; Cooke, see above n.837, 173-175.

[1048] Lobban, M (1996). Nineteenth century frauds in company formation: Derry v. Peek in context. *Law Quarterly Review*, 112, 287, 330; Great Britain, Parliamentary Papers on Companies Act. (1877). The Select Committee on the Operations of the Companies Acts, 1862 and 1867. (pp. 125-135). Parliamentary Papers 1877 (365) VIII 419. London, His Majesty's Stationery Office.

[1049] *Overend, Gurney & Co. v. Gurney* (1868-69) L.R. 4 Ch. App. 701, 717-720, per Lord Hatherley; *The Overend & Gurney Company v. Thomas Jones Gibb and John Darby Gibb* (1871-72) L.R. 5 H.L. 480, 495, 500, 502, 506.

requirements of registration, publicity and disclosure had been respected, it was thought that the public interest objective of disclosure and information had been fulfilled. Investors were informed or able to be informed about the nature of the undertaking in which they chose to engage.[1050] Public ordering and interest had thus evolved to acertain extent into a procedural almost box-ticking exercise. This meant checking for compliance with the aforementioned disclosure requirements and that there was no evidence of fraud. Except for these circumstances, shareholders were left to protect themselves.[1051] This indicates that public ordering facilitated the development of private ordering because it was felt that removing impediments to the development of companies was beneficial for the economy. But, there was still judicial intervention and scrutiny of corporate fraud in company formation.[1052]

Yet during the latter part of 19th century, the UK Parliament like the judiciary, took a slightly tougher stance against directors as they sought to protect the public from predatory businessmen (particularly concerning the issuance of prospectuses).[1053] Section 4 of the Companies Act of 1867 augmented directors' liability for misconduct.[1054] This illustrates that although public ordering of companies generally was less stringent; it was still an important aspect of the ordering of companies, particularly their governance.

Subsequently, the courts and legislators sought a middle ground between protecting the public from dishonest businessmen and not punishing directors who were

[1050] *The Overend & Gurney Company v. Thomas Jones Gibb and John Darby Gibb* (1871-72) L.R. 5 H.L. 480, 500.

[1051] The courts sometimes stepped in clear cases of extreme imprudence, absurdity and failure to be reasonable: *Overend Gurney* (1869) L.R. 4 Ch. App. 701, 720; *Re Crenver & Wheal Abraham United Mining Co., ex parte Wilson* (1872) L.R. 8 Ch. App. 45; *Charitable Corpn. v. Sutton* (1742) 2 Atk. 400, 404; Lobban, see above n.1048; *Derry v. Peek* (1889) 14 App. Cas. 337, 338-340; Mackie, see above n.838, 20-21; *Barned's Banking Co Ex p. Contract Corp, Re* (1867-68) L.R. 3 Ch. App. 105, 118.

[1052] Lobban, see above n.1048, 313, 317, 323; W. R. Callender Jr. (1867, 16 August). The Commercial Crisis of 1857: its Causes and Results (1858), (pp. 36). *The Times*. London, UK. The Times Digital Archive. The judgment delivered yesterday in the House. (pp. 7). *The Times*. London, UK. The Times Digital Archive.

[1053] Lobban, see above n.1048, 325-6; This is reflected in the legislations such as the Fraudulent Trustees Act, 1857; section 165 of the Companies Act, 1862 and section 38 of the Companies Act, 1867**;** *York and North Midland Railway Company v. Hudson* 16 Beav. 485, 491*; Derry v. Peek* (1889) 14 App. Cas. 337, 345-349, per Lord Branwell. He voiced concerns about protecting the public, even though he thought that the directors had made an unfortunate but honest statement; Hansard. (1878, 10 May). House of Commons Debate, Volume 239, cc1705-12; The Times. (1889, 5 July). The uncertainty of the law has been forcibly. (pp. 9). London, UK. The Times Digital Archive; Pollock. F, (1889). Derry v. Peek in the House of Lords. *Law Quarterly Review*, 410, 421-423.

[1054] Also see sections 5-8 of the Companies Act, 1867.

innocent of wrongdoing such as deceit but were negligent or insufficiently informed about the company they managed.[1055] This led to the controversial ruling in *Derry v. Peek* and the Directors' Liability Act of 1890 which was influenced by what was considered the defective ruling in the House of Lords' decision *in Derry v. Peek*.[1056] The case was primarily concerned with the liability of directors and promoters of companies for statements made in prospectuses and other related documents. It focussed on misrepresentation and untrue statements made in these documents.[1057] The regulation of prospectuses was intended to reduce fraud and protect the public, particularly the investing public.[1058] This is another example of public ordering of companies for the public interest.

In fact, the preoccupation with good corporate governance and company directors led to the Davey Report of 1894-1895.[1059] The Report was the first recommendation for the codification of common law directors' duties. It focussed on the need to make clear to shareholders, directors and society, "the standard of commercial morality" expected of directors.[1060] It also highlighted the need to impose an obligation of reasonable care and diligence on directors.[1061] Consequently, the Davey Report exemplifies public ordering in the regulation of directors' obligations. In the Draft Companies Bill attached to the Report, there was a five clauses section on directors' responsibilities.[1062] Although private ordering of companies were influential in the 19th century, the public ordering of companies and the regulation of directors' conduct

---

[1055] *In Re Forest Dean Coal Mining Company* (1878) 10 Ch. D. 450,451-459 per Jessel M.R.**;** *In Re Cardiff Savings Bank, Marquis of Bute's Case* (1892) 2 Ch. D. 100, 108-110**;** *Overend and Gurney Co. v. Gibb* (1872) L.R. 5 H.L. 480, 495.

[1056] Lobban, see above n.1048, 331-4; Lord Herschell's objections in Hansard. (1890, 15 July). House of Lords Debate, Volume 346, cc1699**;** The Lord Chancellor's comments in Hansard. (1890, 15 July). House of Lords Debate, Volume 346, cc1702-5; Hansard. (1890, 02 July). House of Commons Debate, Volume 346, cc 598-600**;** The Times. (1890, 16 July). The debate in the House of Lords yesterday on. (pp. 9). London, UK. The Times Digital Archive; The other Companies Acts were not relevant to the research question of this thesis.

[1057] Sections 3-5 of the Directors' Liability Act of 1890; Lee, A. S. Y. (2002). *Law, economic theory and corporate governance: the origins of UK legislation on company directors' conflicts of interest, 1862-1948*. (pp. 87-88). University of Cambridge, Faculty of law, Thesis. (Unpublished).

[1058] "The Times, (1889, 5 July), see above n.1053.

[1059] Lee, see above n.1057; This Report was influenced by a number of scandals caused by rogue company directors, particularly Jabez Balfour- Taylor, see above n.1033, 220, 223, 230-1.

[1060] The Davey Report 1895, paras. 17, 30-32.

[1061] Ibid.

[1062] Clauses 3, 8-12 of the Draft Companies Bill 58 Vict. (1895); Great Britain, Parliamentary Papers (1895). *Dept. Committee to inquire into Amendments in Acts relating to Joint Stock Companies incorporated with Limited Liability under Companies Acts: Report and Appendix*. (pp. 174, 177- 179). London, His Majesty's Stationery Office; Lee, see above n.1057, 88-89.

remained and thrived, until the 20th century, as evident in the Companies Act of 1900.[1063]

5.7 CONCLUSION

A review of the development of companies, primarily from the 17th-19th centuries, particularly joint stock companies, reveal a number of things. The development of companies in England is not mono-causal. It is not purely attributable to contracting and private ordering. The development of companies has been influenced in a complementary and sometimes contradictory manner by both public and private ordering. [1064]

Likewise, the development of companies and ordering has been characterised by numerous public interest concerns. These ranged from the prevention of bubbles and fraud to the encouragement of free trade and commerce to bolster the nation's economy. Public interest also includes upholding the common good in integrity, trust and honesty in the governance of companies. At the same time, private ordering of companies equally facilitated the development of companies. It did so through the use of contracts and devices such as the Deed of Settlement, particularly during the era of the Bubble Act, when public ordering stifled the growth of companies.

Nevertheless, the inadequacies of private ordering led to the demand for public ordering. This is the failure of Deed of Settlement device to afford all corporate privileges attributed to incorporated companies. Therefore, the development of companies in England is in fact a product of dual ordering. This straddles private and public law with a focus on the public purpose, utility and interest in companies.[1065] In fact, interest groups, scholars and the business world felt, at different periods, that state intervention was necessary for the full development of (joint stock) companies.[1066]

Shedding light on areas of state reluctance to intervene in the development of companies as illustrated throughout this chapter revealed a complex picture. It

[1063] Sections 2, 3 and 7(2), 9-10 of the Companies Act, 1900 but strict provisions on directors' liability were not incorporated into the Act. Similarly sections 21-23 of the Act concerned strict audit provisions which show that regardless of the growth in private ordering in the development of companies, their good governance was still of some public interest.
[1064] Mackie, see above n.838, 22-23.
[1065] Sugarman & Rubin, see above n.828, 10-11.
[1066] Ibid, 12-13.

showed firstly that “legal intervention or abstention did not occur in vacuo”.[1067] Secondly, such intervention was characterised by the socio-economic contexts of the era.[1068] Understanding all of these issues opens the door to discussions for the public ordering of contemporary companies, particularly the regulation of directors’ conflicts of interest.

A key argument which can be drawn from this chapter is that there is a public interest in the running of companies. Even during very early days of regulation, there were mandatory provisions governing directors’ conduct and in particular, regulating conflicts of interest. Having revealed that public interest and public ordering were integral to (the development of) the regulation of directors’ conduct, it is important to examine directors’ conflicts of interest in detail. This is essential to examining if the ordering of this aspect of directors’ conduct has continued to be of societal interest.

[1067] Ibid, 112.
[1068] Ibid, 112, 123.

CHAPTER SIX

BREACH OF TRUST, DIRECTORS' CONFLICTS OF INTEREST AND THE QUESTION OF PUBLIC INTEREST

6.1 INTRODUCTION

Having defined public interest as well as conflicts of interest in chapters 3 and 4 of this thesis, it was ascertained that public ordering and public interest justifications were present in the development of companies and their governance in chapter 5. It is now imperative to review the regulation of directors' conflicts of interest in detail and the role that breach of trust played in the regulation of directors' conflicts of interest.

Consequently, this chapter will explore the historical origins of the regulation of directors' conflicts of interest. This is because one cannot assess the existence of public interest considerations for the regulation of directors' conflicts of interest without looking at the breach of trust. Breach of trust has historically provided the basis for directors' duty of loyalty to companies. It afforded these companies (some) protection from the appropriation of their property and assets. However, it is important to examine if the regulation of breach of trust also serves public interest purposes.

Trust is an excellent vehicle which shows a well-established history of the regulation of directors' conflicts of interest. Yet the question posed in this chapter is if the diverse justifications for the legislative and judicial intervention in directors' conflicts of interest are indicative of public interest concerns. Such exploration is important because it could indicate that public interest is neither novel nor alien to corporate governance, particularly the regulation of directors' conflict of interest.

Before addressing the notion of breach of trust, it is imperative to highlight the competing societal interests to be discussed in this chapter. These have influenced the regulation of directors' conflicts of interest. These societal interests include private interests such as the protection of shareholders' and companies' property and money. They also include public interest in the protection of the investing public and general public from fraud and corporate misconduct. Also of import are the public interest in

the common good and values such as honesty and integrity in commerce as well as protecting the economic life of the nation by encouraging healthy growth and development of companies.

Essentially, the manner in which conflict of interest rules have evolved to meet societal needs or interests will be analysed. This is vital to verifying if the regulation of directors' conflict of interest is simply a product of private ordering with a private purpose. This chapter concludes, in support of Lord Wedderburn's argument, that the regulation of directors' conflicts of interest and directors' fiduciary obligation, though sometimes imposed by private law, are also the subject of public ordering, and serve public function and social purpose.[1069]

This chapter will be structured as follows: a review of the origin and development of the notion, breach of trust and directors as trustees in relations to conflicts of interest. Then a review of breach of trust, disclosure and ratification of directorial irregularity and a study of legislative intervention and breaches of trust will ensue. These are significant for examining the development of the regulation of directors' conflicts of interest and existence of public interest motivation for regulation. Some concluding remarks will then be made.

6.2 BREACH OF TRUST AND DIRECTORS AS TRUSTEES: ORIGINS AND DEVELOPMENT OF DIRECTORS' CONFLICTS OF INTEREST AND PUBLIC INTEREST

6.2.1 HISTORIC RELATIONSHIP BETWEEN TRUSTS AND THE COMPANIES

There is an historic relationship between trusts and companies as discussed in chapter 5 of this thesis, and noted by Maitland.[1070] The trust was initially useful to companies because it served to attain, albeit clumsily, the privileges of incorporation. It provided a framework for the governance of companies because honesty and diligence were required of trustees.[1071] Trust principles, subsequently known as

[1069] Wedderburn, Lord. (1985). Trust, Corporation and the Worker. *Osgoode Hall Law Journal*, 23 (2), 203, 221.
[1070] Maitland, F.W. (2003*). Maitland: state, trust and corporation*. Runciman, D., & Ryan, M. (eds.) (pp. 76, 94). Cambridge, CUP; Maitland, F.W. (1936). Trust and corporation. In H. Hazeltine, G. Lapsley & P. Winfield (eds.) *Maitland: Selected Essays*. (pp. 141, 214). Cambridge, CUP.
[1071] Maitland, (2003). Ibid, 102-4.

fiduciary principles, have provided means of protecting the best interests of companies and their members by imposing certain rights and obligations on directors.[1072] For example, during the era of the Bubble Act, the ingenious use of trusts allowed individuals to continue to create and operate (quasi) joint stock companies. This meant that these entities continued to exist and develop even in a hostile societal context.[1073] Even in cases where trusts were not used explicitly, directors were treated like trustees. They accepted what the Chancery Courts considered to be akin to appointment of trusts, in the management of companies and they were held accountable for breaches of these trusts.[1074]

Essentially trust and fiduciary principles enabled companies to organise their internal affairs, and separate ownership from management.[1075] It is thus argued that trusts were, and have always been a natural companion of companies; especially unincorporated ones. Trust required a certain standard of ethics from directors which is reminiscent of public law notions, and common interest conceptions of public interest. These include values such as integrity, loyalty and stewardship.[1076] However, this is not a satisfactory premise to conclude that, directors' fiduciary duties including conflicts of interest obligations, are born of public interest justifications. After all, the trust is a legal mechanism which is present in various areas of life and imposes itself on all decision-makers. Due to this, it has acquired in a juridical sense, a remarkably independent and refined form.[1077] Nevertheless, although trusts enable companies to organise their affairs, the state strengthens the stewardship of trust property, which is at the heart of corporate entities' activities.[1078] Of course, in the UK it has to be enforced by individuals, except in cases of director disqualification.

Furthermore, breach of trust has provided the foundation for directors' fiduciary duty, the duty of loyalty.[1079] This is the duty to which the regulation of directors' conflicts of

[1072] Sheikh, S. (2008). *A Guide to the Companies Act 2006*. (pp. 400-1). London, Routledge-Cavendish.
[1073] Cooke, see above n.837; Dubois, see above n.831.
[1074] See above n.1069, 212.
[1075] Ibid, Sheikh, see above n.1072, 400.
[1076] Millett, L. (1998). Equity's Place in the Law of Commerce. *Law Quarterly Review,* 114, 214, 216.
[1077] Maitland, see above n.1070, 106-7.
[1078] Getzler, J. (2016). Frederic William Maitland – Trust and Corporation. *University of Queensland Law Journal*, 35 (1), 171, 185.
[1079] Miller, P. (2014). The fiduciary relationship. In A. Gold & P. Miller (eds.) *Philosophical Foundations of Fiduciary Law*. (pp. 63-65). Oxford, OUP; DeMott, D. (2006). Breach of fiduciary duty:

interest generally is central.[1080] Since breach of trust is so vital, an understanding of its history is just as significant. The history of the regulation of directors' conflicts of interest can thus be traced back to fiduciary duties and the breach of trust. This will be explored in the next section of this chapter.

6.2.2 HISTORY OF FIDUCIARY PRINCIPLES, BREACH OF TRUST AND CONFIDENCE

The origin of fiduciary duties can be traced back to biblical and Islamic traditions.[1081] These duties were influenced by Roman law and other secular concepts of property and inheritance law which provided the foundation for corporate law.[1082] This is evident in the manner in which fiduciary law was extended to encompass situations that were not necessarily trusts but concerned breaches of trust and confidence. This was the case in English company law.[1083]

Historically, many thought that the focal point of fiduciary duties of directors was shareholders' interests.[1084] Nevertheless, the influence and framework provided by the Roman and ecclesiastical law meant that these duties were underpinned by notions of selflessness and honesty.[1085] In fact, a number of theorists argue that fiduciary is a relatively new term in English law and that historically trust has been used to describe fiduciary relationships for want of a better term.[1086] Trust has permitted the development of fiduciary principles for specific relationships such as the relationships between directors and companies.[1087]

---

on justifiable expectations of loyalty and their consequences. *Arizona Law Review*, 48, 925, 935-940; Walsh, J. (2002). The Fiduciary Foundation of Corporate Law. *Journal of Corporation Law*, 27, 333; *Bristol and West Building Society v. Mothew* [1998] 1 Ch 1, 18 (CA).

[1080] Conaglen, M. (2005). The nature and function of fiduciary loyalty. *Law Quarterly Review,* 121, 452, 480; Lowry, J. (2009). The duty of loyalty of company directors: bridging the accountability gap through efficient disclosure*. C.L.J.* 68(3), 607-622.

[1081] Szto, M. (2004). Limited Liability Company Morality: Fiduciary Duties in Historical Context. *Quinnipiac Law Review*, 23 (1), 61, 86-88; Seipp, D. J. (2011). Trust and Fiduciary Duty in the Early Common Law. *Boston University Law Review,* 91 (3), 1011-1016.

[1082] Szto, Ibid, 89-96.

[1083] Ibid, 97.

[1084] Ibid, 110-111.

[1085] Ibid, 112-113; Seipp, see above n.1081, 1011-1016.

[1086] Sealy, L. (1962). Fiduciary Relationships. *Cambridge Law Journal,* 20 (1), 69; Finn, see above n.699*;* Scott, A. W., & Fratcher, W. F. (1987). *The Law of Trusts.* (Vol. I, pp. 9-26). (Vol. III, pp. 22-36). (4th ed.). Boston, Little, Brown and company Publishers.

[1087] Finn, ibid, 1; Rotman, L., (2011). Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence. *Boston University Law Review*, 91, 921, 925-6.

Breach of trust and confidence was historically one of the branches of equity and trust law.[1088] It was generally applied to cases of representation, dependence on another's professional advice or expertise, employment, etc. It was commonly felt that confidence was reposed in these relationships and then if abused, relief could be sought from the courts of equity.[1089] This approach was applicable to public and private appointments or undertakings, including companies.[1090] Actually, when courts used the phrase 'breach of trust', it was short-hand for breach of trust and confidence to describe fiduciary relationships. This was not necessarily a trust in technical legal terms but a situation where a person was entrusted with a certain undertaking, and trust or confidence had been placed in this person to act on behalf of others and that trust had been abused.[1091]

It is inferred that the type of fiduciary relationship applicable to directors *vis à vis* a company is the sort of obligation born of the situation whereby one entrusts another with a task to be performed.[1092] The courts in such situations believed that the fiduciary ought to act consistently with her undertaking and that there is an implicit acceptance that she will not act for her profit in carrying out the undertaking.[1093] This indicates that fiduciary relationships are tied to the idea of a duty of loyalty.[1094]

Fiduciary principles are generally viewed as fundamental aspects of equity.[1095] These have evolved over time to address different types of relationships, situations and

---

[1088] Sealy, see above n.1086; Maitland, F. W. (1936). *Equity: A course of lectures*. (pp. 6-7). (2nd ed.). Brunyate, J. (rev.). Cambridge, CUP.
[1089] *Gartside v. Isherwood, and Others* (1783) 1 Brown's Chancery Cases 558, 560, per Lord Thurlow; 28 E.R. 1297, 1299.
[1090] *Charitable Corpn. v. Sutton* (1742) 2 Atk. 400, 406.
[1091] Sealy, see above n.1086, 70-74; *Duke of Beaufort v. Berty* (1721) 24 ER 579; 1 P.Wms. 703, 704-705, per Lord Macclesfield; *Charitable Corpn. v. Sutton* (1742) 2 Atk. 400; *Cholmondeley v. Clinton* (1821) 4 Bli 1, 96, per Lord Eldon; (1820) 37 ER 527, 2 Jac. & W. 1, 183 (Plumer M.E.). There are early examples of the word, fiduciary but they are said to be used in similar manner as the notions, trust and breach of trust**:** *Bishop of Winchester v. Knight* (1717) 24 ER 447; 1 P.Wms. 406, 407; *Oliver v. Court* (1820) 8 Price 127, 143, Dan 301; 146 ER 1152 (counsel)**;** *Docker v. Somes* (1834) 2 My & K 655, 3 LJ Ch 200; 39 ER 1095.
[1092] Sealy, see above n.1086, 76; *Reading v. The King* [1949] 2 K.B. 232, 236; *Benson v. Heathorn* (1842) 62 ER 909, 1 Y. & C.C.C. 326, 340-341**;** Scott, A. (1949). The Fiduciary Principle. *California Law Review,* 37, 539, 540**;** *Gluckstein v. Barnes* [1900] A.C. 240.
[1093] Sealy, see above n.1086, 76; *Whichcote v. Lawrence* (1798) 30 ER 1248, 3 Ves. 740, 750; *Ex parte Lacey* (1802) 6 Ves. 625, 626, 31 ER 1228, 34 ER 955.
[1094] Miller, P. (2013). Justifying fiduciary duties. *McGill Law Journal*, 58, 969, 975–976; Weinrib, E. (1975). The Fiduciary Obligation. *The University of Toronto Law Journal,* 25 (1), 1, 16; DeMott, D. (1988). Beyond Metaphor: An Analysis of Fiduciary Obligation. *Duke Law Journal*, 37 (5), 879, 882;
[1095] *Re Smith & Fawcett Ltd*. [1942] Ch 304, 306, 308; *Woodhouse v. Meredith* (1820) 1 Jac & W 204, 213.

agreements. Fiduciary principles place emphasis on regulating and setting the standards of behaviour to which those holding power over the interests of others ought to aspire. They are thus associated with notions of justice or fairness.[1096] These are often associable with unitary or common interest articulation of the public interest.[1097] These theories are value-based or ideal-regarding conceptions of the public interest, for which notions like justice, honesty, and integrity are central. They are either at the heart of serving unitary societal interests or transcending societal interests, acting in the common good, that is, the common interest of all in society. Fiduciary principles can therefore be said to incorporate public interest considerations. They promote values that are associated with unitary or common interest theories, discussed in chapter 3. Hence, directors' conflicts of interests' association with fiduciary principles shows a concern with the public interest.

Similarly, fiduciary principles play a significant role in safeguarding sustainability and continuity in the effectiveness of relationships which require social and economic interdependence.[1098] For instance, the application of fiduciary principles prevents the misuse and abuse of trust or confidence by those who hold power or manage the affairs of others.[1099] There is a keen awareness of the centrality of trust and confidence in socio-economic relationships.[1100] This once again suggests that some of the motivations of the use of fiduciary principles for the regulation of directors' conflicts of interest could be public interest. This means the sustenance of values such as justice, fairness and trust in corporate governance.

6.2.3 EXTENSION OF FIDUCIARY PRINCIPLES: BREACH OF TRUST AND DIRECTORS AS TRUSTEES

Sealy in his seminal article on directors as trustees,[1101] stated that the notion of directors as trustees, was an analogy used by the courts to ensure that directors were sanctioned for their breaches of trust. Directors were not considered trustees in the

[1096] Finn, see above n.699, 1-10.
[1097] Chapter 3 of this thesis in sections 3.3.2 and 3.3.3.
[1098] Finn, P. D. (1989). The Fiduciary Principle. In T.G. Youdan (ed.) *Equity, Fiduciaries and Trusts*. (pp. 1, 26-27). Toronto, Carswell.
[1099] Rotman, see above n.1087, 932-934; Finn, see above n.699, 3-4.
[1100] Finn, P. D. (1989). Contract and the Fiduciary Principle. *University of New South Wales Law Journal,* 12, 76, 84; *Warren v. Pfeil*, 346 Ill. 344, 360, 178 N.E. 894, 900.
[1101] Sealy, see above n.607.

strict sense of the term. Even in early companies such as Deed of Settlement companies, there were recognised differences between directors and trustees. The directors and the trustees of these companies were often different groups and were subject to separate company provisions.[1102] Even though they sometimes were the same persons chosen to fulfil both roles, there is no evidence that this overlap led to judicial confusion in the identification of the two roles.[1103]

Why then did the courts use the word 'trust' to describe directors' breaches of fiduciary duties? It is submitted again that the reason for this was the limitation of legal vocabulary[1104] and doctrinal pragmatism.[1105]

Sealy added that,

> *"It was sufficient for the court to determine that the directors had accepted an office, duty or 'trust'; they were 'trustees' who ought to be accountable for 'breaches of trust'."*[1106]

In fact, Sealy asserted that the 'trustee' in a strict sense, a person in whom property is legally vested for the benefit of others, was not separately identified from other 'quasi-trustees' such as directors until well into the nineteenth century. The expression,

> *"'Fiduciary' was eventually accepted to differentiate true trusts from those other relationships, like that between a director or a promoter and his company, which in some degree resemble them."*[1107]

Fiduciary principles have thus been applied to a vast number of interdependent relationships including those which exist in corporate law. The courts applied fiduciary principles to deal with directors' duties vis à vis the company and/or shareholders.[1108]

[1102] Ibid, 83.
[1103] Ibid, 83-84; Dubois, see above n.831, 266, 274; *Benson v. Heathorn* (1842) 1 Y. & C.C.C. 326; *Gleadow v. Hull Glass Co*. (1849) 19 L.J.Ch. 44; *York and North-Midland Ry. v. Hudson* (1853) 16 Beav. 485.
[1104] Sealy, see above n.607, 83, 86.
[1105] Whincop, see above n.917, 31.
[1106] Sealy, see above n.607, 83, 86; *York and North-Midland Ry. v. Hudson* (1853) 16 Beav. 485, 491, per Lord Romilly M.R.
[1107] Sealy, see above n.607, 83, 86.
[1108] Frankel, T. (1983). Fiduciary Law. *California Law Review*, 71 (3), 795, 805-806.

Keech v. Sandford[1109] illustrates this. It is an important case, often cited as the antecedent of the rule on breach of trust and the regulation of conflicts of interest. Although this case concerned an actual trust, it was extended to address directors' breaches of trust and conflicts of interest even where they were not actual trustees.[1110] Lord Eldon added in *Ex parte James*, that the no conflict and no profit doctrine applied to trustees and persons having a confidential character, including directors. This was irrespective of how honest they were because the general interests of justice required a strict application of the doctrine.[1111]

This thesis argues that the *South Sea Company* case marked another traceable starting point for the notion of directors' breach of trust and the regulation of conflicts of interests.[1112] This is because the directors of this large corporation were accused of a breach of trust due to a number of conflicts of interest including self-dealing, for which they had to account.[1113] They had to account for these breaches of trust due to the private interests as well as the public interests concerned. The Company was a joint stock incorporated company with shareholders (subscribers) who had invested in it through the purchase of stocks. The Company's objectives were to contribute to the alleviation of the public debt and encourage trade in South America. The breach of trust here was of private interest to the company and its subscribers because they were entitled to due performance of contractual obligations. The breach of trust was of public interest not only because the Company failed to alleviate public debt or bolster trade in South America, but also the bubble that resulted from the failure of the Company had ripple effects legislatively, politically and socially. It affected the manner in which joint stock companies were perceived for decades. The breach of trust and its regulation in the *South Sea Company* case is evidence of public interest as well as private interest in the regulation of directors' conflicts of interest.

[1109] *Keech v. Sandford* (1726) Sel. Cas. Ch. 61, per Lord King.
[1110] *Whelpale v. Cookson* (1747) 1 Ves. Sen. 9, 11 ; *Ex parte Lacey* (1802) 6 Ves. 625, 627, per Lord Eldon L.C.
[1111] *Ex parte James* (1803) 8 Ves. 337, 345, per Lord Eldon L.C.
[1112] Chapter 4 of this thesis.
[1113] It is notable that directors have also been considered agents: *Ferguson v. Wilson* (1866) LR 2 Ch App 77, 89-90; *Smith v. Anderson* (1880) 15 Ch D 247, 276; *Automatic Self-Cleansing Filter Syndicate v. Cuninghame* [1906] 2 Ch 34, 43-45 but it was stated that directors are not merely agents.

Similarly, the courts used the analogy of trust and breach of trust in the seminal 18th century case, *Charitable Corporation v. Sir Robert Sutton and Others*.[1114] It was held that the directors acted in a manner that showed a lack of fidelity and reasonable diligence in the management of the affairs of the Corporation. Their actions led to loss for and prejudice to the Corporation and that they had to make good on these losses.[1115] This case concerned a corporation incorporated by charter, thus created by a concession of the state. In this case, Lord Hardwicke made it clear that the committeemen (modern day directors) of the Corporation owed duties in the same manner and quality as trustees of a trust. He stated,

> *"I take the employment of a director to be of a mixed nature: it partakes of the nature of a publick office, as it arises from the charter of the crown….* (and that directors are) *most properly agents to those who employ them…., and who empower them to direct and superintend the affairs of the corporation". [1116]*

This case involved a very small company incorporated by Royal Charter, to provide loans of money to poor people, making sure that they were not exploited by pawnbrokers. It served a public interest and public purpose. Due to the directors' negligence and self-dealing, the Corporation was mismanaged and suffered a significant loss. The Court was quite severe with the directors for a number of reasons. The Corporation's money was mismanaged and so it meant that it failed to serve its main public interest purpose, relieving the poor by giving them loans. The directors failed to uphold their public office and purpose of their Charter of incorporation, a privilege granted by the state. The mismanagement of the Corporation also had consequences for those with private financial interests in it as the directors mismanaged the money and the affairs of the Corporation.[1117] As mentioned earlier in this thesis, this reveals that corporations historically were subject to public and private ordering and correspondingly, directors' obligations were viewed through this lens.[1118]

[1114] (1742) 2 Atk. 400.
[1115] (1742) 2 Atk. 400, 405-406; *A-G v. Wilson* (1840) Cr & Ph 1, 10 LJ Ch 53.
[1116] (1742) 2 Atk. 400, 405.
[1117] (1742) 2 Atk 400.
[1118] Chapter 5 of this thesis.

In fact, some contended that because the management of (joint stock) companies was granted to directors and since shareholders "must necessarily continue passive, the courts of equity were very strict in enforcing the due execution of the trust reposed in those functionaries."[1119] The use of the term, 'functionaries' in 1866 evoked responsibilities of a public nature. By indicating that those directors' fiduciary responsibilities were analogous to *fonctionnaires,* courts sought to hold directors to standard of behaviour akin to public officials. 'Fonctionnaire', a French word can be translated into 'public officials' in English language. The case above is illustrative of the private and public interest justifications for the regulation of directors' breaches of trust. It also implies that there is a public function for breach of trust or corporate fiduciary principles.

In the same manner, the courts used notions of breach of trust to provide solutions when relief was sought for bubble companies concocted in fraud.[1120] Here, one is reminded of the public interest preoccupation with the prevention of fraud and bubbles associated with joint stock companies discussed in chapter 5 of this thesis. The courts analogised directors as trustees of companies' money or property because they wanted to protect private interests. They sought to afford shareholders a measure of protection, encourage or preserve honesty and trust in commercial affairs and hold those to whom they entrusted the company, accountable.

The discussion thus far has centred on incorporated by charter companies. It is therefore vital to review the case of registered unincorporated companies to ascertain if there were indications of public interest considerations in the regulation of these companies too.

6.2.4 BREACHES OF TRUST AND JUDICIAL INTERVENTION: REGISTERED UNINCORPORATED COMPANIES

The courts used the analogy of trustee and breach of trust to ensure that directors were held accountable and liable for misappropriation of company money or property. They also used the analogy to hold them accountable for failure to act in accordance or compliance with the role, duties and responsibilities with which they have been

[1119] Smith, J. S. (1855). *A compendium of Mercantile Law*. (3rd Ed.) (pp. 131). New York, D. Appleton and company; *Wallworth v. Holt* 4 M. & Cr. 619.
[1120] Smith, ibid, 132.

entrusted. This was not because they were necessarily considered actual trustees of the companies as directors and trustees were recognised as distinct. For example, in the case of Deed of Settlement companies, the role of trustee was distinct from that of director, though an individual could serve both roles.[1121] The trust analogy has been instrumental in creating and enforcing strict and absolute prohibition to directors' conflicts of interest and other breaches of trust. The approach was that it was sufficient that directors had accepted a position of trust, they were treated like trustees and they were held accountable for breaches of trust.[1122] This is presumably because these trust law elements were familiar to the courts and provided ready-made solutions with which the judges were comfortable.

These breaches of trust included a number of duties associated with the fiduciary relationship between directors and the company whose affairs they have been entrusted.[1123] These included conflicts of interest such as misapplied company money or property and accounting for gains made by directors.[1124] During the era of unincorporated Deed of Settlement companies, directors were made liable for breach of trust with a severity greater than that which was applied to actual trustees. In one instance, the directors were held liable whilst the trustees of the company avoided liability for the misappropriation of company funds because they claimed that they had been coerced by the directors.[1125] It was thus held that the directors had been entrusted with the entire management of the company.[1126] This reinforces the idea that the courts did not exactly consider directors to be trustees and evidently saw a distinction between the two roles.[1127]

[1121] Sealy, see above n.607, 84; Dubois, see above n.831, 266; *Benson v. Heathorn* (1842) 62 ER 909, 1 Y. & C.C.C. 326.
[1122] Sealy, see above n.607, 85-86; *York and North-Midland Ry. v. Hudson* (1853) 16 Beav. 485, 491, per Lord Romilly M.R; *Re Kingston Cotton Mill (No. 2)* [1895] 1 Ch. 331, 345; *Re Exchange Banking Co., Flitcroffs Case* (1882) 21 Ch. D. 519, 525.
[1123] Sealy, see above n.607, 83.
[1124] *Re Lands Allotment Co* [1894] 1 Ch 616 (CA), 631; *In Re Forest Dean Coal Mining Company* (1878) 10 Ch. D. 450, 453 per Jessel MR; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v. Sharpe* [1892] 1 Ch 154,165-167, per Lindley LJ; *Re Duckwari plc (No 2)* [1998] 2 BCLC 313, 315.
[1125] *Grimes v. Harrison* (1859) 26 Beav. 435, 436, 446-7.
[1126] *Benson v. Heathorn* (1842) 1 Y & C.C.C.326, 62 ER 909; *Grimes v. Harrison* (1859) 26 Beav. 435, 447-8.
[1127] Wedderburn, see above n.1069, 212; *Aberdeen Railway Co v. Blaikie Bros* (1854) 1 Macq H.L. 461, 471-2.

Nevertheless, courts analogised directors as trustees where they saw fit. In *Benson v. Heathorn*,[1128] the directors were analogised as trustees in order to hold them accountable for self-dealing and misappropriation of company funds for personal use by a co-director. They incurred liabilities for these acts.[1129] It is apparent that breach of trust provided the means of regulating directors' conflicts of interest and ensuring that directors took their fiduciary obligations seriously. These included duties of loyalty, avoiding self-dealing and ensuring that company funds and property were not used for unauthorised purposes.[1130]

Similarly, it can be deduced from these cases that the standard for the holders of social power in trust, that is, those who govern, including directors, could not be permitted to fall.[1131] Fiduciary principles such as breach of trust were ways of ensuring that this did not occur. Although, some may say that the courts were merely enforcing private rights, the public ordering imposed by the courts served to protect more than the private interests of the company and its members in the good governance of companies. Breach of trust also served to protect societal interest in good corporate governance and holding those who govern or hold social power to high standard of conduct.

In the same manner, in cases where a director is a recipient of company property and assets obtained in breach of trust including breaches of fiduciary duty concerning conflicts of interest, the director was seen as holding the assets or property on trust for the company.[1132] This was due to the trustee-like nature of the director's duties to the company and so the director was liable to account for profits gained due to the breach of trust too.[1133] With regards to secret profits, directors who participated or contributed to the breach of trust were jointly and severally liable.[1134]

[1128](1842) 1 Y & C.C.C.326, 62 ER 909.
[1129] Ibid – The directors incurred various liabilities for the act of a co-director, Heathorn, who misappropriated company funds for his own benefit.
[1130] Sealy, see above n.607, 87.
[1131] Wedderburn, see above n.1069, 223.
[1132] *Cook v. Deeks* [1916] 1 A.C. 554.
[1133] Ibid.
[1134] *Re Oxford Benefit Building and Investment Society* (1886) 35 Ch. D. 502, 505-6,509, 516; *Re Faure Electric Accumulator Co* (1888) 40 Ch D 141,158 ; *Re Duckwari plc (No 2)* [1998] 2 BCLC 313, 322, CA. *Benson v. Heathorn* (1842) 1 Y & C Ch Cas 326.

An exploration of the notion, breach of trust thus far reveals that it was a way in which judicial intervention could occur in early cases of conflicts of interest and other breaches of directorial fiduciary duties. This section revealed that directors were treated in a comparable manner to trustees in cases concerning corporations[1135] and unincorporated companies.[1136] The trust analogy therefore was indispensable to creating and enforcing strict and absolute prohibition to directors' conflicts of interest and other breaches of trust. The trust analogy was a means of ensuring public ordering of the internal organisation of corporate entities, so that companies appropriately served the aforementioned private and public interests and purposes.

By the same token, the strict approach taken by the courts, in particular, in *Keech v. Sandford* and *Ex parte James,* highlight the courts' underlying public policy and interest in ensuring that fiduciaries do not divert opportunities to their advantage.[1137] Once again, the notion of breach of trust was applied to directors in like manner to trustees.

In *Re Cameroon's Coalbrook Railway Co*[1138] and a number of cases, particularly concerning conflicts of interest, the courts treated directors like trustees of the company who had to or were required to act for the benefit of the company and its shareholders. It was held that their private interests must be subservient to the interests of the company whenever these conflicted. This was considered to be in the character and quality of the office or appointment they accepted as directors.[1139] In fact, it was held in *Re Cameroon's Railway Coalbrook Company* that *"directors of a public company are trustees for the shareholders, and their private interests must yield to their public duty whenever they are conflicting."*

[1135] *R. v. Watson* (1788) 2 Term Rep. 199; *Mayor of Colchester v. Lowten* (1813) 1 V. & B. 226, 232-233, 242-245; *Att.-Gen. v. Wilson* (1840) Cr. & Ph. 1; *Att.-Gen. v. Compton* (1842) 1 Y. & C.C.C. 417.

[1136] *Benson v. Heathorn* (1842) 62 ER 909, 1 Y. & C.C.C. 326.

[1137] Edmunds, R., & Lowry, J. (2000). The no conflict-no profit rules and the corporate fiduciary: challenging the orthodoxy of absolutism. *Journal of Business Law*, 122, 127-8, 131; *Bray v. Ford* [1896] A.C.44, 51-52.

[1138] (1854) 18 Beav 339, 349.

[1139] *Re Cameroon's Coalbrook Railway Co* (1854) 18 Beav 339, 349-50; *Ferguson v. Wilson* (1866) LR 2 Ch App 77, 89-91; *Overend Gurney & Co v. Gurney* (1869) LR 4 Ch App 701; *In Re Forest Dean Coal Mining Company* (1878) 10 Ch D 450-453; *Re Land Allotment Co* [1894] 1 Ch 616 (CA), 631, [1891-94] All ER Rep 1032,1034; *Great Eastern Rly Co v. Turner* (1872) LR 8 Ch 149, 152.

This indicates that directors were not solely expected to be concerned with the interests of the company and its shareholders. *Re Cameroon's Coalbrook Railway Co* is an interesting case because it was a registered Deed of Settlement joint stock company with a public purpose, the construction of a railway. It is thus not surprising that the courts chose to protect the interests of the shareholders and to hold the directors liable for a breach of trust as they had not acted in the interests of the Company.[1140] It was held that they were bound to uphold the character and quality of the office they accepted, with all its corresponding duties and interests, even if this meant subordinating their individual interests to the Company's and shareholders' interests.[1141] Although the public duty highlighted was not stated explicitly, this thesis deduces that the duty in this particular case, implied the responsibility to act in the interest of the company and society due to the Company's public purpose. This is because the Company applied for and obtained an Act of Parliament to enable it to build a railway. The Company served a public purpose and so its directors had a public duty to society too.[1142]

The courts stated that a director's personal interests, even as a creditor of the company, ought to yield to his duty as a trustee for the company.[1143] The strict no conflict rule applied in this case reinforces the authority of the case, *Wallworth v. Holt,*[1144] and John William Smith's argument that the courts were very strict in enforcing the trust reposed in these functionaries.[1145] In fact, in *Benson v. Heathorn*, it was held that:

> *"in the case of trustees and all parties whose character and responsibilities are similar ….induces the Court (not only for the sake of justice in the individual case, but for the protection of the public generally, and with a view to assert and vindicate the obligation of plain and direct dealing between man and man in all cases, but especially in those where one man is trusted*

[1140] (1854) 18 Beav 339, 350,355.
[1141] Ibid.
[1142] *Re Cameroon's Coalbrook Railway Co* (1854) 18 Beav. 339, 342.
[1143] Ibid, 349-50.
[1144] (1841) 4 My & Cr 619, 10 LJ Ch 138.
[1145] Smith, see above n.1119, 131-2.

by another) to adhere strictly to the rule, that no profit of any description shall be made by a person so circumstanced".[1146]

This case again highlighted the public interest in the public ordering and regulation of directors' conflicts of interest. The courts used the breach of trust analogy to ensure that directors upheld their duty to avoid conflicts of interest (no profit rule). This was important to ensure that the public is protected from the mismanagement of companies, and that justice and integrity are upheld by directors, holders of social power. These fiduciary principles and public interest motivations formed the basis for the decisions which Lord Eldon made in a number of cases, particularly *Ex parte Lacey*.[1147]

Like in the *Re Cameroon's Coalbrook Railway Co case*, *Benson v. Heathorn* concerned a joint stock company which was not incorporated by charter. Essentially in both cases, the directors were analogised as trustees even though they managed joint stock companies not corporations. There was a strict application and interpretation of directors' fiduciary duty to avoid conflicts of interest nonetheless. In these cases, in addition to seeking to protect the interests of the company and shareholders, the courts held directors to a high standard of behaviour. The courts felt that directors ought to be held to the standard to which those who govern in the public sphere were held because they held a moral trust.[1148] This meant that those who governed, particularly in the public sphere and the body politic,[1149] were held to a high standard of conduct because their sphere of governance was of public interest and as such, bad governance could have devastating consequences for the nation. In the case of companies, this could include bubbles as well as mismanaged companies caused directorial self-dealing and other conflicts of interest which could paralyse the nation's economic and social well-being and stability. As a result, the courts deployed fiduciary principles to not only protect individuals' interests but also societal interests in the good management and governance of companies.

[1146] (1842) 62 ER 909, 1 Y & C.C.C.326, 342-3.
[1147] Ibid. ; *Ex Parte Lacey* (1802) 6 Ves. 625.
[1148] Maitland, see above n.1070, 127.
[1149] Often used synonymous with the corporation: Dictionary, Merriam Webster, 2019. Retrieved from https://www.merriam-webster.com/dictionary/body%20politic; *Mayor of Colchester v. Lowten* (1813) 1 V. & B. 226, 240.

Comparatively, the courts used the trust analogy and breach of trust to encapsulate the public interest that those who manage the affairs of others do so with undivided and disinterested loyalty and in good faith. This ensured that fiduciaries were insulated from influences likely to distract or tempt them from the proper performance of their non-fiduciary duties.[1150] This also is an indication that loyalty is at the heart of conflict of interest rules and are central to fiduciary principles.[1151]

Certain scholars nonetheless aver that breach of trust is an instrument of private ordering solely, particularly in cases of directors' conflicts of interest.[1152] They contend that the objective of breach of trust was to protect the principal or the beneficiary; the company and its members.[1153] This thesis advances the view instead that this is an incomplete explanation for the courts' decision to apply trust or fiduciary principles to the regulation of directors' duties, including their conflicts of interest. The strict application of breach of trust to directors' conflicts of interest is indicative of the use of fiduciary principles to address the public interest in maintaining and protecting integrity, honesty, loyalty, credibility and the utility of certain relationships. These relationships were perceived as important and of interest to society because their effect exceeded individual interests of the companies or shareholders. They also contributed to economic interests of society in the development of companies.

The examination of the notion of breach of trust and its application to the regulation of directors' conflicts of interest reveals something of importance. It shows that the regulation of directors' conflicts of interest is at the intersection of public and private law. It further supports the contention that companies are subject to dual ordering, that is, public and private ordering, and purpose. This has an impact on the manner in which the courts have applied the corporate fiduciary doctrine and conflict rules. This is illustrated by the fact that in some cases reviewed above, the courts explicitly considered private and public interests when discussing breaches of trust because it was vital to carefully weigh these interests as they reflected the utility or purpose of

[1150] *Re Cameroon's Railway Co* (1854) 18 Beav. 339.
[1151] *Bristol West Society v. Mothew* CA [1998] Ch 1, 18-20; Conaglen, M. (2010). *Fiduciary loyalty: protecting the due performance of non-fiduciary duties*. (ch. 4). Oxford, Hart Publishing.
[1152] Maume, P. (2015). Conflicts of interest and disclosure under company law: a continental-European perspective on legal origins. *Journal of Corporate Law Studies*, 16 (1), 69, 69-70; Miller, see above n.1094; Clark, R. (1986). *Corporate Law*. (pp.160-6). US, Little, Brown.
[1153] Kershaw, D. (2018). *The foundations of Anglo-American Corporate Fiduciary Law*. (pp. 285-291, 293-4). Cambridge, CUP.

companies.[1154] This is an issue that is present throughout this thesis. The development of companies and the regulation of their governance have always required incorporating and balancing private and public interests.

6.2.5 BREACHES OF TRUST, DIRECTORS AS TRUSTEES AND ABSENTEE DIRECTORS, AND THE SHIFT FROM ABSOLUTE PROHIBITION TO REGULATION OF CONFLICTS OF INTEREST

However the courts over time changed their position on directors' breach of trust. This was due to a number of reasons, including protecting the public interest. In cases where the courts were confronted with novel issues, the courts deferred and opted instead to rely on laissez-faire justification for their adjudicatory passivity.[1155] These issues are namely, absentee directors or deliberate risk-taking which is prominent in business affairs. This approach was reflective of the fact that company directors in the 18th and parts of 19th century were often gentlemen or layman directors who were sometimes unfamiliar with true state of affairs of the companies they managed.[1156]

Laissez-faire ideology had also now mixed with conservative distrust of speculation which had taken hold in British society, and government, influencing Parliament and courts alike. Thus, shareholders were increasingly expected to make full enquiries before engaging in speculation and shareholders got the directors they deserved if they neglected to do so.[1157] There was reluctance to (over)penalise directors for mismanagement of companies. This was thought to be counterproductive to the public and private interests in respecting contractual agreements, the freedom to contract, not restraining trade and encouraging entrepreneurialism.[1158]

Additionally, with the development of the law, the courts' application of the notion of breach of trust to directors' conflicts of interest became nuanced.[1159] There was a

[1154] *Ex parte Lacey* (1802) 6 Vesey Junior 625; *Benson v. Heathorn* (1842) 1 Y. & C.C.C. 326, 62 ER 909; *Charitable Corpn. v. Sutton* (1742) 2 Atk. 400; *Wallworth v. Holt* (1841) 4 My & Cr 619, 10 LJ Ch 138.
[1155] Whincop, see above n.917, 31; *Overend Gurney & Co. v. Gurney* (1869) L.R. 4 Ch. App. 701, 720, per Lord Hatherley L.C.
[1156] Sealy, see above n.607, 101-102.
[1157] *Overend Gurney & Co. v. Gurney* (1868-69) L.R. 4 Ch. App. 701, 720.
[1158] See chapter 5 of this thesis on the 19th century and discussion of *Derry v. Peek* (1889) 14 App. Cas. 337.
[1159] Sealy, see above n.1086, 71; *George James Marquis of Cholmondeley, and The Honourable Ann Seymour Damer v. Robert Cotton St. John Lord Clinton, and Others* (1821) IV Bligh 1, 96.

shift from absolute prohibition to relaxed regulation of directors' conflicts of interest.[1160]

6.2.6 BREACHES OF TRUST, DIRECTOR AS TRUSTEE AND CORPORATE OPPORTUNITIES

In cases of corporate opportunities, initially, the courts applied the no conflict rule strictly. This is evident in the House of Lords decision in *Regal (Hastings) Ltd v. Gulliver* where the directors were required to disgorge their profits which they made from the sale of shares that they had acquired by reason of their positions as directors.[1161] The case concerned the lease of cinemas with a view to extend the interests and sphere of operation of Regal. However, the landlord wanted personal guarantees from the directors which they declined to give. It was instead suggested that *Regal* create and take up shares in the venture through the guise of a created subsidiary company, Hastings Amalgamated cinemas Ltd (hereafter Hastings). *Regal* could not afford to cover the entire cost of the venture and so the directors and solicitor became subscribers of Hastings. They acquired the shares to protect and secure the interests of Regal in the venture. An action was later brought by *Regal* against these (former) directors to recover sums of money, profits they made due to their acquisition and sale of shares in the subsidiary company formed by *Regal*, Hastings. The action was based on the allegation that the directors (and solicitor) had used their position to acquire shares in Hastings for themselves to enable them to sell these shares at a substantial profit, thus acting in conflict with their duty to *Regal*. The courts held that they had in fact exploited corporate opportunity even though they had acted honestly and in good faith and in the interest of the company.[1162] This case is significant because it highlights how the courts restrained private enterprise and refused to tolerate a conflict of interest even though it benefitted the company.

Evidently, the conflict of interest in the case above was so important that the courts had to interfere and apply a strict and absolute prohibition of conflicts of interest. This

[1160] *Re Land Allotment Co* [1894] 1 Ch 616 (CA), 631, [1891-94] All ER Rep 1032, 1034; *Re Exchange Banking Co (Flitcroft's case)* (1882) 21 Ch D 519, 534; *Leeds Estate, Building and Investment Co v. Shepherd* (1887) 36 Ch D 787, 798.
[1161] [1967] 2 A.C. 134.
[1162] [1942] 1 ALL ER 378, 386, 389, per Lord Russell and 392, per Lord Macmillan; Edmunds, R., & Lowry, J. (1998). The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and Its Remedies. *Modern Law Review*, 61 (4), 515, 516.

is revelatory of an implicit public function and interest in conflict rules. Public ordering here reflects the public interest in the high standard of morality and integrity to which directors were held. Although, the directors sought to protect and maximise the interests of *Regal*, the courts felt that this was irrelevant in light of the perception of a mismanaged conflict of trust and its impact on trust and integrity in the management of the Company. The decision in *Regal* also indicates that the regulation of directors' conflicts of interest served the purpose of protecting societal interest and the interests of shareholders in the good governance of companies. By applying the law, so strictly, the House of Lords was not protecting company property and shareholders' interests from exploitation and appropriation, it was reinforcing the need for directors to act in a manner that is seen as above reproach.

Similarly in a number of early cases concerning corporate opportunities, the courts also applied the no conflict rule strictly.[1163] In *Cook v. Deeks*,[1164] a significantly different case to the *Regal* case, the courts also interpreted the breach of trust and conflict rule in a strict manner. This supports the argument that the courts displayed a willingness to intervene in a way that may be considered supportive of public interest and function of the conflict rules. Likewise, the courts' strict approach was reflective of the public interest and purpose of companies as important to the growth and development of the nation's economy. Therefore, it was important to retain trust in their governance. It also reiterates that holders of social power like directors are held to a high standard of honesty, integrity and morality. This approach was plausibly taken because it was believed that absolute prohibition was the only way to achieve the desired deterrent effect required by equity.[1165] It is likewise conceivable that the courts were influenced by the various private and public interests implicated. These interests include protecting shareholders' property rights, and protecting companies from directors who might be tempted to exploit corporate opportunities for their own benefit. They also include ensuring the good governance of companies because of their function in the economy.

[1163] *Cook v. Deeks* [1916] 1 AC 554, PC; *Furs Ltd v. Tomkies* (1936) 54 CLR 583, 592; *Industrial Development Consultants Ltd v. Cooley* - [1972] 2 All ER 162.
[1164] *Cook v. Deeks* [1916] 1 A.C. 554.
[1165] Edmunds & Lowry, see above n.1162, 517.

However, the courts shifted their approach from prohibition of directorial exploitation of corporate opportunities to regulation of the exploitation of these opportunities. The courts began to apply fiduciary principles to these conflicts of interest in a less inflexible manner in order to reflect the changing commercial landscape and not stifle entrepreneurialism. An example is *Island Export Finance v. Umunna*[1166] which concerned Umunna, the managing director of a company, IEF Ltd which pursued business in West Africa. Umunna secured a contract for IEF Ltd from the Cameroons postal authorities for postal caller boxes. Although IEF Ltd hoped for other orders, it received no such assurance from the postal authorities. A few years later, Umunna resigned as managing director due to his dissatisfaction with IEF Ltd and he established his own company. His resignation was not attributed to a desire to appropriate the postal call box business for his own company. At the time of the establishment of his company, IEF Ltd was not actively seeking repeat or further orders. Therefore, Umunna obtained for his own company an order for postal caller boxes and for a travelling post box from the Cameroons postal authorities. IEF Ltd brought proceedings, alleging that Umunna, in entering into the two contracts for his own company, had breached his fiduciary duty to IEF Ltd. It added that he remained under such a duty even after his resignation as a director and that he made improper use of IEF Ltd.'s confidential information and accordingly Umunna's company ought to account for the profits derived from these two contracts. The Court held that although the director's fiduciary duty did not necessarily come to an end when he resigned; he was not liable for breach of duty.[1167] The Court gave this ruling even though it agreed that a director is precluded from exploiting a maturing company opportunity for himself especially if the resignation is prompted by a desire to exploit a company opportunity. Yet the Court held that the director, Umunna, had not improperly exploited any confidential information he had acquired as a director. The Court stated that it would be unreasonable to state that the knowledge of the existence of a particular market acquired by a director during his term as a director was confidential information which he could never use for his own purposes on termination of the directorship. The Court considered this to be too wide a restriction

[1166] *Island Export Finance Ltd v. Umunna and another* [1986] BCLC 460.
[1167] Ibid, 480-483.

on former directors' conduct and that this was in conflict with public policy as it could restrain trade.[1168]

In *Balston Limited and Another v. Headline Filters Limited and Another*,[1169] a similar ruling was made. Here, a director who had resigned his position and had started a company in competition with his former company after the cessation of the directorship did not incur liabilities even though the desire and intention to start such a company was formed before he ceased to be director. The Company for which he was director was in the business of manufacturing and selling filter tubes. The director on resigning from his duties, started preparations to launch his company but this was before the end of his notice period. He was contacted by his one of his former company's clients who informed him of a price increase for the filter tubes and that the company was only prepared to continue to accept orders for those tubes for a limited period. The director informed the client that he was leaving the Company's employ and that he would be in a position to supply filter tubes. The client agreed and placed an order. The Company brought an action alleging that the director had breached some of his fiduciary duties. The Company also alleged that he had breached his duty of fidelity as an employee and the duty not to use or disclose the plaintiff's trade secrets after the termination of his employment.

In relation to the claims for breach of fiduciary duty, the Company's main contention was that the director had formed the intention to set up in competition with it while he was still a director. It was added that this intention had caused a conflict between his personal interest and that of the Company. The failure to disclose this intention and the resulting conflict of interest meant that the director had acted in breach of his fiduciary duty. The Company also contended that the director had diverted a maturing business opportunity to himself.

Despite the facts of the case, the Court held that the director was not liable for a breach of trust due to the exploitation of a corporate opportunity. It was held that he had not attempted to divert a maturing company opportunity for himself and he had not undertaken any action which was actual competitive activity whilst he was a

[1168] Ibid, 483.
[1169] [1990] F.S.R. 385.

director.[1170] This ruling supports the idea that the courts applied a pragmatic approach to this type of (potential) conflict of interest due to private and public interest reasons. They did not want to inhibit individuals' rights to enterprise, restrict the exploitation of viable economic opportunities as these serve both private and public interest purposes. Instead they wanted to encourage efficient business operations and the exploitation of new business opportunities as well as entrepreneurial activities. These were in the public interest and private interests of the (directors) concerned.[1171]

The courts have also vacillated in other ways in which they have adjudicated on directors' breach of trust and conflicts of interest.[1172] This thesis maintains that this is due to the competing public interests as well as private interests in due performance of contractual obligations or even efficiency in the control of companies. The courts were influenced by the need for flexibility in the regulation of directors' conflicts of interest so as to not stifle entrepreneurial initiative and competitiveness which might be in the best interests of the company concerned and the economy.[1173]

The absolute prohibition of directors' conflicts of interest which was a product of trust law as illustrated by the cases aforementioned, has evolved slowly into the regulation of such conflicts of interest. Directors' fiduciary duties, including conflicts of interest, were born of and were determined by trust principles. Yet, directors were nonetheless treated differently to trustees. This distinction is evident in two important 19th century cases, where a comparison of both indicates that directors were subject to trust principles and yet were not trustees in the full sense of the term. They were subject to different and varying obligations to those to whom they owe their duty.[1174] For example, directors unlike trustees, did not need to be unanimously in agreement on decisions concerning the management of companies concerning intra vires issues.[1175] Yet, directors who were not active parties to any particular dealing

[1170] Ibid, 386-7, 422: the director was held liable for breach of duty as an employee; *Framlington Group plc & Anor v. Anderson & Ors*. [1995] B.C.C. 611.
[1171] Hannigan, B. (2009). *Company Law*. (pp. 261-2). (2nd ed.). Oxford, OUP.
[1172] Ahern, D. (2011). Guiding Principles for Directorial Conflicts of Interest: Re Allied Business and Financial Consultants Ltd; O'Donnell v. Shanahan. *Modern Law Review*, 74 (4) 596, 606-7; *Balston Ltd v. Headline Filters Ltd (No. 2)* [1998] 1 WLUK 319; *Framlington Group plc & Anor v. Anderson & Ors*. [1995] B.C.C. 611; *In Plus Group Ltd v. Pyke* [2002] EWCA Civ. 370.
[1173] Edmunds & Lowry, see above n.1137, 133-136.
[1174] *Re Kingston Cotton Mill (No. 2)* [1896] 1 Ch. 331, 345; *Re Exchange Banking Co., Flitcroffs Case* (1882) 21 Ch.D. 519, 525.
[1175] Sealy, see above n.607, 87.

concerning a company's matters could be held liable as fiduciaries. This was a reflection of commercial practices in the 18th century.[1176] Though the courts were of the opinion that directors when accepting a directorship had undertaken to give it their fullest attention,[1177] directors were afforded a wider margin of appreciation of risk and discretion in the execution of their fiduciary duties in comparison to trustees.[1178]

It seems that the courts were trying to balance the private ordering of and private interests in companies with the public ordering and public interest. This is attributable to ensuring that directors did not yield to the temptation of self-dealing, appropriating or exploiting corporate opportunities. This is because they could undermine public confidence and trust in the governance of companies, thus companies themselves. The courts' approach was also intended to protect private interests, that is, the investment of shareholders and company property. The courts chose the approach of granting directors wider margin of discretion in the execution of their fiduciary duties as they thought that this was indispensable for commercial affairs.[1179]

In essence, directors were afforded greater discretion as long as they did not engage in certain acts. These included acts that could affect the position of the company such as those which resulted in an advantage for the directors or others,[1180] at the company's expense or a financial conflict of interest between the directors and the company. It was nonetheless permitted in some instances that directors engage in certain acts in the interest of the company which may incidentally[1181] lead to an advantage for the directors[1182] or benefits to third parties.[1183] The courts made it apparent that engaging in most of these acts could still be seen an abuse of power. Consequently, they held the directors liable for misapplied company property or loss of any company property as already mentioned earlier in this chapter.[1184]

[1176] Ibid, 87-88.
[1177] *York and North Midland Ry. v. Hudson* (1853) 16 Beav. 485, 500; *Charitable Corpn. v. Sutton* (1742) 2 Atk. 400; *Benson v. Heathorn* (1842) 62 ER 909, 1 Y. & C.C.C. 326; *Burt v. British Nation Life Assce. Assn.* (1859) 4 De G. & J. 158.
[1178] Sealy, see above n.607, 89.
[1179] Whincop, see above n.917, 31.
[1180] Sealy, see above n.607, 93-94; *Hirsche v. Sims* [1894] A.C. 654; *Seligman v. Prince & Co.* [1895] 2 Ch. 617, 625.
[1181] *Cannon v. Trask* (1875) L.R. 20 Eq. 669.
[1182] *Hirsche v. Sims* [1894] A.C. 654; *Seligman v. Prince & Co*. [1895] 2 Ch. 617, 625.
[1183] *Hutton v. West Cork Ry*. (1883) 23 Ch.D. 654, 671.
[1184] *Re Anglo-French Co-operative Soc, ex p. Pelly* (1882) 21 Ch.D. 492.

Also if a benefit was received by a director at the company's expense or if there was a potential (undisclosed) financial conflict of interest between the company and the director, the director could not try to show that there was no ulterior motive to act in a manner that would not benefit the company.[1185] The no conflict rules were strict and arguably absolute in application in response to or in consideration of public interest. This was evident in the *Regal Hasting* case.[1186] Essentially, although the courts relaxed the strict approach of treating directors as trustees, even in cases of conflicts of interest, conflicts of interests were not taken lightly by the courts. They were still in essence prohibited, subject to certain exceptions and relaxation in judicial approach, in response to private and public interests. These were namely the protection of property, freedom of trade and encouragement of free development of companies as well as entrepreneurialism.

Likewise, the courts adjudicated in situations where directors' actions were considered to be undertaken with inadequate and deliberate consideration due to issues such as, bias.[1187] This can be a form or consequence of conflicts of interest.

With regards to director transactions with the company, the courts historically were strict and the rule applicable to trustees was applied without qualification. This was the case in *Benson v. Heathorn*[1188] and in *Aberdeen Railway Co. v. Blaikie Brothers*.[1189] Similarly, it was held in a number of cases, that directors' power of issuance of shares could not be abused, for example, solely to keep their positions.[1190] This is arguably both a breach of loyalty and conflict of interest as directors had a fiduciary duty towards the company to act in its general best interests.[1191] The courts' approach meant that directors could not engage in self-dealing and make other profit from their position.[1192] The courts' strict and absolutist approach to these forms of conflicts of interest once again exemplifies the public

[1185] Sealy, see above n.607, 93-94; *Aberdeen Ry. v. Blaikie Bros*. (1854) 1 Macq. 461.
[1186] [1942] 1 All ER 378.
[1187] Sealy, see above n.607, 95; *Bermingham v. Sheridan* (1864) 33 Beav. 660, 664; *Re Englefield Colliery Co.* (1878) 8 Ch.D. 338; *Leeds Estate Building & Investment Co. v. Shepherd* (1887) 36 Ch.D. 787.
[1188] (1842) 62 ER 909, 1 Y. & C.C.C. 326.
[1189] (1854) 1 Macq. 461.
[1190] *Fraser v. Whalley* (1864) 2 H & M 10; *Gabtside v. Whalley* [1861-73] All ER Rep Ext 1456*; Punt v. Symons & Co*. [1903] 2 Ch. 506.
[1191] Shepherd, see above n.698, 362-563.
[1192] (1842) 62 ER 909, 1 Y. & C.C.C. 326, 341.

function of directors' fiduciary duties. No conflict and no profit rules are parts of directors' fiduciary duties. The absolute prohibition approach taken reflects the mandatory nature of conflict rules and harks back to the idea of directors as functionaries.

6.2.7 BREACHES OF TRUST AND DIRECTORS IN COMPETITION WITH COMPANY

Conversely, looking at other conflicts of interest issues such as director competition with the company, the courts appear to have taken a less strict approach.[1193] Some postulate that there is no outright rule preventing directors from taking the appointment of directorship or membership of rival companies, subject to forms of prohibition, express or implied by the company[1194] But the courts have made it clear that directors could not exploit company opportunities or engage in other conflicts of interest if they were actively engaged to deal in a related or relevant matter on behalf of the company.[1195] Essentially, this implies being in a position to effectively make decisions for the company.[1196] This approach seems to recognise the competing private interests of directors, private ordering and contractarian arguments concerning the freedom to contract and engage in enterprise. It also implicitly highlights the desire to prevent the exploitation of conflicts of interest so that companies' interests are preserved or best served. This is sometimes in conflict with competing public interest considerations of entrepreneurialism and not hindering practices which may be in the commercial interests of companies and society.

Companies may choose directors who are exposed to a number of conflicts of interest because they are well connected people with potential clients and suppliers. This might actually be in the best interests of the companies.[1197] This provides an explication for why the courts have taken a pragmatic approach to adjudicating on potential breaches of trust which involve competing directorships.

[1193] Sealy, see above n.607, 97.
[1194] Ibid; *London & Mashonaland Exploration Co. v. New Mashonaland Exploration Co*. [1891] W.N. 165; *Bell v. Lever Bros. Ltd.* [1932] A.C. 161, 195, per Lord Blanesburgh.
[1195] *Parker v. McKenna* (1874) L.R. 10 Ch. App. 96, 125-127.
[1196] Ibid.
[1197] Parsons, R. (1967). The directors' duty of good faith. *Melbourne University Law Review*, 5, 395, 400.

On one hand, permitting competing directorships may in certain cases, be in the public interest because it means that these directors' skills and expertise may be used in a manner that is economically efficient and exploits economic opportunities. These could be good for the nation's economy. On the other hand, these could serve as a smokescreen for exploiting conflicts of interest, so that they are accepted without reservation. These could in fact be counterproductive for private and public interests for a number of reasons. These include the violation of property rights, making companies vulnerable to all manners of exploitation, distorting competition and contributing to the mismanagement and destabilisation of companies. These have consequences for the nation's economy. This demonstrates that there are tensions between various competing public and private interests. The tensions are apparent in the courts' regulation of conflicts of interest, their use of breach of trust and the analogy of directors as trustees.

The public policy or interest in preventing conflicts of interest appears greater in certain situations and relaxed in other cases, and this is reflected in the courts' approaches. On one hand, the courts considered that like trustees, directors were prohibited from taking bribes or engaging in other forms of secret profits or advantages.[1198] The courts were so concerned with protecting the property of companies and their members that they deemed conflict situations where a director holds himself out to other parties to be acting in the name of the company, or generally, acting for the company unacceptable.[1199] Likewise, conflict of interest involving the exploitation of corporate opportunities by directors if the opportunity is a form of property which belongs to the company or is procured at its expense is dealt with severely.[1200] The courts' treatment of directors like trustees could be seen as reflective of private interests because the good governance of companies is important for shareholders and other stakeholders as well as the protection of their investment. Consequently, judicial intervention appeared to incorporate private and public interests in the regulation of directors' conflicts of interest as they are not mutually exclusive.

[1198] Sealy, see above n.1086, 79-81; Sealy, L. (1963). Some Principles of Fiduciary Obligations. *Cambridge Law Journal,* 21 (1), 119, 128-136.
[1199] Sealy, see above n.607, 99; *Cook v. Deeks and Others* [1916-17] All ER Rep 285.
[1200] *Canada Safeway Ltd. v. Thompson* [1951] 3 D.L.R. 295.

On the other hand, directors were not held to the same degree of fiduciary obligation as trustees concerning the proper discharge of trust.[1201] This reflects the fact that unlike trustees, directors do not generally actually hold and deal with company property. Therefore, they are treated differently to trustees because their factual position is different. Equally, the courts have thus held that directors are generally only liable for dealing with company property if they have misapplied or contributed to the loss of company property through acts which exceed the authority conferred on them by the company's constitution, and which then results in loss in accordance with general trust rules.[1202] Even this was tempered by the demands of commercial practice which treated directors' acts unlike trustees' acts, in such matters as permissible if they acted bona fide.[1203]

The various conflict of interest questions discussed above reveal that the courts have vacillated between various competing interests, private and public interests. The courts have also wavered between different competing public interest considerations due to the desire to balance them in a manner that best suited companies, the unique role that directors play, and the development of companies generally as well as the progression of societal interests.[1204]

6.3 BREACHES OF TRUST, DISCLOSURE AND RATIFICATION OF DIRECTORIAL IRREGULARITY

Also of note are disclosure and ratification of irregularity and their significance to the regulation of directors' breach of trust concerning conflicts of interest. These have an effect on the absolute prohibition of conflicts of interest discussed earlier in this chapter, and any public interest consideration. Directors' (irregular) acts could be ratified by shareholders (members of the company) if they were not completely ultra vires.[1205] This was subject to compliance with full disclosure requirements and

[1201] Sealy, see above n.607, 91.
[1202] *Re Exchange Banking Co., Flitcroft's Case* (1882) 21 Ch.D. 519, 535-536, per Cotton L.J; *Re Railway & General Light Improvement Co., Marzetti's Case* (1880) 42 L.T.206, 209, per Cotton L.J.; *Re Sharpe* [1892] 1 Ch. 154, 165-166, per Lindley L.J.
[1203] Sealy, see above n.607, 91-93; *Grimwade v. Mutual Society* (1884) 52 L.T. 409, 416, per Chitty J.
[1204] Authorisation of conflicts of interest is arguably a procedure, which illustrates this, see section 175 of Companies Act 2006, explored in detail in Chapter 7 of this thesis.
[1205] *Grant v. United Kingdom Switchback Railways Company* (1888) 40 Ch. D. 135.

subsequent authorisation of members to continue with said unauthorised acts.[1206] The members could not only ratify these unauthorised acts which may include director contracts with the company, they could also release directors from a claim for breach of fiduciary obligations unless the company is near to or in an insolvent state. Some scholars assert that this is telling of the private ordering nature of conflict rules and the fiduciary duty of loyalty.[1207]

Some academics add that fiduciary duties including conflict rules serve to supplement the incomplete aspects of the relational contract which characterise corporate law and address the issue of principal and agent dynamics in the governance of companies.[1208] While there are some elements of truth to these arguments, they provide an incomplete explanation for the regulation of conflicts of interest and the role of disclosure. They fail to consider that there might be public interest justifications for disclosure and ratification of irregular acts. This can be surmised as the courts considering that disclosure allows a company to be informed of the conflicted situation and consent to it. This means that these procedural safeguards were put in place to protect the interests of the company and societal interests in the good governance of companies.

Disclosure seems to be a regulatory middle ground and a less restrictive form of public ordering. It allows for the balance of competing public and private interests. The private interests implicated are the protection of the property, interests and development of companies. The public interests implicated are the good governance of companies due to their importance for the nation's economic growth whilst respecting and not stifling directorial entrepreneurialism in conformity with commercial practices, for the same reason of contributing to economic growth.

[1206] Sealy, see above n.607, 102-3; *Grant v. United Kingdom Switchback Railways Company* (1888) 40 Ch. D. 135, 139-140. The majority of members at a general meeting have an obligation to act "bona fide for the benefit of the company as a whole"- *Greenhalgh v. Arderne Cinemas Ltd*. [1951] Ch. 286; *Cook v. Deeks* [1916] 1 A.C. 554, 563-564.
[1207] Kershaw, see above n.994, 427-428; Easterbrook, F. & Fischel, D. (1993). Contract and Fiduciary Duty. *Journal of Law and Economics*, 36, 425; Eisenberg, M. (1988). Self-interested transactions in corporate law. *Journal of Corporation Law,* 13, 997; Macey, J. (1999). Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective. *Cornell Law Review,* 84, 1266, 1268.
[1208] Ibid.

Disclosure also seems to attempt to incorporate the complexities of managing or directing the affairs of companies into the regulation of companies.[1209]

As Keeton stated, the shift in the courts' approach indicates a demonstrably different social outlook with regards to directors in comparison to trustees.[1210] This new social outlook viewed directors as necessary to the development of companies. As such, they must be treated with caution so they continue to manage companies and are not deterred from taking directorship appointments. Since companies are believed to be necessary for the growth of the economy, their management is very important. Therefore, directors were no longer simply people who must be prevented at all cost from exploiting temptation to engage in self-dealing when managing the affairs of the companies with which they have been entrusted.[1211]

In the diverse cases discussed above, it is demonstrated that breach of trust and its application to directors' duties, including the regulation of conflicts of interest is subject to and guided by a number of public interests and private interests.[1212] The courts have applied breach of trust to protect the interests of shareholders and companies in order to uphold a number of values. These include the freedom to contract,[1213] property rights, honesty and due performance of contractual obligations between directors and companies. The courts have also upheld shareholders' rights to choose to authorise or ratify certain disclosed directors' conflicts of interest. Judicial intervention in the regulation of directors' breaches of trust also involves addressing competing public interest considerations. These include common interest in the good management of companies, integrity of decision-makers as well as removing restraints to trade and encouraging economic efficiencies.[1214] These public interest considerations have shifted in accordance with societal needs.

[1209] Langbein, J. (2005). Questioning the trust law duty of loyalty: sole interest or best interests. *Yale Law Journal,* 114 (5), 931, 964-6.
[1210] Keeton, G. W. (1952). The Director as Trustee. *Current Legal Problems*, 5 (1), 11, 14, 16-17; *Ferguson v. Wilson* (1866-67) L.R. 2 Ch. App. 77, 89-90; *In Re Forest Dean Coal Mining Company* (1878) 10 Ch. D 450, 451.
[1211] *In Re Forest Dean Coal Mining Company* (1878) 10 Ch D 450, 451, per Jessel M.R.*; Derry v. Peek* (1889) 14 App. Cas. 337, 346, 352.
[1212] Ibid.
[1213] Parsons, see above n.1197, 400.
[1214] Edmunds & Lowry, see above n.1162, 517-518; *Aberdeen Railway Co v. Blaikie Brothers* (1854) 1 Macq 461; *Bray v. Ford* [1896] AC 44; *Cook v. Deeks* [1916] 1 AC 564; *Regal (Hastings) Ltd v. Gulliver* [1967] 2 AC 134; *Phipps v. Boardman* [1967] 2 AC 46; *Industrial Development Consultants*

The courts changed their position concerning the enforcement of fiduciary principles on breach of trust for a number of reasons. The reasons shifted from an imperative to uphold public trust and confidence,[1215] and the prevention of fraud[1216] to an understanding that directors can and are expected to take risks which are inherent in the nature of their office.[1217] This is the case even though directors are expected to be vigilant about and are liable for conflicts of interest. In addition, the courts have accepted that there is a need to protect entrepreneurialism, reduce or remove restraint to trade. This includes ensuring that directors are not so restricted by fiduciary duties that they no longer wish to take on directorship offices because this could be counterproductive for the development and best interests of companies and society.[1218] These competing public interest considerations as well as private interests have guided and impacted the courts' approaches to breach of trust, and director as trustees analogy, including its application to directors' conflict of interest. They provide explanations for the courts' vacillation in cases concerning breaches of trust or breach of fiduciary duty, and conflict of interest issues are not exempt. They also provide clues as to why disclosure, consent and other procedural solutions have been used to regulate conflicts of interest rather than absolute prohibition in all cases.[1219]

6.4. LEGISLATIVE INTERVENTION AND BREACHES OF TRUST

Although various pieces of legislation from 1862 to 1908 did not really address or codify regulation about directors' conflicts of interest,[1220] there were some legislative and parliamentary efforts to regulate these breaches of trust. There were several reports published by parliamentary committees regarding company law reforms and directors' duties in light of numerous corporate scandals. Fiduciary principles such as

Ltd v. Cooley [1972] 1 WLR 443; *Hospital Products Ltd v. United States Surgical Corporation* (1984) 156 CLR.

[1215] Millett, see above n.1076, 214-219.

[1216] Beck, S. M. (1975). The Quickening of the Fiduciary Obligation. *Canadian Bar Review*, 53, 771, 792-3; *Peso-Silver Mines Ltd v. Cropper* (1965) 56 D.L.R. (2d) 117 (B.C.CA.), 139 per Norris J.A.

[1217] *Re Duckwari Plc.* (no.2) [1998] 2 BCLC 313, 321 (CA).

[1218] *Island Export Finance Ltd v. Umunna* [1986] B.C.L.C. 460, 481–482; Lim, E. (2013). Directors' fiduciary duties: a new analytical framework. *Law Quarterly Review*, 129, 242, 260; Langbein, see above n.1209, 960-6.

[1219] Langbein, see above n.1209, 960-6.

[1220] Lee, see above n.1057, 85-86.

breach of trust or analogising directors as trustees were important aspects of the legislative efforts to comprehend and address directors' duties.

6.4.1 THE DAVEY REPORT AND COMMITTEE

The Davey Report[1221] resulted from parliamentary action taken following corporate scandals like the Jabez Balfour saga. The Committee advocated utmost publicity of company affairs to better inform the public.[1222] It also advocated for honesty in the management of companies to protect the interests of shareholders and creditors.[1223] It felt that this contributed to the better prevention of fraud in the formation and management of companies. This was because it deemed that shareholders and others in society are entitled to a standard of commercial morality in directors as they are invited to trust them.[1224]

Although society was not explicitly mentioned here, public interest in the good governance of companies also motivated the provision of the Report.[1225] The Committee recommended the enactment of provisions which would afford legislative protection for the investing public and protect against fraud and directorial misconduct such as self-dealing. Yet, it added the law must not deter men of standing and repute from becoming directors, or unduly fetter the promotion of bona fide companies.[1226] This Report is significant because it undoubtedly led to the birth of modern day legislative provisions on director conflict of interest and contributed to the Companies Act of 1900.[1227] It likewise reveals that as in the case of judicial intervention for directors' breaches of trust, the approach taken in the Report also incorporates

[1221] Great Britain, Parliament. (1895). *Companies Acts, 1862 to 1890 (amendment). Report of the departmental committee appointed by the Board of Trade to inquire what amendments are necessary in the acts relating to joint stock companies incorporated with limited liability under the Companies Acts, 1862 to 1890. With appendix*, (paras. 30, 31-32). London, His Majesty's Stationery Office. (Henceforth, Report of 1895).
[1222] Para. 6 of the Report of 1895.
[1223] Ibid, para 7.
[1224] Ibid, paras. 6, 30.
[1225] Ibid, para 26, 31, Appendix A.3.
[1226] Ibid, Appendix 15.
[1227] Ibid, Appendix to Report, Part II- Clause 10, also see Clauses 8-12. However, four of these clauses were not included in the Companies Act of 1900, 63 & 64 Vict. Ch. 48; Companies Bill 1898 (50) i. 347; 1899 (36) i.263; 1900 (79) i.377; i.397; Clause 8 was kept as Section 8 of the Companies Act of 1900 but was not strictly a director's duty.

private and public interest justifications. These include the protection of property rights and the promotion of bona fide companies.[1228]

6.4.2 THE WARMINGTON REPORT AND COMMITTEE

The Companies Act 1900 was ineffective as many companies found ways to evade compliance.[1229] The deficiencies of the Act led to a call for reform which gave rise to the Warmington Report. The Committee made two main recommendations for directors' duties.[1230] The Report attempted to balance the public interest in protecting the public from fraudulent companies and directors, with the need to protect honest directors from unnecessary statutory liability.[1231] Firstly, the Committee recommended granting courts the explicit power to relieve directors of liability for breach of duty including breach of trust or negligence on such terms as the courts deemed proper. This was also subject to the condition that the courts were satisfied that said directors have acted honestly and reasonably.[1232] The Report stated that while it was important to protect society from fraudulent companies and dishonest directors, the Companies Act 1900 ought to be amended. This was because it was important to ensure that honest directors were not oppressed as the law was too strict and could deter people from taking up directorships.[1233] The inclusions of such provisions in this piece of legislation show that while there was a legislative preoccupation with directorial breaches of trust including conflicts of interest, ensuring that directors and companies were not overburdened with strict regulations was the greater public interest.[1234]

However, directors' breaches of trust and conflicts of interest were still of interest to society because of the effect that they had on trust in governance in the corporate or commercial sector and public governance. Therefore in 1913, a bill was introduced

---

[1228] See above n.1221, Appendix 12.
[1229] Lee, see above n.1057, 91-92.
[1230] Great Britain, Board of Trade. (1905). *Company Law Amendment Committee. Report of the Company Law Amendment Committee*. (para. 1) London, His Majesty's Stationery Office. (Henceforth, Warmington Report).
[1231] Ibid, paras. 4-8, 16, 87.
[1232] Ibid, para. 24; This became section 32 and 33 of the Companies Act 1907 and survived as section 727 of Companies Act, 1985, Part XXV and section 33 disappeared from the Companies Consolidation Act 1908, First schedule, Table A, no.71-75.
[1233] Ibid, the Committee added that in any case, an analogous power to deal with trustees was granted to the Courts in section 3 of the Judicial Trustees Act 1896.
[1234] Warmington Report, see above n.1230, paras. 4-8.

to prohibit certain conflicts of interest and disqualify directors of public companies from transacting or having contracts with government departments.[1235] It was also intended that these directors would be prohibited from being elected as members of parliament.[1236] Voting as a member of the House of Commons during the time that the incorporated company, for which they are directors, was transacting with the government, was also to be prohibited.[1237] Although the focus of this Bill was on the relationships between directors and public offices, it was one of the earliest robust parliamentary efforts to address directors' conflicts of interest. The Bill however failed, ironically, due to the prevalence of conflicts of interest. A number of parliamentarians at the time were also company directors. They argued that this did not affect their independence and objectivity in decision-making generally.[1238]

6.4.3 THE WRENBURY REPORT & GREENE REPORT AND COMMITTEES

Directors' breach of trust or conflicts of interest and their regulation remained of public interest in the early twentieth century. In 1918, the Wrenbury Committee[1239] recommended the prohibition of tax free remuneration for directors.[1240] This was not accepted immediately due to other pressing public interests such as the reconstruction of the nation after the war.[1241]

It was nonetheless felt that it was imperative to ensure better management and promotion of companies and protect the public, particularly the new investing public, from fraudulent or mismanaged companies and their directors.[1242] This undoubtedly included directors' conflicts of interest and breaches of trust. In fact directorial conflicts of interest and other breaches of trust were rife during the 19th and 20th

[1235] Section 1 of Directors of Public Companies and Government Contracts Bill. A bill to restrain directors of incorporated trading companies, contracting in their corporate capacity, concerned in any contract, commission, or agreement made for the public service from being elected or sitting as members of the House of Commons: Hansard. (1913, 23 April). House of Commons Debate, Volume 52, cc388-390.
[1236] Ibid.
[1237] Ibid.
[1238] Hansard. (1913, 23 April). House of Commons Debate, Volume 52, cc387-90.
[1239] Great Britain, Board of Trade. (1918). *Report Of the Committee upon the Amendment of the Law under the Companies Acts, 1908 to 1917, 1918*. London, His Majesty's Stationery Office. (Hereafter, the Wrenbury Report).
[1240] Ibid, paras. 58, 60 of the Wrenbury Report were adopted into section 34 of the Companies Act, 1947 and section 311 of the Companies Act, 1985.
[1241] Ibid, Wrenbury Report, para.1
[1242] Ibid, Wrenbury Report, Reservation by Mr. A. S. Comyns Carr, para 4.

centuries. Existing statutory and legislative provisions were ill-equipped to deal with the problem. This meant that corporate mismanagement, frauds and directorial self-dealing were frequent.[1243] Examples of directorial self-dealing scandals included Gerard Lee Bevan of City Equitable Companies[1244] and Horatio William Bottomley.[1245] There were thus parliamentary efforts to address these corporate governance issues due to public outcry and dissatisfaction.[1246] One such initiative was the Greene Report. This Report stated that directors ought not to be relieved from breaches of trust (or negligence).[1247] It added that directors appeared to evade liability for loss for inadvertent cases of conflicts of interest and this was a cause for societal concern.[1248] The Report recommended, that any contract or provisions, permitting directors or other officers of the company to be excused from or indemnified against liability for breach of duty or trust be declared void.[1249] This is irrespective of whether they are contained in the company's articles or elsewhere.

The Report also reviewed other possible causes of directorial conflicts of interest or breach of trust. These included loans to directors and misappropriation or abuse of moneys or company property.[1250] The Report indicated that these were aspects of directors' fiduciary duties that were not well regulated by the law. In fact, when caught taking unauthorised loans from the companies with whose money or property they have been entrusted, the directors often justified this action as temporary borrowing and/or acting in the company's interests.[1251] The Report recommended disclosure and transparency rather than prohibition to address these conflicts of interest.[1252]

[1243] See chapter 5 of this thesis; also, see Robb, G. (1992). *White Collar Crimes in Modern England, Financial Fraud and Business Morality, 1845-1929*. (pp. 128-9). Cambridge, CUP.
[1244] Manley, P.S. (1973). Gerard Lee Bevan and the City Equitable Companies. *Abacus*, 9 (2), 107; *Re City Equitable Fire Insurance Co*. (1925) Ch.407 (CA); Weyer, M. V. (2011). *Fortune's spear: the story of the blue-blooded rogue behind the most notorious city scandal of the 1920s*. London, Elliott & Thompson.
[1245] Sparrow, G. (1959). *The great swindlers*. (pp. 17-8). London, John Long.
[1246] Great Britain. Board of Trade. Company Law Amendment Committee. (1926*). Company Law Amendment Committee, 1925-26: Report presented to Parliament by command of His Majesty*. (para. 46). London: H. M. Stationery off. (Henceforth, Greene Report).
[1247] Ibid, Greene Report, paras.46-47.
[1248] Ibid, Greene Report, para. 46; *Brazilian Rubber Estates* 1911, 1 Ch. 425; *Re City Equitable Fire Insurance Co*. 1925 ch.407
[1249]Ibid, Greene Report, paras. 46, 47. This was subject to the expertise and knowledge of any director so as not to over-penalise novice directors. Section 327 of the Companies Act, 1929.
[1250] Ibid, Greene Report, para. 48.
[1251] Robb, see above n.1243, 164.
[1252] Greene Report, see above n.1246, paras. 48-49.

Similarly, directors' emoluments, another possible cause of conflicts of interest, were examined in this Report.[1253] However, there were worries that it could be bad for companies to disclose their directors' remuneration and that transparency might induce competitors to tempt away directors through offers of higher remuneration.[1254] This could be detrimental to companies' private interests and disruptive for companies, affecting the public interest in the stability and good governance of companies. The Greene Report also recommended the introduction of fraudulent trading sometimes associated with directorial self-dealing, to protect the public, particularly creditors.[1255]

Various recommendations in the Greene Report were incorporated into the Companies Act of 1928.[1256] The Act also imposed a duty on directors to disclose conflicts of interest.[1257]

Nevertheless the Greene Committee argued that the prevalence of directors' breaches of trusts and corporate scandals was over stated and that scandals were anomalies.[1258] This was reiterated during the reading of the Companies (Prospectuses and Offers for sale) Bill.[1259] In both instances, critics thought that preventing dishonest directors from self-dealing and corporate malpractices were of public interest but they were less significant in comparison with societal interest in the nation's economic prosperity.[1260] They contended that the regulation of companies had to be elastic so as not to create intolerable fetters on businesses because this could negatively impact the business life of the nation. [1261]

Although the Act incorporated different conflicts of interest provisions, the media and some of the members of Parliament felt that the Act had not adequately dealt with

[1253] Ibid, para. 50.
[1254] Ibid. There were worries that this could be in disfavour with societal social convention of privacy of personal finance and income- Hansard. (1927, 28 June). House of Lords Debate, Volume 67, cc1072-4.
[1255] Greene Report, see above n.1246, paras. 61-62.
[1256] 1928 (25) i. 343; also see Companies Act, 1929.
[1257] Section 81 of the Companies Act, 1928.
[1258] Greene Report, see above n.1246, para. 7.
[1259] A bill to amend the Companies (Consolidation) Act, 1908, 1924; Hansard. (1924, 1 October). House of Commons Debate, Volume177, cc146.
[1260] Greene Report, see above n.1246, paras. 8-9.
[1261] Ibid.

directors' conflicts of interest.[1262] Some even maintained that the ultra-cautious approach taken by the Government in respect of conflicts placed the interests of businesses above the interests of shareholders and general public.[1263] This displays evidence that the media also thought that the regulation of directors' conflicts of interest was of public interest. It also highlights the tensions between two competing public interest. These are namely, protecting economic interests of the nation through the protection of the legitimate interests of businesses and protecting shareholders and the public interest in the good governance of companies. However, overall some legislative progress was made in the regulation of directors' conflicts of interest, following the recommendations of the Greene Report.[1264]

6.4.4 THE COHEN REPORT AND COMMITTEE

The next significant reform of English Company Law was born of the recommendations of the Cohen Committee.[1265] The Clarence Hatry scandal and subsequent Great Depression equally had an impact on the development of English company law during this era.[1266]

It was apparent, particularly, following a series of corporate scandals, that the Acts of 1928-1929 inadequately addressed corporate abuses and did not protect the public from unscrupulous company directors.[1267] These included the Royal Mail steam packet company scandal[1268] and Ivar Kreuger, the Swedish Match King saga.[1269]

Legislative efforts were made to address share-pushing and prevent fraud due to public outcry about the corporate scandals and the perceived inadequacies of the

[1262] The Economist. (1928, 25 February). Volume 106, No. 4409, 368. London, Great Britain.
[1263] Ibid.
[1264] Greene Report, see above n.1246, paras. 50-52; Prohibition of tax-free payments to directors and partial disclosure provisions were implemented in sections 78 to 81 of the Companies Act, 1928. Some of these provisions were adopted in sections 310 and 232 of the Companies Act, 1985.
[1265] There were other committees during this period but they focussed on socio-economic development of the nation in light of the Great Depression such as the Anderson Committee, Great Britain, Board of Trade (1936). *Report of the departmental committee appointed by the Board of Trade*. (paras. 3, 7, 10, 37-41). London, His Majesty's Stationery Offices.
[1266] Robb, see above n.1243, 147.
[1267] The Accountant. (1930, 18 October). (pp. 525-7). London, UK; Hansard. (1931, 7 July). House of Commons Debate, Volume 254, cc1897; Hansard. (1933, 15 March). House of Commons Debate, Volume 275, cc2106.
[1268] *Rex v. Kyslant* (Lord) [1932] 1 KB 442; The Accountant. (1931, 25 July). (pp.109-27). London, UK.
[1269] The Economist. (2007, 19 December). The Match King. London, UK.

law.[1270] Although this was considered an important issue of interest to the public, the Second World War was unsurprisingly the nation's main priority.[1271]

After the War, the focus of the public's interest was post-war reconstruction and reform.[1272] This included a desire for extensive reform of existing company law so as to take the interests of shareholders, investor and the public alike, into consideration. This was the focus of the Cohen Report.[1273] However, the Report cautioned against over-regulation of companies because the Committee thought that this could hamper the free development of companies. The Committee deemed that self-regulation was a better approach to regulating companies.[1274]

Nevertheless, the Report addressed directors' conflicts of interest, particularly director remuneration, insider dealing and making illicit gains through the use of secret information.[1275] It stated that it is desirable that the highest standard of conduct should be observed by those who manage companies, particularly large public companies.[1276] MPs likewise added that directors are in a position of trust, and their conduct must not only be above reproach but must also be seen to be above reproach because this is important to inspire and build confidence in companies, which is imperative to their leadership.[1277] Here, critics made a clear link between highest standards of conduct, and building trust and confidence in directors' ability or expertise to lead companies. This illustrates that the good governance of companies is of public interest. It also exemplifies a common interest approach to the public interest in the management of companies. This is due to the focus on values such as integrity, honesty and trust as well as incorporating economic interests of the nation, companies, their shareholders and other stakeholders.

[1270] Prevention of Fraud (Investments) Act, 1939.
[1271] Hansard. (1938, 21 November). House of Commons Debate, Volume 341, cc1372-1403.
[1272] Marwick, A. (1974). *War and Social Change in the Twentieth Century*. London, Palgrave Macmillan; Marwick, A. (1968). *Britain in the century of total war: war, peace and social change, 1900-1967*. London, Bodley Head.
[1273] Great Britain, Board of Trade. *Report of the Committee on Company Law Amendment, 1944-5*. (paras. 2, 5, 101). London, His Majesty's Stationery Offices. (Henceforth, the Cohen Report).
[1274] Ibid, para.5.
[1275] Ibid, paras. 50-3, 82, 84-95; Hansard. (1946, 17 December). House of Lords Debate, Volume 144, cc1042-3.
[1276] Ibid, Cohen Report, paras. 2, 5, 101; Hansard. (1946, 17 December). House of Lords Debate, Volume 144, cc1006.
[1277] Hansard. (1946, 17 December). House of Lords Debate, Volume 144, cc1006.

In this Report, disclosure and publicity were some of the solutions recommended to diminish and mitigate directors' conflicts of interest issues, particularly those associated with directors' fees.[1278] The Cohen Committee's recommendations on directors' conflicts of interest were largely adopted in the Companies Act of 1947.[1279]

The Act seemed successful due to the explicit acceptance that the good governance of companies is of public interest as are maintaining a healthy public trust, engagement and confidence in British companies and their governance.[1280] Therefore, it was no surprise that there was an implicit demand that directors' conduct be exceptional and exemplary.[1281] Parliamentarians felt that this meant better regulation of directors' conflicts of interest, even though they expressed reservations concerning the imposition of stringent regulatory intervention. They felt that this could create hindrances for the development of businesses, another public interest.[1282] Hence, the Companies Act was not a charter for protecting investors alone but also protecting societal interests.[1283]

The Report explicitly made a case for the reform of company law based on the private interests as well as public interest in the good governance of companies. The Report also made a case for regulation so as to encourage the healthy development of companies. The good governance of companies due to the role which they play in the nation's economic growth was however not the sole public interest at stake. There was a competing (recurring) public interest in ensuring proportionate regulation of directors' conduct so as not to deter people from taking up directorships. In fact, even when looking at these public interests, it is clear that there were tensions between

[1278] Cohen Report, see above n.1273, para 87-90; Hansard. (1946, 17 December). House of Lords Debate, Volume 144, cc1017-8, 1033; Hansard. (1947, 6 June). House of Commons Debate, Volume 438, cc600-1.
[1279] 10 & 11 Geo. 6. ch.47; Clauses 32-34 of Companies Bill [H.L.], 1946-7; Sections 34-36 of the Companies Act 1947 and Clauses 35-39 of the Bill; Sections 37-41 of the 1947 Act. Sections 186-199 of the Companies Act 1948. Clauses 32-34 and 39 (5) later became part of Part X of Companies Act, 1985.
[1280] The Lord Chancellor, William Allen Jowitt in Hansard. (1946, 17 December). House of Lords Debate, Volume 144, and cc1000, 1004, 1006-7: The Lord Chancellor also noted the shift in directorial conduct and societal acceptance of said conduct from 1919 to 1939, further indicating that the reform was born of public interest as public outcry about the mismanagement of many companies and series of corporate scandals led the desire to reform company law. Also, see Hansard. (1946, 17 December). House of Lords Debate, Volume 144, cc1032, 1042-3.
[1281] Hansard. (1947, 6 June). House of Commons Debate, Volume 438, cc591, 599-602.
[1282] Hansard. (1946, 17 December). House of Lords Debate, Volume 144, cc1012-3, 1067.
[1283] Ibid, 1012.

them. There were tensions between the desire for good governance of companies and preventing the over-burdening of companies with regulations so as ensure that they develop freely.

6.4.5 THE JENKINS REPORT AND COMMITTEE

In 1962, further efforts were made to reform existing company law.[1284] This was largely because critics, the Minister of the Board of Trade,especially, felt that though the Companies Acts of 1947-8 required a great deal of disclosure, they did not demand enough information.[1285] Consequently, investors and the public were not sufficiently informed about the state of many companies' affairs.[1286] The Committee made a number of recommendations including concerning directors' conflicts of interest.[1287] Like the Greene Report, the Committee advocated disclosure and publicity as ways of addressing directorial misconduct.[1288] It reasoned that companies should disclose more information about their affairs both to their shareholders and to the public.[1289] The report led to the Companies Act of 1967.[1290]

During the parliamentary debates of the Bill, the Minister of State, Board of Trade stated that publicity was the most important safeguard against corporate abuse, and disclosure of information was desirable for (national) economic efficiency and progress.[1291] Corporate abuse of course includes directors' conflicts of interest. The Minister of State thought that publicity was in the interests of a number of stakeholders; creditors, investors, employees, the government as well as the public.[1292] He reiterated that incorporation with limited liability is itself a privilege which carried obligations to the public, one of which was disclosure of information and opening up to public inspection.[1293]

[1284] Great Britain, Board of Trade (1962). *Report of the Company Law Committee*. London, Her Majesty's Stationery Office (Henceforth, the Jenkins Report).
[1285] The Minister of State, Board of Trade in Hansard. (1966, 21 February). House of Commons, Volume 725, cc37.
[1286] Ibid, 51-52.
[1287] The Jenkins Report, see above n.1284, Clauses 86-99.
[1288] Ibid.
[1289] The Minister of State, Board of Trade in Hansard. (1966, 21 February). House of Commons Debate, Volume 725, cc35.
[1290] Companies Act of 1967.
[1291] See above n.1289, cc36.
[1292] Ibid.
[1293] Ibid, cc36-37.

The Companies Act of 1967 adopted extensive disclosure provisions on issues such as political contributions.[1294] It addressed directors' conflicts of interests including directors' service contracts and dealings in securities as well as directors' emoluments.[1295] The Act was nonetheless critiqued for a number of reasons. This includes the fact that it was hastily enacted and superficially addressed inadequacies in company law. It made some important forays into the regulation of directors' duties including conflicts of interest.[1296] This is because of its extensive coverage of directors' conflicts of interest such as directors' service contracts.[1297] In essence, it elaborated further on the regulation of directors' remuneration. It mandated extensive disclosure of directors' emolument.[1298] This was also the case for directors' contracts with the company[1299] and directors' interests in company shares.[1300] The Act explicitly discussed the role of public interest in the management of companies and thus directors' conflicts of interest.[1301]

The inspiration for the Act even reflected the discussion that limited liability is a privilege granted to companies.[1302] This thesis deduces that this meant that companies were expected to take into consideration public interest in exchange for the privilege granted to them. This is very reminiscent of the initial debates about granting companies limited liability in the nineteenth century.[1303] The Jenkins Report and the Companies Act of 1967 significantly reformed company law and their impact continued until 1985.[1304]

[1294] Section 19 of the Companies Act, 1967.
[1295] Sections 6-7, 25-28 of the Companies Act, 1967.
[1296] Leigh, L. H. (1968). *Companies Act 1967*. *Modern Law Review,* 31 (2), 183.
[1297] Section 16 of the Companies Act, 1967.
[1298] Ibid, section 6.
[1299] Ibid, section 16 (c).
[1300] Ibid, section16 (e).
[1301] Hansard. (1966, 07 July). House of Lords Debate, Volume 275, cc1230; Hansard. (1966, 21 February). House of Commons Debate, Volume 725, cc36, 41-42.
[1302] Hansard. (1966, 21 February). House of Commons Debate, Volume 725, cc36.
[1303] See the Limited Liability Act of 1855; Gower, see above n.1013, 48; Bolodeoku, see above n.1013, 489.
[1304] The Companies Act, 1976 was not a fundamental restructuring of English company Law. It improved disclosure mechanisms and strengthened the penalties for non-compliance with disclosure provisions, particularly in sections 25-29 and 39 of the Act. Prentice, D. D. (1977). Companies Act 1976. *Modern Law Review*, 40 (3), 314.

6.5 CONCLUSION

This chapter makes it clear that in the 19th and 20th centuries, companies became the prevailing organisational form of economic activity for the nation. This unsurprisingly raised trepidations about how accountable those who managed companies were to society and those who invested in them in various capacities. These fears were reflected in the regulation of directors' conflicts of interest. Originally, the notions, breaches of trust and 'directors as trustees' were used by the courts to address directors' conflicts of interest in order to protect a number of interests. Public ordering through judicial intervention, using fiduciary principles was fundamental for the development of regulation of directors' conflicts of interest. This was especially significant when the legislature was slow to act. These fiduciary principles served to protect private interests (of shareholders) and the public interest, in the good governance of companies and mitigating directorial self-dealing and other conflicts of interest.

This chapter also reveals that public interest was one of the myriad of justifications for the various legislative and judicial interventions into directors' conflicts of interest. However, it unveils that public interest was of concern in varying degrees and fluctuated throughout the development of the regulation of directors' conflict of interest. Public interest was not an absolute justification. There were several instances where public interest did not seem as strong as it was in the 18th century and this is reflected in public ordering.

Likewise, it is evident that there were tensions between public and private interest justifications for the regulation of directors' conflicts of interest. This is not surprising as companies are and were entities involving both public and private ordering and interests, as discussed in Chapter 5 of this thesis. However, what is surprising, are the tensions within public interest itself and tensions between public interest justifications. For example, a key public interest seen throughout this chapter was the healthy and sustainable development of companies because of their significance to the nation's economy. However within this public interest was the desire for good corporate governance as well as encouraging innovation and directorial entrepreneurialism. These justifications were not always in alignment or harmony.

The above observations are significant for this thesis as they indicate that public interest in the regulation of directors' conflicts of interest is not singular or static. It is in line with the discussion of public interest as a dynamic notion in chapter 3. It reinforces that public interest is subject to numerous interpretations. Therefore, public interest in the regulation of directors' conflicts of interest has historically varied. It ranged from economic considerations of growth and profit maximisation to social and moralistic notions of integrity and good management of companies for the common good.

Attention will turn to contemporary regulation of directors' conflicts of interest and the articulation of the public interest so as to verify the observations made in this chapter.

CHAPTER SEVEN

CONTEMPORARY REGULATION OF CONFLICTS OF INTEREST AND PUBLIC INTEREST

7.1 INTRODUCTION

This chapter considers the contemporary regulation of directors' conflicts of interest to examine if the question of public interest is present in these regulatory approaches. Several legislative provisions in the Companies Act 2006 are dedicated to directors' conflicts of interest. A brief glance at these provisions does not reveal adequately the justification for the regulation of these conflicts. So, it is important to explore the recent history, path and development of these regulatory measures.

A review of the Companies Act 1980 and Part X of the Companies Act 1985 is particularly significant to understanding the current state of affairs. This is also important for analysing the future of the regulation of directors' conflicts of interest and the existence of any public interest justification. These might be significant for the reform of directors' duties. After all, the desire to rectify the perceived inadequacies in the regulation of directors' duties, in particular directors' conflicts of interest, led to extensive reform and modernisation of company law. As was the case with breach of trust, the reformulation of directors' duties and the regulation of directors' conflicts of interest, highlight that the purpose of company law, is not limited to the protection of a singular type of interest. Company law serves a myriad of competing interests. These are private and public interests which sometimes require a balancing act in legislative and judicial intervention.

The provisions in 1980 Act and Part X of the Companies Act 1985 were a continuation of the fiduciary principles such as breach of trust, used to address directors' misconduct. As stated in chapter 6, breach of trust historically provided the basis for the regulation of those directors' duties to companies that involve loyalty. It afforded companies (some) protection from appropriation of their property and assets as well as afforded public interest justifications for the regulation of directors' misconduct. This pattern continued in the Companies Acts of the 1980s. An exploration of the criminal and civil sanctions imposed for non-compliance with the provisions contained

in Part X will be undertaken in this chapter. They illustrate the continued significance of the varying justifications for regulatory provisions concerning directors' conflicts of interest.

This chapter will thus analyse the Companies Acts of 1980 and 1985 and relevant subsequent legislative interventions in relation to directors' conflicts of interest for the reasons mentioned above. This is imperative to considering if public interest rationales for the regulation of directors' conflicts of interest were ephemeral or have become obsolete.

It is vital therefore to probe the reasons why the Act of 1980 and Part X of the Companies Act 1985 were enacted, why they were later critiqued and considered not fit for purpose. Similarly, it is essential to look closely at the plethora of reports and comprehensive reviews of the regulation of directors' conflicts of interest in the latter part of the last century and beginning of the current one. These will reveal the justifications for the enactment of the Companies Act 2006 and regulatory provisions regarding directors' conflicts of interest. Delving into these justifications discloses a range of competing and conflicting interests for the regulation of directorial misconduct and self-dealing. Although the purpose and objective of the reform efforts were the modernisation of company law so as to encourage competitiveness, there was also a desire to augment accountability of directors and enhance simplicity, coherence and consistency in company law.[1305] These objectives will be shown to incorporate competing and conflicting positions which have been part and parcel of the development of company law.

Like the regulation of directors' conflicts discussed in preceding chapters of this thesis, these objectives include private and public interests. These range from the protection of shareholders' and companies' properties and money or protection of the investing public. They also include protecting the general public from fraud and corporate misconduct to encouraging honesty and integrity in business. These interests equally comprise of protecting the economic life of the nation or encouraging

[1305] Great Britain, DTI. (2001). *Company Law Review Steering Group, Modern Company Law: For a competitive economy- Final Report, Volume I.* (pp. ix). URN 01/942; Great Britain, House of Commons Trade and Industry Committee (2003). *The White Paper on Modernising Company Law, Sixth Report of session 2002-3*. (pp. 5). London, London: The Stationery Office Limited.

healthy growth, competiveness and development of companies because they are essential components of the nation's economic activity.

Therefore, this chapter will begin with a review of the Companies Act of 1980 and Part X of the Companies Act 1985 which will form parts 1 and 2 of this chapter. Although the Act of 1985 itself was said to be a consolidation of existing company law provisions, it contained extensive provisions fashioned to place restrictions on directors taking financial advantage of their position. This thesis accepts that these provisions afforded means of protecting companies' properties from directorial misconduct or temptation to self-enrich. However it adds that this does not adequately explain the mandatory nature of the provisions and severe criminal sanctions for non-compliance in certain cases. It is important to explore these further in order to address the research question posed in this thesis.

This thesis maintains that like past legislative and judicial interventions in the regulation of directors' conflicts of interest, the provisions contained in Companies Acts of 1980 and 1985, were enacted due to corporate governance concerns and scandals.[1306] This seems indicative of public interest justification(s) for regulatory intervention. In the same manner, this thesis will explore if the subsequent reform of the regulation of directors' conflicts of interest is symptomatic of such public interest justification. This chapter will test the validity of Lord Wedderburn's statement that the regulation of directors' conflicts of interest serves a public function and social purpose as well as private interests and function.[1307]

Part 3 of this chapter will explore the quest for a modern company law and reform of the regulation of directors' conflicts of interest. The justifications for these reform efforts will be drawn out. A critique of these reforms in light of public interest justifications sought will be discussed. Part 4 will assess the Companies Act of 2006 and its provisions on the regulation of directors' conflicts of interest. Part 5 will tackle key contemporary cases about directors' conflicts of interest in order to evaluate current judicial intervention and the question of public interest. Likewise, recent and

[1306]Ibid, 5.
[1307] Wedderburn, see above n.1069, 221; Sugarman, D. (1999). Is company law founded on contract or regulation? The Law Commission's paper on company directors. *Company Lawyer*, 20 (6), 162, 168, 175.

further development in the regulation of directors' conflicts of interest will be discussed. Part 6 provides some concluding remarks.

7.2 COMPANIES ACT 1980

7.2.1 LEGISLATIVE HISTORY AND PUBLIC INTEREST

The Companies Act 1980 was introduced to implement the Second EEC Directive on Company Law[1308] and enhance the regulation of directors' conflicts of interest.[1309] The Act was enacted partly due to public outcry about corporate scandals like those involving the Lonrho Limited[1310] and the Peachey Property Corporation Limited.[1311] Both examples concerned investigations into the affairs of these companies under section 165(6) of the Companies Act, 1948 due to financial irregularities in relation to their directors. These directors were involved in a number of conflicts of interest which ranged from using professional fees to conceal loans paid to others,[1312] use of company money for expensive gifts for purely personal use[1313] to the payment of bribes.[1314] The directors also awarded themselves excessive payments and other benefits, including flats and houses paid for at the company's expense, even though some of the directors were not resident in the country for more than two months.[1315]

[1308] EU, Council of the European Union. (1976). Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. DG15/B/02. Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31977L0091.

[1309] Durham, M. F. (1982). The Companies Act, 1980: Its Effects on British Corporate Law. *Northwestern Journal of International Law & Business,* 4, 551.

[1310] Heyman. A., & Slimmings, W. [for the] Department of Trade. (1976). *Lonrho Limited: investigation under Section 165 (b) of the Companies Act 1948: Report*. London, H.M.S.O.; Hansard. (1976, 04 August). House of Commons Debate, Volume 916, cc2023-71; The Law Commission of England and Wales & the Scottish Law Commission. (1998). *Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties.* (Paras. 1.9-10). Consultation Paper No. 153. Retrieved from https://www.lawcom.gov.uk/project/company-directors-regulating-conflicts-of-interest-and-formulating-a-statement-of-duties/.

[1311] Kidwell, R. I., & Samwell, S. D. [for the] Department of Trade. (1979*). Peachey Property Corporation Limited: investigation under section 165 (b) of the Companies Act 1948: Report*. London: H.M.S.O.; Hansard. (1979, 15 March). House of Commons Debate, Volume 964, cc933-54.

[1312] Ibid, paras. 29-30.

[1313] Ibid, paras. 28, 161-64.

[1314] Heyman & Slimmings, see above n.1310, part 8.

[1315] Ibid, paras. 9.48-9, 9.53.

There was equally a lack of disclosure of directors' interests in transactions entered into with the company.[1316]

Unsurprisingly, the Act was a culmination of diverse legislative initiatives on the regulation of directorial conduct and the management of companies.[1317] It incorporated a more comprehensive regulation of directors[1318] and introduced the prohibition of insider trading.[1319] It required directors to have regard for employee interests.[1320] These provisions were influenced by recommendations made in the Jenkins Report, discussed in chapter 6 of this thesis, and Companies Bills of 1973 and 1978.[1321] The recommendations all incorporated public interest justifications for the regulation of directors' duties, particularly conflicts of interest. During the reading of the Companies Bill of 1978, disclosure was deemed important for the public interest due to the impact of companies on wider economic and social developments as well as public expectations about companies' activities.[1322]

7.2.2 THE REGULATION OF CONFLICTS OF INTERESTS AND PUBLIC INTEREST

Sections 47-53 of the Act concerned restrictions on particular transactions giving rise to a conflict of interest. These included contracts of employment for directors[1323] and substantial property transactions involving directors.[1324] These provisions were enacted to address a number of scandals such as the Peachey affair mentioned above. These were discovered during inspector examinations into companies' affairs and mentioned in subsequent reports, which sought to tighten the regulatory

[1316] Ibid, para. 10.72.
[1317] Brown, P. P. (1981). Corporate Governance in the United Kingdom. *Notre Dame Law*, 56 (5), 936.
[1318] Part IV of Companies Act, 1980.
[1319] Part V of the Companies Act, 1980.
[1320] Section 46 of the Companies Act, 1980; Prentice, D. D. (1981). A Company and its Employees: The Companies Act 1980. *Industrial Law Journal*, 10 (1), 1–9.
[1321] Report of the Company Law Committee, see above n.1284; Hansard. (1978, 20 November). House of Commons Debate, Volume 958, cc929-48; Hansard. (1974, 01 April). House of Commons Debate, Volume 871, cc923-43.
[1322] Hansard. (1978, 20 November). House of Commons Debate, Volume 958, cc930-1; Great Britain. DTI. (1998). *Modern Company Law for a competitive Economy*. (Foreword). Retrieved from https://webarchive.nationalarchives.gov.uk/20061209115810/http://www.dti.gov.uk/bbf/co-law-reform-bill/clr-review/page22794.html.
[1323] Section 47 of the Companies Act, 1980.
[1324] Ibid, section 48.

loopholes that had allowed some directors to act with impropriety as described in the aforementioned scandals.[1325]

Although contracts entered into with directors were voidable under common law at a company's demand,[1326] these contracts could be modified by a company's articles.[1327] The provisions concerning contracts and substantial property transactions were aimed at increasing shareholder awareness of such arrangements. These provisions meant that subject to certain conditions, these contracts were voidable if they were inadequately authorised or approved.[1328]

Similarly, sections 49 to 53 addressed company loans to directors and replaced existing legislative provisions in section 190 of the Companies Act 1948. These were considered unsatisfactory because directors were finding ways to circumvent the legal provisions.[1329] Section 49 concerned the prohibition of loans, quasi-loans, credit transactions to directors and connected persons. Likewise the guaranteeing of such transactions for directors was also prohibited.[1330] A company could avoid or refuse any prohibited transaction stated in section 49 subject to certain exceptions.[1331] In addition to civil remedies available to the company for breach of section 49, non-compliance with the provisions contained in the section exposed directors to criminal penalties which were severe as there was a penalty of imprisonment.[1332]

The imposition of criminal penalties as well as civil remedies reveals the public interest implicit in the regulation of these conflicts of interest. It protected shareholders' and employees' interests for a number of reasons. These include the sanctity of contract, protection of property rights[1333] but the legislative measures

[1325] Durham, see above n.1309, 569; Brown, see above n.1317, 941-943.
[1326] *Aberdeen Railway Co. v. Blaikie Bros* (1854) 1 Macq 461.
[1327] Durham, see above n.1309, 569.
[1328] Sections 47 (5) and 48 (3) of the Companies Act, 1980.
[1329] Great Britain, Department Of Trade. (1977). *The Conduct of Company Directors*. (pp. 2). Cmnd. 7037. Retrieved from https://discovery.nationalarchives.gov.uk/details/r/C10935660.
[1330] Section 50 of the Companies Act, 1980 incorporated exceptions to section 49, which concerned provisions of funds to directors for expenditure incurred for company purposes in Section 50 (3-4) of the Act.
[1331] Section 71 of the Companies Act, 1980, exceptions are enumerated in section 52 (1).
[1332] Ibid, Section 53.
[1333] This is implicit in the requirement of shareholder approval for various director arrangements with companies including all contracts of employment as well as contracts of services which exceed five years and which do not permit termination for any reason in section 47 (2-3) of the Companies Act, 1980.

clearly exceeded these objectives. This thesis reasons that it was important to reduce directorial impropriety in order to preserve market integrity and trust in companies as well as have a robust company law. This was the basic legal framework for the majority of the nation's industrial and commercial institutions.[1334] Some critics argued that the mandatory nature of the rules led to the reduction of transactions costs and externalities not bargained for by society so as to prevent an overall welfare loss to society.[1335]

Similarly, the criminal penalties were reflective of public interest for a number of reasons.[1336] The provisions could not be avoided through contractual bargaining and thus are contrary to prevalent economic analysis of the law.[1337] The fact that these provisions were mandatory also shows the conflicts of interest concerned were not treated as purely private interests out of which shareholders or the board of directors could agree that the company could contract. Non-compliance carried severe consequences, some penal in nature which were imposed and enforced by the state.[1338] The provisions served public and private ends of controlling the management of companies. This was the intention of policy-makers, although the effectiveness or lack of, of these provisions will be discussed in detail in subsequent parts of this chapter.

The sanctions, especially criminal sanctions, were intended to act as a real deterrent to undesirable behaviour. They were also supposed to bolster disclosure requirement particularly, the disclosure of interests in shares for which there was limited scope for other remedies such as civil remedies.[1339] The state stepped in to protect societal interests and not simply the interests of victims of criminal conduct, here,

[1334] Hansard. (1978, 20 November). House of Commons Debate. Volume 958 cc931, 939.
[1335] Brown, see above n.1317, 943; The Law Commission, (1998), see above n.1335, paras. 3.15-6: although this concerned Part X of the Companies Act 1985, it is applicable here too.
[1336] The Law Society, Company Law Committee (1998). *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties.* No.366. (para 2.17, 3.15-6). London, Law Society; Hansard. (1979, 25 June). House of Lords Debate, Volume 400, cc1269-70; Hansard. (1986, 20 November). House of Commons Debate, 20 Volume 105, cc279; Hansard. (1985, 21 March) House of Lords Debate, Volume 461, cc713.
[1337] Posner, (1977), see above n.171.
[1338] Dine, J. (1995). *Criminal Law in the Company Context*. (pp. 159-161). University of Michigan, Dartmouth Publishing House.
[1339] Sugarman, see above n.1307, 170.

shareholders and other corporate actors. The fact that the primary remedy for the criminal conduct was not compensation but punishment is also of importance.[1340]

Some academics have suggested that criminal sanctions and public enforcement generally may be explained in terms of the desire to protect private interests.[1341] They asserted that the high detection costs of non-compliance and limited incentives for shareholders to initiate litigation meant that it made economic sense for corporate actors to desire public enforcement.[1342] The problem with this argument is that public enforcement and criminal enforcement are not necessarily the same thing. This point could be addressed by choosing public enforcement that is civil in nature. It therefore does not explain the imposition of criminal enforcement and is an incomplete explanation. While the public enforcement argument may be plausible, it does not negate the contention that criminal sanctions are enforced by the state and are born of the necessity to prevent harm to society. Here, harm is the exploitation of undesired conflicts of interest. The state put in place effective deterrence of directors from breaching the relevant aspect of the fiduciary duty concerning conflicts of interest.[1343]

Similarly, some claimed that criminal sanctions were penalty default rules rather than mandatory rules based on the argument that they set out to induce directors to cooperate by sharing risk and information subject to the imposition of an unwelcome liability.[1344] They added that these rules therefore had an economically beneficial 'information-inducing' or 'cooperation inducing' effect.[1345] While it may be true that these rules have a cooperation inducing effect, they were mandatory rules which restricted parties' contractual autonomy. They were imposed and enforced by the state, and were criminal sanctions. This was indicative of a desire to protect the public from a perceived harm and punish directors for non-compliance with the legislative provisions.

[1340] Ball, H., & Friedman, L. (1965). The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View. *Stanford Law Review*, 17 (2), 197; Hart Jr., H. M. (1958). The Aims of the Criminal Law. *Law and Contemporary Problems*, 23, 401; Duff, R. A. (20110. Responsibility, Citizenship and Criminal Law. In R. A. Duff & S. P. Green. (eds.) *Philosophical Foundations of Criminal Law*. (pp. 140). Oxford, OUP; Feinberg, J. (1984). *The Moral Limits of the Criminal Law: Harm to others*. Oxford, OUP.

[1341] The Law Society, see above n.1336, para 3.79.

[1342] Ibid.

[1343] Worthington, S. (2001). Reforming directors' duties. *Modern Law Review*, 64 (3), 439, 458.

[1344] The Law Society, see above n.1336, para 3.34-5; Section 317 of Companies Act, 1985.

[1345] Ibid.

Also, the legislature sought to protect the integrity of commercial morality and the economic institution, the company.[1346] Directors' mismanagement of conflicts of interest here was seen as harmful or an attack on the valuable societal institution that is the company, a legitimate aim of criminal law.[1347] The role of the state in imposing and enforcing criminal sanctions for the mismanagement of directors' conflicts of interest is suggestive of a theme which has been present throughout this thesis. This is the idea that limited liability and other aspects of the company are privileges granted by the state because it considers companies to be indispensable to the development of the economy. Although there is a concession that companies are subject to private interests, those of shareholders and creditors primarily, the state is interested in the good management of companies and directors' conduct because of the public interest at stake.

Likewise, the Act incorporated more rigorous provisions with regards to the disclosure of transactions with the companies involving directors, subject to certain exceptions such as transactions with recognised banks.[1348] The transactions to be disclosed included substantial contracts or arrangements with directors.[1349] The provisions mandated that particular information concerning the transactions be disclosed in annual accounts.[1350] The imposition of more stringent regulation concerning the record-keeping of directors' contracts of service and making them open to inspection by company's members[1351] is also indicative of public interest implicit in the regulation of directors' conflict of interest.[1352] Disclosure or publicity was initially introduced so as to ensure that the limited liability privilege afforded to companies was not abused because it bolstered transparency and accountability in governance. Disclosure was equally of private interest because it served the interests of shareholders. It enhanced their ability to monitor directors' behaviour but disclosure also served to inform

[1346] Hansard. (1979, 25 June). House of Lords Debate, Volume 400, cc1269-70.
[1347] Dine, see above n.1338, 34-36; Mill, J. S. (1992) *On liberty*. (pp. 138, ch. IV). London, Everyman's Library.
[1348] Sections 54 (5), 55, 56 (3-4), 57-61 of the Companies Act 1980.
[1349] Ibid, Section 54.
[1350] Ibid, sections 55 and 154.
[1351] Ibid, section 61 (1-2) of the Act amends section 26 of the Companies Act 1967.
[1352] Wedderburn, Lord. (1985). The Social Responsibility of Companies. *Melbourne University Law Review*, 15 (1) 4, 9.

creditors, the state and the general public about the affairs of companies, their management and finances.[1353]

The mandatory nature of disclosure and the penalties for non-compliance had important consequences. Disclosure was considered one of the ways of dealing with directors' conflicts of interest; this is evident in sections 54 to 58 of the Act. These could not be contracted out of and were imposed by the state, they are also representative of the public interests underpinning the regulation of directors' conflicts of interest.

Also of importance is the fact that the Secretary of State could extend disclosure requirements contained in sections 54 to 58 and 62 to 66 to unregistered but incorporated companies, including those incorporated by royal charters.[1354] This is important because companies incorporated by royal charter were incorporated by grant of a Charter from the Crown. They are more indicative of incorporation being a privilege afforded to corporations, thus a concession of the Crown. Historically, they were companies incorporated to serve public purposes such as the development of education, the development of trade or were benevolent institutions. Hence, it is unsurprising that disclosure provisions were extended to them.[1355] However, the extension of disclosure provisions to other unregistered but incorporated companies displayed a desire to ensure that directorial conduct and the governance of companies was of a high standard. That is, with uniform obligations of transparency and accountability. This suggests an attempt to better protect shareholders' interest in good governance. It also shows public interest in the integrity of the market and propriety in the management of companies, regardless of whether the company was

[1353] The Limited liability Act, 1855 and Joint Stock Companies Act, 1844; DTI, (1998), see above n.1322.

[1354] Section 67 of the Companies Act, 1980; Hansard. (1980, 26 February). House of Commons Debate, Volume 979, cc1158-61.

[1355] This is arguably because the Charters defined the privileges and purpose of the incorporated entity or corporation. Such entities included universities and towns and these were subject to other disclosure or accountability requirement due to their explicit public interest purposes. They are subject to special and specific conditions concerning the amendment or revocation of their Charters. Retrieved from https://privycouncil.independent.gov.uk/royal-charters/chartered-bodies/.
For example, the Royal Charter establishing the Chartered Institute for Public Relations states that it is bound to act in the public benefit. Retrieved from https://www.cipr.co.uk/sites/default/files/Charter%20and%20By-Laws_0.pdf.

registered or unregistered.[1356] Even now, although private companies do not have the same disclosure requirements as public companies, they are still subject to some disclosure requirements such as directors' report.[1357] Failure to comply with these disclosure requirements like the failure to file accounts is considered a criminal offence.[1358] There are civil penalties for non-compliance.[1359] Therefore it can be deduced that private companies are also relevant for the public interest, albeit in a different manner for many reasons, including their size.[1360]

The prohibition of insider trading by individuals connected with a company,[1361] particularly directors, who had previously not been subject to stringent or any real control is also indicative of public interest.[1362] The Secretary of State for Trade deemed that insider trading represented a threat to market integrity, public confidence in directors and others closely associated with companies. He felt that this was unfair to shareholders and investors and was frequently a breach of directors' obligations to companies.[1363] This statement is an excellent illustration of the private and public interests supporting the regulation of directors' conflicts of interests, of which insider trading can be a type. Additionally, the criminal penalties imposed for non-compliance with these provisions are also indicative of the public interest nature of these regulations. [1364]

[1356] Durham, see above n.1309, 574; Hansard. (1980, 27 March). House of Lords Debate, Volume 407, cc1047.
[1357] Sections 413, 415-6 of the Companies Act, 2006; Regulation 5 and 7 of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, No. 409. Although, small and micro-entity companies may be exempt from some of the disclosure requirements because of the public interest in the encouragement of the growth of micro-entities due to their importance for the economy. It is thought that reducing the domestic regulatory burden on such businesses is essential: The Small Companies (Micro-Entities' Accounts) Regulations 2013. (Explanatory Memorandum, para. 7). No. 3008; Section 415A of the Companies Act, 2006.
[1358] Sections 415 and 451 of the Companies Act, 2006.
[1359] Section 453 of the Companies Act, 2006.
[1360] This issue exceeds the scope of this thesis.
[1361] Sections 68-73 of the Companies Act, 1980.
[1362] *Percival v. Wright* [1902] 2 Ch 421, 426; Hansard. (1978, 20 November). House of Commons Debate, Volume 958, cc941; Hawes, D. W., Lee, T., & Robert, M. (1982). Insider Trading Law Developments: An International Analysis. *Law & Policy in International Business*, 14 (2), 335, 337; Spitz, M. A. (1989). Recent Developments in Insider Trading Laws and Problems of Enforcement in Great Britain. *Boston College International & Comparative Law Review*, 12 (1), 265, 271-2.
[1363] Hansard. (1978, 20 November). House of Commons Debate, Volume 958, cc940-1.
[1364] Brown, see above n.1317, 944.

7.2.3 CALLS FOR REFORM

This piece of legislation though an important predecessor to the Companies Act 1985 was not particularly successful, due to similar reasons for which the Act of 1985 was subsequently criticised. Some contended that the regulation of conflicts of interest therein were too complex and could deter people from taking directorships.[1365] They disputed that the enforcement of the criminal breaches contained in the regulation of conflicts of interest were difficult because the government had not devoted sufficient resources to their enforcement which meant that these provisions had no real bite to them.[1366] Equally, they claimed that the courts were not seriously committed to intervening in such cases as was made evident by the scant cases of successful prosecutions.[1367] This meant that the public interest and private interest objectives of the regulation of conflicts could not be adequately met.

7.3 COMPANIES ACT 1985 AND OTHER RELEVANT LEGISLATIONS

7.3.1 LEGISLATIVE HISTORY OF PART X OF THE COMPANIES ACT 1985

The Companies Act of 1985 is in essence a consolidation of various legislative provisions relating to companies.[1368] It was a piece of legislation which governed diverse aspects of formation and registration of companies as well as their management and winding up of companies. In Part X, it addressed the enforcement of fair dealing by directors and the provisions contained therein. It included the regulation of diverse conflicts of interests. It involved restrictions on directors taking financial advantage of their position to exploit companies through tax free payments to directors,[1369] property transactions[1370] and interest in contracts. [1371] Like its

[1365] Ibid; The Law Society, see above n.1336, para 3.15.
[1366] This is particularly the case for insider trading - Spitz, see above n.1362, 283.
[1367] Ibid, 284.
[1368] Companies Consolidation (consequential provisions) [H.L.] Bill. A bill intituled an act to make, in connection with the consolidation of the Companies Acts 1948 to 1983 and other enactments relating to companies, provision for transitional matters and savings, repeals (including the repeal, in accordance with recommendations of the Law Commission, of certain provisions of the Companies Act 1948 which are no longer of practical utility) and consequential amendments of other acts: Hansard. (1984, 08 November). House of Lords Debate, volume 457, cc141-206.
[1369] Section 312 of the Companies Act, 1985.
[1370] Ibid, Sections 313-320.
[1371] Ibid, sections 317-9.

predecessors, the Act was introduced in response to particular scandals and corporate abuses.[1372]

Like the Companies Act of 1985, a number of other legislative provisions were introduced in 1985 and 1986 to deal effectively with all aspects of companies' affairs, particularly directors' misconduct.[1373] These include the Insolvency Act of 1985 (followed by the Insolvency Act 1986), Business Names Act 1985, Company Director Disqualification Act 1986. For instance, one of the major provisions of the Insolvency Act 1985 extended the powers of the courts to attach personal liability to directors of insolvent companies.[1374] Likewise, the Company Director Disqualification Act 1986 provided for disqualification of those found unfit to manage the affairs of companies.[1375] Parliamentarians considered that it was highly desirable in the public interest that some suitable and effective mechanism were made available to deal with directors who failed to conform with acceptable standards of conduct and were unfit to manage companies.[1376] Through these provisions, the government sought to encourage directors to take closer interest in their company's affairs and to identify and tackle financial problems early. [1377] Thus the motivations for this piece of legislation were public and private interests. They were namely, the desire to minimise losses to creditors and interests of others who suffer financially when a company experiences commercial failure and the promotion of a healthy environment in which businesses may flourish.[1378]

It was in this climate that the Companies Act of 1985 came into existence as the legislature and government wanted to be seen to be taking directors' misconduct and

[1372] Sugarman, see above n.1307, 168.
[1373] Insolvency Bill: Hansard. (1985, 21 March). House of Lords Debate, Volume 461, cc713; Companies (Procedure) Bill: Hansard. (1985, 23 January). House of Commons Debate, Volume 71, cc989-90.
[1374] Sections 216-217 of the Insolvency Act 1986, where a company's name was reused.
[1375] Hansard. (1986, 20 November). House of Commons Debate, Volume 105, cc279.
[1376] Insolvency Bill [H.L.]: Hansard. (1985, 15 January). House of Lords Debate, Volume 458, cc895.
[1377] Hansard. (1985, 29 January). House of Lords Debate, Volume 459, cc602-603, 607; Hansard. (1985, 15 January). House of Lords Debate, Volume 458, cc627. Great Britain, Parliament (1982). *Report of the Review Committee on Insolvency Law and Practice.* Cmnd 8558. (pp. 407, para. 1808; pp.411, para. 1826). London, H.M.S.O; Hansard. (1986, 10 July). House of Commons Debate, Volume 101, cc447; *Re Lo-Line Electric Motors Ltd* [1988] Ch 477.
[1378] Insolvency Bill. Hansard. (1985, 15 January). House of Lords Debate, Volume 458, cc881, cc884.

corporate scandals seriously. This was especially so, in light of the aforementioned scandals about directors' transactions with companies and other conflicts of interest.

7.3.2 PART X: THE REGULATION OF CONFLICTS OF INTERESTS

The sections contained in Part X of the 1985 Act addressed the regulation of directors' conflicts of interest. They included the prohibition of tax-free payments to directors[1379] and payment for loss of office or retirement without thorough disclosure of the proposed payment to the shareholders and prior approval of the company.[1380] The prohibition of transfer of the whole or any part of the undertaking or property of a company as payment to be made to a director to compensate them for loss of office, or retirement, without its disclosure to shareholders and prior approval of the company was another issue dealt with in Part X of the 1985 Act.[1381] Sections 314 and 315 addressed directors' duty of disclosure on takeover offers and any proposed payments to be made to a director for loss of office or retirement. It also included the consequences of non-compliance with these disclosure obligations.[1382] The mandatory nature of section 317 is indicative of the public interest in the regulation of the conflicts of interest concerned.[1383] It allowed no derogation based on fairness or even the disinterestedness of individual fellow directors to ascertain the fairness of the contract. The mandatory nature of these provisions indicates that there was a public interest in regulation because the provisions went beyond enabling the relationship between the constituents of companies. They imposed obligations on directors subject to criminal and civil penalties for non-compliance.

In fact, the significance of companies to the economy bolstered public interest in the creation of effective means of regulating directors' conduct.[1384] It strengthened standard setting for their behaviour.[1385] This is displayed by the fact that companies

[1379] Section 311 of the Companies Act, 1985.
[1380] Ibid, section 312.
[1381] Ibid, section 313.
[1382] Ibid, section 316.
[1383] DeMott, D. (1999). The Figure in the Landscape: A Comparative Sketch of Directors' Self-Interested Transactions. *Law and Contemporary Problems*, 62 (3), 243, 245; *Guinness Plc v. Saunders* [1990] 2 AC 663, 694, per Lord Templeman.
[1384] Hantke-Domas, M. (2003). The Public Interest Theory of Regulation: Non-Existence or Misinterpretation? *European Journal of Law and Economics*, 15, 165, 169.
[1385] Hannigan, B. (2017). Public interest in the regulation of the small private limited company – the dwindling role of mandatory rules in English company law. In S. Watson (ed.) *The Changing*

and their directors could not customise or contract out of the mandatory norms in Part X. This suggests that these provisions were not purely viewed as protecting private interests of parties such as shareholders or investors.[1386] If the rules were solely aimed at protecting these private parties and their interests, the law would allow them to opt out of the provisions in respect for their autonomy. It would enable them to choose what protections they wanted and what they might dispense with, in the interest for another gain, including a cheaper price of shares for example.

Although some contend that the making of a declaration to a meeting of fellow directors is not necessarily a strong deterrent for such self-dealings,[1387] it was nonetheless a prescriptive rule. It legally mandated disclosure subject to penalties for non-compliance. The directors could not contract out of this legal obligation. This indicates public interest in ensuring that directors' actions are held to a high standard of conduct and integrity. This reflects a common interest conception of public interest discussed in chapter 3. The public interest in the regulation of directors' self-dealings attempts to balance the economic interests of companies and the nation with the imposition of values such as trust and integrity in governance to protect common (societal) interests in good corporate governance. Like past regulatory responses to directors' conflicts of interest, emphasis placed on economic interests or integrity in governance depended on what was considered of more importance to society at a given time. Essentially, public interest changed and fluctuated throughout the development of companies, and common interest public interest theories best encapsulates this.

Additionally, although the threshold for disclosure by directors was low, this thesis suggests that this does not mean that the disclosure requirement here was devoid of public interest. There was a weighing up of competing interests, private and public interests.[1388] For example, the private interests and rights protected were those of the

Landscape of Corporate Law in New Zealand. (pp. 99). University of Canterbury, NZ, Centre for Commercial and Corporate Law Inc.

[1386] Gordon, J. (1989). The Mandatory Structure of Corporate Law. *Columbia Law Review*, 89 (7), 1549, 1555-1569.

[1387] Sugarman, see above n.1307, 168.

[1388] The Law Commission, (1998), see above n.1335, para 3.47; The Law commission of England and Wales & the Scottish Law Commission (1999). *Company Directors: regulating conflicts of interests and formulating a statement of duties.* (para 2.8). LC261. Retrieved from https://www.lawcom.gov.uk/project/company-directors-regulating-conflicts-of-interest-and-formulating-a-statement-of-duties/.

company and its shareholders. This was done by ensuring that this type of directors' conflicts of interest was made known to the company and shareholders by mandating disclosure. This was intended to protect these rights through information, basically attempting to rectify the imbalance created by information asymmetry in such cases.[1389] This meant that these parties, the company or its shareholders, were informed and were able to take action if necessary whilst a standard of transparency or accountability in governance was maintained.[1390] The mandatory nature of this regulation points to public interest concerns but the fact that the disclosure requirement was not onerous indicates that private interests were given priority.

The low threshold of disclosure equally implies the presence of a public interest in the exploitation of business opportunities. This is because taking up business opportunities could be beneficial for the nation's economy, even if it involves conflicted directors.[1391] This harks back to the discussion of the exploitation of corporate opportunities in the 19th and 20th centuries, and judicial intervention on the issue. It indicates that since economic development was indispensable for the common interests of all in society, it was necessary to sometimes take a tolerant approach to certain conflicts of interest which could be beneficial for the economy and the nation's competiveness.

Part X equally obliged directors to disclose interests in contracts[1392] and contract of employment for more than five years and which do not permit termination for any reason.[1393] Besides, there was an obligation for directors' service contracts to be open to inspection, non-compliance with this provision exposed the company and any director in default to a fine.[1394] Substantial property transactions involving directors were prohibited without the prior approbation of the company.[1395] Contravention of section 320 meant that the transaction was voidable at the request of the company.[1396]

[1389] Grantham, see above n.1020, 554.
[1390] Gordon, see above n.1386, 1555-1569.
[1391] The Law Commission, (1998), see above n.1335, para 3.48.
[1392] Section 317 of the Companies Act, 1985.
[1393] Ibid, section 319.
[1394] Ibid, section 318 (8).
[1395] Ibid, section 320 (1) of the Companies Act 1985, subject to exceptions in section 321.
[1396] Ibid, section 322 (1), subject to exceptions in section 322 (2-6).

Likewise, dealing in share options by directors and their families was prohibited.[1397] It was an offence which exposed directors to a liability of imprisonment, a fine, or both.[1398] Directors had a duty to disclose shareholdings in their own company[1399] and liability for non-compliance with this obligation was imprisonment or a fine or both.[1400] Additionally, there was an obligation to keep records of directors' interests and shares in the company, for which there were pecuniary sanctions for non-compliance.[1401] These provisions on directors' share dealings mandated notification of interests in shareholdings to companies. They imposed an obligation on companies to record such interests in a register and to disclose them to relevant institutions and stock exchanges.[1402] The mandatory and substantive rules though often considered to be merely ministerial provisions, are important proofs of the public interest character of disclosure in the regulation of conflicts of interest.[1403] In addition to the deterrence or punitive role they served as discussed earlier in this chapter, they provided the means of achieving the transparency desired by shareholders and the society alike. They also led to the reduction of the cost that shareholders may incur in monitoring the activities of directors.[1404]

Of equal importance is the imposition of civil remedies some of which incorporate a restitutionary element. This is because it serves private interests of protecting companies and their corporate actors as the fiduciary may be made to account for profits arising from conflicts of interest such as a diversion of a corporate opportunity.[1405] It also serves the public interest objective of ensuring or facilitating efficiency in the detection of breaches of duty to avoid conflicts of interest and deterring directorial impropriety.[1406] Part X is indicative of an understanding that

[1397] Ibid, section 327; section 323 of the Act extended the provision to spouses and children of directors.
[1398] Section 323(2) of the Companies act 1985.
[1399] Ibid, section 324 (1-2).
[1400] Ibid, section 324 (7), section 328 of the Act extended the provisions contained in section 324 to spouses and children of directors.
[1401] Ibid, section 325; also see sections 329, 326 and 329 (3) on the sanctions for non-compliance.
[1402] Ibid, sections 324, 326, 328-9 and schedule 13.
[1403] Chapter 6 of this thesis on the public interest character of disclosure; Sugarman, D. (1982). *The conceptual and policy basis of directors' fiduciary duties under English law: Part II*. (pp. 3-4). Middlesex Polytechnic, Working Paper.
[1404] The Law Society, see above n.1336, para 5.1.
[1405] Ibid, para 3.76; this is not always possible for all cases of self-dealing – *Re Cape Breton Co* (1881) 19 Ch. D. 77.
[1406] The Law Society, see above n.1336, para 3.76-7.

effective sanctions are thus indispensable to thoroughly regulating directors' conflicts of interest which would serve private and public interests.

Part X also contained extensive restrictions on a company's power to make loans,[1407] long term and substantial quasi-loans[1408] to directors and persons concerned with them.[1409] Like in the cases of conflicts of interest dealt with in Part X, civil remedies[1410] and criminal penalties[1411] were also imposed for the violation of these provisions.

7.3.3 PART X: A CONSOLIDATION OF PRIVATE INTERESTS AND PUBLIC INTEREST IN THE REGULATION OF DIRECTORS' CONFLICTS OF INTEREST

Part X exemplified the notion that strict regulation of directors' fiduciary duties, including the conflicts of interest, recognises the interests of all in being able to have confidence and trust in those who direct and manage the affairs of companies.[1412] This applies to companies, their members, employees and society at large. In fact it is well-known that public outrage about corporate impropriety and abuse of directorial power influenced the enactment of Part X.[1413] Stringent prescriptive and mandatory rules were imposed in response to non-compliance with existing legislative measures. This showed recognition of the necessity of public and private ordering of directors' duty to avoid conflicts.[1414]

Also, although the regulation of directors' conflicts of interest could be said to serve economic purposes, this is not limited to the private interests of companies and their members. The regulatory approach was equally aimed at encouraging economic competiveness and reducing the effect of externalities on third parties such as creditors as well as the society, through the prevention of a general welfare loss.[1415] In fact, the absolute prohibitions contained in sections 323 and 330 of the Act were indicative of the consideration that there was a significant risk that conflicted

[1407] Sections 330-331 of the Companies Act 1985.
[1408] Ibid, section 332.
[1409] Subject to various exceptions in sections 332-338 of the Companies Act, 1985.
[1410] Section 341 of the Companies Act 1985.
[1411] Ibid, sections 342 (4) and 343(8).
[1412] Prentice, D. D. (1972). Protection of Minority Shareholders: S.210 of the Companies Act 1948. *Current Legal Problems,* 25 (1), 124; Sugarman, see above n.1403, 12.
[1413] Sugarman, see above n.1307, 181-3.
[1414] Harlow, C. (1997). Back to Basics: Reinventing Administrative Law. *Public Law,* 245, 257.
[1415] The Law Society, see above n.1336, paras. 3.15-6, 318.

transactions could give rise to negative externalities. These could cause harm to the interests of creditors and other parties such as employees and negatively impact market integrity and confidence, outweighing the benefits to the internal corporate actors such as shareholders.[1416] The consequence of these absolute prohibitions was that they could not be contracted out of by (some of) the parties it was meant to protect which leads to the conclusion that they were not intended purely to protect private interests.

7.3.4 PART X, THE NEED FOR REFORM AND THE PUBLIC INTEREST

Part X though an ambitious effort to rectify the loopholes in the regulation of directors' conflicts of interest, was criticised for a number of reasons. These reasons point toward underlying public and private interest justifications.

One of the most important criticisms of the provisions contained in Part X is the fact that disclosure and ratification of directors' conduct requirements were inconsistent, incoherent and confusing.[1417] In certain cases, there was an obligation to simply notify the company of conflicted situations.[1418] In other cases, company's approval of such conflicts at a general meeting was required.[1419] These regulatory measures suggest that the rules were of a private nature as they could be set aside (to a certain extent) by private parties.

By the same token, in certain cases, absolute prohibition was applied to some conflicts of interest such as loans[1420] which points to public interest in the regulation of these conflicts of interest. In other cases, prior disclosure to shareholders sufficed to remedy the conflicts of interest.[1421] At other times, there was a requirement that the director simply disclosed the nature of the potential conflicts of interest to the board.[1422] These are indicative of both public and private interests in the regulation of these conflicts of interests.[1423] This is because disclosure, even a low threshold of

[1416] The Law Society, see above n.1336, paras. 316, 3.54
[1417] Walters, A. (1999). Directors' duties and shareholder remedies. *Company Lawyer*, 20 (5), 138; Sugarman, see above n.1307, 166-168.
[1418] Section 324 of the Companies Act, 1985.
[1419] Walters, see above n.1417, 138; section 319, 312, 320-322 of the Companies Act, 1985.
[1420] Ibid, sections 330-342.
[1421] Ibid, section 318.
[1422] Ibid, section 317.
[1423] DeMott, see above n.1383, 254, 259.

disclosure, served a public interest in accountability and transparency in the governance of companies as mentioned earlier in this chapter. It also served private interests as it meant that shareholders were informed about conflicted transactions. Disclosure similarly contributed to mitigating information asymmetry between shareholders and directors.

Nevertheless, the disclosure requirements were criticised for inconsistency. The *Neptune* case[1424] is often cited as an example of the absurdity of disclosure without qualification.[1425] It concerned an action by a company against its former sole director's duty under section 317 of the 1985 Act to disclose the director's interest in a contract. The director at a board meeting of the company attended by the defendant and the company's secretary had resolved as sole director that his own service contract should be terminated and that the sum of £100,892 should be paid to him by way of compensation for the termination of his service contract.[1426] The Court held that the sole director had to disclose to himself the nature of the interest in compliance with section 317 and duly note the disclosure too.[1427] Such disclosure did not augment the protection of private interests of shareholders or the company and neither did it do anything other than pay lip-service to the regulatory measure. So it was a mockery of the public character of the regulation of such conflicts of interest as disclosure did not mean that a conflicted director was necessarily deterred from acting self-interestedly.

There was moreover a lack of consistency in the application of sanctions for non-compliance with the regulation of conflicts of interest. In certain cases, criminal sanctions were imposed[1428] and in others, civil sanctions or remedies were mandated[1429] or both, criminal and civil sanctions are imposed.[1430] In some cases, the transaction which was the subject of the conflict of interest was void[1431] and in other cases, it was voidable.[1432]

[1424] *Neptune (Vehicle Washing Equipment) Ltd v. Fitzgerald* [1996] Ch. 274.
[1425] Sugarman, see above n.1307, 166, 170.
[1426] Ibid.
[1427] *Neptune (Vehicle Washing Equipment) Ltd v. Fitzgerald* [1996] Ch. 274, 275.
[1428] Section 326 of the Companies Act, 1985.
[1429] Ibid, section 315.
[1430] Ibid, sections 341-2.
[1431] Ibid, sections 313 and 319 (6).
[1432] Ibid, section 320.

Also of importance is the fact that some of these provisions could be circumvented through creative compliance. This was evident in the *Atlas Wright* case. It concerned a director's long-term service contract negotiated by the director with the sole shareholder of the company on a contract for life. It meant that the company had no right of termination in what appeared to be a contravention of section 319 of the Act, subsections (3) and (5), with which there had been non-compliance. The contract should have been rendered void in breach of the statutory requirements of sections 319.[1433] The Court considered that the contract was not in breach of the statutory requirements due to the fact that the sole shareholder had consented to the contract despite the lack of compliance with the formalities prescribed in section 319.[1434] The Court held that the underlying intention of the section 319 was to protect the interest of shareholders by mandating unequivocal approval of the shareholders to long-term contract with directors. This was done to ensure that there had been adequate opportunity for shareholders to consider the terms of the contract.[1435]

Firstly, this case is indicative of the view that there was pre-eminence of private ordering in the regulation of some conflicts of interest. Judicial intervention upheld a shareholder-centric or private interest justification for the regulation of the conflicts of interest concerned in this case. Secondly, the case highlighted the inconsistent approach to disclosure and ratification requirements in Part X and how they could be creatively circumvented. Therefore the regulatory intent of the provision could be avoided through contracting. This had repercussions for private interests as it could lead to inefficiency in bargaining for corporate actors such as the company itself. The interests of shareholders were not necessarily the interests of companies, such contracts may benefit shareholders but be detrimental to companies' interests. In terms of the public interest, this meant that the initial regulatory loophole was not only inadequately addressed, it was even arguably worsened. After all, directors could still have long term contracts or contracts for life with companies. This had consequences

[1433] Ibid, section 319 (6).
[1434] *Atlas Wright (Europe) Ltd v. Wright & Anor.* [1999] B.C.C. 163, 164, 175; *Duomatic Ltd, Re* [1969] 2 Ch 365 - established the 'duomatic' principle under which a director has a defence to a charge of breach of duty if the matter was ratified by the unanimous vote of the shareholders.
[1435] *Atlas Wright (Europe) Ltd v. Wright & Anor*. [1999] B.C.C. 163, 164.

for the perception that directors could be held accountable for impropriety or mismanaging companies. This impacted public trust and confidence in companies.

Sections 318 and 319 were also criticised for public interest reasons. They granted shareholders the right to inspect directors' service contracts with the company and prevent burdening companies with long-term contracts without shareholders' approval. However, they did not address or prevent excessive or lavish remuneration and other benefit packages which directors could award themselves without any correlation with company performance.[1436] This meant that these provisions which attempted to regulate self-dealing and address problematic loopholes in the regulation of payments to directors, failed to serve both the private interest and public interest objectives initially sought. Public outcry about these issues and other corporate governance concerns led to the establishment of committees such as the Cadbury Committee,[1437] Greenbury Committee[1438] and Hampel Committee.[1439]

Another example of the inadequacies of the provisions in Part X was the lack of safeguards afforded to other corporate actors in cases of breach of certain conflicts of interest such as substantial property transactions involving directors.[1440] In section 320 of the Act, substantial property transactions involving directors were prohibited unless the transactions were first approved by a resolution of the company in general meeting. The obligation of approval and ratification of such transactions afforded some protection to shareholders and the company but did not adequately protect the interests of other corporate actors such as creditors or employees. These corporate actors' interests could be at stake in these transactions as such transactions could have a huge effect on the company's financial interests. Yet they had no say in the ratification of such transactions. Although shareholders were protected, this provision failed to adequately protect the private interests of other corporate actors.[1441] The protection of whose interests can be in the public interest, as it is in the public interest

[1436] Sugarman, see above n.1307, 166, 172.
[1437] The Cadbury Report. (1992). *Report of the Committee on the Financial Aspects of Corporate Governance*. London, Gee and Co. Ltd.
[1438] The Greenbury Report. (1995). *Study Group on Directors' Remuneration*. London, Confederation of British Industry (CBI).
[1439] The Hampel Report. (1998). *Committee on Corporate Governance, Final report*. London, National Association of Pension Funds (NAPF). The Report examined the role of directors, particularly directors' remuneration, and accountability generally.
[1440] Section 320 of the Companies Act, 1985.
[1441] DeMott, see above n.1383, 259.

that these parties' interests are protected because of their significance to companies' development, and that companies continue to function and produce benefits. This was an important weakness as the regulation of conflicts of interest in Part X was not intended to protect shareholders only.[1442]

According to several academics, Part X was largely defective due to inconsistent and incoherent rules.[1443] These included the imposition of disclosure and ratification requirements, incoherent imposition of penalties, both criminal and civil and the general complexity of all the provisions.[1444]

Another critique levelled at Part X was the fact that the incoherence and fragmented nature of the Act might have unnecessarily increased risks of personal liability of directors which could deter potential directors from standing for office.[1445] Some contended that this was potentially detrimental for private interests of companies and their members and well as the public interest in the encouragement of entrepreneurialism and the nation's economic competiveness.[1446]

In sum, the provisions of Part X did not create a consistent or effective approach to the regulation of directors' conflicts of interest. This is particularly exemplified by the incoherent and chaotic imposition of disclosure or ratification requirements for different conflicts of interest and the fact that the reasons for such inconsistency were not provided by regulators.[1447] For these reasons, Part X is comparable to the Bubble Act. Like that infamous statue, it was well-meaning and detailed but in reality its provisions were fragmented, inconsistent and even defective in their regulation of directors' conflicts of interest.[1448]

[1442] The Law Commission, (1998), see above n.1335; Walters, see above n.1417, 141.
[1443] For example, Dine, see above n.1338, 159, 161-2; Walters, see above n.1417, 142; Sugarman, see above n.1307, 167-8.
[1444] Ibid.
[1445] The Law Commission, (1999), see above n.1388, para 2.18.
[1446] Milman, D. (1999). Personal liability of directors; aiding an enterprise culture? *Palmer's In Company*, (2), 1-2.
[1447] The Law Commission, (1998), see above n.1335, paras. 3.71, 3.91
[1448] Sugarman, see above n.1307, 168; DTI. (1999). *Modern company law for a competitive economy: the strategic framework*. (para 7.4). URN 99/654. London. Retrieved from https://webarchive.nationalarchives.gov.uk/20061209115810/http://www.dti.gov.uk/bbf/co-law-reform-bill/clr-review/page22794.html.

7.3.5 OTHER LEGISLATION OF IMPORTANCE

Although there were some pieces of legislation enacted after 1985, they did not extensively or exhaustively address directors' conflicts of interest.[1449] Nevertheless, the Companies Act of 1989 addressed some conflicts of interest concerning the remuneration of directors. Directors' remuneration can be a source of conflict of interest because the decision-making procedure for it is often not transparent and can be quite informal.[1450] This is especially problematic if directors are involved in determining their own remuneration due to the risk that they will make such decisions solely in their own interests, which might not be the best interests of the company.[1451] They could overvalue assets and undervalue liabilities to feign high profits so as to retain certain levels of remuneration. This could undermine the company's stability.[1452] The Companies Act amended the provisions on directors' remuneration to include all emoluments and other benefits of directors in the information to be disclosed.[1453] Section 322A was inserted by the Companies Act 1989 to create liabilities in relation to transactions involving directors, which exceed their powers under the company's constitution. Section 322A (1) rendered voidable at the instance of the company any transaction whose parties included a director of the company or its holding company, and which exceeded any limitation on the director's powers under the company's constitution.[1454] This is a reflection of aforementioned public and private interests implicit in the regulation of the financial conflict of interest associated with the remuneration of directors.

[1449] Company Director Disqualification Act 1985, Schedule 1, Part 1 concerned the breach of any fiduciary or other duty which was now considered a matter for determining the unfitness of a director to manage a company.

[1450] Handschin, see above n. 734, 288.

[1451] Ibid, 288-9.

[1452] Ibid, 290.

[1453] Schedule 4 of Companies Act, 1989.

[1454] It also extended to transactions between the company and a person connected with a director or a company associated with him as defined in Part X of the Companies Act, 1985.

7.4 THE QUEST FOR A MODERN COMPANY LAW AND REGULATING DIRECTORS' CONFLICTS OF INTEREST AND PUBLIC INTEREST

The problems identified in Part X of the Companies Act 1985 were some of the reasons why company legislation in the UK was generally thought to be outdated, archaic and a relic of the Victorian era.[1455]

In 1998, the UK Government began a series of all-encompassing consultations on existing company law. A Steering Committee was established by the Government through the Department of Trade and Industry (DTI). It was tasked with reviewing UK company law in its entirety and making recommendations for reform where necessary.[1456] The Steering Committee comprised of academic and non-academic business experts and it created several groups to review different aspects of company law, offer suggestions and recommendations for reform.[1457]

The Steering Committee issued a number of consultation papers on company law reform from the late 1990s to the early 2000s. The Law Commissions of England and Wales and of Scotland were also significant in influencing the reform of company law due to their thorough review, just prior to the start of the work of the Steering Committee, of key aspects of company law such as directors' duties.[1458] The consultation documents of these institutions influenced the publication of two White Papers in 2002 and 2005 and subsequent enactment of the Companies Act of 2006.

The DTI's paper, *Modern Company Law for a Competitive Economy* in 1998 set the stage for the launch for the company law reform.[1459] It was part of the Government's strategy to modernise the nation. The review of company law was intended to ensure that company law continued to underpin the growth, competitiveness and accountability of British companies into the 21st Century. [1460] As aforementioned, the DTI tasked a Steering Committee with the objective of reviewing company law and listed a number of principles which would guide the review.[1461]

[1455] Sheikh, see above n.1072, preface; DTI, (1998), see above n.1322, foreword, para 3.1.
[1456] Ibid, DTI, paras. 7.1, 7.2.
[1457] Sheikh, see above n.1072, 13.
[1458] The Law Commission, (1998), see above n.1335.
[1459] Sheikh, see above n.1072, 25; DTI, (1998), see above n.1322, para 3.8.
[1460] Hansard. (1998, 4 March). House of Commons Debate, Volume 307, cc636-7.
[1461] DTI, (1998), see above n.1322, paras. 3.1, 3.8

In the DTI's paper, *Modern company law for a competitive economy: the strategic framework,* the Steering Committee's first consultation document, key substantive company law issues were analysed.[1462] One of them was Part X of Companies Act 1985 which it considered "fragmented, excessive and in some respects, a defective regulation of directors."[1463] The Steering Committee argued that the objective of modern company law was to support a competitive economy, in a coherent and accessible form, providing maximum freedom for participants to perform their proper functions.

Yet the Committee recognised the need for high standards in directors' conducts and appropriate protection for all interested parties. The Committee was against interventionist legislation and in favour of facilitating market regulation bolstered by transparent provision of information, wherever possible. It was against creating criminal offences unless the subject matter necessitated it.[1464] This approach effectively leaned toward deregulation and a facilitative role for company law as a means of securing efficiency, wealth and general welfare maximisation for all parties, including society.[1465] The Committee thought that this approach was the optimal way to serve private interests or corporate parties and the public interest, in issues such as the promotion of a competitive economy. However, it felt that high standards of conduct ought to be assured as they were important for the promotion of a competitive and efficient economy. It thought that this was indispensable for the participation of internal corporate actors such as shareholders as well as external actors such as the society at large.[1466]

The Committee added that companies may be viewed largely as contractual entities, created and controlled through agreements entered into by members and directors. The law had a place in ensuring that companies are operated in a way that a wider range of interests are met so that wherever possible, the law enabled both internal and external interests to be satisfied.[1467] The Steering Committee unsurprisingly advocated for an enlightened shareholder value approach. This meant that directors

[1462] DTI, (1999), see above n.1448, paras. 2.20-2.25.
[1463] Ibid, para 7.4.
[1464] Ibid, para 2.1.
[1465]Sheikh, see above n.1072, 35; DTI, (1999), see above n.1448, paras. 1.5, 2.4
[1466] DTI, (1999), see above n.1448, para 1.6.
[1467] Ibid, para 1.7.

ought to maximise shareholder welfare whilst being cognisant and considerate of other wider interests including those of employees and society.[1468]

The Law Commissions during the same period embarked on a review of aspects of company law which the Steering Committee considered in its consultation reviews. The Law Commissions issued two reports on shareholders remedies[1469] and directors' duties.[1470] The first report is of some importance for the purpose of this thesis due to its impact on the breach of directors' duties and the availability of remedies for shareholders, particularly minority shareholders. [1471]

The Law Commissions identified a few main issues regarding shareholder remedies. In particular, they addressed the complexity of the law concerning shareholders bringing legal proceedings on behalf of their company, including for cases of breaches of directors' duty.[1472] They felt that the ineffective remedies impacted the efficacy of sanctions for directors' breach of duty, including the duty to avoid conflicts of interests, and the protection of private interests, namely the interests of shareholders. These remedies unwittingly affected the enforcement of mandatory rules relating to the regulation of directors' conflict of interest. Although directors were mandated to avoid or properly manage their conflicts of interests at the risk of criminal or civil sanctions, the inadequate means of enforcement effectively made it difficult to hold them accountable for breach of duty.[1473] Likewise, the lack of a consistent approach to remedies for breach of any of the provisions was problematic because the consequences were not coherent. Directors could in certain cases be subject to criminal penalties but in other cases, there was not only a lack of criminal sanctions, the law was silent. Certain conflicts of interest, namely directors' accountability for gains made through conflicted transactions were directly addressed in company legislation.[1474] For instance, section 322 of the Companies Act 1985 which rendered

[1468] Sheikh, see above n.1072, 43; Section 172 of the Companies Act 2006 which was arguably inspired by section 309 of the Companies Act 1985 which urged directors to have regard for the interests of employees as well as shareholders.
[1469] The Law Commission of England and Wales & The Scottish Law Commission. (1997). *Shareholder Remedies Report*. LC. 246; Nolan, R. C. (2001). Enacting Civil Remedies in Company Law. *Journal of Corporate Law Studies*, 1 (2), 245.
[1470] The Law Commission, (1998), see above n.1335.
[1471] The Law Commission, (1997), see above n.1469, para 1.2.
[1472] Ibid, para 1.4; *Foss v. Harbottle* (1843) 2 Hare 461.
[1473] Nolan, see above n.1469, 263-5.
[1474] Ibid, 254.

conflicted transactions voidable did not mention any other consequence for such transactions. As Nolan, a scholar whose article on shareholder remedies influenced the Law Commissions' Report stated that it was unclear "whether voidance revested in the company equitable title to an asset it lost, or whether any such title could be traced into substitutes of the asset".[1475]

The Law Commissions also published a consultation paper relating to the regulation of directors' conflicts of interest and a formulation of statement on directors' duties.[1476] The paper incorporated public and private interests in its review and recommendations for reform of directors' duties. The inclusion of guiding principles for directors' dealings and duties inspired by those of the Steering Committee is an example of this.[1477] The principles included the principle of separate but interdependent roles for shareholders and directors, law as facilitator, the principle of the imposition of appropriate and proportionate regulations and sanctions. Inclusivity that is, taking into consideration other constituents of companies in decision-making was another one of the guiding principles. The principles of efficiency and cost effectiveness, commercial judgment and of course, the principle of ample but efficient disclosure were other guiding principles.[1478] Although these principles indicate a bias in favour of shareholder primacy, both private and public interests in the regulation of directors' conflicts of interest and other duties were important considerations. For instance, the paper argued that disclosure was one of the best ways of achieving high standards in governance because it obliged directors to consider not only the illegality of an action but its ethics, should it be disclosed to the public or the company's shareholders. Nevertheless, it added that disclosure ought to be tempered with proportionality as disclosure carried its own direct and indirect costs and consequences so disclosure ought not to outweigh its utility.[1479]

[1475] Ibid, 251; Nolan was one of the Committee's consultants throughout the consultation project: The Law Commission, (1999), sees above n.1388, para 1.44; Nolan's paper also influenced the Company Law Review Steering Group; see Great Britain, DTI (2000). *Modern company law for a competitive economy: completing the structure.* (para 13. 74). URN, 00/1335.
[1476] The Law Commission, (1998), see above n.1335.
[1477] Ibid, para 3.14.
[1478] Ibid, para 3.4.
[1479] Ibid, para 2.17.

The Commissions' consultation paper generally undertook an economic analysis approach to the company law review.[1480] It added that this approach was useful for evaluating the efficiency of legal provisions concerning directors' duties. Essentially, the Commissions thought that economic analyses helped to assess if the legal provisions contributed to the wealth or well-being of society as a whole. This means how far they promoted allocative efficiency, or the allocation of scarce resources in a way which maximised their value to society.

The Commissions also reasoned that economic analyses were useful for determining the technical efficiency of these legal provisions, or the minimisation of costs which were involved in the use of resources.[1481] They felt that economic analyses were useful to predict the effect of legal changes on commercial and social practices.[1482] They deemed that the effects of legal provisions may be marginal when weighed against wider economic forces but changes in legal rules could alter incentives and so could change the ways in which markets operated. Therefore, economic analyses could help to predict when wider social and economic forces rendered a rule ineffective.[1483] In essence, the Commissions' paper sought to assess the efficiency of legal provisions for private interests.[1484] These interests included the promotion of efficient bargaining and reduction of transaction or monitoring costs for corporate actors. The paper equally attempted to assess the efficiency of these legislative provisions for public interest. These interests were namely; ensuring (procedural) fairness in the regulation of directors' self-dealing as well as serving other wider societal interests such as the prevention of overall welfare loss and the promotion of economic competiveness.[1485]

The Paper made a number of recommendations for the reform of Part X of Companies Act 1985. It highlighted the cost of an unqualified duty of loyalty on private interests of shareholders and companies, and public interest such as economic competitiveness.[1486] It put forward the view that emphasis ought to be placed on

[1480] Ibid, para 3.1.
[1481] Ibid, para 3.4-5.
[1482] Ibid, para 3.6.
[1483] Ibid, paras. 3.6-3.8.
[1484] Ibid, paras. 3.15-3.18.
[1485] Ibid.
[1486] Ibid, paras. 3.19-3.29.

disclosure of information and ratification of conflicted transactions as adequate procedures for dealing with directors' conflicts of interest. This was thought to be preferable to absolute prohibition of conflicts of interest because it did not unnecessarily fetter the contractual autonomy of corporate parties. The Paper stated that disclosure was desirable because directors would be induced to release information or cooperate without being locked in an inefficient allocation especially if directors consider the private costs of disclosing information to outweigh its gains for them. Also the Commissions thought that an absolutist approach to the regulation of conflicts of interests could act as deterrence to those wanting to take up directorships. They added that corporate opportunities might increasingly go unexploited which could have ramifications for economic competitiveness and the promotion of entrepreneurialism which are of public interest.[1487] It consequently appears that the Commissions took a common interest approach to public interest in the regulation of directors' duties by attempting to marry ideal-seeking values with economic interests, private and societal ones alike.

In general, the Law Commissions only advocated absolute prohibitions in cases where it may be argued that there was a significant risk to third parties. For instance, risks which may impact the interests of creditors and which sufficiently outweighed those of internal corporate actors or risks which could potentially harm the public through, for example, damage to market integrity.[1488] Concerning criminal sanctions, the Commissions only felt that they were efficient if the harm caused to society by the conflict of interest outweighed internal actors' interests, and the likelihood of directors being held liable was low due to high detection costs and limited incentives of private parties to initiate litigation.[1489] They also claimed that effective civil remedies might be a way of mitigating the need for criminal sanctions due to reasons of proportionality, procedural fairness and avoiding over-deterrence. [1490]

In 1999, the Law Commissions issued another Consultation Paper relating once again to directors duties and the regulation of conflicts of interest.[1491] They again

[1487] Ibid, paras 3.47-48.
[1488] Ibid, paras. 2.13 and 3.16.
[1489] Ibid, para 3.79.
[1490] Ibid, para 3.80-4.
[1491] The Law Commission, (1999), see above n.1388.

placed emphasis on economic analysis and the Paper included a report on *Economic Considerations* prepared for the Law Commissions by Dr Deakin and Professor Hughes. This was done to see how far features of the existing legal provisions could be explained using economic concepts.[1492] Retaining many of the recommendations made in the initial paper on directors' duties, it reiterated that the wider context of company law was intended to regulate commercial activity so as to enhance efficiency and promote economic prosperity.[1493]

The Steering Committee likewise published a number of consultation papers on different areas of company law, some of which were *Modern Company Law for a Competitive Economy: Developing the framework*[1494] and *Modern Company Law for a Competitive Economy: Completing the Structure*.[1495] The papers focussed on a review of key aspects of the governance of companies, including directors' duties. They also addressed the interests in which companies should be run.[1496] Although the Committee rejected a pluralist or pure stakeholder value approach, it embraced an enlightened shareholder value.[1497] This inclusive approach was incorporated into the recommendations for reform of directors' duties. Also, the Committee advocated for wider public accountability achieved principally through improved company reporting and disclosure.[1498] It contended that this was beneficial for the overall objective of wealth generation and economic competitiveness.[1499] The Committee recommended amendments to Part X of the Companies Act 1985, particularly on directors' conflicted transactions.[1500]

[1492] Ibid, Part 3 - although it was conceded that economic analysis may not be the only way to examine the utility and efficiency of these legal provisions and their reform.
[1493] The Law Commission, (1999), see above n.1388, para 2.8.
[1494] Great Britain, DTI. (2000). *Modern company law for a competitive economy: developing the framework*. URN 00/656; Great Britain, DTI. (1999). *Modern Company Law for a Competitive Economy: Company General Meetings and shareholder Communication.* URN 99/1144; Great Britain, DTI. (1999). *Modern Company Law for a Competitive Economy: Company Formation and Capital Maintenance*. URN 99/1145; Great Britain, DTI. (1999). *Modern Company Law for a Competitive Economy: Reforming the Law Concerning Overseas Companies*. URN 99/1146.
[1495] DTI, (2000), see above n.1475.
[1496] DTI, (2000). See above n.1494, paras. 3.55-56.
[1497] This is enshrined in section 172 of the Companies Act, 2006.
[1498] DTI, (2000). See above n.1494, introduction.
[1499] Ibid.
[1500] Ibid, paras. 3.86 -3.89.

The Committee suggested a flexible approach to company law particularly technical fast evolving aspects of company issues.[1501] Yet, it stated that it was not controversial that some aspects of company law were so fundamental or concerned elements of public interest that they should be enshrined in primary legislation. The public interest rationales for such public ordering may be summarised as protection of market integrity, the protection of investors and creditors and good corporate governance, and the protection of wider societal interests.[1502] Evidently, the imposition of hard law was recommended to serve public interests as well as private interests. For instance, the Committee recommended disclosure requirements to enhance the regulation of directors' remuneration and other areas of conflicts of interests such as loans and other conflicted transactions. They could be mandated by the Secretary of State when such disclosure would be in the public interest.[1503] The Committee felt that this could afford better protection of shareholders' interests and enable them to exercise better control of directors as well as protect the interests of creditors from directors mismanaging company assets.[1504] The Committee also felt that this would protect societal interest in proper directorial conduct and in the valuable economic institution, the company. [1505]

In the Steering Committee's final report, a number of recommendations concerning directors' duties were made which included the regulation of directors' conflicts of interest. The Report was mainly about the need to clarify and update Part X of the Companies Act 1985 and strengthen disclosure requirements.[1506] However, these recommendations were made in the spirit of company law as primarily of an enabling or facilitative nature. It would provide an effective vehicle for business leadership and enterprise to flourish unhindered but in a climate of discipline and accountability so as to better channel the resources of the community to wealth generation.[1507] This indicates a liberal, shareholder-centric approach to the regulation of companies including their governance. But this was not simply because companies were thought

[1501] DTI, (2000), see above n.1475, para 12.36.
[1502] DTI, (2000), see above n.1475, paras. 12.20-12.21, 12.25.
[1503] Ibid, para 12.51; DTI, (2000). See above n.1494, paras. 5.74- 5.78.
[1504] DTI, (2000), see above n.1475, paras. 12.20, 12.25.
[1505] Ibid.
[1506] DTI. (2001). See above n.1305, (Ch. 3 & 6).
[1507] Ibid.

to be private entities intended to serve the interests of corporate actors solely. Instead there was an understanding that companies serve public interest.

Nevertheless, the Committee appeared to believe that these interests, both private and public were best protected through an enhancement and strengthening of the rights of shareholders and less state intervention in the management of companies. Yet the public nature of company law was not completely jettisoned. The Committee accepted that the freedom afforded to companies ought to be combined with transparency obligations. This was necessary to ensure responsible and accountable use of corporate freedom, to prevent abuse that could disrupt and hinder economic activities.[1508] Therefore, the Committee thought that facilitative but effective regulation in all aspects of company law could potentially contribute to a number of public interests goals. These include the renewal of public confidence in the legitimacy of companies as means of wealth generation for society.[1509]

These consultation papers have nonetheless been criticised for a number of reasons. Sugarman argued that there is an inherent fundamental paradox within them, particularly the Law Commission's consultation documents.[1510] Even though they were motivated by a desire to modernise company law, the Law Commissions interpreted this desire as facilitative legislation and deregulation in its consultation documents. Modernising company law was thus equated with reducing mandatory regulation as company law was considered complex and inefficient. It was also equated with maximising contractual freedom and autonomy. This approach deemphasized the public character of company law. It contributed to the erasure of the historic hybrid of private and public nature of companies and company law.

Company law is a fruit of public and private law as illustrated throughout this thesis. Consequently, modernising company law could have meant rethinking and reviewing existing company law. It did not necessarily require the jettisoning of mandatory regulation.[1511] The values espoused by the Law Commissions did not engage with the substantive issues at the heart of the reform efforts. The regulation of directors'

[1508] Ibid, foreword.
[1509] Ibid.
[1510] Sugarman, see above n.1307.
[1511] Ibid, 172-3.

duties was intended to raise questions about the values and purpose of company law and not solely focus on technical issues.[1512] The Law Commissions' guiding principles did not make the normative case for regulating the conduct of directors and focused primarily on technical issues. Emphasis was placed on the perspective of those being regulated to the exclusion of the wider range of interests which company law, including the regulation of directors' conflicts of interest, was intended to address.[1513]

The primacy of economic analyses was also problematic because other forms of analysis which may have been pertinent to understanding and reforming company law were not considered. Efficiency does not and did not have to be synonymous with economic analysis. Efficiency defined through the lens of economics does not generally consider or incorporate issues such as social efficiency of legal provisions. This approach can be seen as illustrative of a shift from a common interest approach to the public interest to a more aggregative or economic conceptions of the public interest discussed in chapter 3 of this thesis.

Many have said that the regulation of directors' conduct over the years has been lenient, even as early as during the Victorian era.[1514] Yet, Part X was seen as particularly inefficient not solely due to its complexity but also because its ineffectiveness and inadequacies. It did not prevent directors from abusing their power and engaging in self-dealing. If prescriptive rules did not deter directors from exploiting conflicts of interest and creatively evading the effects of these legal provisions, it might be counter-productive to reduce the mandatory nature of these rules and the public nature of the regulation.[1515]

In similar fashion, the Steering Committee approach was criticised for a number of reasons. Like the Law Commissions, it favoured an economic analytical approach to reviewing company law without giving any serious consideration to any other analyses.[1516] It made some references to pluralist approaches which were later rejected. Although the Committee addressed the normative purpose for the company

[1512] Ibid, 176-7.
[1513] Ibid, 178-9; Riley, C. A. (1997). The values behind the Law Commission's consultation paper. *Company Lawyer*, 18, 260, 260-264.
[1514] DTI, (1998), see above n.1322, foreword.
[1515] Milman, see above n.1446, 1-2; Harlow, see above n.1414, 257.
[1516] Worthington, see above n.1343, 443.

law reform, it rejected a pluralist approach because it felt that shareholder primacy enabled company law to better serve private and public interests.[1517] It also thought that shareholder value was better for ensuring accountability in governance.[1518] Enlightened shareholder value (ESV) was thus employed. This was codified in section 172 (1) of the Companies Act 2006 which stated that directors must act in good faith to promote the success of the company for the benefit of its shareholders but have regard for other stakeholders such as employees, the community, the environment, etc.[1519] In light of this, this thesis considers that the Steering Committee did not sufficiently engage with the public functions and purposes of the company because it reinforced shareholder primacy rather than stating that other interests, such as societal interests in the governance of companies or the interests of employees, ought to be or could be promoted on equal footing with shareholder interests.

The consultation documents (by the Steering Committee and Law Commissions) nonetheless culminated in the Government's White Papers, particularly the consultation papers of the Steering Committee which greatly influenced the UK Government.[1520] The White Papers made it clear that it was imperative that a reform of company law was undertaken in order to promote the nation's competitiveness and prosperity. They also revealed the Government's desire to simplify and modernise the law. They showed the desire to facilitate the running of companies whilst deterring abuse and inefficiencies which could have a negative impact on the nation's economy.[1521] Extensive disclosure provisions were introduced such as the *Directors' Remuneration Report*.[1522] Provisions concerning better guidance for directors on their duties and responsibilities were equally included in the issues in the reform.[1523]

[1517] Deakin, S., & Hughes, A. (1999). Economic Efficiency and the Proceduralisation of Company Law. *Company Financial and Insolvency Law Review*, 3 (2), 169.
[1518] Worthington, see above n.1343, 446.
[1519] ESV has been critiqued as problematic - Keay, A. & Iqbal, T. (2018). Sustainability in large UK listed retail companies: sectoral analysis. *Deakin Law Review*, 23, 209, 215-217; Ajibo, C. (2014). A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory. *Birbeck Law Review* 2 (1), 37.
[1520] Great Britain, DTI (2002). *Modernising Company Law, Command Paper*. CM. 5553-1; Great Britain, DTI. (2005). Company Law Reform. Cm. 6456.
[1521] Ibid, DTI, (2002); Ibid, (2005), foreword.
[1522] The Directors' Remuneration Report Regulations 2002, SI. 2002, No. 1986; DTI, (2005), see above n.1520, 90-92.
[1523] DTI, (2005), see above n.1520, 12.

Likewise, they stated that Part X of the Companies Act would be reformed to simplify directors' duties and deregulate certain issues such as companies' ability to give loans to directors with the approval of shareholders.[1524] However, one of the main objectives of the White Papers was the enhancement of shareholders' engagement and long term investment culture. This displays a regulatory shift in favour of the private nature of companies and company law, including directors' conflicts of interests.[1525]

Although there was mention of the need for directors to take account of wider interests in the management of companies in guise of ESV, this was to be undertaken with a primary focus on the promotion of the success of the company for the benefit of shareholders.[1526]

In sum, the consultation papers and the White Papers constituted the primary efforts to radically reform company law in the UK. They also marked the entrenchment of a significant shift to a more shareholder-centric approach to the regulation of companies, including directors' conflicts of interests, in law rather than practice.[1527] This is because for the first time in UK law, there is a statement in section 172 (1) of the Companies Act 2006 that directors' duty is to ultimately benefit the members. This will be considered in detail in a subsequent part of this chapter on the Companies Act 2006 and the regulation of directors' conflicts of interest.

7.5 REGULATING CONFLICTS OF INTEREST UNDER THE COMPANIES ACT 2006, THE PUBLIC INTEREST AND RECENT DEVELOPMENTS

7.5.1 THE DUTY TO AVOID CONFLICTS OF INTEREST

Section 175 of the Companies Act 2006 addresses directors' duty to avoid conflicts of interest.[1528] This includes direct or indirect conflict of interest and actual or potential conflicts of interest. This duty applies to the exploitation of any property, information or opportunity regardless of whether the company can or would exploit such property,

[1524] Ibid, 90-91.
[1525] Ibid, 12.
[1526] Ibid, 16-18.
[1527] Some would argue that it was simply affirming what was already in existence- Hampel Report, see above n.1439, para 1.16-7.
[1528] Section 175 (1) of the Companies Act, 2006.

opportunity or information.[1529] Similarly, the duty includes situations of conflict of interests and duty as well as conflict of duties.[1530]

It is important to note that this section, like other provisions of the 2006 Act, is not divorced from the general duties, common law rules and equitable principles governing directors' duties prior to the enactment of the Act.[1531] Therefore, the law continues to take a strict approach to the avoidance of conflicts of interest as established in the *Regal Hastings v. Gulliver* case[1532] discussed in Chapter 6 of this thesis. This is evident in fairly recent cases: *Towers v. Premier Waste Management Ltd*[1533] and *Breitenfeld UK Ltd v. Harrison*.[1534] In the former case, it was held that the Act imposed a strict duty to avoid conflicts of interest and a duty not to accept benefits from third parties. Consequently, a director's liability for breach of the no conflict duty did not depend on proof of fault or proof that the conflict of interest had in fact caused the company loss.[1535]

By the same token, a director acting in good faith was no excuse for the breach of this duty.[1536] In *Breitenfeld*, a managing director was held to have breached the no conflict rule because he exploited his company's corporate opportunities and his honesty or good faith were irrelevant to the breach.[1537] This inflexible approach arguably promotes certainty, and addresses the agency problem of efficient monitoring of the conduct of directors.[1538] It is thus aimed at deterring directorial impropriety which serves private interests as well as public interest in the good governance of companies.[1539]

[1529] Ibid, section 175 (2).
[1530] Ibid, section 175 (7).
[1531] Ibid, section 170 (3-4); *Towers v. Premier Waste Management Ltd* [2011] EWCA Civ. 923; [2012] B.C.C. 72.
[1532] [1967] 2 AC 134.
[1533] [2011] EWCA Civ. 923; [2012] B.C.C. 72.
[1534] [2015] EWHC 399 (Ch) - the good faith of the director did not matter in this case which indicates that judges can be proactive in such situations if they think that directors are not acting in an appropriate manner.
[1535] [2011] EWCA Civ. 923; [2012] B.C.C. 72.
[1536] Ibid.
[1537] [2015] EWHC 399 (Ch); *Bray v. Ford* [1896] A.C. 44 at 48.
[1538] Hannigan, see above n.1171, 246; Clark, B., & Benstock, A. (2006). UK company law reform and directors' exploitation of "corporate opportunities". *International Company and Commercial Law Review*, 17 (8), 231, 234-5.
[1539] As discussed in chapter 6 of this thesis.

However, as discussed in chapter 6, the law is increasingly taking a less inflexible approach to the regulation of conflicts of interest. This is evident in the ability of directors to obtain authorisation of conflicts of interest. Therefore the strict rule only really applies in cases of non-disclosure of conflicts of interests. Firstly, this duty to avoid conflicts of interest is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest. Secondly, the conflicts may be authorised if the company is a private company and there is nothing in the company's constitution which invalidates such authorisation, by the matter being proposed to and authorised by the directors.[1540] In the case of public companies, the conflict can be authorised if their constitutions include provisions enabling directors to authorise such conflicts.[1541] But such conflicts need to be authorised by the directors in accordance with the constitution of the company.[1542] Therefore, the authorisation of conflicts of interest by directors is another exception to the strict application of the no conflict rule.

The new provisions in section 175 (4) (b) mean that directors are no longer required to disclose conflicts of interest to be approved at general meetings of members.[1543] During the reform of the regulation of directors' conflicts of interest, the retention of this approach was thought to be too onerous a requirement. Critics thought that this would not restrain directors' entrepreneurialism to start new enterprises and businesses which could be beneficial for the economy.[1544] This is because disclosure processes could be time consuming and costly. It could mean that the time taken to convene a general meeting could lead to the loss of a corporate opportunity for the director. This is reasoned to be disastrous not only for a director's interests but also the public interest in the development of commerce and enterprise generally. [1545]

This approach is a reflection of and contributory to the (increasing) private nature of the regulation of directors' conflicts of interest. Some even contend that it is the general practice of companies to incorporate in their articles, provisions permitting directors to be involved in situations of conflicts of interest, subject to disclosure and

[1540] Section 175 (5) (a) of the Companies Act, 2006.
[1541] Ibid, section 175 (5) (b).
[1542] Section 175 (5) of the Companies Act, 2006.
[1543] *Regal (Hastings) Ltd v. Gulliver* [1967] 2 AC 134; *Cook v. Deeks* [1916] AC 554.
[1544] DTI. (2001). See above n.1305, para 3.23-7; Edmunds & Lowry, see above n.1137, 124.
[1545] Clark & Benstock, see above n.1538, 238.

approval by the board of directors, thus the new provisions did not introduce any greater liberality.[1546] Essentially, the law appears to have codified and recognised this practice which the private parties who are involved in the management of companies bargained for. However, the conditions of proper disclosure for such authorisation codified in the law are indicative of the attempt to balance the multiplicities of interest implicated in the regulation of directors' conflicts of interest.

These provisions regarding the regulation of directors' conflicts of interest if examined in light of the push for efficiency that underpinned the various review of directors' duties, including the Law Commissions and the Steering Committee, are unsurprising. The objective was to balance economic efficiency for the private stakeholders of the company with economic efficiency for society to foster economic development and competitiveness.[1547] Thus, the objective is said to contribute to the general maximisation of welfare.[1548]

In fact, as Professor Worthington stated, economic efficiency was used to identify and choose what was thought to be the most appropriate (equated to) the most efficient rules for the regulation of directors' conflicts of interest. As aforementioned, during the review of the regulation of directors' conflicts of interest, the Law Commissions stated that the use of mandatory rules ought to be reserved for situations where third parties were clearly at risk as opposed to enabling rules from which companies can opt out.[1549] They added that stringent default or enabling rules which mandate shareholder approval for conflicted situations should be reserved for cases where shareholders' interests were chiefly at risk. Likewise, weaker default or enabling rules such as the requirement of proper disclosure ought to be used in cases where shareholders' interests may be subject to limited risk.[1550] This is important because an examination of current regulation of directors' conflicts of interest reveals that this

[1546] Keay, A. (2012). The authorising of directors' conflicts of interests: getting a balance? *Journal of Corporate Law Studies*, 12 (1), 129, 134.
[1547] Clark & Benstock, see above n.1538.
[1548] Ibid.
[1549] Ramsay, I. (1998). Models of Corporate Regulation: The Mandatory/Enabling Debate. In. C. Rickett & R. Grantham (eds.) *Corporate Personality in the 20th Century*. (pp. 215, 221-8). Oxford, Hart Publishing.
[1550] Worthington, see above n.1343, 444.

approach inspired legislative provisions relating to the regulation of directors' conflicts of interest.

Also of significance is the distinction that the law makes between private and public companies. The conditions for disclosure are more stringent for public companies than they are for private companies. In the case of private companies, directors may authorise a conflict unless this is invalidated by the company's constitution.[1551] Where the company is a public company, the directors may authorise a conflict of interest if the company's constitution includes provisions which expressly enable such authorisation.[1552] This also supports the aforementioned efficiency objective which guided the codification of directors' duties. The law is stricter in the case of public companies to better protect the interests of shareholders and other parties such as societal interest in the good governance of companies as there is often more at stake. Public companies tend to have a greater impact on society because of the economic power they have. Their reach and impact are not limited to shareholders but affect their employees, their suppliers and even the local communities in which they operate, in ways which smaller private companies might not.[1553] An example is Carillion.[1554]

Section 175 (6) states that an authorisation is only effective if

> *(a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and*

[1551] Section 175 (5) (a) of the Companies Act, 2006.
[1552] Ibid, section 175 (5) (b).
[1553] Yet private companies, especially large private companies' collapses could have a great impact on society. This is exemplified by the MG Rover and BHS scandals and their impact on British society. This is arguably another critique of the regulation of directors' conflicts of interest. Chu, Ben. (2016, 25 April). BHS: What's the real story behind the collapse of the 88-year-old department store? *The Independent*. Retrieved from https://www.independent.co.uk/news/business/news/bhs-whats-the-real-story-behind-the-collapse-a7000166.html.
[1554] BBC News. (2018, 7 June). Carillion collapse to cost taxpayers £148m. Retrieved from https://www.bbc.co.uk/news/business-44383224; Great Britain, NAO. (2018). Report by the Comptroller and Auditor General. *Investigation into the government's handling of the collapse of Carillion.* London, Cabinet Office. Retrieved from https://www.nao.org.uk/wp-content/uploads/2018/06/Investigation-into-the-governments-handling-of-the-collapse-of-Carillion-Summary.pdf.

(b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

These procedures ensure that although conflicts of interest may be authorised by directors, they are subject to conditions of disclosure and require some independence in decision-making which are incorporated in the authorisation procedure.[1555] These are indicative of public interest in addition to private interests in the proper regulation of directors' conflicts of interest because these procedures incorporate mandatory elements. For example, it is opined that in order for a situation to be reasonably considered not to be a conflict of interest, the director would need to adequately inform the company and the company would investigate the situation and then choose not to proceed with exploiting the situation or opportunity.[1556] Therefore, a full disclosure of relevant facts to the company is imperative. Professor Keay opined that such disclosure exceeds that which exists in an ordinary contractual relationship.[1557] These onerous procedures are intended to balance the need to avoid unnecessary hampering of directors' entrepreneurialism because this entrepreneurialism could be beneficial for the nation's economy with the need to ensure that companies' best interests are served.[1558] These procedures equally ensure that directors manage companies loyally. This is beneficial for the nation's economy as companies play a significant role in the nation's economic growth.[1559]

The combination of the strict inflexible rule regarding the directors' conflicts of interest and the authorisation and disclosure provisions in section 175 of the Companies Act 2006, are indicative of a blend of mandatory and enabling (strong default) rules. These are attempts to adequately balance the various interests at stake in the regulation of directors' conflicts of interest. They do not indicate a complete shift to a private purpose for the regulation of directors' conflicts of interest. Legislative and

[1555] Sections 175 (4) and 175 (5) of the Companies Act, 2006. This is imperfect as the provisions do not address allies (directors) coming together to make a favourable decision and the impact of influential or domineering directors. These issues could negatively impact the independence of a board of directors – Keay, see above n.72, 301; Nolan, R. C. (2005). The Legal Control of Directors' Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report. *Theoretical Inquiries in Law,* 6 (2), 413, 415, 428.
[1556] Keay, A. (2016). *Directors' duties.* (pp. 299) (3rd ed.). Bristol, Jordan Publishing; *Parks of Hamilton (Holdings) Ltd v. Campbell* [2014] CSIH 36; 2014 S.C. 726; 2015 S.C.L.R. 17.
[1557] Ibid.
[1558] Section 172 of the Companies Act, 2006.
[1559] Keay, see above n.1556, 293; Edmunds & Lowry, see above n.1162.

judicial intervention sought to protect private interests which are those of the company and its shareholders' freedom to contract and property rights. So, they held directors to a certain standard of propriety and integrity whilst respecting their contractual liberty and their desire to explore entrepreneurial endeavours. This is reflected in the introduction of flexibility to the inflexible fiduciary principle concerning no conflict rules. This was done through the guise of authorisation and disclosure which mean that certain conflicts of interest are now permissible.

Yet these procedural measures, disclosure and authorisation, are imposed on directors to ensure that conflicts of interest are mitigated and managed because of the importance of companies and their good governance to the nation. For example, in cases of directors establishing competing businesses after their directorship, the courts have increasingly taken a lenient approach to the regulation of such conflicts of interest. This includes cases where the director may have taken preliminary steps towards the establishment of the business so long as there was no actual competitive activity during the directorship.[1560] In fact, the courts commented explicitly that the reason for such lenient judicial intervention is based on the idea that in the effort to prevent directors exploiting company's opportunities whilst in office, the law should not restrain entrepreneurialism and trade as these are of public interest.[1561]

In *Island Export Finance Ltd v. Umunna,* Hutchison J stated that:[1562]

> *'It would, it seems to me, be surprising to find that directors alone, because of the fiduciary nature of their relationship with the company, were restrained from exploiting after they had ceased to be such any opportunity of which they had acquired knowledge while directors. Directors, no less than employees, acquire a general fund of knowledge and expertise in the course of their work, and it is plainly in the public interest that they should be free to exploit it in a new position. It is one thing to ….hold former directors accountable whenever they exploit for their own or a new employer's benefit information which, while they may have come by it solely*

[1560] *Island Export Finance Ltd v. Ummna* [1986] BCLC 460; *Balston Ltd v. Headline Filters Ltd No 2.* [1990] FSR 385; *Coleman Taymar Ltd v. Oakes* [2001] 2 BCLC 749, 769.
[1561] *Balston Ltd v. Headline Filters Ltd No 2.* [1990] FSR 385, 412; *Item Software (UK) Ltd v. Fassihi* [2004] EWCA Civ. 1244 (2004) BCC 994.
[1562] [1986] BCLC 460, 482; Keay, see above n.1556, 343.

because of their position as directors of the plaintiff company, in truth forms part of their general fund of knowledge and their stock-in-trade.'

In like manner, in section 176, the law codified the duty not to accept benefits which is sometimes known as the no-profit rule, that is, the duty not to make secret profits from one's fiduciary position.[1563] The no profit rule is related to the no conflict rule and can overlap as they both concern directorial misconduct and the regulation of conflicts of interest. Section 176 focusses on situations which could be characterised as bribes and directors accepting benefit from third parties, conferred to them by reason of being directors or in their capacity as directors.[1564] This includes cases of multiple directorships, that is, serving two principals.[1565] This is the case if the acceptance of such benefits could reasonably be regarded as a conflict of interest or could potentially lead to a conflict of interest.[1566]

This duty does not incorporate provisions which allow for the possibility of authorisation of the acceptance of such benefits by directors.[1567] This thesis contends that this may be seen as illustrative of public interest and private interest in the prohibition of the acceptance of secret benefits from third parties by directors. The proscription attempts to oblige directors to act loyally in the interest of the company. It obliges them to resist temptations to do otherwise due to possibilities of benefits from third parties. This is a rule that applies generally to all fiduciaries as the law seeks to ensure that they are single minded and loyal in the execution of their duties to beneficiaries. [1568]

Section 176 also incorporates other public interest objectives. It addresses secret profits and bribes which may be particularly problematic for the development of any society because when decision-makers accept a bribe, they yield to the pursuance of

[1563] *Keech v. Sandford* (1726) Sel Cas Ch 61; *Regal (Hastings) Ltd v. Gulliver* [1942] 1 ALL ER 378; Hannigan, see above n.46, 245; section 176 of the Companies Act, 2006.
[1564] Section 176 (1) of the Companies Act, 2006.
[1565] *Boardman v. Phipps* [1967] 2 AC 46; *FHR European Ventures LLP and others v. Mankarious and others* [2013] EWCA Civ. 17.
[1566] Section 176 (4) but section 175 (3) of the Companies Act, 2006 states that: 'benefits received by a director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party.'
[1567] This could be circumvented if this is permitted in a company's articles according to section 180 (4) of the Companies Act 2006.
[1568] *Bray v. Ford* [1895-99] All ER Rep 1011, [1896] AC 44; *Bristol & West Building Society v. Mothew* [1998] Ch 1, 18; *Hurstanger Ltd v. Wilson and another* [2007] EWCA Civ. 299, [2007] All ER (D) 66.

undue interests. This is likely to taint their decision independent of whether the outcome of the decision itself is in line with what is expected of them in the performance of their duties or is legally acceptable.[1569] It is thus generally frowned upon for directors and other fiduciaries to accept bribes.[1570] As a matter of fact, bribery and secret commission are prevalent issues which threaten the foundations of society and erosion of good (corporate) governance.[1571] They negatively impact not only the trust and confidence that beneficiaries place in fiduciaries.[1572] They also impact the trust and confidence that society and other stakeholders place in companies and their management.[1573] It is then unsurprising that the no profit duty is a very strict mandatory rule and that section 176 does not make provisions for directors to seek board approval for the acceptance and retention of benefits gained from third parties.[1574]

Also of importance is the fact that any secret commission or bribe received by the director is held on trust for the company.[1575] The strict approach taken with regards to the no profit duty highlights the public nature of the regulation of directors' conflicts of interest. This is the case despite the increasing prioritising of private interests and growing private nature of the regulation of these conflicts, particularly since the enactment of the Companies Act 2006.[1576]

Having examined the two main duties incorporated in the regulation of directors' conflicts of interest, it is imperative that one considers directors' duty to declare their interest in proposed transactions or arrangements. This is an important aspect of the

[1569] Peters, see above n.1, 30.
[1570] Explanation notes to the Companies Act 2006, section 176, para. 344; *Attorney-General for Hong Kong v. Reid* [1994] 1 AC 324 (PC); Millett, P. (2002). Bribes and Secret Commissions Again. *Cambridge Law Journal*, 71 (3), 583, 583-4; For the definition of bribe, see sections 1 and 2 of the Bribery Act 2010.
[1571] *FHR European Ventures LLP v. Cedar Capital Partners LLC* [2014] UKSC 45; *Novoship (UK) Ltd and others v. Mikhaylyuk and others* [2014] EWCA Civ. 908.
[1572] *Boston Deep Sea Fishing and Ice Co v. Ansell* (1888) 39 Ch D 339, 357, 362-4.
[1573] Millett, see above n.1570, 583.
[1574] Although case-law suggests that full and frank disclosure to the company and the company's consent to directors gaining such benefits might be possible - *Imageview Management Ltd v. Jack* [2009] EWCA Civ. 63.
[1575] This is the case for other fiduciaries- *FHR European Ventures LLP v. Cedar Capital Partners LLC* [2014] UKSC 45; *Attorney-General for Hong Kong v. Reid* [1994] 1 AC 324; *Novoship (UK) Ltd and others v. Mikhaylyuk and others* [2014] EWCA Civ. 908.
[1576] *Towers v. Premier Waste Management Limited* [2011] EWCA Civ. 923: the Court of Appeal took a strict approach to the secret profit and no conflict rule in this case even though it was not considered a case of bribe or secret commission, and Mr Towers was held liable for breach of duty to the company.

management of directors' conflicts of interest. Disclosure tends to be seen as a preventative solution to conflicts of interest as conflicts of interest are products of situations of asymmetric information. Disclosure attempts to facilitate the correction of such asymmetry by ensuring that the principal is (fully) informed about the nature and extent of the conflict of interest situation.[1577] Disclosure also seeks to ensure that directors are loyal, honest and retain a high level of integrity in their corporate dealings and government of companies.[1578] The previous provisions, sections 175 and 176, do not apply to conflict of interests arising in relation to transactions or arrangements with the company.[1579] Section 177 addresses directors' duty to disclose interest in proposed transactions or arrangements, whether direct or indirect, to other directors of the company.[1580] Directors are required to declare the nature and extent of said interest.[1581] This disclosure requirement is broader than the previous disclosure requirement under the Companies Act 1985.[1582] Directors are required to disclose the extent of their interest and not simply the nature.[1583]

The broader disclosure requirement might be said to bolster existing regulation of directors' conflicts of interest especially in light of the increasing shift to a more enabling role for the regulation for such conflicts. This is because this preventative approach attempts to address the agency monitoring problem before it occurs. It seeks to hand back the control to the principal (the company) who gets to make an informed (voluntary) decision concerning the expertise, legitimacy and decision-making capacities of the conflicted agent (director).[1584] Ultimately, it saves the agent the effort of having to renounce a transaction or arrangement as required due to their fiduciary obligations. This means that the director may be able to pursue legitimate

[1577] Issacharoff, S. (2005). Legal responses to conflicts of interest. In M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (ed.) *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy.* (pp. 199). Cambridge, CUP.
[1578] *Woolworths Ltd v. Kelly* (1991) 22 NSWLR 189, 211.
[1579] Section 175 (3) of the Companies Act, 2006.
[1580] Ibid, section 177 (1).
[1581] Ibid.
[1582] Section 317 (1) of the Companies Act, 2006; section 177 of the Companies Act, 2006 does not however explicitly make provision for shadow directors unlike section 317 (8) of the Companies Act 1985; Keay, see above n.1556, 377.
[1583] Ibid, section 317 (1) in application did require a full and frank disclosure of interests - *Movitex v. Bulfield* (1986) 2 B.C.C. 99403; [1988] B.C.L.C. 104; *DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v. Koshy* (Account of Profits: Limitations) [2003] EWCA Civ. 1048; [2004] 1 B.C.L.C. 131.
[1584] Argandona, see above n.772, 9.

private interests in business opportunities. It also relieves the conflict burden on the shoulders of the director as the decision concerning the conflict is passed on to the company. It means that the company is able to weigh up the risks of the proposed transaction and make an informed decision to accept (or reject) the conflict which if exploited, could be beneficial for it and the director.

In the same manner, disclosure is argued to simplify the task of regulating conflicts of interests, by passing the obligation to monitor and evaluate the risks of potential conflicts of interest to directors. Some contend that it could improve the efficiency of social and market mechanisms in relations to the regulation of potential directors' conflicts of interest by partially resolving the asymmetric information issue.[1585] It is unsurprising that the legislator considered this a more efficient approach to dealing with conflicts of interest. This not only serves private interests of all the parties involved but also the public interest in the regulation and management of directors' conflicts of interest.

However, there is one important flaw which is the fact that directors are to disclose their interest to other directors who might be more tolerant or accepting of such conflicted situation.[1586] Also disclosures do not necessarily always mitigate or resolve conflicts of interest, they simply inform, even if information is disclosed to shareholders and other stakeholders. Disclosure is therefore an important but fallible solution.[1587]

Another important flaw is the removal of criminal sanctions for non-compliance with disclosure provisions in section 177 of the Companies Act 2006. Under section 317(9) of the Companies Act 1985, there was a criminal sanction for non- compliance.[1588] The removal of criminal sanction takes much of the deterrent effect out of the provision. It is indicative of the growing shift from a more public nature and purpose

[1585] Ibid, 9-10.
[1586] Keay, see above n.1556, 378.
[1587] Argandona, see above n.772, 11-12; Cain, D. M., Loewenstein, G. & Moore, D. A. (2005). Coming Clean but Playing Dirtier: The shortcomings of Disclosure as a Solution to Conflicts of Interest. In. M. H., Bazerman, D. M., Cain, G., Loewenstein & D. A. Moore. (ed.) *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 104). Cambridge, CUP.
[1588] The probable solutions are more of a private nature. Said transaction or contract is voidable - *Craven Textiles engineers Ltd v. Batley Football Club Limited* [2001] B.C.C. 679; *Guinness Plc v. Saunders* [1990] 2 AC 663.

of the regulation of directors' conflicts of interest to a more private nature and a facilitative or less strictly mandatory approach. For instance, section 177 of the Companies Act 2006 only addresses interests in proposed transactions.[1589] Compliance with section 177 makes a transaction or arrangement exempt from approval by shareholders. [1590] The duty to disclose conflicts of interest has been weakened by this. It takes the control and monitoring of conflict of interest from the hands of shareholders and places it into the hands of other directors who might be more forgiving and tolerant of their colleagues' actions.[1591] Can it then be said that this provision really protects shareholders' interests, let alone societal interest?

Another issue that may be considered problematic is the disclosure procedure itself. The provision is not exhaustive which appears positive at first glance because it can mean a thorough and substantive disclosure of proposed interest in a transaction. However, it leaves the provision open to interpretation and creative compliance which could lead to sidestepping the essence of the disclosure requirement.[1592]

Nevertheless, disclosure of conflicts of interest have not altogether lost their public nature even under the Companies Act 2006 because section 182 (1) addresses directors' declaration of interest in an existing transaction or arrangement. It requires a declaration of the nature and extent of the interest to other directors of the company.[1593] It mandates compliance with strict declaration procedures,[1594] subject to exceptions such as the director's (reasonable) lack of awareness of said transaction or arrangement.[1595] Yet, this disclosure is not without its strengths. For instance, failure to comply with it is an offence.[1596] This provision has thus retained the public interest and public nature of the disclosure obligation because the fine could act as a deterrent. The aim of the provision is not to simply oblige directors to

[1589] Section 180 of the Companies Act, 2006 applies generally to consent, approval and authorisation of conflicts of interest by members of the company. Also see section 182 of the Act.
[1590] Ibid, section 180 (1).
[1591] 'Conflicted directors may, subject to the company's articles of association, participate in decision-taking relating to such transactions with the company'- Explanation notes to the companies Act 2006, para. 354.
[1592] Keay, see above n.1556, 381.
[1593] This section does not apply if or to the extent that the interest has been declared under section 177 of the Companies Act, 2006.
[1594] Ibid, section 182 (2-4).
[1595] Ibid, section 182 (4-5).
[1596] Ibid, section 183 (1-2).

inform companies of their interest in transactions and compensate them for directors' non-compliance but also to punish and deter directors' failure to comply.

This thesis submits that the law's approach to the regulation of directors' conflicts of interest has shifted from absolute and unyielding prohibition. This is due to a number of public interest and private interest reasons. These are the encouragement of entrepreneurialism and competition as well as restricting the restraints on trade and freedom to contract. The shift is now to efficiency in the government of companies through the tolerance and management of directors' conflicts of interest. This is evident in the move from more substantive mandatory regulatory solutions to directors' conflicts of interest to more procedural and preventative strong default rules. The regulatory responses also include some mandatory measures which do not attempt to stop conflicts of interest altogether. They instead attempt to draw them out into the open through disclosure, subject to criminal sanctions in certain cases of flagrant non-compliance.

In essence, the current regulation of directors' conflicts of interest attempts to balance competing public and private interests in the regulation of directors' conflicts of interest. These are the good governance of companies and proper control of directorial conduct. The regulation also serves other public interest objectives. These are on one hand, encouraging entrepreneurialism and directorial initiative in seeking out various business opportunities as these could be beneficial for the nation's economy. On the other hand, these objectives include curbing directorial self-serving behaviour and bolstering trust and confidence in the government of companies, the expertise and legitimacy of directors to manage one of the most important institutions for the nation's economy. It is implicit in the regulatory provisions that there is greater scope afforded to the private nature of the regulation of directors' conflicts of interest. For example, previous criminal sanctions have been eliminated, bar one.

Yet, this review of some of the key conflicts of interest provisions indicate that greater embrace of private interests may not necessarily address directors' conflicts of interest in a satisfactory manner, particularly in light of the increasing power of companies and recent global financial crises.[1597] Could there be other approaches

[1597] This was discussed in chapter 1 of this thesis.

which could address this issue adequately? Looking at different government and political discourses, this thesis reveals that a more balanced approach to the regulation of directors' conflicts of interest and the general government of companies would not be completely unwelcome and alien to company law.

7.5.2 RECENT DEVELOPMENTS AND THE PUBLIC INTEREST

In recent times, there has been a privileging of private interests and shareholder interest maximisation in corporate governance and the regulation of companies. Yet, contemporary governmental and political discourses indicate that there is an increasing awareness of the need to consider wider stakeholder interests in the governance of companies.[1598] Of particular significance are the Corporate Governance Reform (Green Paper) of 2016 and ensuing papers and discussion, particularly, section 172 of the Companies Act of 2006. These will be reviewed below.

Firstly, the incorporation of enlightened or enhanced shareholder value in the Companies Act of 2006 is indicative of the fact that the UK Government felt that wider stakeholder interests ought to be considered in providing value for shareholders and in the long term interests of the company.[1599] Section 172 (1) states:

> *A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—*
>
> *(a) the likely consequences of any decision in the long term,*
>
> *(b) the interests of the company's employees,*
>
> *(c) the need to foster the company's business relationships with suppliers, customers and others,*

[1598] Choudhury, B., & Petrin, M. (2018). Corporate governance that 'works for everyone': promoting public policies through corporate governance mechanisms. *Journal of Corporate Law studies*, 18 (2) 381.

[1599] Section 172 of the Companies Act, 2006. Although it is argued to be a "lame duck" as other stakeholders have no recourse to legal action if their interests are not taken seriously. Keay, A., & Zhang, H. (2011). An analysis of enlightened shareholder value in light of ex post opportunism and incomplete law. *European Company and Financial Law Review*, 8 (4), 445, 471.

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

Although, some contend that section 172 (1) is a flawed provision,[1600] it is nonetheless indicative of public interest objectives in the management of companies. These include companies' retention of the licence to operate by fostering good relationships with suppliers, customers and others as well as having regard for companies' impact on the community and maintaining high standards of business conduct.

Secondly, key political actors and the government have undertaken reviews of corporate governance in the effort to foster trust and accountability in governance. In 2013, the then Business Secretary sought to improve company transparency and boost public trust in business through legislative reform.[1601] He discussed the impact of corporate mismanagement and directors' misfeasance and how these have contributed to the erosion of public trust in governance. He advocated for more robust regulation through the disqualification and prosecution of "rogue" directors as well as public disclosure of relevant company affairs.[1602] It should be noted that despite the public interest framed in this speech, the focus of governance was still maximising shareholder value and delivering long term returns for investors but doing so in a manner that reflects other societal interests.[1603]

Thirdly, the Small Business, Enterprise and Employment Act of 2015 is a piece of legislation which illustrates the government's attempt to address a perceived lack of trust in companies and public anger concerning directorial misconduct and corporate irresponsibility.[1604] Part 9 of the Act created new grounds for director disqualification

[1600] Ibid.
[1601] Cable, V. (2013, 15 July). Reform conference on "Responsible capitalism, Trust, why it matters". Department for Business, Innovation & Skills, UK Export Finance. Retrieved from https://www.gov.uk/government/speeches/reform-conference-on-responsible-capitalism.
[1602] Ibid.
[1603] Ibid.
[1604] Loughrey, J. (2015). Smoke and mirrors? Disqualification, accountability and market trust. *Law and Financial Markets Review*, 9 (1), 50.

in order to ensure that irresponsible or unfit directors are prevented from managing other companies in future, as a matter of public interest.[1605] The reform of the company director disqualification provisions further illustrates this point. The government attempted to reassure shareholders and investors as well as act to reduce public anger and restore trust in the market.[1606] The Act also bolstered provisions concerning company transparency by requiring that people with significant controls of companies are registered.[1607] It even required that company directors be natural persons and non-compliance with this provision could lead to a fine.[1608] It equally applied directors' general duties to shadow directors.[1609]

Likewise, in 2016, a review of corporate governance was undertaken by Parliament and the Government. The Prime Minister in a speech in 2016 spoke of a desire to create an "economy that works for everyone".[1610] She sought to go beyond maintaining economic confidence to ensuring that everyone in the country shared in its wealth. She said that she wanted to restore trust and confidence in the nation's institutions, including companies, to ensure that stakeholders like workers, the local communities and the whole nation had a stake in their governance. The discourse focussed on private interests but was not limited to these issues. The Prime Minister maintained that better governance would help companies to take better decisions for their long–term benefit and that of the economy overall.[1611]

The House of Commons Committee on corporate governance echoed similar sentiments.[1612] It highlighted the loss of public trust in British businesses due to corporate governance failings involving companies like Tesco. It stated that companies should be careful to give due regard to public expectations regarding their conduct of business.[1613] Section 172 of the Companies Act was also examined and

[1605] Sections 105-116 of the Small Business, Enterprise and Employment Act 2015.

[1606] Ibid.

[1607] Sections 81-82 of the Small Business, Enterprise and Employment Act 2015.

[1608] Ibid, section 87.

[1609] Ibid, section 89.

[1610] Theresa May gave a speech in Birmingham launching her national campaign to become Leader of the Conservative Party and Prime Minister of the United Kingdom on 11 July 2016. Retrieved from http://press.conservatives.com/post/147947450370/we-can-make-britain-a-country-that-works-for.

[1611] Ibid.

[1612] House of Commons, Business, Energy and Industrial Strategy Committee (2017). Corporate Governance, Fourth Report of Session 2016–17. London. Retrieved from https://publications.parliament.uk/pa/cm201617/cmselect/cmbeis/702/702.pdf

[1613] Ibid, 7-8.

considered as to whether it satisfactorily protected the interests of stakeholders. [1614] The Committee concluded that companies ought to be encouraged to improve their engagement with stakeholders and to engage in an open and transparent manner with the public.[1615] The Committee's report once again indicates that there is an attempt to balance private and public interests in the management of companies despite the greater embrace of shareholder value in the UK's corporate governance. Although directors' conflicts of interest were not expressly mentioned, they are not necessarily excluded as they are an important aspect of the management or governance of companies.

The Government continued the review of corporate governance in its Green Paper[1616] and then in another paper[1617] the following year. Like the parliamentary effort and the Prime Minister's speech, the papers were shareholder-centric but decidedly enlightened shareholder value based. The discussion of executive remuneration, diversity of boards and disclosure all incorporated elements of the public interest as they were all influenced by the public perception that they were unsatisfactory, both in terms of social and economic public interest goals.[1618] These goals include reducing wealth inequality to which high executive remuneration could be said to be a contributor and promoting equality through diversity on boards which serve social and economic purposes of equality.[1619] They also include disclosure as a means of ensuring better transparency and making companies accountable for better engagement with wider stakeholder interests.[1620]

[1614] Ibid, 15.
[1615] Ibid, 59-60.
[1616] Great Britain, The Department of Business, Energy and Industrial Strategy. (2016). *Corporate Governance Reform: Green Paper*. London. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf.
[1617] Great Britain, The Department of Business, Energy and Industrial Strategy. (2017). Corporate *Governance Reform: The Government response to the green paper consultation*. London. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/640470/corporate-governance-reform-government-response.pdf.
[1618] See above n.1616, 21; Choudhury & Petrin, see above n.1598, 384.
[1619] Ibid.
[1620] Ibid.

7.6 CONCLUSION

Contemporary regulation of directors' conflicts of interest, like regulation in earlier periods, reveals that public interest has played an important role. In the desire to uphold the public interest in good management and growth of companies, public ordering has been used to facilitate private ordering and promotion of selected private interests, including shareholders' rights. This is used to enhance economic competitiveness. In fact, shareholder primacy gained in dominance because it was thought to be the optimal way to ensure that companies are well-managed and their directors are held adequately accountable.

However, increasing criticism that shareholder sharking and corporate irresponsibility mean that companies are not well-managed has impacted company law reform. This is combined with the neglect of the interests of other stakeholders which has also had an impact on corporate reform efforts. Critics feel that current shareholder-centric approaches could slow down economic growth. This critique has led to demands for the reform of corporate governance. The UK Government has highlighted the need for companies to serve all within society, going beyond public interests goals of general welfare maximisation to the reduction of wealth inequalities. This illustrates that the public interest motivations for the regulation of companies are evolving or are open to evolution.

This is not a new phenomenon as public interest has evolved and changed throughout the regulation of directors' conflicts of interest and the development of companies generally. The issues discussed in chapters 5 and 6 in particular exemplify these. A dynamic definition of the public interest, born of common interest conceptions of the public interest indicates that such change is not alien to public interest or the regulation of conflicts of interest. This began due to the desire for good public administration, as discussed in chapters 3 and 4 of this thesis. All of the above these issues will be explored in some detail in the conclusion of this thesis in guise of key research findings, as will recommendations made by this research endeavour.

CHAPTER EIGHT

CONCLUSION

8.1 INTRODUCTION

This chapter draws on the main findings of the preceding chapters to answer the primary research question, is the management of directors' conflicts of interest, a question of public interest? It highlights how the regulation of directors' conflicts of interest has been a question of public interest. It proposes that public interest can continue to be significant to the regulation of directors' conflicts of interest and concludes the thesis. The chapter is divided into five sections. Section 1 introduces the discussion. Section 2 provides an overview of the focus of the research. Section 3 highlights the key research findings as well as key issues that emerged in the study of directors' conflicts of interest, particularly through the historical exploration of the development of companies. Section 4 provides recommendations for enhancing public interest in the regulation of directors' conflicts of interest, and section 5 concludes.

8.1.1 OVERVIEW OF THE RESEARCH

The focus of the study was an analysis of the regulation or management of directors' conflicts of interest to examine if the regulation of this issue is underpinned by public interest motivations. The study is an illustrative analysis of whether public interest plays a role in the regulation of companies generally, particularly corporate governance. Public interest is rarely explicitly discussed in corporate law literature and when it is, it is confined to discourses on corporate citizenship or corporate (social) responsibility. The study sought to ascertain if public interest's reach is limited to those issues or if it is present in areas of corporate law which are often seen as purely of private ordering, such as the management of directors' conflicts of interest.

Therefore, to examine the question of public interest motivation for the regulation of directors' conflicts of interest, this research first undertook an extensive review of various theories of the firm. In order to obtain a thorough understanding of company directors' conflicts of interest and why they are regulated, this thesis began with an

exploration of the different theories of the firm, what this means for the governance of companies and the role of these entities in society were addressed. This has been indispensable to understanding and identifying how and to what degree the management of directors' conflicts of interest in international companies is an issue of (public) interest to society as a whole.

It then analysed the definition of key themes of the research, public interest and conflicts of interest to reveal that these notions are not fixed but in fact are subject to different interpretations. Public interest was examined by exploring several theories on the concept of public interest. The chapter looked predominantly at relevant theories in political science, philosophy, economics and sociology. Subsequently, these theories on public interest were examined in conjunction with different perspectives on corporate theories. Exploring the public interest extensively is vital to the research question of this thesis. An examination of public interest considerations for directors' conflicts of interest could not be undertaken without investigating the current state of the concept of public interest in general, and public interest and the regulation of companies, including directors' conflicts of interest.

Likewise, the defining of conflicts of interests is important because like public interest, it is often used but hardly ever defined. Defining conflicts of interest has been vital to understanding directors' conflicts of interest and why they might be of public interest. Looking at the origin, history and development of conflicts of interest, it is revealed that it is a governance issue of societal interest. Therefore, theories on conflicts of interest enabled the situation of directors' conflicts of interest within the different types of conflicts of interest. More importantly, it suggests that directors' conflicts of interest are of societal concern.

The analyses of conflicts of interest and public interest undertaken in this thesis enabled an overarching examination of public interest rationales in the development of companies, by sharpening the focus on public ordering and utility. In particular, exploring public interest theories or definitions provided a robust backdrop to the exploration of the nature and ordering of companies. It facilitated the idea that public interest and public ordering have evolved over time but that they remain important parts of the development of companies in Britain. Consequently, it advanced the idea

that the development of companies is not mono-causal, purely evolutionary or reactionary, but in fact a subject of dual ordering.

The exploration of the dual nature of the ordering of companies in turn facilitated the exploration of the development and origin of regulation of directors' conflicts of interest under the guise of the breach of trust and the notion of directors as trustees. This historical review centred the discussion on the identification of public interest throughout the years within the regulation of directors' conflicts of interest. This also engendered discussion of public interest motivations for contemporary regulation of directors' conflicts. It showed how public interest is a thread that is woven into the fabric of the regulation of companies, particularly corporate governance, even in current uncertain times. This implies that the regulation of directors' conflicts of interest is not exempt.

8.2 KEY RESEARCH FINDINGS

8.2.1 PUBLIC INTEREST IS NOT ALIEN TO CORPORATE DISCOURSES

Public interest, contrary to accepted knowledge, is not alien to, or exists outside of, corporate law as many theorists such as Posner have stated. It is also not something which was historically the case but is now absent in the construction of the regulation of companies in modern times. It is present, but reduced, paradoxically, to serve societal interests, that is, the public interest. This research shows that since the era of the South Sea Bubble, it has been apparent that companies and their management play a vital role in the development of the UK's economy. Therefore, even when companies were feared and loathed, it was difficult to negate or deny the role companies played in society. This has influenced the development of the regulation of companies. This research has argued that this is reflected in the regulation of directors' conflicts of interest and the manner in which it has evolved over time.

Drawing on Held's definitions and theories on the public interest, the thesis contends that public interest has not been static but in fact it evolved in accordance with societal mores and needs. Looking at the preponderance theories on the public interest, one sees how economic analysis of public interest has informed private ordering and some of the internal organisation of companies. These are namely the separation of

ownership and management, the focus on efficiency and reduction of transaction costs. These are central to some of the perceived aims of companies. Equally, agency costs theory often said to be at the heart of the regulation of directors' conflicts of interest indicates that public interest is not foreign to the management of these issues. After all, the reduction of agency costs is a way of ensuring better management of companies in the interest of the principals, often considered to be the shareholders but can include other stakeholders or a preponderance of individuals in society.

Also, the significance of the common good and notions of integrity and morality which have been vital to the development of the regulation of conflicts of interest generally and in directors' duties may be seen to exemplify Held's category of unitary theories of public interest.

However, the regulation of companies, including directors' conflicts of interest could be best understood in terms of common interest theories on the public interest. In fact, this approach best explicates the incorporation of private economic interests as well as public interests, economic and value-based ones, in the regulation of directors' conflicts of interest. The South Sea Bubble, the Bubble Act and its subsequent repeal in 1825 reflected this. So does the attempt to marry competing societal interests in order to achieve various goals. These include the free development of trade and commerce, respect for individual liberty and entrepreneurialism as well as the desire to prevent fraudulent companies and detriment to the nation's economy. These motivated diverse incidents of public ordering identified throughout this thesis.

8.2.2 CONFLICT OF INTEREST AND THE PUBLIC INTEREST

This research also posits that the origin, history and development of conflicts of interest has been influenced by the public interest in good administration of companies. This contributed in the shift of perception on conflicts of interest from issues of personal temptation and fortitude to macro or institutional challenges in governance. It became evident that conflict of interest was a cross-governance issue which required separate and dedicated scholarship in order to comprehend and address it.

The development of the regulation of directors' conflicts of interest is equally indicative of societal preoccupation and desire for good (corporate) governance and building trust in the legitimacy of decision-makers.

8.2.3 DUAL ORDERING, PUBLIC INTEREST AND THE HISTORICAL DEVELOPMENT OF COMPANIES

A review of the development of companies reveals that their ordering has been of a dual nature: public and private ordering. These developed sometimes in a complementary manner or one trying to fill in the void left by the other. Public ordering has played an important role in the regulation of companies due to the public interest, utility or purposes of companies. This public interest has varied to reflect societal and political attitude to companies; from fear of joint stock corporate entities as detrimental to the economic growth, to praising them as tools for the eradication of poverty. Public interest has influenced public ordering of companies, especially in the 18th and 19th centuries.

This thesis shows that initially the state granted charters largely to corporate entities with some form of public purpose and these entities sought them because of private benefits such as profit maximisation and trade monopoly. The South Sea Company, one of the three biggest corporations of its era, is an excellent illustration of public utility and purpose of companies. It was created to alleviate public debt and pave the way for English trade in South America. Its failure, the failure of other joint stock corporate entities and their effect on the nation's economy, led to significant public ordering of corporate entities and the distrust of these entities. It began to be felt that their utility to society was outweighed by the damage they could cause to the economy. Likewise, the public ordering of unincorporated joint stock companies through the Bubble Act was indicative of public interest in the regulation of companies.

The condemnation of the South Sea Company's directors for breach of trust by the UK Parliament and the Parliament's intervention through public ordering made it clear that the management of corporate entities and especially incorporated ones was of public interest.

Although the Bubble Act has been seen as dead letter due to the tolerance of unincorporated joint stock companies, they were still technically unlawful. Those who wanted to form companies made ingenious use of private ordering, partnership law and trust, the Deed of Settlement Company, in order to circumvent the effects of the Act but this was not enough to recreate the effects of incorporation. However, the toleration of unincorporated companies reflected a gradual change in societal perceptions of joint stock corporate entities as the perceived public utility of entities began to outweigh the fear of fraud and speculation which they could engender. In fact, public authorities began to recommend them as alternatives to companies seeking incorporation. Therefore, private ordering developed in the shadow of public ordering and so continued to serve public interest in the flourishing of the nation. Private ordering was beneficial because it showed that corporate entities could be useful and good for the development of prosperity for the nation. This recognition of the public interest and utility of companies grew so strong that it led to the repeal of the Bubble Act.

Similarly, this thesis reveals that the legislative attempts to reform the regulation of companies in the earlier half of the 19th century reflected the battle between several public interests. On one hand, economic progression was seen as synonymous with the free development of joint stock corporate entities. On the other hand, there was public concern about fraud in company formation and the effects of uncontrolled speculation. These had an impact on the public ordering of companies. For instance, the fact that incorporation was granted sporadically to companies and only to companies regarded as serving the public interest, that is, of public utility or purpose, reflects this. These companies were often railway companies which were perceived as beneficial to the public.

This research found that legislative efforts from 1844 to 1856 which sought to grant unincorporated joint stock companies corporate privileges such as limited liability are indicative of public ordering of companies to serve the public interest. The public ordering of companies was extended to directors' conduct including the management of their conflicts of interest. It was seen as a way of ensuring that companies were able to meet their public purpose or utility. Good governance of companies was deemed as key to this objective. In fact, the extension of corporate privileges to

unincorporated joint stock companies was thought of as a public interest because they enhanced society's protection from corrupt administration. This is another example of public ordering and public interest working together.

The fact that advocates of (unincorporated) joint stock companies lobbied fiercely for limited liability and other privileges indicates that the development of companies is not only a matter of private ordering because private ordering could not adequately ensure the growth of companies. Innovations such as Deed of Settlement companies did not sufficiently afford companies all corporate privileges. State approval was actively sought so as to facilitate companies' unhampered development. This is also an example of complementarity in public ordering and public interest.

Most importantly, this thesis disclosed that the state facilitated private ordering, in particular, through the enactment of the Acts of 1855 and 1862. This was done to serve the public interest in the growth and prosperity of the economy, through the free development of companies. In the same vein, registration and disclosure were measures of public ordering to afford the public a measure of protection. These various pieces of legislation addressed directors' conflicts of interest in different degrees due to the public interest in the good management of companies and prevention of fraud. Consequently, this research displays that public ordering of companies is closely linked with public interest and public utility of these entities.

8.2.3 BREACH OF TRUST, DIRECTORS' CONFLICTS OF INTEREST AND PUBLIC INTEREST

Another finding of this thesis is that breach of trust was used to address directors' misconduct including conflicts of interest, but this was not only for the benefit of shareholders and the company. This also served public interest purposes. Initially directors' conflicts of interest were seen as examples of breach of trust and confidence through the application of fiduciary principles. This thesis reveals that directors were associated with trustees so as to uphold the public interest in the promotion of values such as justice, fairness and trust in governance. These reflected the general societal expectation to manage conflicts of interest because of their impact on administration and governance. This was particularly important in cases

which concerned directors of corporations who had breached the trust and confidence placed in them by engaging in self-dealing.

Public ordering of directors' conflicts of interest was not limited to corporations. It also included registered Deed of Settlement companies where directors were also treated like functionaries or public administrators when accused of conflicts of interest. This was due to a belief that directors ought to be held to a high standard of conduct as the mismanagement of companies could have devastating consequences for the nation's economy. Consequently directors were treated like trustees due to the public interest in good governance of companies. This indicates that the regulation of directors' conflicts of interest was not limited to protecting private interests solely.

Likewise, this thesis demonstrates that the shift in public ordering of directors' conflicts of interest from absolute prohibition to regulation can also be attributed to the public interest. Laissez-faire ideology had taken hold in society during the 19th century and had infused the public interest. The desire for good governance was now tempered with a reluctance to over-penalise directors for mismanagement, which was thought to be counter-productive to the public interest of the freedom to contract, entrepreneurialism and freedom to trade. This is reflected in the regulation of directors' conflicts of interest concerning corporate opportunities and directors in competition with the company whose affairs they managed. These are also indicative of greater private ordering in company regulation, a reminder of the dual ordering of companies.

Equally, key procedural regulatory solutions to directors' conflicts of interest, disclosure and ratification are indicative of the dual ordering of companies. These are suggestive of private ordering as they enabled private agreements concerning the management of conflicts of interests. Yet, they were facilitated and concretised by public ordering which enabled them to exist. Disclosure also serves the public interest in good governance because it seeks to protect not only shareholders through the availability of information. It protects the public by ensuring more transparency in directors' conduct.

In the same way, many legislative interventions during the late 19th century to early 20th century were illustrative of public ordering of directors' breaches of trust,

especially conflicts of interest. Reports undertaken by UK Parliamentary committees such as the Davey Committee advocated measures like increased publicity of companies' affairs. They sought to ensure that, on one hand, the public and relevant stakeholders were protected against fraud and directorial misconduct. On the other hand, they sought to ensure that honest and reputable people were not deterred from taking on company directorships and that regulation did not hamper the promotion of bona fide companies as this was perceived as detrimental to the economy.

In sum, the focus of these public interest considerations was strengthening the economy and removing anything which could be detrimental or harmful to it. It became clear that companies were the dominant organisational form of economic activity. Hence, public interest was concerned with their preservation, either by making sure that they were well governed or that they could develop freely. These public interests were constantly being balanced by the state, and this is well-reflected in the regulation of directors' conflicts of interest.

8.2.4 CONTEMPORARY REGULATION OF DIRECTORS' CONFLICTS OF INTEREST

This thesis highlights the fact that public interest has continued to be relevant even in the deregulation of directors' conflicts in contemporary times. The regulatory developments of the 1980s and the Companies Act of 1985 were clear examples of the impact of public interest in this regulation. The developments included criminal and civil sanctions for non-compliance with provisions on conflicts of interest. The fact that these could not be contracted out of and served punitive objectives highlight that they were intended for more than just the protection of shareholders and the company. It implies a desire to protect society from harm and punish wrongdoing directors.

Although, the reform of the 1985 Act is often said to be a clear signal of the triumph of private ordering and private interests over public ordering and public interests, this thesis shows that this is a simplistic claim. The Act was criticised for a number of reasons including loopholes and lack of consistency in the regulation of directors' conflicts of interest. This lack of consistency made them ineffective to protect public and private interests in the good governance of companies.

In the same way, the public interest in finding an optimal way to serve both public and private interests in the promotion of a competitive economy led to the reform efforts of the late 1990s and early 2000s. This is illustrated by the Law Commissions' consultation papers as well as the Steering Group's findings. Both advocated a strengthening of the rights of shareholders and less state intervention in the management of companies. They did so because it was deemed that this was the optimal way to serve the public interest in the development of the economy.

The Companies Act of 2006 reflected and integrated much of these findings. This in turn indicates that private ordering was privileged over public ordering. Yet, this was done through the facilitative use of statute, a form of public ordering. It was thought that prioritising private ordering was better for the public interest in the growth and competiveness of the economy.

Various corporate reform efforts in the last few years also display that public interest continues to play a key part in the regulation of companies. This research suggests that the focus remains primarily on economic development with an emphasis on profit maximisation and shareholder primacy. These different company law reform efforts implicitly show that some public interests have been slightly neglected in contemporary regulation of directors' conflicts of interest. These include a greater concern for societal interests in integrity in corporate governance and holding directors to a high standard of conduct. The reduction of mandatory rules prohibiting directors from engaging in conflicts of interest and general deregulation of directors' conflicts of interest are indicative of the tacit abandonment of these public interests.

Yet, the quest to re-centre societal interests as well as interests of other stakeholders in the government of companies demonstrate that public interest need not be limited to economic progress, development and wealth maximisation. Maintaining trust and legitimacy of corporate decision-makers and integrity in directors' conduct are important societal concerns of common interest to all.

8.3 RECOMMENDATIONS FOR FUTURE RESEARCH

Having identified that public interest is a rationale for the regulation of directors' conflicts of interest, there is still scope to see how this is articulated and understood by company directors, companies and society at large.

The research conducted in this thesis has its limitations, which may indicate room for further studies. Some of the most relevant ones are indicated below:

Firstly, it is recognised in this thesis that public interest has a dynamic and nebulous nature. The focus of the thesis has largely been on public interest in the regulation of directors' conflicts of interest, but more comparative research into public interest can be undertaken. It is, after all, a notion that is not limited to one nation. Although this research has attempted to consider some non-western theories on the public interest, the majority of theorists discussed have their basis in western political thought or theories. It may be interesting to look more closely into other theories, and other peoples' perspectives on the public interest. This might provide new approaches to defining the public interest which could inform international corporate governance and corporate responsibility. This could be a useful exercise in light of the growing globalised reach of companies. Reflecting the public interest in a more inclusive or other worldly manner might contribute to affording large companies the social licence and legitimacy to operate. One might even pose questions such as does a comparative analysis on the public interest contribute to sustainability? Does defining public interest using non-western theories contribute to a sense of responsibility in the management of multinational companies?

In fact, a comparative examination of two or more jurisdictions on the question of public interest and how or if it is articulated as a rationale for the regulation of directors' conflicts of interest might be undertaken. After all many companies are multinational or with global reach, and it might be a way of examining in detail how dynamic the concept, public interest is and how it is viewed in relation with the regulation of directors' interests in these jurisdictions. Any similarities or divergences could be highlighted as these may reveal international societal challenges in the regulation of directors' conduct.

Secondly, the research into conflicts of interest provided only an overview of theories due to the limited scope of this thesis. Exploring and examining conflicts of interest in detail, especially psychological barriers to identifying it, in a number of jurisdictions, is another recommendation for further research. Empirical research into conflicts of interest could be undertaken in different countries to draw out if different societies have different perceptions of conflicts of interest. This could be analysed in light of

any regulation of conflicts of interest. This could provide greater and richer understanding of conflicts of interest and their ambiguous role in society.

8.4 FINAL CONCLUSION

Directors' conflicts of interest like other areas of corporate governance are regulated to ensure the good governance of companies. Some have argued that this is done simply to protect the private interests of those directly involved in the company.

In this thesis, it is argued that directors' conflicts of interest are regulated in the public interest. This is not to say that it is the sole purpose of this regulation. Directors' conflicts of interest are the subject of dual ordering and dual interests. These are categorised as private and public ordering, and private and public interests. Arguing that directors' conflicts of interests are regulated simply to protect shareholders, creditors or the company is a singular and incomplete story. Of course, the development of companies have been due to both private interests and public interest. It is not unreasonable to say that while public interest in the regulation of companies are still relevant they do not appear to be as dominant as they have been in the past. This could be due to the greater influence of shareholder primacy in the UK when compared with pre-1970s developments.

This thesis shows that directors' conflicts of interest like other aspects of company organisation are regulated. They have been regulated for the public interest due to the public purpose or utility they serve. It also highlights that public interest itself is not singular but it is in fact a dynamic concept, which takes on many forms in accordance with ever-changing societal needs or interests. It ranges from the prevention of fraud to encouraging national economic prosperity. By highlighting these elements, this thesis illustrates that companies serve public interest to a certain degree. Likewise, identifying that public interest itself is not static means that there is room for it to go beyond simple economic prosperity or efficiency in the manner in which it is articulated in company law.

BIBLIOGRAPHY

PRIMARY SOURCES

LEGISLATION

UNITED KINGDOM

Act for the encouragement of British White Herring Fishery 1750

An Act for better securing certain Powers and Privileges, intended to be granted by His Majesty by Two Charters, for Assurance of Ships and Merchandizes at Sea and going to Sea, and for lending Money upon Bottomry; and for restraining several extravagant and unwarrantable Practices therein mentioned, (The Bubble Act) 1720

Bribery Act 2010

Chartered Companies Act 1837

Companies Act 1862

Companies Act 1867

Companies Act 1907

Companies Act 1928

Companies Act 1929

Companies Act 1947

Companies Act 1948

Companies Act 1967

Companies Act 1976

Companies Act 1980

Companies Act 1985

Companies Act 2006

Companies Act of 1900

Companies Consolidation Act 1908

Companies' Winding up Act 1844

Company Director Disqualification Act 1985

Directors' Liability Act of 1890

Fraudulent Trustees Act 1857

Honours (Prevention of Abuses) Act 1925

Insolvency Act 1986

Joint Stock Banks Act 1858

Joint Stock Companies Act 1856

Joint Stock Companies Act 1857

Joint Stock Companies Registration and Regulation Act 1844

Judicial Trustees Act 1896

Larceny Act 1862

Limited Liability Act 1855

Prevention of Fraud (Investments) Act 1939

Small Business, Enterprise and Employment Act 2015

The Repeal of the Bubble Act 1825

The Small Companies (Micro-Entities' Accounts) Regulations 2013

The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008

The Statutory Auditors and Third Country Auditors Regulations 2016

Trading Companies Act 1834

CANADA

Conflict of Interest Act 2007 (CA)

FRANCE

Code de commerce 2019 (FR)

Law of 24th of July 1966 (FR)

Loi de Sécurité Financière (LSF) of 1st August 2003 (FR)

UNITED STATES OF AMERICA

Bribery of Public Officials and Witnesses, Act, June 25, 1948 (18 U.S.C. § 201) (US)

The Dodd-Franck Wall Street Reform and Consumer Protection Act of 2010 (US)

The Sarbanes-Oxley Act of 2002 (US)

SWITZERLAND

Swiss Civil Code 2016 (SW)

INTERNATIONAL CONVENTIONS

Council of Europe Criminal Law Convention on Corruption, ETS n°.173 (27 January 1999).

Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. EU, Council of the European Union. (1976). DG15/B/02.

UNITED KINGDOM SECONDARY LEGISLATION

The Directors' Remuneration Report Regulations 2002, SI. 2002, No. 1986

BILLS

A bill to amend the Companies (Consolidation) Act 1908, 1924

Companies (Procedure) Bill 1985

Companies Bill 1898

Companies Bill 1946-7

Companies Consolidation (consequential provisions) Bill 1984

Directors of Public Companies and Government Contracts Bill 1913

Draft Companies Bill 1895

Insolvency Bill 1985

CASES

UNITED KINGDOM

Aberdeen Railway Co v. Blaikie Bros (1854) 1 Macq H.L. 461

A-G v. Wilson (1840) Cr & Ph 1, 10 LJ Ch 53.

Atlas Wright (Europe) Ltd v. Wright & Anor. [1999] BCC 163

Att.-Gen. v. Compton (1842) 1 Y & CCC 417

Attorney- General for Hong Kong v. Reid [1994] 1AC 324 (PC)

Automatic Self-Cleansing Filter Syndicate v Cuninghame [1906] 2 Ch 34

Balston Ltd v Headline Filters Ltd No 2. [1990] FSR 385

Barned's Banking Co Ex p. Contract Corp, Re (1867-68) L.R. 3 Ch App 105

Bell v. Lever Bros. Ltd. [1932] AC 161

Benson v. Heathorn (1842) 62 ER 909, 1 Y & CCC 326

Bermingham v. Sheridan (1864) 33 Beav 660

Bishop of Winchester v. Knight (1717) 24 ER 447, 1 P Wms 406

Blundell v. Winsor (1835) 8 Sim 601

Boardman v. Phipps [1967] 2 AC 46

Boston Deep Sea Fishing and Ice Co v. Ansell (1888) 39 Ch D 339

Boulting v. Association of Cinematograph, Television and Allied Technicians [1963] 2 QB 606

Bray v. Ford [1895-99] All ER Rep 1011, [1896] AC 44

Brazilian Rubber Estates 1911, 1 Ch. 425

Bristol & West Building Society v. Mothew [1998] Ch 1, EWCA Civ 533

Brown v. Holt (1812) 4 Taunt 587

Buck v. Buck (1808) 1 Camp 547, 170 ER 1052

Burt v. British Nation Life Assce. Assn. (1859) 4 De G & J 158

Canada Safeway Ltd. v. Thompson [1951] 3 DLR 295

Cannon v. Trask (1875) L R 20 Eq 669

Chan v. Zacharia (1984) 154 CLR 178

Charitable Corporation v. Sutton (1742) 2 Atk 400

Child v. Hudson's Bay Company (1723) 2 Peere Williams 207

Cholmondeley v. Clinton (1820) 37 ER 527, 2 Jac & W 1

Coleman Taymar Ltd v. Oakes [2001] 2 BCLC 749, 769.

Cook v. Deeks [1916] 1 AC 554, [1916-17] All ER Rep 285

Craven Textiles engineers Ltd v. Batley Football Club Limited [2001] BCC 679

DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v. Koshy (Account of Profits: Limitations) [2003] EWCA Civ. 1048, [2004] 1 BCLC 131

Derry v. Peek (1889) 14 App Cas 337

Docker v. Somes (1834) 2 My & K 655, 3 LJ Ch 200, 39 ER 1095

Don King Productions Inc v. Warren [2000] 1 BCLC 607

Duke of Beaufort v. Berty (1721) 24 ER 579, 1 P Wms 703

Duomatic Ltd, Re [1969] 2 Ch 365

Duvergier v. Fellowes (1828) 5 Bingham 248

Ellison v. Bignold (1821) 2 Jacob & Walker 503

Ex parte James (1803) 8 Ves. 337

Ex parte Lacey (1802) 6 Ves. 625, 31 ER 1228, 34 ER 955

Ferguson v. Wilson (1866-67) LR 2 Ch App 77

FHR European Ventures LLP and others v. Mankarious and others [2013] EWCA Civ 17

FHR European Ventures LLP v. Cedar Capital Partners LLC [2014] UKSC 45

Foss v. Harbottle (1843) 2 Hare 461

Framlington Group plc & Anor v. Anderson & Ors. [1995] BCC 611

Fraser v. Whalley (1864) 2 H & M 10

Furs Ltd v. Tomkies (1936) 54 CLR 583

Gabtside v. Whalley [1861-73] All ER Rep Ext 1456

Garrad v. Hardey (1843) 5 Man & Gr 471

Gartside v. Isherwood, and Others (1783) 1 Brown's Chancery Cases 558

George James Marquis of Cholmondeley, and The Honourable Ann Seymour Damer v. Robert Cotton St. John Lord Clinton, and Others (1821) IV Bligh 1, 4 ER 721

Gleadow v. Hull Glass Co. (1849) 19 L J Ch 44

Gluckstein v. Barnes [1900] A.C. 240

Grant v. United Kingdom Switchback Railways Company (1888) 40 Ch D 135

Great Eastern Rly Co v. Turner (1872) LR 8 Ch 149

Greenhalgh v. Arderne Cinemas Ltd. [1951] Ch 286

Grimes v. Harrison (1859) 26 Beav 435

Grimwade v. Mutual Society (1884) 52 L.T. 409

Guinness Plc v. Saunders [1990] 2 AC 663

Harrison v. Heathorn (1843) 6 Man & Gr 81

Hirsche v. Sims [1894] AC 654

Seligman v. Prince & Co. [1895] 2 Ch 617

Hollis v. Childe, Chancery, June 25, 1756, the National Archives, Chancery Equity Suits 1558-1875, 12/807/22.

Hospital Products Ltd v. United States Surgical Corporation (1984) 156 CLR

Hurstanger Ltd v. Wilson and another [2007] EWCA Civ 299, [2007] All ER (D) 66, [2007] 1 WLR 2351

Hutton v. West Cork Ry. (1883) 23 Ch D 654

Imageview Management Ltd v. Jack [2009] 1 BCLC 724, [2009] EWCA Civ. 63

In Plus Group Ltd v. Pyke [2002] EWCA Civ 370

In Re Cardiff Savings Bank, Marquis of Bute's Case (1892) 2 Ch D 100

In Re Forest Dean Coal Mining Company (1878) 10 Ch D 450

Industrial Development Consultants Ltd v. Cooley [1972] 2 All ER 162, [1972] 1 WLR 443

Island Export Finance Ltd v. Umunna and another [1986] BCLC 460

Item Software (UK) Ltd v. Fassihi [2004] EWCA Civ 1244, (2004) BCC 994

Josephs v. Pebrer (1825) 3 B & C 639

Keech v. Sandford (1726) Sel Cas Ch 61

Kinder v. Taylor 3 Law Journal Reports 68

King v. Webb (1811) 14 East 406

Leeds Estate Building & Investment Co. v. Shepherd (1887) 36 Ch D 787

Logicrose Ltd v. Southend United Football Club Ltd [1988] 1 WLR 1256

London & Mashonaland Exploration Co. v. New Mashonaland Exploration Co. [1891] WN 165

Maunsell v. Midland Great Western (Ireland) Railway Company (1863) 71 ER 58

Mayor of Colchester v. Lowten (1813) 1 V & B 226

Movitex v. Bulfield (1986) 2 B.C.C. 99403, [1988] BCLC 104

Neptune (Vehicle Washing Equipment) Ltd v. Fitzgerald [1996] Ch 274

Novoship (UK) Ltd and others v. Mikhaylyuk and others [2014] EWCA Civ. 908

Oliver v. Court (1820) 8 Price 127, 146 ER 1152

Overend and Gurney Co. v. Gibb (1872) LR 5 HL 480

Overend Gurney & Co. v. Gurney (1869) L R 4 Ch App 701

Parker v. McKenna (1874) L R 10 Ch App 96

Parks of Hamilton (Holdings) Ltd v. Campbell [2014] CSIH 36

Percival v. Wright [1902] 2 Ch 421

Phipps v. Boardman [1967] 2 AC 46

Pratt v. Hutchinson (1812) 15 East 511

Punt v. Symons & Co. [1903] 2 Ch 506

Queen v. Arnaud (1846) 9 QB 806

R v. Cawood 2 Ld Raymond 1361, 92 ER 386

R v. Dodd (1808) 9 East 516, 103 ER 670

R v. Stratton (1809) 1 Camp. 549n, 170 ER 1053n

R. v. Watson (1788) 2 Term Rep 199

Re Anglo-French Co-operative Soc, ex p. Pelly (1882) 21 Ch D 492

Re Cameroon's Coalbrook Railway Co. (1854) 18 Beav 339

Re Cape Breton Co. (1881) 19 Ch D 77

Re City Equitable Fire Insurance Co. (1925) Ch 407 (CA)

Re Crenver & Wheal Abraham United Mining Co., ex parte Wilson (1872) L R 8 Ch App 45

Re Duckwari Plc. (No 2) [1998] 2 BCLC 313

Re Englefield Colliery Co. (1878) 8 Ch D 338

Re Exchange Banking Co. (Flitcroft's case) (1882) 21 Ch D 519

Re Faure Electric Accumulator Co. (1888) 40 Ch D 141

Re Forest Dean Coal Mining Company (1878) 10 Ch D 450

Re Kingston Cotton Mill (No. 2) [1895] 1 Ch 331

Re Land allotment Co. [1894] 1 Ch 616 (CA), [1891-94] All ER Rep 1032

Re Lo-Line Electric Motors Ltd [1988] Ch 477

Re Oxford Benefit Building and Investment Society (1886) 35 Ch D 502

Re Railway & General Light Improvement Co., Marzetti's Case (1880) 42 LT 206

Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v. Sharpe [1892] 1 Ch 154

Re Smith and Fawcett Ltd [1942] Ch 304

Reading v. The King [1949] 2 K B 232

Regal (Hastings) Ltd v. Gulliver [1942] 1 ALL ER 378, [1967] 2 AC 134

Regentcrest Ltd v. Cohen [2001] 1 BCLC 80

Rex v. Kyslant (Lord) [1932] 1 KB 442

Rex. v. Stratton (1808) 1 Camp 549

Salomon v. Laing (1850) 12 Beav 339

Salomon v. Salomon & Co Ltd [1897] AC 22, [1896] 11 WLUK 76, [1896] UKHL 1, [1897] AC 22

Sir Alexander Murray of Stanhope v. York Buildings Company (1733) Mor 3780

Sir Theophilus Metcalf, Bart. v. Bruin (1810) 12 East 400

Smith v. Anderson (1880) 15 Ch D 247

Stent v. Bailis (1724), 2 P Wms 217

The Case of Sutton's Hospital (1612) 10 Coke Reports 1a

The Case of the Ipswich Tailors (1615), 11 Coke, Rep. 53

The Case of the York-Buildings Company (1740) 26 ER 432

The Overend & Gurney Company v. Thomas Jones Gibb and John Darby Gibb (1871-72) L R 5 HL 480

Towers v. Premier Waste Management Ltd [2011] EWCA Civ 923, [2012] BCC 72

Walburn v. Ingilby (1833) Myline & K 61

Wallworth v. Holt (1841) 4 My & Cr 619, 10 LJ Ch 138

Whelpale v. Cookson (1747) 1 Ves. Sen. 9

Whichcote v. Lawrence (1798) 30 ER 1248, 3 Ves. 740

Woodhouse v. Meredith (1820) 1 Jac & W 204

York and North Midland Railway Company v. Hudson (1853) 16 Beav. 485

AUSTRALIA

Woolworths Ltd v. Kelly (1991) 22 NSWLR 189

CANADA

Peso-Silver Mines Ltd v. Cropper (1965) 56 DLR, (2d) 117 (BCCA.)

FRANCE

Décision de la Commission des sanctions du 16 mai 2014 à l'égard de MM. Joseph Raad, Charles Rosier, Abraham Benhamron et Thomas Xander (FR)

UNITED STATES OF AMERICA

Bank of the U.S. v. Dandridge 25 U.S. (12 Wheat.) 64 (1827) (US)

Bank of the United States v. Deveaux (1809) 9 U.S. (5 Cranch) 61

Button v. Hoffman (1884) 61 Wis. 20

CDX Liquidating Trust v. Venrock Assocs., et al. 2011 U.S. App. LEXIS 6390 (7th Cir. March 29, 2011)

Dartmouth College v. Woodward 17 U.S. (4 Wheat.) 518 (1819). 17 U.S. (4 Wheat.) 518 (1819) (US)

Re Equitable Office Bldg. Corp (1949), D.C.N.Y., 83 F. Supp. 531 (US)

San Mateo v. Southern Pac. R.R. Co. 116 U.S. 138 (1882) 10, 12

Santa Clara County v. Southern Pacific Railroad Co (1886) 118 U.S. 394

Warren v. Pfeil 346 Ill. 344, 178 N.E. 894

Woods v. City National Bank and Trust Co. of Chicago (1941), 61 S. Ct. 493, 312 U.S. 262, 85 L. Ed. 820 (US)

SECONDARY SOURCES

UNITED KINGDOM PARLIAMENTARY DEBATES AND REPORTS

House of Commons Journal Volume 11: 26 October 1696. In *Journal of the House of Commons: Volume 11, 1693-1697*. London: His Majesty's Stationery Office, 1803. 568, 595. British History Online. Retrieved from http://www.british-history.ac.uk/commons-jrnl/vol11/pp568-569

House of Commons Journal Volume 19: 31 May 1720. In *Journal of the House of Commons: Volume 19, 1719-1721*. London: His Majesty's Stationery Office, 351. British History Online

House of Commons Journal Volume 20: 21 February 1723. In *Journal of the House of Commons: Volume 20, 1723-1724*. London: Cobbet, Parliamentary History, 380

House of Lords Journal, Volume 23: May 1728, 21-30. In *Journal of the House of Lords Volume 23, 1727-1731* (pp. 273-290). London: Her Majesty's Stationery Office. British History Online. Retrieved from http://www.british-history.ac.uk/lords-jrnl/vol23/pp273-290

House of Commons. (1733). *Report from the Committee to whom the Petition of the Proprietors of the Stock of the Governor and Company for Raising the Thames Water in York Buildings was referred.* House of Commons Papers, I, 581, 655

House of Commons. (1733). *Report from the Committee of the House of Commons on the Charitable Corporation for the relief of the Industrious Poor*. House of Commons Papers, I, 537

House of Commons (1802). *Journal of House of Commons. Volume 29, 1764*. London, British History Online. Retrieved from http://www.british-history.ac.uk/commons-jrnl/vol1

House of Commons. (1803*). Further report from the committee to whom the petition of the company York buildings was referred, referred by Mr Vyner, Reports from committees of the House of Commons: which have been printed by order of the House, and are not inserted in the journals; reprinted by order of the House, Volume 1.* House of Commons, London.

Hansard. (1824, 10 May). *House of Commons Debate*, Volume 11, cc609

Hansard. (1824, 25 May). *House of Lords Debate*, Volume 11, cc856-7

Hansard. (1824, 28 May). *House of Commons Debate*, Volume 11, cc920-33

Hansard. (1824, 15 June). *House of Lords Debate*, Volume 11, cc1339

Hansard. (1824, 18 June). *House of Lords Debate*, Volume 11, cc1456-7

Hansard. (1824, 18 June). *House of Lords Debate*, Volume 11, cc1456-7

Hansard. (1824, 21 May). *House of Commons Debate*, Volume 11, cc791-792

Hansard. (1825, 3 February). *House of Lords Debate*, Volume 12, cc31

Hansard. (1825, 7 February). *House of Lords Debate*, Volume 12, cc127-8

Hansard. (1825, 16 March). *House of Commons Debate*, Volume 12, cc1060, cc1066-69

Hansard. (1825, 16 March). *House of Commons Debate*, Volume 12, cc1063-1064

Hansard. (1825, 25 March). *House of Lords Debate*, Volume 12, cc1195

Hansard. (1825, 29 March). *House of Commons Debate*, Volume 12, cc1279-1280

Hansard. (1825, 02 June). *House of Commons Debate*, Volume 13, cc1018-23

Hansard. (1826, 10 February). *House of Commons Debate*, Volume 14, cc165, 209, 243

Austin, J. (1826). *Joint stock companies. Parliamentary History and Review: containing reports of the proceedings of the two houses of parliament during the session of 1825: --6 Geo. IV, with critical remarks on the principal measures of the session.* London: W. Wilson

House of Lords Journal Volume 64: 3 July 1832. *In Journal of the House of Lords: Volume 64, 1831-1832*. London, His Majesty's Stationery Office. British History Online. Retrieved from http://www.british-history.ac.uk/lords-jrnl/vol64/pp346-350

Hansard. (1834, 18 July). *House of Commons Debate*, Volume 25, cc192-4

Hansard. (1836, 06 May). *House of Commons Debate*, Volume 33, cc688-692

Hansard. (1836, 19 April). *House of Commons Debate*, Volume 32, cc1187-1189

House of Commons. (1844). *First Report of the Select Committee on Joint Stock Companies together with the minutes of evidence (taken in 1841 and 1843)*. *(appendix and index).* London, H.M. Stationery Office

Hansard. (1844, 02 April). *House of Commons Debate*, Volume 73, cc1755

Hansard. (1844, 02 April). *House of Commons Debate*, Volume 73, cc1754-8

Hansard. (1844, 03 July). *House of Commons Debate*, Volume 76 cc277-282

Slaney, R. (1850). *The Report from the Select Committee on Investments for the Savings of the Middle and Working Classes Together With the Proceedings of the Committee, Minutes of Evidence, and Index*. London, House of Commons

Hansard. (1850, 16 April). *House of Commons Debate*, Volume 110, cc420-4

House of Commons. (1851). *Report from the select Committee on the Law of Partnership: together with the proceedings of the Committee, minutes of evidence, appendix and index*. London, HardPress

Hansard. (1852, 17 February). *House of Commons Debate*, Volume 119, cc668

Hansard. (1852, 17 February). *House of Commons Debate*, Volume 119, cc679

Great Britain. (1854). *First Report of the Royal Commission on the Mercantile Laws and Amendments to the Law of Partnership*. (MLC). British Parliamentary Papers, Volume XXVII, 170

Hansard. (1855, 29 June). *House of Commons Debate*, Volume 139, cc310-358

Hansard. (1856, 01 February). *House of Commons Debate*, Volume 140, cc110-130

Hansard. (1856, 01 February). *House of Commons Debate*, Volume 140, cc130-134

Hansard. (1867, 05 March). *House of Commons Debate*, Volume 185, cc1370-87

House of Commons. (1867). *Report from the Select Committee on Limited Liability Acts; together with the proceedings of the committee, minutes of evidence, appendix, and index*. London, H.M. Stationery Office

Great Britain, Parliamentary Papers on Companies Act. (1877). *The Select Committee on the Operations of the Companies Acts, 1862 and 1867.* Parliamentary Papers 1877 (365) VIII 419. London, His Majesty's Stationery Office

Hansard. (1878, 10 May). *House of Commons Debate*, Volume 239, cc1705-12

Redington, J. (1889). (ed.). *Calendar of Treasury Papers Volume 6, 1720-1728, Volume 259: April 6-August 23, 1727*. London: Her Majesty's Stationery Office, British History Online. Retrieved from http://www.british-history.ac.uk/cal-treasury-papers/vol6/pp449-465

Hansard. (1890, 02 July). *House of Commons Debate*, Volume 346, cc 598-600

Hansard. (1890, 15 July). *House of Lords Debate*, Volume 346, cc1699

Hansard. (1890, 15 July). *House of Lords Debate*, Volume 346, cc1702-5

Great Britain, Parliamentary Papers (1895).*Dept. Committee to inquire into Amendments in Acts relating to Joint Stock Companies incorporated with Limited Liability under Companies Acts: Report and Appendix*. London, His Majesty's Stationery Office

Great Britain, Parliament. (1895). *Companies Acts, 1862 to 1890 (amendment). Report of the departmental committee appointed by the Board of Trade to inquire what amendments are necessary in the acts relating to joint stock companies incorporated with limited liability under the Companies Acts, 1862 to 1890. With appendix.* London, His Majesty's Stationery Office

Great Britain, Board of Trade. (1905). *Company Law Amendment Committee. Report of the Company Law Amendment Committee*. London, His Majesty's Stationery Office

Hansard. (1913, 23 April). *House of Commons Debate*, Volume 52, cc388-390

Hansard. (1913, 23 April). *House of Commons Debate*, Volume 52, cc387-90

Great Britain, Board of Trade. (1918). *Report Of the Committee upon the Amendment of the Law under the Companies Acts, 1908 to 1917, 1918*. London, His Majesty's Stationery Office

Hansard. (1924, 1 October). *House of Commons Debate*, Volume177, cc146

Great Britain. Board of Trade. *Company Law Amendment Committee. (1926). Company Law Amendment Committee, 1925-26: Report presented to Parliament by command of His Majesty.* London: H. M. Stationery Office

Hansard. (1927, 28 June). *House of Lords Debate*, Volume 67, cc1072-4

Hansard. (1931, 7 July). *House of Commons Debate*, Volume 254, cc1897

Hansard. (1933, 15 March). *House of Commons Debate*, Volume 275, cc2106

Anderson Committee, Great Britain, Board of Trade (1936). *Report of the departmental committee appointed by the Board of Trade.* London, His Majesty's Stationery Office

Hansard. (1938, 21 November). *House of Commons Debate*, Volume 341, cc1372-1403

Great Britain, Board of Trade. *Report of the Committee on Company Law Amendment, 1944-5*. London, His Majesty's Stationery Office

Hansard. (1946, 17 December). *House of Lords Debate*, Volume 144, cc1000, 1004, 1006

Hansard. (1946, 17 December). House of Lords Debate, Volume 144, cc1012-3, 1067

Hansard. (1946, 17 December). *House of Lords Debate*, Volume 144, cc1017-8, 1032-3, 1042-3

Hansard. (1947, 6 June). *House of Commons Debate*, Volume 438, cc591, 599-602

Hansard. (1966, 07 July). *House of Lords Debate*, Volume 275, cc1230

Hansard. (1966, 21 February). *House of Commons Debate*, Volume 725, cc35-7, 41-42

Hansard. (1974, 01 April). *House of Commons Debate*, Volume 871, cc923-43

Hansard. (1976, 04 August). *House of Commons Debate*, Volume 916, cc2023-71

Hansard. (1978, 20 November). *House of Commons Debate*, Volume 958, cc929-48

Hansard. (1979, 25 June). *House of Lords Debate*, Volume 400, cc1269-70

Hansard. (1978, 20 November). *House of Commons Debate*, Volume 958, cc940-1

Hansard. (1979, 15 March). *House of Commons Debate*, Volume 964, cc933-54

Hansard. (1979, 25 June). *House of Lords Debate*, Volume 400, cc1269-70

Hansard. (1980, 26 February). *House of Commons Debate*, Volume 979, cc1158-61

Hansard. (1980, 27 March). *House of Lords Debate*, Volume 407, cc1047

Great Britain, Parliament (1982). *Report of the Review Committee on Insolvency Law and Practice*. Cmnd 8558. London, H.M.S.O

Hansard. (1984, 08 November). *House of Lords Debate*, Volume 457, cc141-206

Hansard. (1985, 21 March). *House of Lords Debate*, Volume 461, cc713

Hansard. (1985, 23 January). *House of Commons Debate*, Volume 71, cc989-90

Hansard. (1985, 15 January). *House of Lords Debate*, Volume 458, cc627

Hansard. (1985, 15 January). *House of Lords Debate*, Volume 458, cc881, cc884

Hansard. (1985, 15 January). *House of Lords Debate*, Volume 458, cc895

Hansard. (1985, 29 January). House of Lords Debate, Volume 459, cc602-603, 607

Hansard. (1985, 21 March). *House of Lords Debate*, Volume 461, cc713

Hansard. (1986, 20 November). *House of Commons Debate*, 20 Volume 105, cc279

Hansard. (1986, 20 November). *House of Commons Debate*, Volume 105, cc279

Hansard. (1986, 10 July). *House of Commons Debate*, Volume 101, cc447

Hansard. (1998, 4 March). *House of Commons Debate*, Volume 307, cc636-7

House of Commons, Business, Energy and Industrial Strategy Committee (2017). *Corporate Governance, Fourth Report of Session 2016–17*. London. Retrieved from https://publications.parliament.uk/pa/cm201617/cmselect/cmbeis/702/702.pdf

GOVERNMENTAL PAPERS

Attorney General's Report. (1728, 24 February*). Parliamentary Archives*. HL/PO/JO/10/6/409, fo. 6

Great Britain, Board of Trade (1962). *Report of the Company Law Committee*. Cmnd. 1749. London, Her Majesty's Stationery Office

(UK) *Colonial Office Papers*. 388/23/R.33

(UK) *Colonial Office Papers*. 388/25/39

Heyman. A., & Slimmings, W. [for the] Department of Trade. (1976). *Lonrho Limited: investigation under Section 165 (b) of the Companies Act 1948: Report.* London, H.M.S.O.

Great Britain, Department Of Trade. (1977). *The Conduct of Company Directors*. Cmnd. 7037. Retrieved from https://discovery.nationalarchives.gov.uk/details/r/C10935660

Kidwell, R. I., & Samwell, S. D. [for the] Department of Trade. (1979). *Peachey Property Corporation Limited: investigation under section 165 (b) of the Companies Act 1948: Report.* London: H.M.S.O.

Great Britain. DTI. (1998). *Modern Company Law for a competitive Economy.* Retrieved from https://webarchive.nationalarchives.gov.uk/20061209115810/

Great Britain, DTI. (1999). *Modern company law for a competitive economy: the strategic framework.* URN 99/654. London. Retrieved from http://www.dti.gov.uk/bbf/co-law-reform-bill/clr-review/page22794.html

Great Britain, DTI. (1999). *Modern Company Law for a Competitive Economy: Company General Meetings and shareholder Communication*. URN 99/1144

Great Britain, DTI. (1999). *Modern Company Law for a Competitive Economy: Company Formation and Capital Maintenance*. URN 99/1145

Great Britain, DTI. (1999*). Modern Company Law for a Competitive Economy: Reforming the Law Concerning Overseas Companies*. URN 99/1146

Great Britain, DTI (2000). *Modern company law for a competitive economy: completing the structure.* URN, 00/1335

Great Britain, DTI. (2000). *Modern company law for a competitive economy: developing the framework.* URN 00/656

Great Britain, DTI. (2001). *Company Law Review Steering Group, Modern Company Law: For a competitive economy- Final Report, Volume I*. URN 01/942

Great Britain, DTI (2002). *Modernising Company Law, Command Paper*. CM. 5553-1

Great Britain, House of Commons Trade and Industry Committee (2003). *The White Paper on Modernising Company Law, Sixth Report of session 2002-3*. London, London: The Stationery Office Limited

Great Britain, DTI. (2005). *Company Law Reform*. Cm. 6456

Cable, V. (2013, 15 July). *Reform conference on "Responsible capitalism, Trust, why it matters".* Department for Business, Innovation & Skills, UK Export Finance. Retrieved from https://www.gov.uk/government/speeches/reform-conference-on-responsible-capitalism

May, T. (2016, 11 July). Speech: We can make a Britain that works for all. Retrieved from http://press.conservatives.com/post/147947450370/we-can-make-britain-a-country-that-works-for

Great Britain, The Department of Business, Energy and Industrial Strategy. (2016). *Corporate Governance Reform: Green Paper.* London. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf

Great Britain, The Department of Business, Energy and Industrial Strategy. (2017). *Corporate Governance Reform: The Government response to the green paper consultation.* London. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/640470/corporate-governance-reform-government-response.pdf

Great Britain, NAO. (2018). *Report by the Comptroller and Auditor General. Investigation into the government's handling of the collapse of Carillion. London, Cabinet Office.* Retrieved from https://www.nao.org.uk/wp-content/uploads/2018/06/Investigation-into-the-governments-handling-of-the-collapse-of-Carillion-Summary.pdf

UNITED KINGDOM GOVERNMENT (DEPARTMENTAL) REPORTS

UK Department for Business Innovation & Skills (BIS). (2009). *Report on the Affairs of Phoenix Venture Holdings Limited, MG Rover Group Limited and 33 Other Companies Volume I.* Retrieved from https://webarchive.nationalarchives.gov.uk/+/http:/www.bis.gov.uk/files/file52782.pdf

Department for Business, Innovation & Skills. (2011). *MG Rover's Phoenix Four disqualified as directors.* Retrieved from https://www.gov.uk/government/news/mg-rover-s-phoenix-four-disqualified-as-directors

Department of Business Innovation & Skills. (2010). *Corporate Governance*. Retrieved from http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/whatwedo/businesslaw/corp-governance/page15267.html

LAW COMMISSIONS AND SOCIETY PAPERS

The Law Commission of England and Wales & The Scottish Law Commission. (1997). *Shareholder Remedies Report*. LC. 246

The Law Commission of England and Wales & the Scottish Law Commission. (1998). *Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties*. Consultation Paper No. 153. Retrieved from https://www.lawcom.gov.uk/project/company-directors-regulating-conflicts-of-interest-and-formulating-a-statement-of-duties/

The Law Society, Company Law Committee (1998). *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties*. No.366. London, Law Society

The Law Commission of England and Wales & the Scottish Law Commission (1999). *Company Directors: regulating conflicts of interests and formulating a statement of duties*. LC. 261. Retrieved from https://www.lawcom.gov.uk/project/company-directors-regulating-conflicts-of-interest-and-formulating-a-statement-of-duties/

BOOKS

Aristotle, (1934). *Nicomachean Ethics.* (H. Rackham, trans.). (Vol. 19). Cambridge, MA, Harvard University Press

Arrow, K. (1969). *The organization of Economic Activity: issues pertinent to the choice of market and non-market allocation.* The U.S. Joint Economic Committee. Washington, DC: US Government Printing Office

Arrow, K. J., & Maskin, E. (2012). *Social Choice and Individual Values.* New York, Yale University Press

Bahar, R., & Thévenoz, L. (2007). *Conflict of Interest: Corporate Governance & Financial Markets.* Alphen aan den Rijn: Kluwer International

Baily, F. (1810). *An Account of the several Life-Assurance Companies, established in London; with a comparative view of their respective merits and advantages*. London

Bainbridge, S. (2008). *The New Corporate Governance in Theory and Practice*. New York. Oxford University Press

Balen, M. (2008). *A very English deceit: the secret history of the South Sea Bubble and the first great financial scandal.* London: Fourth Estate

Barker, E. (1885). Introduction. In Aristotle. *The Politics of Aristotle*. (B. Jowett, trans.). New York, OUP

Barnard, C. (1938). *The Functions of the Executive*. Cambridge, MA: Harvard University Press

Barney, J. & Ouchi W. (1986*). Organizational Economics.* San Francisco, Jossey-Bass

Barry, B. (1965*). Political Argument.* New York: Humanities Press

Baston, T. (1758). *Thoughts on Trade, and a Publick Spirit. Consider'd Under the Following Heads, Viz. I. Companies in Trade. II. Stock-jobbers. III. Projectors. IV. Corruptions in the Law and Public Offices. V. Of a Public Spirit. Humbly Dedicated to All Lovers of Their Country.* (2nd ed.). London

Bebchuk, L. (1990). (ed.) *Corporate Law and Economic Analysis*. Cambridge, Cambridge University Press

Becker, G. S. (1978). *The Economic Approach to Human Behavior*. Chicago, Chicago University Press

Bentham, J. (1843). *The Works of Jeremy Bentham*, *Vol. 8.* Published under the Superintendence of his Executor, John Bowring (ed.) Edinburgh, William Tait

Bentham, J. (1948). *An introduction to the principles of morals and legislation.* New York, Hafner

Bentley, A. (1949). *The Process of Government*. Evanston, Principia Press

Berle, A., & Means, G. (1932). *The Modern Corporation and Private Property*. USA, Harcourt, Brace & World, Inc

Blackstone, W. (1753). *Commentaries on the Laws of England Volume I*. A Project of Liberty Fund, Inc.

Blackstone, W. (1803). *Blackstone's Commentaries: with notes of Reference, to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia*. Philadelphia, PA: William Young Birch & Abraham Small

Blanpain, R., Bromwich, W., Rymkevich, O., & Senatori, I., (eds.) (2011). *Rethinking Corporate Governance: From Shareholder Value To Stakeholder Value.* Alphen aan den Rijn, Kluwer International

Blaug, M. (1980). *The Methodology of Economics: or, How Economists Explain*. Cambridge, CUP

Blumberg, P. (1993). *The Multinational Challenge to Corporation Law: The search for a new corporate personality.* New York, OUP

Boatright, J. R. (2007). Conflict of Interest. In R. Kolb (ed.). *Encyclopaedia of Business Ethics and Society*. Thousand Oaks, Calif., Sage

Bottomley, S. (2007). *The Constitutional Corporation, Rethinking Corporate Governance*. Aldershot, Hampshire, Ashgate Publishing Limited

Boyle, A. J. (2011). *Minority Shareholders' Remedies*. Cambridge, CUP

Bozeman, B. (2007). *Public Values and Public Interest: Counterbalancing Economic Individualism.* Washington, Georgetown University Press

Brummer, J. (1991). *Corporate Responsibility and Legitimacy: An interdisciplinary Analysis*. Westport, Connecticut, Greenwood Press

Buchanan, J., & Tullock, G. (1965). *The Calculus of consent.* Ann Arbor, University of Michigan Press

Cheffins, B. R. (1997). *Company Law: Theory, Structure and Operation*. Oxford, OUP

Child, J. (1693). *A new discourse of trade wherein is recommended several weighty points relating to companies of merchants : the act of navigation, naturalization of strangers, and our woollen manufactures, the balance of trade, and the nature of plantations, and their consequences in relation to the kingdom, are seriously discussed and some proposals for erecting a court of merchants for determining controversies, relating to maritime affairs, and for a law for transferrance of bills of depts., are humbly offered, Small treatise against usury.* London, John Everingham

Clark, R. (1986). *Corporate Law*. US, Little, Brown

Clarke, J., Gewirtz, S., & McLaughlin, E. (eds.) (2000). *New managerialism, new welfare?* London, Thousand Oaks, Calif: Open University in association with SAGE Publications

Clay, W. (1825). *Remarks on joint stock companies by an old merchant*. London, John Murray

Coase, R. (1988). *The Firm, the Market, and the Law*. Chicago, University of Chicago Press

Commons, J. (1932). *Institutional Economics*. Madison, University of Wisconsin Press

Conaglen, M. (2010). *Fiduciary loyalty: protecting the due performance of non-fiduciary duties*. Oxford, Hart Publishing

Cooke, C. A. (1950). *Corporation, trust and company: an essay in legal history.* Manchester, Manchester University Press

Corbet, T. (1841). *An inquiry into the Causes and Modes of the Wealth of Individuals, or Principles of Trade and speculation explained.* London, Smith, Elder & Co.

Cottrell, P. L. (1983). *Industrial Finance 1830–1914: The Finance and Organization of English Manufacturing Industry.* London, Methuen

Craig, P. P. (2012). *Administrative Law.* (7th ed). London, Sweet & Maxwell

Crimmins, J. E. (2015). Jeremy Bentham. In Edward N. Zalta (ed.). *The Stanford Encyclopaedia of Philosophy*. Retrieved from: https://plato.stanford.edu/archives/spr2019/entries/bentham/

Dahl, R., & Lindblom, C. (1963*). Politics, Economics, and Welfare*. New York, Harper Torchbook

Dale, R. (2004). *The First Crash, Lessons from the South Sea Bubble.* New Jersey, Princeton University Press

Davies, P. & Gower, L. C. B. (1997*). Gower's Principles of modern company law*. (6th ed.). London, Sweet and Maxwell

Davies, P. (2012). *Gower and Davies: Principles of Modern Company Law* (8th ed.). London, Thomson, Sweet & Maxwell

Davis, M. & Johnston, J. (2009). Conflict of Interest in Four Professions: A Comparative Analysis. In B Lo & M. J. Field (eds.) *Conflict of Interest in Medical Research, Education and Practice, Institute of Medicine*. Washington, National Academies Press

Day, H. (1808). *A defence of joint stock companies: being an attempt to shew their legality, expediency, and public benefit*. London, Longman, Hurst, Rees, Orme, and Brown

Day, M., Frase, R., & Helm R. (Eds.). (2012*). A Practitioner's Guide to Conflicts of Interest in the Financial Services Industry.* London, Sweet and Maxwell

Deakin, S., & Hughes, A. (eds.). (1997). *Enterprise and Community, New Directions in Corporate Governance.* Oxford, Wiley-Blackwell

Dicey, A. V. (2008). *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century.* R. V. Wetering (ed.). Indianapolis: Liberty Fund

Dignam, A., & Galanis, M. (2009). *The Globalisation of corporate governance.* London, Ashgate

Dine, J. (1995). *Criminal Law in the Company Context*. University of Michigan, Dartmouth Publishing House.

Dine, J. (ed.) (2000). *The Governance of Corporate Groups, Cambridge Studies in Corporate Law*. Cambridge, CUP

Doeringer, P., & Piore, M. (1971). *Internal Labour Markets and Manpower Analysis*. Boston, D.C. Heath and Co

Donaldson, T., & Dunfee, T.W. (1999). *Ties that Bind: A Social Contracts Approach to Business Ethics.* Boston Massachusetts, Harvard Business School Press.

Du Plessis, J.J., Großfeld, B., Luttermann, C., Saenger, I., Sandrock, O., Casper, M. (2012). *German Corporate Governance in International and European Context.* Springer-Verlag Berlin Heidelberg

Dubois, A., B. (1938). *The English Business Company after the Bubble Act, 1720–1800*. New York, Commonwealth Fund

Dworkin, R. (1977). *Taking rights seriously*. Cambridge, Mass. Harvard University Press

Easterbrook, F. & Fischel, D. (1991). *The Economic Structure of Corporate Law.* Cambridge, MA. Harvard University Press

Eells, R. (1962). *The Government of Corporations*. Free Press of Glencoe

Erleigh, K. C. (1933). *The South Sea Bubble.* London, Peter Davies

Etzioni, A. (1993). *The Spirit of Community: The Reinvention of American Society*. New York: Simon & Schuster

Feinberg, J. (1984*). The Moral Limits of the Criminal Law: Harm to others*. Oxford, OUP

Ferrar, J. (2005). *Corporate Governance, Theories, Principles, and Practice.* (2nd ed.). Oxford, OUP

Finn, P. D. (1977). *Fiduciary Obligations.* Sydney, Law book Company

Fitzgibbons, A. (1995). *Adam Smith's system of liberty, wealth, and virtue: the moral and political foundations of the wealth of nations*. Oxford, Clarendon Press

Flathman, R. E. (1966). *The public interest: An essay concerning the normative discourse of politics*. New York, John Wiley

Frase, D., Helm, R., & Day, M. (2012). *A Practitioner's Guide to Conflicts of Interest in the Financial Services Industry.* London, Sweet & Maxwell

French, P. (1984). *Collective and Corporate Responsibility.* New York: Columbia University Press

Freund, E. (1897). *The legal nature of corporations*. Chicago, University of Chicago Press

Friedman, M. (1953). *Essays in Positive Economics.* Chicago, University of Chicago Press

Friedman, M. (1962). *Capitalism and Freedom.* Chicago, University of Chicago Press

Gauthier, D. (1986). *Morals by Agreement.* Oxford, Clarendon

Gbadegesin, S. (1996). *African Philosophy: Traditional Yoruba Philosophy and Contemporary African Realities*. (2nd ed.). New York, Peter Lang Inc., International Academic Publishers.

George, J. (1825). *A view of the existing law, affecting unincorporated joint stock companies*. London, S. Sweet

Gierke, O. (1881*). III Deutsches Genossenschaftsrecht*. (English translation by Maitland, 1913)

Gierke, O. (F.W. Maitland ed. 1900). *Political Theories of the Middle Age.* Cambridge, CUP

Gower, L. C. B. (1969). *The Principles of Modern Company Law.* (3rd ed.) London, Stevens.

Greenfield, K. (2006). *The failure of corporate law: fundamental flaws and progressive possibilities*. Chicago, University of Chicago Press

Gyekye, K. (1997). *Tradition and Modernity: Philosophical Reflections on the African Experience.* New York, Oxford University Press

Hacker, A. (ed.). (1965). *The Corporation Take-over*. DoubleDay Anchor

Hadden, T. (1997). *Company law and capitalism*. London, Weidenfeld & Nicolson.

Hannigan, B. (2009). *Company Law.* (2nd ed.). Oxford, OUP

Hannigan, B. (2015). *Company Law.* (4th ed.). Oxford, OUP

Hansmann, H. (1996). *The Ownership of Enterprise.* Cambridge, MA: Harvard University Press

Harris, R. (2000). *Industrialising English Trade*. Tel- Aviv University, CUP

Hausman D. M., & McPherson, M. S. (1996). *Economic Analysis and Moral Philosophy*. Cambridge, CUP

Hawes, J. (1854). *Observations on Unlimited and Limited Liability; and suggestions for the improvement of the law of partnership*. London, Saville

Hayek, F. A. (1944). *The Road to serfdom.* London, George Routledge and Sons

Hayek, F. A. (1960). *The Constitution of liberty.* Chicago, University of Chicago Press

Hegel, G. (1942). *Philosophy of Right.* (T.M. Knox, trans.). Oxford, Clarendon Press

Held, V. (1970). *The Public Interest and Individual Interests.* New York, Basic Books, INC. Publishers

Held, V. (1984). *Rights and Goods: Justifying Social Action.* New York, The Free Press

Herring, P. (1965). *The Politics of democracy.* New York, Norton

Hobbes, T. (1947). *Leviathan.* (Everyman's edition). New York, E.P. Dutton

Hood, C. (1986). *Administrative Analysis: an introduction to rules, enforcement and organizations*. New York, St. Martin's Press

Hooks, B. (2000*). Feminist Theory: From Margin To Center*. (2nd ed). South End Press, Cambridge, MA

Hume, D. (1957). An Inquiry concerning the principles of morals. New York, Liberal Arts Press

Hume, D. (1961). A Treatise of Human Nature. Garden City, N.Y., Doubleday Dolphin

Hunt, B. C. (1936). *The development of the business corporation in England, 1800-1867.* Cambridge, Mass, Harvard Economic Studies, Vol, LII, Harvard University Press

Hutcheson, A. (1723). *Some Paragraphs of Mr. Hutcheson's Treatises on the South-Sea Subject; which Relate to the Relief of the Unhappy Traders in South-Sea Stock, and to Publick Credit. And the Reason of His Reprinting Them at this Time*. London

Hutchinson, A. (2005). *The Companies We Keep: Corporate Governance for a Democratic Society*. Toronto, Irwin Law

Johnson, P. (2010). *Making the Market: Victorian Origins of Corporate Capitalism.* Cambridge, CUP

Johnson, S. (1921). *The history of the Yorubas.* Lagos, CMS (Nigeria) Bookshop

Johnston, A. (2010). *EC Regulation of Corporate Governance.* Cambridge, CUP

Keay, A. (2011). *The Corporate Objective: Corporations, Globalisation and the Law.* Cheltenham, Edward Elgar Publishing Ltd.

Keay, A. (2014). *Directors' Duties*. (2nd ed.). Bristol, Jordan Publishing

Keay, A. (2015). *Board Accountability in Corporate Governance*. Abingdon, Routledge

Keay, A. (2016). *Directors' duties*. (3rd ed.). Bristol, Jordan Publishing

Keeley, M. (1988). *A Social Contract Theory of Organizations*. South Bend, University of Notre Dame Press

Kershaw, D. (2018). *The foundations of Anglo-American Corporate Fiduciary Law.* Cambridge, CUP

Kindleberger, C. P. (1978). *Manias, Panics and Crashes.* USA, John Wiley & Sons Inc.

Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H., Hertig, G., Hopt, K., Kanda, H., Pargendler, M., Ringe, W., & Rock. E. (2004). *The Anatomy of Corporate Law*. Oxford, OUP

Kyd, S. (1793). *A Treatise on the Law of Corporations*. London, Butterworth

Lalor, J. (1852). *Money and Morals: A book for the times*. London, John Chapman

Lewin, L., (1991). *Self-Interest and Public Interest in Western Politics*. Oxford, OUP

Lippmann, W. (1955). *Essays in the Public Philosophy*. Boston and Toronto, Little, Brown and Company

Little, I.M.D. (1950). *A critique of welfare econo*mics. Oxford, Clarendon Press

Locke, J. (1764). (Thomas Hollis ed.). *The Two Treatises of Civil Government*. London, A. Millar et al.

Loughrey, J. (2013). *Directors' duties and shareholder litigation in the wake of the financial crisis.* Cheltenham, Edward Elgar Publishing Limited

Luhmann, N. (1990). *Essays on self-reference*. New York, Columbia University Press

Luhmann, N., Ziegert, K., Kastner, F., Nobles, R., Ziegert, R., & Schiff, D. (2004*). Law as a Social System.* Oxford, OUP

MacIntyre, A. (1984). *After Virtue: A Study in Moral Theology* (2nd ed.). Notre Dame, University of Notre Dame Press

MacIntyre, A. (1995). Is Patriotism a Virtue? In R. Beiner. (ed.) *Theorizing Citizenship.* (pp. 209-228). Albany, State University of New York Press

Maitland, F. W. (1911). *The Collected Papers of Frederic William Maitland, Volume 3*. Fisher, H.A.L. (ed.). Cambridge, CUP

Maitland, F. W. (1936). *Equity: A course of lectures*. (2nd ed.) Brunyate, J. (rev.). Cambridge, CUP

Maitland, F.W. (2003). *Maitland: state, trust and corporation*. D. Runciman & M. Ryan (eds.). Cambridge, CUP

Mancur, O. (1965). *The logic of collection action.* Cambridge, MA, Harvard University Press

March, J., & Simon, H. (1958). *Organization.* New York, Wiley

Marris, R. (1964). *The Economic Theory of 'Managerial' Capitalism*. New York, Free Press and McMillan

Marshall, A. (1949). *Principles of Economics.* (8th ed.). New York, The Macmillan Co

Marwick, A. (1968). *Britain in the century of total war: war, peace and social change, 1900-1967.* London, Bodley Head

Marwick, A. (1974). *War and Social Change in the Twentieth Century.* London, Palgrave Macmillan

Marx, K. & Engels, F. (1968). *The German Ideology in Basic writings*. (T. Delaney & B. Schwartz, trans.). Progress Publishers

Masolo, D. (2010). *Self and Community in a Changing World*. Indiana, Indiana University Press

Mayer, C. (2013). *Firm Commitment - why the corporation is failing us and how to restore trust in it. Oxford, OUP*

Mbiti, J. (1970). *African Religions and Philosophies*. New York, Doubleday and Company

Miceli, T., & Baker, M. (eds.). (2014). *Economic models of law*. Edward Elgar Publishing

Mill, J. S. (1804-1808). *Selected Economic Writings*. D. Winch (ed.). Edinburgh: Oliver Boyd for the Scottish Economic Society

Mill, J. S. (1895). *Utilitarianism*. (12 ed.). London, Longmans, Green and Co. Publishers

Mill, J.S. (1848). *Principles of Political Economy with some of their Applications to Social Philosophy*. Ashley W. (ed.). (1909, 7th ed.) London: Longmans, Green and Co.

Mill, J. S. (1992). *On liberty.* London, Everyman's Library

Miller, A. S. (1965). *Private Governments and the Constitution*. Santa Barbara, Center for the Study of Democratic Institutions

Mischan, E. (1964). *Welfare Economics*. New York, Random House

Mitchell, L. (ed.) (1995) *Progressive Corporate Law*. (Preface). Colorado, Westview Press

Molfessis, N. (2011). *Les mouvements du droit face aux conflits d'intérêts.* Paris, LexisNexis

Moore, M. (2013). *Corporate Governance in the Shadow of the State*. Oxford, Hart Publishing

Morawetz, V. (1886). *Treatise on the Law of Private Corporation*. Boston, Little, Brown and Company

Oppenheim, F. (1981). *Political Concepts, a Reconstruction.* Oxford: Basil Blackwell

Pareto, V. (2014). *Manual of Political Economy.* Oxford, OUP

Parkinson, J. (1995). *Corporate Power and Responsibility: Issues in the theory of company law. Oxford*, Clarendon Press

Parkinson, J., Gamble, A., & Kelly, G. (2001). (eds). *The Political Economy of the Company.* Oxford-Portland, Hart Publishing

Pendleton, H. (1936). *Public Administration and the Public Interest.* New York, McGraw Hill

Pigou, A. (1962). *The Economics of Welfare.* London, Macmillan and Co

Plamenatz, J. (1958). *The English Utilitarians.* Oxford, Basil Blackwell

Plato (1974). *The Republic* (H.D.P. Lee, trans.) (2nd ed.). Baltimore, Penguin. (Original work published c. 380 BC)

Posner, R. (1977). *Economic Analysis of Law*. (2nd ed.) Chicago, Little Brown and Company

Posner, R. (1983). *The Economics of Justice*. (2nd ed.). Cambridge, Harvard University Press

Posner, R., & Parisi, F. (1997). (eds.). *Law and Economics.* Chicago, Edward Elgar

Redford, A. (1973). *Manchester Merchants and Foreign Trade, Volume 1.* Manchester, Manchester University Press

Reese, R. (1897). *The True Doctrine of Ultra Vires in the Law of Corporations.* Colorado, State Journal Printing Company

Richardo, D. (1817). *On the principles of political economy and taxation.* London, John Murray, Albemarle-Street

Robb, G. (1992). *White Collar Crimes in Modern England, Financial Fraud and Business Morality, 1845-1929.* Cambridge, CUP

Romano, R. (1993). *Foundations of Corporate Law.* New York, OUP

Rothenberg, J. (1961). *The measurement of social welfare.* Englewood Cliffs, N.J., Prentice-Hall

Rousseau, J. (1947). *The Social Contract.* (Charles Frankel, ed.). New York, Hafner. (Originally published in 1762)

Sandel, M. (1996). *Democracy's Discontent: America in search of a Public Philosophy*. Cambridge, MA, Harvard University Press

Sandercock, L. (1998). *Towards Cosmopolis*. Chichester, Wiley

Schubert, G. (1960). *The Public Interest: A Critique of the Theory of a Political Concept*. Glencoe, IL, Free Press

Scott, A. W., & Fratcher, W. F. (1987). *The law of trusts.* (4th ed.). Boston, Little, Brown and Company Publishers

Scott, W., Mitchell, T. & Birnbarum, P. (1981). *Organisation Theory: A structural and Behavioural Analysis.* (4th ed.). Irwin, Homewood, Ill, R.D.

Senghor, L. (1964) *On African Socialism.* (M.Cook, trans.). New York, Frederick A. Praeger

Shapiro, S. P. (2002). *Tangled Loyalties: Conflict of Interest in Legal Practice*. Ann Arbor, University of Michigan Press.

Sheikh, S. (2008). *A Guide to the Companies Act 2006*. London, Routledge-Cavendish

Shepherd, L. (1981). *The Law of Fiduciaries.* Toronto, Carswell

Simon, H. A. (1957). Models of Man. New York, Wiley

Simon, H. A. (1983). *Reason in Human Affairs.* Stanford, Stanford, University Press

Smith, A. (1776). *An Inquiry into the Nature and Causes of the Wealth of Nations.* University of Chicago Press, UK Edition (February 15, 1977)

Smith, G., Stephen, L., & Sidney Lee, S. (1897). *Robert Slaney, Dictionary of National Biography, From the Earliest Times to 1900.* (Volume 52, 387-388). Oxford, OUP

Smith, J. S. (1855). *A compendium of Mercantile Law*. (3rd ed.). New York, D. Appleton and company

Sparrow, G. (1959). *The great swindlers.* London, John Long

Stark, A. (2000). *Conflict of Interest in American Public Life.* Cambridge, Mass: Harvard University Press

Sugarman, D., & G. R. Rubin. (1984). (eds.) *Law, economy and society, 1750-1914: essays in the history of English Law*. Abingdon, Oxon. Professional Books Limited.

Talbot, L. (2013). *Progressive Corporate Governance for the 21st Century.* Oxford, Routledge

Taylor, C. (1985). *Philosophy and the Human Sciences: Philosophical Paper 2.* Cambridge, CUP

Taylor, J. (2006). *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture, 1800-1870.* London, Royal Historical Society

Taylor, J. (2013). *Boardroom Scandal: The Criminalization of Company Fraud in Nineteenth-Century Britain.* Oxford, OUP

Teubner, G. (1993). *Law as an Autopoietic System.* Oxford, Blackwell

The Bible, King James's Version

Thompson, S. (1895). *Commentaries on the Law of Private Corporations*. San Francisco, Bancroft-Whitney Company

Trebilcock, C. (1985). *Phoenix Assurance and the Development of British Insurance. Volume I.* Cambridge, CUP

Warnock, M. (ed.) (2003). *Utilitarianism: and, on liberty: including Mill's Essay on Bentham and selections from the writings of Jeremy Bentham and John Austin* (2nd ed.). Oxford, Blackwell Publishing

Weyer, M. V. (2011). *Fortune's spear: the story of the blue-blooded rogue behind the most notorious city scandal of the 1920s.* London, Elliott & Thompson

Whincop, M. J. (2001). *An Economic and Jurisprudential Genealogy of Corporate Law.* Aldershot: Ashgate

Williamson, O. (1975) *Markets and Hierarchies: Analysis and Antitrust Implications*. The Free Press, New York

Williamson, O. (1985). *The Economic Institutions of Capitalism*. New York, The Free Press

Williamson, O. (1987). *Internal Economic Organization. Crafoord Lectures 1: Perspectives on the Economics of Organizations.* Institute of Economic Research. Lund University

Wiredu, K. (1996). *Cultural Universals and Particulars: An African Perspective*. Bloomington, Indiana University Press

CHAPTERS IN BOOKS

Arendt, H. (1977). Public Rights and Private Interests: in response to Charles Frankel. In M. Mooney & F. Stuber. (eds.). *Small comforts for hard times: Humanists on public policy*. (pp. 103-9). Columbia University Press, New York

Bailey, S. (1962). The Public Interest: Some Operational Dilemmas. In C. Friedrich (ed.). *The Public Interest.* (pp.96-106). New York, Atherton Press

Banaji, M.R., Bazerman M.H., & Chugh, D. (2005). Bounded Ethicality as a Psychological Barrier to Recognising Conflicts of Interest. In M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore. (eds.). *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 74-91). Cambridge, CUP

Barry, B. (1967). The public interest. In A. Quinton. (ed.). *Political Philosophy*. (pp. 112-126). Ely House, London, OUP

Bazerman, M. H., Cain, D. M., Moore, D. A. & Loewenstein, G. (2005). Introduction. In M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.). *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy.* (pp. 1-12). Cambridge, CUP

Benhabib, S. (1997). Autonomy, modernity, and community: communitarianism and critical social theory in dialogue. In A. Honneth, T. McCarthy, C. Offe & A. Wellmer. (eds.) *Cultural-Political Interventions in the Unfinished Project of Enlightenment.* (pp. 39-62). Cambridge: MIT Press

Berle, A. (2004). The Impact of the Corporation on Classical Economic Theory. In T. Clarke. (ed.) *Theories of Corporate Governance, the Philosophical Foundations of Corporate Governance*. (pp.45-53). Oxford, Routledge

Bewaji, J. (2004). Ethics and Morality in Yoruba Culture. In K. Wiredu (ed.). *A Companion to African Philosophy.* (pp. 396–403). Oxford, Blackwell Publishing

Boatright, J. R. (1992). Conflict of Interest: An Agency Analysis. In. N. E. Bowie & E. Freeman (eds.). *Ethics and Agency Theory*. (pp. 187-203). New York, OUP

Boatright, J. R (2001). Financial Services. In M. Davis & A. Stark (eds.). *Conflict of Interest in the Professions.* (pp. 217-236). New York, Oxford University Press

Bodenheimer, E. (1962). Prolegomena to a Theory of the Public interest. In C. Friedrich. (ed.). *The Public Interest.* (pp. 205-217). New York, Atherton Press

Branson, D. (1995). The Death of Contractarianism and the Vindication of Structure and Authority in Corporate Governance and Corporate Law. In L. Mitchell. (ed.). *Progressive Corporate Law*. (pp. 93-104). Colorado, Westview Press Inc

Bratton Jr, W. (1995). Game Theory and the Restoration of Honor to Corporate Law's Duty of Loyalty. In L. Mitchell, (ed.). *Progressive Corporate Law*. (pp. 139-168). Colorado, Westview Press Inc

Braybrooke, D. (1962). The Public Interest: The Present and Future of the Concept. In C. Friedrich. (ed.). *The Public Interest*. (pp. 129-164). New York, Atherton Press

Buchanan, A. (1996). Is there a Medical Profession in the House? In R. Spece, D. Shimm & A. Buchanan. (eds.). *Conflicts of interest in Clinical Practice and Research.* (pp. 105-136). Oxford, OUP

Cain, D. M., Loewenstein, G. & Moore, D. A. (2005). Coming Clean but Playing Dirtier: The shortcomings of Disclosure as a Solution to Conflicts of Interest. In. D.A. Moore (ed.). *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy.* (pp. 104-125). Cambridge, CUP

Campbell, D. (1993). Why regulate the modern corporation? The failure of market failure. In J. McCahery, S. Picciotto, & C. Scott (eds*.). Corporate Control and Accountability, Changing Structures and the Dynamics of Regulation* (pp. 103-131). Oxford, Clarendon Press

Cassinelli, C. W. (1962). The Public Interest in Political ethics. In C. Friedrich (ed.). *The Public Interest.* (pp. 44-53). New York, Atherton Press

Chan, J. (1999). A Confucian Perspective on Human Rights for Contemporary China. In J. R. Bauer & D. A. Bell (eds). *The East Asian Challenge for Human Rights.* (pp. 212-237). New York, Cambridge University Press

Clarke, T. (2004). Introduction: Theories of Governance – Reconceptualizing Corporate Governance Theory after the Enron Experience. In T. Clarke. (ed.). *Theories of Corporate Governance, the Philosophical Foundations of Corporate Governance.* (pp. 1-12). Oxford, Routledge

Cohen, J. (1962). A lawman's view of the Public Interest. In C. Friedrich. (ed.). *The Public Interest.* (pp. 155-161). New York, Atherton Press

Coleman, J. (2002). Efficiency, Utility and Wealth-Maximization. In J. Coleman (ed.). *Markets, Morals and the Law*. (pp.95-132). Cambridge, CUP

Colm, G. (1962). The Public interest: Essential Key to Public Policy. In C. Friedrich (ed.). *The Public Interest.* (pp. 115-128). New York, Atherton Press

Dallas, L. (1995). Working towards a new paradigm. In L. Mitchell (eds.). *Progressive Corporate Law*. (pp. 35-50). Colorado, Westview Press Inc.

Davis, M. (1998). Conflict of interest. In R. F. Chadwick (ed.). *Encyclopaedia of Applied Ethics.* (Vol. 1, pp. 586). San Diego & London, Academic Press

Davis, M. (2001). Introduction. In M. Davis & A. Stark (eds.). *Conflict of Interest in the Professions*. (pp. 3-22). New York, Oxford University Press

Davis, M. (2012). Empirical research on Conflict of interest: a critical look. In L. Handschin & A. Peters (eds.). *Conflict of Interest in Global, Public and Corporate Governance*. (pp. 54-62). Cambridge, CUP

Dawes, R. (2005). Commentary: On Tyler's "Managing Conflicts of Interest within Organizations". In. M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.). *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy.* (pp. 36-40). Cambridge, CUP

Dees, G.J. (1992). Principals, Agents and Ethics. In N. E. Bowie & R. E. Freeman (eds*.). Ethics and Agency Theory.* (pp. 25-58). Oxford, OUP

Dine, J. (1999). Companies and Regulations: Theories, Justifications and Policing. In D. Milman (ed.). *Regulation Enterprise, Law and Business Organisations in the UK.* (pp. 291-312). Oxford and Portland, Oregon, Hart Publishing

Duff, R. A. (20110. Responsibility, Citizenship and Criminal Law. In R. A. Duff & S. P. Green. (eds.). *Philosophical Foundations of Criminal Law.* (pp. 125-150). Oxford, OUP

Eisenhardt, K. M. (2004). Agency Theory: An Assessment and Review. In T. Clarke. (ed.) *Theories of Corporate Governance, the Philosophical Foundations of Corporate Governance.* (pp.78-92). Oxford, Routledge

Finn, P. D. (1989). The Fiduciary Principle. In T. G. Youdan (ed.). *Equity, Fiduciaries and Trusts.* (pp. 1-27). Toronto, Carswell

Foot, P. (1978). Hume on moral judgement. In P. Foot. (ed.). *Virtues and Vices: and other essays in moral philosophy.* (pp. 74-81). California, University of California Press

Friedberg, E. (2012). Conflict of Interest from the Perspective of the Sociology of Organised Action. In A. Peters & L. Handschin (eds.) *Conflict of interest in global, public and corporate governance*. (pp. 39-53). Cambridge, CUP

Fuchs, C., & Hofkirchner, W. (2009). Autopoiesis and critical social systems theory. In R. Magalhães, & R. Sanchez (eds*.). Autopoiesis in organization theory and practice* (pp. 111-129). Bingley, Emerald

Gamble, A., & Kelly, G. (2001). The Politics of the Company. In J. Parkinson, A. Gamble & G. Kelly (eds.). *The Political Economy of the Company*. (pp. 21-50). Oxford-Portland, Hart Publishing

Gilbert, M. (1972). Introduction. In M. Gilbert (ed.) *The Modern Business Enterprise: Selected Readings.* (pp. 1-20). Middlesex, Penguin Education

Griffith, E., (1962). The ethical foundations of the public interest. In C. Friedrich (ed.). *The Public Interest.* (pp. 14-23). New York, Atherton Press

Hagan, C. B. (1966). The group in political science. In R. Young. (ed.) *Approaches to the study of politics.* (pp. 38-51). Evanston, III: North-western University Press

Handschin, L. (2012). Conflict of interest related to management and board payments - profit-based remuneration systems make things worse. In A. Peters & L. Handschin (eds.) *Conflict of interest in global, public and corporate governance.* (pp. 288-307). Cambridge, CUP

Hannigan, B. (2017). Public interest in the regulation of the small private limited company – the dwindling role of mandatory rules in English company law. In. S. Watson (ed.). *The Changing Landscape of Corporate Law in New Zealand.* (pp. 99-123). University of Canterbury, NZ, Centre for Commercial and Corporate Law Inc

Hansmann, H. (1990). Ownership of the Firm In L. Bebchuk (ed.). *Corporate Law and Economic Analysis.* (pp. 283-287). Cambridge, CUP

Hejka-Ekins, A. (1998). Conflict of Interest. In J. M. Shafritz (ed.). *International Encyclopaedia of Public Policy and Administration, Vol. I: A – C.* (pp. 481-485) Westview Press, New York

Hernes, T., & Bakken, T. (2002). Introduction: Niklas Luhmann's autopoietic theory and organisation studies – a space of connections. In T. Bakken & T. Hernes (eds.) *Autopoietic Organization Theory: Drawing on Niklas Luhmann's Social Systems Perspective.* (pp. 9-22). Oslo, Abstrakt Liber Copenhagen Business School Press

Hicks, S. R. C. (1995). Conflicts of Interest. In. J. K. Roth. *International Encyclopaedia of Ethics* (pp. 183). London & Chicago, Fitzroy Dearborn Publishers

Hsieh, Y. (1967). The status of the individual in Chinese ethics. In C. E. Moore (ed.). *The Chinese mind.* (pp. 307-322). Honolulu, HI: East–West Center Press

Hsu, F. (1998). Confucianism in Comparative Context. In W. H. Slote & G. A. De Vos. (eds.). *Confucianism and the Family.* (pp. 53-74). Albany, State University of New York Press

Ihara, C. K. (2004). Are Individual Rights Necessary? A Confucian Perspective. In K. Shun & D. Wong (eds.). *Confucian Ethics: A Comparative Study of Self, Autonomy, and Community.* (pp. 11-30). Cambridge, CUP

Ireland, P. (2001). Defending the Rentier: Corporate Theory and the Reprivatization of the Public Company. In J. Parkinson, A. Gamble & G. Kelly (eds.). *The Political Economy of the Company*. (pp. 141-174). Oxford-Portland, Hart Publishing

Issacharoff, S. (2005). Legal responses to conflicts of interest. In M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (ed.). *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 189-201). Cambridge, CUP

Kassirer, J. P. (2005). Physicians' Financial Ties with the Pharmaceutical Industry. In M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.). *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy.* (pp. 133-141). Cambridge, CUP

Kelly, G., & Parkinson, J. (2001). The Conceptual Foundations of the Company: A pluralist Approach. In J. Parkinson, A. Gamble & G. Kelly (eds.). *The Political Economy of the Company.* (pp. 113-140). Oxford-Portland, Hart Publishing

Knahr, C. & Reinisch, A. (2012). Conflict of Interest in International Investment Arbitration. In L. Handschin & A. Peters (eds.) *Conflict of Interest in Global, Public and Corporate Governance.* (pp.103-124). Cambridge, CUP

Lasswell, H. (1962). The Public Interest: Proposing Principles of Content and Procedure. In C. Friedrich (ed.). *The Public Interest.* (pp. 54-79). New York, Atherton Press

Latham, E. (1960). The Body Politics of the Corporation. In E. Mason (ed.). *The Corporation in Modern Society.* (pp. 218-236). Cambridge, MA, Harvard University Press

Lee, I. (2012). The Role of the Public Interest in Corporate Law. In C. Hill & B. McDonnell (eds.). *Research Handbook on the Economics of Corporate Law*. (pp. 106-131). Palgrave

Leys, W. (1962). The Relevance and Generality of the Public Interest. In C. Friedrich (ed.). *The Public Interest.* (pp. 237-250). New York, Atherton Press

Luhmann, N. (1988). The Autopoiesis of Social Systems. In F. Geyer & J. Van der Zouwen. (eds.) *Sociocybernetic Paradoxes* (pp. 172-192). London, Sage

Luhmann, N. (2002). Organization. In T. Bakken & T. Hernes (eds.) *Autopoietic Organization Theory: Drawing on Niklas Luhmann's Social Systems Perspective.* (pp. 31-52). Oslo, Abstrakt Liber Copenhagen Business School Press

MacDonald, C., & Norman, W. (2010). Conflicts of Interest. In G. Brenkert, G., & T. Beauchamp (eds.). *The Oxford Handbook of Business Ethics.* (pp. 463-464). Oxford, OUP

Maitland, F.W. (1936). Trust and corporation. In H. Hazeltine, G. Lapsley & P. Winfield (eds.). *Maitland: Selected Essays.* (pp. 141-214). Cambridge, CUP

Margolis, J. (1979) Conflict of Interest and Conflicting Interests. In T. L. Beauchamp & N. E. Bowie (eds.). *Ethical Theory and Business.* (pp. 361-372). Englewood Cliffs, Prentice-Hall

Masolo, D. (2004). Western and African Communitarianism: A Comparison. In K. Wiredu (ed.). *A Companion to African Philosophy*. (pp. 488-498). Oxford, Blackwell Publishing

Menkiti, I. (1984). Person and Community in African Traditional Thought. In R. Wright (ed.). *African* Philosophy: An Introduction. (pp. 171-181). Lanham, MD: University Press of America

Miller, D.T. (2005). Commentary: Psychologically Naïve Assumptions about the Perils of Conflicts of Interests. In M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.). *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 126-132). Cambridge, CUP

Miller, P. (2014). The fiduciary relationship. In A. Gold & P. Miller (eds.) *Philosophical Foundations of Fiduciary Law*. (pp. 63-91). Oxford, OUP

Millon, D. (1995). Communitarianism in Corporate Law: Foundations and Law Reform Strategies. In L. Mitchell (ed.) *Progressive Corporate Law*. (pp. 1-10). Colorado, Westview Press, Inc.

Minor, W. (1962). Public Interest and Ultimate Commitment. In C. Friedrich (ed.). *The Public Interest*. (pp. 26-43). New York, Atherton Press

Mitchell, L., (1995). Trust. Contract. Process. In L. Mitchell (ed.) *Progressive Corporate Law*. (pp. 185-199). Colorado, Westview Press, Inc.

Moore, D. A, Loewenstein, G., Cain, D. M., & Bazerman, M. H. (2005). Introduction. In. M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.). *Conflicts of*

Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy. (pp. 1-9). Cambridge, CUP

Musgrave, R, (1962). Efficiency in the Creation and Maintenance of Material Welfare. In C. Friedrich (ed.). *The Public Interest*. (pp. 107-114). New York, Atherton Press

Niemeyer, G. (1962). Public Interest and Private Utility. In C. Friedrich (ed.). *The Public Interest.* (pp. 1-13). New York, Atherton Press

O'Connor, M. (1995). Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law distinction to enforce implicit employment agreements. In L. Mitchell (ed.). *Progressive Corporate Law.* (pp. 219-245). Colorado, Westview Press, Inc

Pennock, J. R. (1962). The one and the Many: A note on the concept. In C. Friedrich (ed.). *The Public Interest.* (pp.177-182). New York, Atherton Press

Peters, A. (2012). Conflict of interest as a Cross-Cutting Problem of Governance. In L. Handschin, & A. Peters (eds.). *Conflict of Interest in Global, Public and Corporate Governance.* (pp. 3-38). Cambridge, CUP

Peters, A. (2012) Managing Conflict of Interest: lessons from multiple disciplines and settings. In L. Handschin, & A. Peters (eds.). *Conflict of Interest in Global, Public and Corporate Governance*. (pp. 357-421). Cambridge, CUP

Ramsay, I. (1998). Models of Corporate Regulation: The Mandatory/Enabling Debate. In. C. Rickett & R. Grantham (eds.). *Corporate Personality in the 20th Century*. (pp. 215-270). Oxford, Hart Publishing

Roth, M. (2012). Conflict of Interest: compliance and its contribution to corporate governance in the financial services sector. In A. Peters & L. Handschin. (eds.). *Conflict of Interest in Global, Public and Corporate Governance*. (pp. 255-271). Cambridge, CUP

Sandel, M. (1984). Introduction. In M. Sandel (ed.). *Liberalism and its Critics* (pp. 1-12). Oxford, Basil Blackwell

Shapiro, S. P. (2012). Conflict of Interest at the bedside: surrogate decision-making at the end of life. In L. Handschin & A. Peters (eds.) *Conflict of Interest in Global, Public and Corporate Governance*. (pp.334-354). Cambridge, CUP

Solomon, L. (1995). On the frontier of Capitalism: implementation of Humanomics by Modern Publicly Held Corporations - A critical Assessment. In L. Mitchell. (ed.) *Progressive Corporate Law*. (ch.10). Colorado: Westview Press.

Sorauf, F. (1962). The Conceptual Muddle. In C. Friedrich (ed.). *The Public Interest.* (pp. 1831-191). New York, Atherton Press

Stark, A. (2001). Comparing Conflicts of Interest across the Professions. In. M. Davis & A. Stark. (eds.) *Conflict of Interest in the Professions.* (pp. 335-353). New York, OUP

Stark, A. (2005). Why are (some) Conflicts of Interest in Medicine so uniquely vexing? In. M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.). *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy.* (pp. 152-180). Cambridge, CUP

Tenbrunsel, A.E. (2005). Commentary: Bounded Ethicality and Conflicts of Interest. In M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.). *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy.* (pp. 96-103). Cambridge, CUP.

Teubner, G. (1985). Corporate Fiduciary Duties and their Beneficiaries: A Functional Approach to the legal Institutionalization of Corporate Responsibility. In K. Hopt, & G. Teubner. (eds.) *Corporate Governance and Directors' Liabilities.* (pp. 149-177). Berlin, Walter de Gruyter

Teubner, G. (1994). Company interest: the public interest of the enterprise 'in itself'. In R. Rogowski & T. Wilthagen. (eds). *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation*. (pp. 21-52). Deventer: Kluwer Law and Taxation Publishers

Tirole, J. (1988). The Theory of the Firm. In. J. Tirole (ed.). *The Theory of Industrial Organization.* (pp. 35-50) Cambridge, MA: MIT Press

Turner, J. D. (2018). The Development of English Company Law before 1900. In H. Wells. (ed.). *Research Handbook on the History of Corporate and Company Law.* (pp. 121-141). Cheltenham, Edward Elgar

Tyler, T.R. (2005). Managing Conflicts of Interest within Organizations: Does activating social values change the impact of self-interest on Behaviour? In. M. H. Bazerman, D. M. Cain, G. Loewenstein & D. A. Moore (eds.). *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy*. (pp. 13-35). Cambridge, CUP

Uruena, R. (2012). Conflict of Interest in Global Governance In L. Handschin & A. Peters (eds.) *Conflict of Interest in Global, Public and Corporate Governance*. (pp. 85-102). Cambridge, CUP

Wiredu, K. (2004). Introduction: African Philosophy in Our Time. In K. Wiredu. (ed.). *A Companion to African Philosophy.* (pp. 1-28). Oxford, Blackwell Publishing House

Wong, D. (2004). B., Rights and Community in Confucianism. In K. Shun & D. Wong (eds.). *Confucian Ethics: A Comparative Study of Self, Autonomy, and Community*. (pp. 31-48). Cambridge, CUP

Wong, D. (2017). Chinese Ethics. In E. N. Zalta (ed.). *The Stanford Encyclopaedia of Philosophy*. Retrieved from https://plato.stanford.edu/archives/spr2017/entries/ethics-chinese/

JOURNAL ARTICLES

Ahern, D. (2011). Guiding Principles for Directorial Conflicts of Interest: Re Allied Business and Financial Consultants Ltd; O'Donnell v Shanahan*. Modern Law Review,* 74 (4) 596-607

Ajibo, C. (2014). A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory. *Birbeck Law Review* 2 (1), 37-58

Al Mamun, A., Yasser, Q.R., Rahman, M.A. (2013). A discussion of the suitability for only one vs more than one theory for depicting corporate governance. *Modern Economy* 4 (1), 37-48

Alchian, A. (1965). Some Economics of Property Rights. *Il Politico*, 30, 816-829

Alchian, A., & Demsetz, H. (1972). Production, Information Costs, and Economic Organization. *American Economic Review*, 62 (5), 777-795

Allen, W. (1993). Contracts and Communities in Corporation Law. *Washington & Lee Law Rev*iew, 50, 1395-1407

Armour, J., & Whincop, M. J. (2007). The Proprietary Foundations of Corporate Law. *Oxford Journal of Legal Studies*, 27 (3), 429-465

Avi-Yonah, R. (2010). Citizens United and the Corporate Form. *Wisconsin Law Review,* 4, 999-1047

Bainbridge, S. (1992). Interpreting Nonshareholder Constituency Statutes. *Pepperdine Law Review*, 19, 971-1025

Bainbridge, S. (1997). Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship. *Cornell Law Review*, 82, 856-904

Bainbridge, S. (2002). The Board of Directors as Nexus of Contracts. *Iowa Law Review*, 88 (1), 1-34

Bainbridge, S. M. (2003). Director Primacy: The Means and Ends of Corporate Governance. *Northwestern University Law Review*, 97 (2), 547-606

Baker, G., Gibbons, R., & Murphy, K. (2002) Relational Contracts and the Theory of the Firm. *The Quarterly Journal of Economics,* 117 (1), 39-84

Ball, H., & Friedman, L. (1965). The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View. *Stanford Law Review*, 17 (2), 197-223

Barker, B. A., Cameron, K. S., & Caza, A. (2004). Ethics and Ethos: The Buffering and Amplifying Effects of Ethical Behaviour and Virtuousness. *Journal of Business Ethics*, 52 (2), 169-178

Baron, P. (1992). Bringing Back the Bubble - Regulation of Corporate Abuse by an Action in Public Nuisance. *University of Tasmania Law Review*, 11 (2), 149-166

Baxi, U. (1996). "Global Neighborhood" and the "Universal Otherhood": Notes on the Report of the Commission on Global Governance. *Alternatives: Global, Local, Political*, 21 (4), 525-549

Beck, S. M. (1975). The Quickening of the Fiduciary Obligation. *Canadian Bar Review,* 53, 771-793

Bell, D., & Kristol, I. (1961). What is the public interest? *The Public Interest*, 1-3

Benditt, T.M. (1973). The Public Interest. *Philosophy & Public Affairs*, 2 (3), 291-311

Benn, S. I. (1959). Interests in Politics. *Proceedings of the Aristotelian Society*, 60, 123-140

Berle, A. (1931). Corporate Powers as Powers in Trust. *Harvard Law Review,* 44 (7), 1049-1074

Berle, A. (1932). For Whom Corporate Managers Are Trustees: A Note. *Harvard Law Review*, 45 (8), 1365-1372

Bini Smaghi, L. (2009). Conflicts of Interest and the Financial Crisis (Digest Summary). *International Finance*, 12, (1), 93-106

Blair, M. (2003). Post-Enron Reflections on Comparative Corporate Governance. *The Journal of Interdisciplinary Economics*, 14 (2), 113-124

Blair, M., & Stout, L. (1999). Team Production in Business Organizations: An Introduction. *Journal of Corporation Law,* 24 (4), 743-752

Blair, M., & Stout, L., (1999). A Team Production Theory of Corporate Law. *Virginia Law Review,* 85 (2), 247-328

Blair, M., & Stout, L. (2001). Director Accountability and the Mediating Role of the Corporate Board. *Washington University Law Quarterly,* 79 (2), 403-447

Boatright, J.R. (1996). Business Ethics and the theory of the firm. *American Business Law Journal,* 34 217-238

Boatright, J. R. (2002). Contractors as stakeholders: Reconciling stakeholder theory with the nexus-of-contracts firm. *Journal of Banking & Finance*, 26 (9), 1837-1852

Bolodeoku, I. O. (2005). Contractarianism and Corporate Law: Alternative Explanations to the Law's Mandatory and Enabling/Default Contents. *Cardozo Journal of International and Comparative Law*, 13 (2), 433-520

Bone, J. (2011). Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought?. *The Canadian Journal of Law and Jurisprudence*, 24, 277-304

Bottomley, S. (1992). Shareholder Derivative Actions And Public Interest Suits: Two Versions Of The Same Story?. *University of New South Wales Law Journal*, 15, 127-148

Bottomley, S. (1997). From Contractualism to Constitutionalism: A framework for Corporate Governance. *Sydney Law Review, 19* (3), 277-313

Bottomley, S. (1999). The Birds, the Beasts and the Bat: Developing a Constitutionalist theory of Corporate Regulation. *Federal Law Review*, 27, 243-264

Bradley, M., Schipani, C., Sundaram, A. & Walsh, J. (1999). The Purpose and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroad. *Law & Contemporary Problems*, 62, 9-86

Bratton Jr, W. (1989). The “nexus of contracts” Corporation: A critical Appraisal. *Cornell Law Review,* 74, 407-465

Bratton Jr., W. (1989). The New Economic Theory of the Firm: Critical Perspectives from History. *Stanford Law Review,* 41, 1471-1527

Bratton Jr, W. (1992). Public Values and Corporate Fiduciary Law. *Rutgers Law Review*, 44, 675-698

Brown, J. (2008). The Personality of the Corporation and the State (1905). *Journal of Institutional Economics,* 4 (2), 255-273

Brown, P. P. (1981). Corporate Governance in the United Kingdom. *Notre Dame Law,* 56 (5), 936-946

Butler, H. & Macey J. (1996). Externalities and the Matching Principle: the Case for Reallocating Environmental Regulatory Authority. *Yale Law & Policy Review,* 14, 23-66

Butler, H., & Ribstein, L. (1999). Opting out of fiduciary duties: A response to anti-contractarians. *Washington Law Review*, 65, 1-72

Calabresi, G. (1961). Some thoughts on risk distribution and the law of torts. *Yale Law Journal,* 70 (4), 499-553

Calabresi, G., & Melamed, A. D. (1972). Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*, 85 (6), 1089-1128

Caldwell, P. (1991). A Hair Piece: Perspectives on the Intersection of Race and Gender. *Duke Law Journal,* 365-396

Campbell, H., & Marshall, R. (2002). Utilitarianism's Bad Breath? A Re-Evaluation of the Public Interest Justification for Planning. *Planning Theory,* 1, 163-187

Canfield, G. (1917). The Scope and Limits of the Corporate Entity Theory. *Columbia Law Review*, 17 (2), 128-143

Champlin, D., & Knoedler, J. (2003). Corporations, Workers, and the Public Interest. *Journal of Economic Issues*, 37 (2), 305-313

Chapman, B. (1993) Trust, Economic Rationality, and the Corporate Fiduciary Obligation. *University of Toronto Law Journal*, 43, 547-588

Chen, P. (2007). Complexity of Transaction Costs and Evolution of Corporate Governance. *The Kyoto Economic Review*, 76 (2), 139-153

Cheung, S. (1969). Transaction Costs, Risk Aversion, and the Choice of Contractual Arrangements. *The Journal of Law & Economics*, 12 (1), 23-42

Chilton, B.S., & Woods, J. (2006). Moral Justifications on the Rehnquist Court Hercules, Herbert, and "Druggies" Under the Fourth Amendment. *Criminal Justice Policy Review*, 17 (3), 343-413

Choudhury, B. (2009). Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm. *University of Pennsylvania Journal of Business Law*, 11 (3), 631-674

Choudhury, B., & Petrin, M. (2018). Corporate governance that 'works for everyone': promoting public policies through corporate governance mechanisms. *Journal of Corporate Law studies*, 18 (2) 381-415

Cioffi, J. (2010). The Global Financial Crisis: Conflicts of Interest, Regulatory Failures, and Politics. *Policy Matters, A Quarterly Publication of the University of California*, 4 (1), 1-11

Clark, B., & Benstock, A. (2006). UK company law reform and directors' exploitation of "corporate opportunities*". International Company and Commercial Law Review*, 17 (8), 231-241

Coase, R. (1937). The Nature of the Firm. *Economica,* 4 (16), 386-405

Coase, R. (1960). The Problem of Social Costs*. Journal of Law and Economics,* 3, 1-44

Coleman, J. (1966). Foundations for a theory of collective decisions. *The American Journal of Sociology,* 81 (6), 616-627

Colm, G. (1960). In Defense of the Public Interest. *Social Research*, 27 (3), 295-307

Conaglen, M. (2005). The nature and function of fiduciary loyalty. *Law Quarterly Review,* 121, 452-478

Crenshaw, K., (1991). Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color. *Stanford Law Review*, 43 (6), 1241-1299

Daily, C.M., Dalton, D.R., & Cannella, A.C., (2003). Corporate Governance: Decades of Dialogue and Data. *Academy of Management Review*, 28 (3), 371-382

Dallas, L. (1988). Two Models of Corporate Governance: Beyond Berle and Means. *University of Michigan Journal of Law Reform,* 22(1), 19-116

Dallas, L. (2011) Short-Termism, the Financial Crisis, and Corporate Governance*. Journal of Corporation Law,* 37, 264-375

Dari-Mattiacci, G., Gelderblom, O., Jonker, J., & Perotti, E. C. (2017). The emergence of the corporate form. *Journal of Law, Economics, and Organization*, 33 (2), 193-236

David Sugarman, D. (1999). Is company law founded on contract or regulation? The Law Commission's paper on company directors. *Company Lawyer*, 20 (6), 162-183

Davis M., & Snead, W. S. (1982). Conflict of Interest (with Commentary). *Business & Professional Ethics Journal*, 1 (4), 29-32

Davis, J., Schoorman, F., & Donaldson, L. (1997). Towards a Stewardship Theory of Management. *Academy of Management Review*, 22, 20-47

Davis, M. (1982). Conflict of Interest. *Business and Professional Ethics Journal*, 1 (4), 17-27

Deakin, S., & Hughes, A. (1999). Economic Efficiency and the Proceduralisation of Company Law. *Company Financial and Insolvency Law Review*, 3 (2), 169-189

Debow, M., & Lee, D. (1993). Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation. *Delaware Journal of Corporate Law*, 18 (2), 393-424

Deiser, G. (1908).The Juristic Person - I. *University of Pennsylvania Law Review*, 57, 131-142

Delgado, R., & Stefancic, J. (1993). Critical Race Theory: An Annotated Bibliography. *Virginia Law Review,* 79 (2), 461-516

DeMott, D. (1988). Beyond Metaphor: An Analysis of Fiduciary Obligation. *Duke Law Journal*, 37 (5), 879-924

DeMott, D. (1999). The Figure in the Landscape: A Comparative Sketch of Directors' Self-Interested Transactions. *Law and Contemporary Problems*, 62(3), 243-272

DeMott, D. (2006). Breach of fiduciary duty: on justifiable expectations of loyalty and their consequences*. Arizona Law Review*, 48, 925-976

Demsetz, H. (1967). Toward a Theory of Property Rights. *The American Economic Review*, 57 (2), 347-359

Demsetz, H. (1972). When Does the Rule of Liability Matter?. *Journal of Legal Studies*, 1 (1), 13-28

Demsetz, H. (1998). Review: Oliver Hart's firms, contracts, and financial structure. *Journal of Political Economy,* 106, 446–452

Dewey, J. (1926).The Historic Background of Corporate Legal Personality. *Yale Law Journal*, 35, 655-678

Dine, J. (1999). Fiduciary Duties as Default Rules, European Influences and the Need for Caution in the Use of Economic Analysis. *Company Lawyer*, 20 (6), 190-195

Downs, A. (1962). The Public Interest: Its meaning in a Democracy. *Social Research*, 29, 1-36

Dunfee, T. W. (1999). Corporate Governance in a Market with Morality. *Law and Contemporary Problems*, 62 (3), 129-157

Duran, X., & McNutt, P. (2010). Kantian ethics within transaction cost economics. *International Journal of Social Economics*, 37 (10), 755-763

Durham, M. F. (1982). The Companies Act, 1980: Its Effects on British Corporate Law. *Northwestern Journal of International Law & Businessw,* 4, 551-585

Easterbrook, F. & Fischel, D. (1981). Corporate Control Transactions. *Yale Law Journal*, 91, 698-737

Easterbrook, F. & Fischel, D. (1989). The Corporate Contract. *Columbia Law Review*, 89 (7), 1426-1448

Easterbrook, F. & Fischel, D. (1993). Contract and Fiduciary Duty. *Journal of Law & Economics,* 36, 425-446

Edmunds, R., & Lowry, J. (1998). The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and Its Remedies. *Modern Law Review*, 61 (4), 515-537

Edmunds, R., & Lowry, J. (2000). The no conflict-no profit rules and the corporate fiduciary: challenging the orthodoxy of absolutism. *Journal of Business Law,* 122-142

Eisenberg, M. (1983). Corporate Legitimacy, Conduct, and Governance - Two Models of the Corporation. *Creighton Law Review*, 17, 1-19

Eisenberg, M. (1988). Self-interested transactions in corporate law*. Journal of Corporation Law,* 13, 997-1009

Eisenberg, M. (1999). The conception that the corporation is a Nexus of contracts, and the dual nature of the firm. *Journal of Corporation Law*, 24 (4), 819-836

Elhauge, E (2005). Sacrificing Corporate Profits in the Public Interest*. New York University Law Review,* 80 (3), 733-866

Epstein, R. (1993). Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase. *Journal of Law & Economics*, 36 (1), 553-586

Etzioni, A. (1998). A Communitarian Note on Stakeholder Theory. *Business Ethics Quarterly*, 8, 679-691

Etzioni, A., (2014). Communitarianism revisited. *Journal of Political Ideologies*, 19 (3), 242-260

Fama, E. (1980). Agency Problems and the Theory of the Firm. *Journal of Political Economy*, 88 (2), 290-307

Fama, E., & Jensen, M. (1983). Separation of Ownership and Control. *Journal of Law and Economics*, 26 (2), 302-325

Farrar, J. & Watson, S. (2011). Self-Dealing, Fair Dealing and Related Party Transactions—History, Policy and Reform. *Journal of Corporate Law Studies*, 11 (2), 493-523

Finn, P. (1989). Contract and the Fiduciary Principle. *University of New South Wales Law Journal,* 12, 76-97

Florini, A. (2002). Increasing Transparency in Government. *International Journal on World Peace*, 19 (3), 3-37

Foust, M. A. (2008). Perplexities of filiality: Confucius and Jane Addams on the private/public distinction. *Asian philosophy*, 18 (2), 149-166

Frankel, T. (1983). Fiduciary Law. *California Law Review,* 71 (3), 795-836

Fraser, A. (1983). The Corporation as a Body Politic. *Telos*, 57, 5-40

Freeman, E.R, Wicks, A.C., & Parmar, B. (2004) Stakeholder Theory and "The Corporate Objective Revisited". *Organization Science*, 15(3), 364-369

Freeman, J. (2000). The Private Role in Public Governance. *New York University Law Review*, 75, 543-675

Freeman, M., Pearson, R., & Taylor, J. (2013). Law, politics and the governance of English and Scottish joint-stock companies, 1600–1850. *Business History*, 55(4), 633-649

Galston, W. (2007). An old debate renewed: the politics of the public interest. *Daedalus*, 136 (4), 10-19

Getzler, J. (2016). Frederic William Maitland – Trust and Corporation. *University of Queensland Law Journall*, 35 (1), 171-191

Gill, A. (2008). Corporate Governance as Social Responsibility: A Research Agenda. *Berkeley Journal of International Law,* 26 (2), 452-477

Gordon, J. (1989). The Mandatory Structure of Corporate Law. *Columbia Law Review*, 89 (7), 1549-1598.

Gower, L.C. B. (1953). The English Private Company. *Law and Contemporary Problems*, 18, 535-545

Grantham, R. (1998). The Doctrinal basis of the rights of Company Shareholders. *The Cambridge Law Journal*, 57 (3), 554-588

Greenfield, K. (2015). Sticking the landing: making the most of the "stakeholder moment". *European Business Law Review*, 26 (1), 147-171

Greenfield, Kent (2014). The Third Way. *Seattle University Law Review*, 37 (2), 749-773

Grossman, S. &, Hart, O. (1986). The costs and benefits of ownership: a theory of vertical integration and lateral integration. *Journal of Political Economy*, 94, 691-719

Hager, M. (1989). Bodies Politic: The Progressive History of Organizational Real Entity Theory. *University of Pittsburgh Law Review*, 50 (2), 575-654

Halpern, P., Trebilcock, M., & Turnbull, S. (1980). An Economic Analysis of Limited Liability in Corporation Law. *University of Toronto Law Journal*, 30 (2), 117-150

Hantke-Domas, M. (2003). The Public Interest Theory of Regulation: Non-Existence or Misinterpretation? *European Journal of Law and Economics*, 15, 165-194

Harbsmeier, C. J. (2015). On the Nature of Early Confucian Classical Chinese Discourse on Ethical Norms. *Journal of Value Inquiry*, 49 (4), 517-541

Harlow, C. (1997). Back to Basics: Reinventing Administrative Law. *Public Law*, 245-257

Harmon, M. (1969). Administrative Policy Formulation and the Public Interest. *Public Administration Review*, 29 (5), 483-491

Harris, R. (1994). The Bubble Act: Its Passage and Its Effects on Business Organization. *The Journal of Economic History*, 54 (3), 610-627

Harris, R. (1997). Political Economy, Interest Groups, Legal Institutions, and the Repeal of the Bubble Act in 1825. *The Economic History Review*, 50 (4), 675-696

Hart Jr., H. M. (1958). The Aims of the Criminal Law. *Law and Contemporary Problems*, 23, 401-441

Hart, O. (1988). Incomplete contracts and the theory of the firm. *Journal of Law, Economics and Organization*, 4, 119-139

Hart, O., & Moore, J. (1990). Property rights and the nature of the firm. *Journal of Political Economy*, 98, 1119-1158

Hawes, D. W., Lee, T., & Robert, M. (1982). Insider Trading Law Developments: An International Analysis. *Law & Policy in International Business*, 14 (2), 335-345

Hayden, G., and Bodie, M. (2001). The Uncorporation and Unravelling of 'Nexus of Contracts Theory. *Michigan Law Review*, 109 (6), 1127-1144

Heath, J. (2009). The Uses and Abuses of Agency Theory in Business Ethics. *Business Ethics Quarterly*, 19 (4), 497-528

Holcombe, R.G. (2009). A reformulation of the foundations of welfare economics. *The Review of Austrian Economics*, 22 (3), 209-224

Holdsworth, W. S. (1922). English Corporation Law in the 16th and 17th Centuries. *Yale Law Journal*, 31 (4), 382-407

Holmstrom, B. (1979). Moral hazard and observability. *Bell Journal of Economics*, 10, 74-91

Holmstrom, B. (1982). Moral Hazard in Teams. *Bell Journal of Economics*, 13 (2), 324-371

Holmstrom, B., & Costa, J. (1986). Managerial Incentives and Capital Management. *Quarterly Journal of Economics,* 101, 835-860

Horwitz, M. (1985-86). Santa Clara Revisited: The Development Of Corporate Theory. *West Virginia Law Review,* 88-186

Hunt, C. (1935). The Joint-Stock Company in England, 1830-1844. *Journal of Political Economy*, 43 (3), 331-364

Hyden, G. (1997). The Economy of Affection Revisited. *African Rural and Urban Studies*, 4 (2), 19-34

Ireland, P. (1996). Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality. *Journal of Legal History*, 17 (1), 41-73

Ireland, P. (1999) Company Law and the Myth of Shareholder Ownership. *Modern Law Review*, 62 (1), 32-57

Ireland, P., Grigg-Spall, I., & Kelly, D. (1987). The Conceptual Foundations of Modern Company Law. *Journal of Law and Society*, 14 (1), 149-165

Jensen, M. C., & Meckling, W. H. (1994). The Nature of Man. *Journal of Applied Corporate Finance,* 7 (2), 18-57

Jensen, M., & Meckling, W. (1976). Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure. *Journal of Financial Economics,* 3 (4), 305-360

Jensen, M., C. (1994). Self-interest, Altruism, Incentives, and Agency Theory. *Journal of Applied Corporate Finance*, 7 (2), 40-45

Johnson, E. (1986). General Motors Corporation, Its Constituencies and the Public Interest*. Journal of Business Ethics*, 5 (3), 1731-76

Johnson, L., & Millon, D. (2005). Recalling Why Corporate Officers Are Fiduciaries. *William and Mary Law Review*, 46 (5), 1597-1653

Johnson, L., (1992). Individual and Collective Sovereignty in the Corporate Enterprise. *Columbia Law Rev*iew, 92, 2215-2250

Kaufman, A., & Englander, E. (2005). A Team Production Model of Corporate Governance. *Academy of Management Executive,* 19 (3), 9-22

Keay, A. & Iqbal, T. (2018). Sustainability in large UK listed retail companies: a sectoral analysis. *Deakin Law Review,* 23, 209-244

Keay, A. (2000). Insolvency Law: A Matter of Public Interest? *Northern Ireland Legal Quarterly*, 51, 509-534.

Keay, A. (2012). The authorising of directors' conflicts of interests: getting a balance? *Journal of corporate Law studies*, 12 (1), 129-162

Keay, A. (2015). Assessing the accountability of boards under the UK Corporate Governance Code. *Journal of Business Law*, 7, 551-572

Keay, A., & Loughrey, J. (2015). The framework for board accountability in corporate governance. *Legal Studies,* 35 (2), 252-279

Keay, A., & Zhang, H. (2011). An analysis of enlightened shareholder value in light of ex post opportunism and incomplete law. *European Company and Financial Law Review*, 8(4), 445-475

Keeton, G. W. (1952). The Director as Trustee. *Current Legal Problems*, 5 (1), 11-29

Kerr J.E. (2007). Sustainability means profitability: the convenient truth of how the business judgment rule protects a board's decision to engage in social entrepreneurship. *Cardozo Law Review*, 29, 623-668

Kershaw, D. (2012). The Path of Corporate Fiduciary Law. *New York University Journal of Law and Business*, 8 (2), 395-485

Kim, J., & Mahoney, J.T. (2005). Property Rights Theory, Transaction Costs Theory, and Agency Theory: An Organizational Economics Approach to Strategic Management. *Managerial and Decision Economics* 26, 225-242

King, S.M., Chilton, B.S., & Roberts, G.E. (2010). Reflections on Defining the Public Interest. *Administration and Society*, 41, 954-978

Kirkpartrick, G. (2009). The Corporate Governance Lessons from the Financial Crisis. *OECD Journal: Financial Market Trends*, 2009 (1), 61–87

Kleiman, E. (2011). Arbitrage et conflits d'intérêts: une année mouvementée. Les mouvements du droit face aux conflits d'intérêts. *La Semaine juridique, Edition Générale,* 52 (6), 26

Kraakman, R. H. (1984). Corporate Liability Strategies and the Costs of Legal Controls. *Yale Law Journal*, 93 (5), 857-898

Krannich, J. (2005). The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation. *Loyola University Chicago Law Journal,* 37, 61-109

Langbein, J. (2005). Questioning the trust law duty of loyalty: sole interest or best interests. *Yale Law Journal*, 114 (5), 931-990

Laski, H. (1916). The Personality of Associations. *Harvard Law Review*, 29 (4), 404-426

Laski, H. J. (1916). The basis of vicarious liability. *Yale Law Journal,* 26, 105-135

Laski, H. J. (1919). The Theory of Popular Sovereignty: I. *Michigan Law Review*, 17 (3), 201-215

Lee, I. (2006). Efficiency and Ethics in the Debate about Shareholder Primacy. *Delaware Journal of Corporate Law,* 31 (2), 533-587

Leigh, L. H. (1968). Companies Act 1967. *Modern Law Review,* 31(2), 183-197

Leung, W. (1996-1997). The inadequacy of Shareholder Primacy: Proposed Corporate Regime That Recognizes Non-Shareholder Interests. *Columbia Journal of Law and Social Problems*, 30 (4), 587-634

Lewis, C. (2006). In Pursuit of the Public Interest*. Public Administration Review*, 66 (5), 694-701

Lim, E. (2013). Directors' fiduciary duties: a new analytical framework. *Law Quarterly Review,* 129, 242-279

Liu, Q. (2003). Filiality versus sociality and individuality: on Confucianism as ‘consanguinitism’. *Philosophy East & West*, 53 (2), 234-250

Llewellyn, K. (1931). What Price Contract? An Essay in Perspective. *Yale Law Journal*, 40 (5), 704-751

Lobban, M (1996). Nineteenth century frauds in company formation: Derry v Peek in context. *Law Quarterly Review,* 112, 287-334

Loughrey, J. (2015). Smoke and mirrors? Disqualification, accountability and market trust. *Law and Financial Markets Review*, 9 (1), 50-62

Lowry, J. (2009). The duty of loyalty of company directors: bridging the accountability gap through efficient disclosure. *Cambridge Law Journal,* 68 (3), 607-622.

Luebke, N. (1987). Conflict of Interest as a Moral Category. *Business and Professional Ethics Journal,* 6 (1), 67-81

Lutz, D. (2009). African "Ubuntu" Philosophy and Global Management. *Journal of Business Ethics*, 84 (3), 313-328

Macey, J. (1999). Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective. *Cornell Law Review,* 84, 1266-1281

Machen, Jr., A.W. (1911). Corporate Personality. *Harvard Law Review,* 24 (4), 253-267

Mackie, C. (2011). From privilege to right: emergence of limited liability. *Juridical Review,* 294-313

Mackie, C. (2017). A tale of unintended consequence: corporate membership in early UK company law. *Journal of Corporate Law Studies*, 17 (1), 1-37

Mahoney, J.T., McGahan, A.M., & Pitelis, C.N. (2009). The interdependence of Private and Public Interests. *Organisation Science*, 20 (6), 1034-1052

Manley, P.S. (1973). Gerard Lee Bevan and the City Equitable Companies. *Abacus*, 9 (2), 107-115

Manne, H. (1965). Mergers and the Market for Corporate Control. *Journal of Political Economy*, 73 (2), 110-120

Manne, H. (1967). Our Two Corporation Systems: Law and Economics. *Virginia Law Review*, 53 (2), 259-284

Masten, S. (1993). Transaction Costs, Mistakes, and Performance: Assessing the Importance of Governance. *Managerial and Decision Economics*, 14 (2), 119-129

Matheson, J., & Olson, B. (1992). Corporate Law and the Long term Shareholder Model of Corporate Governance. *Minnesota Law Review*, 76, 1313-1391

Maume, P. (2015). Conflicts of interest and disclosure under company law: a continental- European perspective on legal origins. *Journal of Corporate Law Studies*, 16 (1), 69-99

McClelland, P. L. & O'Brien, J. P. (2011). Transaction cost economics and corporate governance: the case of CEO age and financial stake. *Managerial and Decision Economics*, 32, 141–158

McCristal Culp, Jr., J. (1994). Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims. *New York University Law Review,* 69, 162-196

McDonald, D., & Puxty, A.G. (1979). An inducement-contribution approach to corporate financial reporting. *Accounting, Organizations & Society,* 4 (1), 53-65

McHarg, A. (1999). Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*. Modern Law Review,* 62(5), 671-696

McMunigal, K. (1992). Rethinking Attorney Conflict of Interest Doctrine. *Georgetown Journal of Legal Ethics,* 5, 823-877

Meese, A. (2002). The Team Production Theory of Corporate Law: A Critical Assessment. *William & Mary Law Review,* 43, 1629-1716

Merrick Dodd, Jr., (1932). For whom are Corporate Managers Trustees? *Harvard Law Rev*iew, 45 (7), 1145-1163

Miller, A., (1961). Foreword: The Public Interest Undefined. *Journal of Public Law,* 10, 184-202

Miller, D. (2011). Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights. *New York University Law Review,* 86, 887-957

Miller, E. (1990). Economic Efficiency, the Economics Discipline, and the "Affected-with-a-Public-Interest" Concept. *Journal of Economic Issues*, 24 (3), 719-732

Miller, P. (2013). Justifying fiduciary duties. *McGill Law Journal*, 58, 969–1023

Millett, L. (1998). Equity's Place in the Law of Commerce. *Law Quarterly Review,* 114, 214-222

Millett, P. (2002). Bribes and Secret Commissions Again. *Cambridge Law Journal,* 71 (3), 583-614

Millon, D. (1990). Theories of the Corporation. *Duke Law Journal*, 39 (2), 201-262

Millon, D. (1993). New Directions in corporate law, Communitarians, Contractarians, and the crisis in corporate law. *Washington and Lee Law Review*, 50, 1379-1393

Millon, D. (2001). The Ambiguous Significance of Corporate Personhood. *Stanford Agora: An Online Journal of Legal Perspectives*. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=264141.

Milman, D. (1999). Personal liability of directors; aiding an enterprise culture? *Palmer's In Company,* (2), 1-2.

Mitchel, L. (1990). The Death of Fiduciary Duty in Corporate Law. *University of Pennsylvania Law Review,* 138, 1675-1731

Mitchell, L. (1993). Fairness and Trust in Corporate Law. *Duke Law Journal*, 43, 425-491

Mitchell, L. (1993). Groundwork of the metaphysics of corporate law. *Washington and Lee Law Review*, 50 (4), 1477-1488

Mitchell, L. (1997). Theoretical and practical framework for enforcing corporate constituency statutes. *Texas Law Review,* 70 (3), 579-644

Mitchell, L. E. (1992). Critical look at corporate governance. *Vanderbilt Law Review,* 45 (5), 1263-1318

Morrissey, J. F. (2013). A Contractarian Critique of Citizens United. *Journal of Constitutional Law*, 15 (3), 765-830

Muller Y. (2012). Le droit pénal des conflits d'intérêts. *Revue Droit Pénal*, Etude 1.

Nino, C. (1989). The Communitarian Challenge to Liberal Rights. *Law and Philosophy*, 8 (1), 37-52

Nolan, R. C. (2001). Enacting Civil Remedies in Company Law. *Journal of Corporate Law studies,* 1 (2), 245-276

Nolan, R. C. (2005). The Legal Control of Directors' Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report. *Theoretical Inquiries in Law*, 6 (2), 413-462

O'Connor, M. (1991). Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers. *North Carolina Law Review,* 69(4), 1189-1259

Ortz, E. (1998). Shirking and Sharking: A legal theory of the Firm. *Yale Law & Policy Review*, 16 (2), 265-329

Padfield, S. (2014). Rehabilitating Concession Theory. *Oklahoma Law Review*, 66, 327-361

Padfield, S. (2015). Corporate Social Responsibility & Concession Theory. *William & Mary Business Law Review,* 6, 1-35

Palazzo, G., & Rethel, L., (2008). Conflicts of Interest in Financial Intermediation. *Journal of Business Ethics*, 81 (1), 193-207

Parisi, F. (1995). Private Property and Social Costs. *European Journal of Law and Economics*, 2 (2), 149-173

Parsons, R. (1967). The directors' duty of good faith. *Melbourne University Law Review*, 5, 395-428

Petrin, M. (2013). Reconceptualizing the theory of the firm - from nature to function. *Penn State Law Review* 118 (1), 1-53

Pettigrew, W. A. (2007). Parliament and the Escalation of the Slave Trade, 1690–1714. *The William and Mary Quarterly*, 64 (1), 3-38

Philips, M. (1994). Reappraising the Real Entity Theory of the Corporation*. Florida State University Law Review,* 21, 1061-1123

Pollock. F, (1889). Derry v. Peek in the House of Lords. *Law Quarterly Review,* 410-423

Posner, R. (1975). The Economic Approach to Law. *Texas Law Review,* 53, 757-782

Posner, R. (1979). Utilitarianism, Economics, and Legal Theory. *Journal of Legal Studies,* 8, 103-140

Posner, R. (1985). Wealth Maximization Revisited*. Notre Dame Journal of Law, Ethics and Public Policy,* 2, 85-105

Posner, R. (1987). The Ethics of Wealth Maximization: Reply to Malloy. *University of Kansas Law Review*, 36, 261-265

Posner, R. (1987). The Law and Economics Movement. *American Economic Review*, 77, 1-13

Posner, R. (1993). The New Institutional Economics Meets Law and Economics. *Journal of Institutional and Theoretical Economics*, 149 (1), 73-87

Posner, R. (2010). From the new institutional economics to organisation economics: with applications to corporate governance, government agencies, and legal institutions*. Journal of Institutional Economics*, 6 (1), 1-37

Pound, J. (1993). The Rise of the Political Model of Corporate Governance and Corporate Control. *New York University Law Review*, 68, 1003-1071

Prentice, D. D. (1972). Protection of Minority Shareholders: S.210 of the Companies Act 1948. *Current Legal Problems*, 25 (1), 124-148

Prentice, D. D. (1977). Companies Act 1976. *Modern Law Review*, 40 (3), 314-322

Prentice, D. D. (1981). A Company and its Employees: The Companies Act 1980. *Industrial Law Journal*, 10 (1), 1–9

Rajan, R. and Zingales, L. (1998). Power in a theory of the firm. *The Quarterly Journal of Economics*, 113 (2), 387-432

Ribstein, L. (1991) Limited Liability and Theories of the Corporation. *Maryland Law Review*, 50, 80-130

Riley, C. A. (1997). The values behind the Law Commission's consultation paper. *Company Lawyer*, 18, 260-264

Rock, E.B. (1997). Saints and Sinners: How does Delaware Corporate Law work? *UCLA Law Review*, 44, 1009-1107

Rodriguez, G., Gomez-Mejia, L., & Wiseman, R. M. (2012). Has Agency Theory Run its Course? Making the Theory More Flexible to Inform the Management of Reward Systems. *Corporate Governance: An International Review,* 20 (6), 526-546

Romano, R. (1985). Law as a Product: Some Pieces of the Incorporation Puzzle. *Journal of Law, Economics, and Organization*, 1 (2), 225-283

Rotman, L., (2011). Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence. *Boston University Law Review*, 91, 921-972

Scheider, A., & Sherer, A. (2015). Corporate Governance in a Risk Society*. J Journal of Business Ethics*, 126 (2), 309-323

Schwarcz, S. L. (1999). Rethinking Freedom of Contract: A Bankruptcy Paradigm. *Texas Law Review*, 77, 515-604

Schwarcz, S. L. (2008). Systemic Risk. *Georgetown Law Journal*, 97, 193-249

Schwarcz, S. L. (2015). Excessive corporate risk-taking and the decline of personal blame. Emory Law Journal, 65 (2), 533-580

Schwarcz, S. L. (2016). Misalignment: Corporate Risk-Taking and Public Duty. *Notre Dame Law Review,* 92, 1-50

Scott, A. (1949). The Fiduciary Principle. *California Law Review*, 37, 539-555

Sealy, L. (1962). Fiduciary Relationships. *Cambridge Law Journal,* 20 (1), 69-81

Sealy, L. (1963). Some Principles of Fiduciary Obligations. *Cambridge Law Journal*, 21 (1), 119-140

Sealy, L. (1967). The Director as Trustee. *Cambridge Law Journal*, 25 (1) 83-103

Sealy, L. (1987). Directors' Wider Responsibilities: Problems, Conceptual, Practical and Procedural. *Monash University Law Review*, 13 (3), 164-188

Seipp, D. J. (2011). Trust and Fiduciary Duty in the Early Common Law. *Boston University Law Review*, 91 (3), 1011-1036

Shankman, N. (1999). Reframing the Debate between Agency and Stakeholder Theories of the Firm. *Journal of Business Ethics*, 19 (4), 319-334

Sison, A. (2007). Toward a Common Good Theory of the Firm: The Tasubinsa Case. *Journal of Business Ethics*, 74 (4), 471-480

Sison, A., & Fontrodona, J. (2011). The Common Good of Business: Addressing a Challenge Posed by “Caritas in Veritate”. *Journal of Business Ethics*, 100 (1), 99-107

Sison, A., & Vaccaro, A. (2011). Transparency in Business: The Perspective of Catholic Social Teaching and the "Caritas in Ventate". *Journal of Business Ethics*, 100 (1), 17-27

Sorauf, F. (1957). The Public Interest Reconsidered. *The Journal of Politics*, 19 (4), 616-639

Spitz, M. A. (1989). Recent Developments in Insider Trading Laws and Problems of Enforcement in Great Britain. *Boston College International & Comparative Law Review*, 12(1), 265-299

Stout, L. & Blair, M. (2001). Trust, Trustworthiness, and the Behavioural Foundations of Corporate Law. *University of Pennsylvania Law Review*, 149, 1735-810

Sullivan, D. P., & Conlon, D. E. (1997). Crisis and Transition in Corporate Governance Paradigms: The Role of the Chancery Court of Delaware. *Law & Society Review*, 31 (4), 732-763

Summers, C. (1982). Codetermination in the United States: A Projection of Problems and Potentials. *Journal of Comparative Corporate Law and Securities Regulation*, 4, 155-191

Szto, M. (2004). Limited Liability Company Morality: Fiduciary Duties in Historical Context. *Quinnipiac Law Review,* 23 (1), 61-113

Talbot, L. (2014). Operationalizing sustainability in corporate law reform through a labour-centred corporate governance: A UK perspective. *European Company Law*, 11, (2), 94-97

Talbot, L. (2014, April 24). Progressive Corporate Governance: Still a Political Economy and Still a Political Choice. *The European Financial Review*. Retrieved from http://www.europeanfinancialreview.com/?p=115

Testy K.Y. (2002). Commentary: Convergence as Movement: Toward a Counter-Hegemonic Approach to Corporate Governance. *Law & Policy*, 24 (4), 433-440

Testy, K. (2004). Capitalism and Freedom: For Whom?: Feminist Legal Theory and Progressive Corporate Law. *Law and Contemporary Problems*, 67 (4), 87-108

Teubner, G. (1988). Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person. *The American Journal of Comparative Law*, 36 (1), 130-155

Thaler, R. (2000). Homo Economicus. *Journal of Economic Perspectives*, 14(1), 133-141

Thomsen, S. (2004). Corporate values and corporate governance. *Corporate Governance: The International Journal of Business in Society*, 4(4), 29-46

Villiers, C. (2006). The Directive on Employee Involvement in the European Company: Its Role in European Corporate Governance and Industrial Relations. *International Journal of Comparative Labour Law and Industrial Relations*, 22 (2), 183-211

Villiers, C. (2014). Post-crisis Corporate Governance and Labour Relations in the EU (and Beyond). *Journal of Law and Society*, 41, 73-94

Wagner, A. (1997). Methodology and communitarianism. *Voluntas*, 8 (1), 66-70

Wallman, M.H. (1991). The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties. *Stetson Law Review*, 21 (1), 163-196

Walsh, J. (2002). The Fiduciary Foundation of Corporate Law. *Journal of Corporation Law*, 27, 333-340

Walters, A. (1999). Directors' duties and shareholder remedies. *Company Lawyer*, 20 (5), 138-142

Watts, Jr., C. (1991). Corporate Legal Theory under the 1st Amendment: Bellotti and Austin. *Miami Law Review*, 46, 317-378

Wedderburn, Lord. (1985). The Social Responsibility of Companies. *Melbourne University Law Review*, 15(1), 4-30

Wedderburn, Lord. (1985). Trust, Corporation and the Worker. *Osgoode Hall Law Journal*, 23 (2), 203-252

Weinrib, E. (1975). The Fiduciary Obligation. *The University of Toronto Law Journal,* 25(1), 1-22

Williamson, O. (1984). Board of Directors and Fiduciary Duties. *Yale Law Journal*, 93, 1197-1230

Williamson, O. (1991). Comparative Economic Organization: The Analysis of Discrete Structural Alternatives. *Administrative Science Quarterly*, 36 (2), 269-296

Williamson, O. (1984). Corporate Governance. *Yale Law Journal*, 93, 1197-1230

Williamson, O. (1998). Transaction Cost Economics: How it works; where it is headed. *De Economist*, 146 (1), 32-58

Williston, S. (1888). History of the Law of Business Corporations before 1800 I. *Harvard Law Review*, 2 (3), 105, 105-124

Winter, R. K. (1977). State Law, Shareholder Protection, and the Theory of the Corporation. *Journal of Legal Studies,* 6 (2), 251-292

Wolfe, A., (1993). The Modern Corporation: Private Agent or Public Actor? *Washington and Lee Law Review*, 50, 1673-1696

Worthington, S. (2001) Shares and shareholders: property, power and entitlement: Part I. *Company Lawyer*, 22 (9), 258-266

Worthington, S. (2001). Reforming directors' duties. *Modern Law Review*, 64 (3), 439-458

Worthington, S. (2001). Shares and shareholders: property, power and entitlement: Part II. *Company Lawyer*, 22 (10), 307

Yosifon, D.G. (2010). The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United. *North Carolina Law Review*, 89, 1197-1246

INTERNATIONAL ORGANISATIONS

Bank for International Settlements (2009*). 79th Annual Report 2008/2009*. Bank For International Settlements, Basel

Global Policy forum (2010). *Comparison of the World's 25 Largest Corporations with the GDP (gross domestic product) of Selected Countries*. Retrieved from https://www.globalpolicy.org/images/pdfs/Comparison_of_Corporations_with_GDP_of_Countries_table.pdf

Financial Reporting Council (FRC). (2012). *The UK Corporate Governance Code*. Retrieved from https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/uk-Corporate-Governance-Code-September-2012.pdf

Financial Reporting Council (FRC). (2016). *The UK Corporate Governance Code*. Retrieved from https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-April-2016.pdf

GOVERNANCE CODES AND REPORTS

The Cadbury Report. (1992). *Report of the Committee on the Financial Aspects of Corporate Governance*. London, Gee and Co. Ltd

The Greenbury Report. (1995). *Study Group on Directors' Remuneration.* London, Confederation of British Industry (CBI)

The Hampel Report. (1998*). Committee on Corporate Governance, Final report*. London, National Association of Pension Funds (NAPF)

U.N. (2010). *United Nations corporate partnerships: The role and functioning of the Global Compact*. Retrieved from https://www.globalpolicy.org/images/pdfs/JIU_report_on_Global_Compact_2.pdf

U.N. (2011). *Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Retrieved from https://www.unglobalcompact.org/library/2

United States Mission to the United Nations. *UN Transparency and Accountability Initiative*. Retrieved from http://usun.state.gov/about/2196/6657

The Organisation for Economic Co-operation and Development (O.E.C.D). (2011). *Guidelines for multinational enterprises*. Retrieved from http://mneguidelines.oecd.org/text/

The Organisation for Economic Co-operation and Development (O.E.C.D). (2014). *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences.* Retrieved from https://www.oecd.org/gov/ethics/managingconflictofinterestinthepublicservice.htm

WORKING PAPERS

Sugarman, D. (1982*). The conceptual and policy basis of directors' fiduciary duties under English law*: Part II. Middlesex Polytechnic, Working Paper

Learmount, S. (2002). *Theorising Corporate Governance: New Organisational Alternatives.* ESRC Centre for Business Research, Working Paper no. 237. University of Cambridge, Cambridge

Argandona, A. (2004). *Conflicts of interest: the ethical viewpoint. University of Navarra.* IESE Business School. Working Paper 552. Retrieved from https://media.iese.edu/research/pdfs/DI-0552-E.pdf

Sargent, M. (2004). *Competing Visions of the Corporation in Catholic Social Thought.* Villanova University School of Law Working Paper Series No. 5, Villanova

Lankester, T. (2007). *Conflicts of Interest: A Historical and Comparative Perspective. 5th Regional Seminar: Conflict of Interest - A Fundamental Anticorruption Concept*. University of Oxford, Oxford. Retrieved from https://www.oecd.org/site/adboecdanti-corruptioninitiative/39368062.pdf

Gelter, M. (2008). *The Dark Side of Shareholder Influence: Toward a Holdup Theory of Stakeholders in Comparative Corporate Governance.* Harvard Olin Fellows' Discussion Paper No. 17. Harvard Law School, Cambridge: MA. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1106008.

Lourenço, A. (2010). *Autopoetic Social Systems Theory: The Coevolution of Law and the Economy*. Centre for Business Research, University of Cambridge Working Paper No. 409. University of Cambridge, Cambridge. Retrieved from https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp409.pdf

Bohinc, R. *Conflicts of Directors' Interests with the Interests of the Company in the Context of Financial and Economic Crisis*. Virtus InterPress, University of Ljubljana, Slovenia. Retrieved from http://www.virtusinterpress.org/IMG/pdf/conflicts_of_directors_interests_with_the_interests_of_the_company_in_the_contex_of_financial_and_economic_crisis_a_comparative_overview_of_some_EU_countries_by_Rado_Bohinc.pdf]

McColloch, W. (2013*). A Shackled Revolution? The Bubble Act and Financial Regulation in 18th Century England*. University of Utah, Department Of Economics Working Paper Series, Working Paper No: 2013-06

Hopt, K. L. (2013). *Conflict of Interest, Secrecy and Insider Information of Directors - A Comparative Analysis*. Max Planck Institute for Comparative and International Private Law and ECGI, Law Working Paper No. 208/2013

Foreman-Peck, J., & Hannah, L. (2015). *UK Corporate Law and Corporate Governance before 1914: a Re-interpretation*. EHES Working Paper 72

Stout, L., Robé, J., Ireland, P., Deakin, S., Greenfield, K. et al. (2016). *The Modern Corporation Statement on Company Law*. Retrieved from https://ssrn.com/abstract=2848833

LECTURES AND CONFERENCES

Greenspan, A. (2004). *Capitalising reputation*. Financial Markets Conference of the Federal Reserve Bank of Atlanta, Sea Island, Georgia. Retrieved from http://www.bis.org/review/r040423a.pdf

Greif, A. (2005). *Rules of Law and Economic Realities: an Historical Reconsideration*. University of Chicago, Law School, Fulton Lectures

Sandel, M. (2009). *A New Citizenship: A New Politics of the Common Good*. Reith Lecture, BBC Radio

UNPUBLISHED MANUSCRIPTS

Lee, A. S. Y. (2002). *Law, economic theory and corporate governance: the origins of UK legislation on company directors' conflicts of interest, 1862-1948*. University of Cambridge, Faculty of Law, Thesis. (Unpublished)

Morrison A, (2015). Autonomy, Meta Contracting, and Regulation: A Liberal Theory of the Firm. Unpublished Manuscript. University of Oxford. Retrieved from http://www3.law.ac.uk/denningarchive/news/events_files/Morrison_9_May.pdf

PAMPHLETS

Anon. (1750). *The fisheries Revived or Britain's hidden treasure*. (T.808 (10) G.L.P.C., XVIII-50-3). London, British Museum Pamphlet Collection

Lauderdale, M. (1814). Pamphlets on the Corn Laws. Eclectic Review, Vol. II

NEWSPAPERS

Weekly essays (1732), (1758). *The London magazine: or, Gentleman's monthly intelligencer*. Volume I, (pp. 4) and (pp. 467-468). Volume XXVII

The Morning Chronicle. (1807). (pp. 324-329, 334-338). *The Spirit of the Public Journals for 1807*

Letter from a plain dealer. (1807, 16 November). *The Morning Chronicle*

The Times. (1824, 25 May). London, UK. *The Times Digital Archive*

The Times. (1824, 6 November). London, UK. *The Times Digital Archive*

The Morning Chronicle. (1825, 9 February)

The Morning Chronicle. (1825, 12 February)

The Morning Chronicle. (1825, 30 March)

The Morning Chronicle. (1825, 1 April)

The Economist. (1854, 1 July). Limited or Unlimited Liability. (pp. 698-701). London, UK

Newspapers Archives. The Circular to Bankers, (1855, 3 February). London, UK

The Times. (1855, 28 July 28). London, UK. The Times Digital Archive

The Economist. (1858, 15 May). Limited Liability in Banking. (pp. 530-1). London, UK

London Daily News. (1866, May 12). The Financial crisis in the City. (pp. 6).*Newspaper Archive* London, UK. Retrieved from https://newspaperarchive.com/london-daily-news-may-12-1866-p-6/

The Spectator. (1866, 16 June). The causes of the failure of Overend, Gurney, and Co. (pp. 3). London, UK. Retrieved from http://archive.spectator.co.uk/article/16th-june-1866/3/the-causes-of-the-failure-of-overend-gurney-and-co

Callender Jr., W. R. (1867, 16 August). The Commercial Crisis of 1857: its Causes and Results (1858) (pp. 36). *The Times*. London, UK. The Times Digital Archive

The Times. (1867, 16 August). The judgment delivered yesterday in the House. (pp. 7). The Times, London, UK. *The Times Digital Archive*

The Times. (1890, 16 July). The debate in the House of Lords yesterday on. (pp. 9). London, UK. *The Times Digital Archive*

The Economist. (1928, 25 February). Volume 106, No. 4409, 368. London, UK

The Accountant. (1930, 18 October). (pp. 525-7). London, UK

The Accountant. (1931, 25 July). (pp.109-27). London, UK

Friedman, M., (1970, Sept. 13). The Social Responsibility of Business is to increase its profits. *NY Times Magazine.* NY, USA. Retrieved from https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html

Mears, B. (2004, 6 May). Scalia won't recuse himself from Cheney case. *CNN International.com.* USA Retrieved from http://edition.cnn.com/2004/LAW/03/18/scalia.recusal/

The Economist. (2007, 19 December). The Match King. London, Great Britain

Rover report: At a glance. (2009, 11 September). *BBC News*. London, UK. Retrieved from http://news.bbc.co.uk/1/hi/business/8250252.stm

Marsh, P. (2011, 8 May). Former MG Rover managers barred. *Financial Times*. Retrieved from https://www.ft.com/content/98c37b04-79af-11e0-86bd-00144feabdc0

Trivett, V. (2011, 27 June). 25 US Mega Corporations: Where they would rank if they were countries. *Business Insider.* London, UK. Retrieved from http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?IR=T
Klein, P. (2011, 12 July). Transparency: Social Media Is Forcing You to Tell the Truth, *Forbes.* NJ, USA. Retrieved from http://www.forbes.com/sites/csr/2011/07/12/transparency-social-media-is-forcing-you-to-tell-the-truth/#626008da436b

Neate, R. (2011, 22 August). Ratings agencies suffer 'conflict of interest', says former Moody's boss. *The Guardian*. London, UK. Retrieved from http://www.theguardian.com/business/2011/aug/22/ratings-agencies-conflict-of-interest

AP. (2012, 27 April). Chesapeake Finally Ends Absurd Conflict In Which CEO Invests Personally In Company Wells. *Business Insider*. Retrieved from http://www.businessinsider.com/chesapeake-finally-ends-absurd-conflict-in-which-ceo-invests-personally-in-company-wells-2012-4?IR=T

The Economist. (2012, 10 July). Focus: Biggest transnational companies. Retrieved from http://www.economist.com/blogs/graphicdetail/2012/07/focus-1

Shemer, Y. (2012, 18 December). Corporations are important in modern economy. *Jerusalem Post*. Jerusalem, Israel. Retrieved from http://www.jpost.com/Business/Business-Features/Corporations-are-important-in-modern-economy

Campbell, D. (2013, 14 March). GPs' links to private healthcare firms spark fears of conflict of interest. *The Guardian*. Retrieved from http://www.theguardian.com/society/2013/mar/14/gps-clinical-commissioning-groups-private/print.

BBC. (2013, 10 May). Bangladesh factory collapse toll passes 1,000. *BBC News*. London, UK. Retrieved from http://www.bbc.co.uk/news/world-asia-22476774

Rankin, J. (2013, 9 September). Deloitte fined £14m for conflict of interest over MG Rover. *The Guardian.* London, UK. Retrieved from http://www.theguardian.com/business/2013/sep/09/deloitte-record-fine-mg-rover-deal/print

Salvador, C. Manuel Pastor, J. & Fernández de Guevara, J. (2013, 2 December). Rating Agencies during the Crisis: Usefulness, Conflicts of Interest and Regulation.

The European Financial Review. Brussels, Belgium. Retrieved from http://www.europeanfinancialreview.com/?p=1268

MG Rover collapse: 10 years on. (2015, April 9). *BBC News.* London, UK. Retrieved from http://www.bbc.co.uk/news/uk-england-birmingham-32220981

Press association. (2015, April 13). Deloitte appeal over MG Rover collapse sees £14m fine cut to £3m. *The Guardian.* London, UK. Retrieved from https://www.theguardian.com/business/2015/apr/13/deloitte-appeal-over-mg-rover-collapse-sees-14m-fine-cut-to-3m

Chen, L. (2015, May 6). The World's Largest Companies 2015. *Forbes.* NJ, USA. Retrieved from http://www.forbes.com/sites/liyanchen/2015/05/06/the-worlds-largest-companies/

Clarke, J. S. (2015, 2 September). Child labour on Nestlé farms: chocolate giant's problems continue. *The Guardian*. London, UK. Retrieved from http://www.theguardian.com/global-development-professionals-network/2015/sep/02/child-labour-on-nestle-farms-chocolate-giants-problems-continue

Richter, M. (2015, 24 September). Volkswagen scandal touches nerve centre of German economy. *Business Insider*. London, UK. Retrieved from http://www.businessinsider.com/afp-volkswagen-scandal-touches-nerve-centre-of-german-economy-2015-9?IR=T

Bryant, C. & Milne, R. (2015, 4 October). Boardroom politics at heart of VW scandal. *FT.* London, UK. Retrieved from http://www.ft.com/cms/s/0/e816cf86-6815-11e5-a57f-21b88f7d973f.html#axzz4AX4Pe1UL

The Guardian. (2015, 4 October). VW scandal is 'heavy blow' for German economy, says EU's Martin Schulz. *The Guardian*. London, UK. Retrieved from http://www.theguardian.com/business/2015/oct/04/vw-scandal-is-heavy-blow-for-german-economy-says-eus-martin-shulz

Telford, L., Newell, C. & Malnick, E. (2015, 11 October). Exclusive: Emissions tester paid £80m by car firms. The Telegraph. London, UK. Retrieved from http://www.telegraph.co.uk/finance/newsbysector/industry/11925283/Exclusive-Emissions-tester-paid-80m-by-car-firms.html

BBC. (2015, 12 October). Report queries VW chairman's role. *BBC News*. London, UK. Retrieved from http://news.bbc.co.uk/1/hi/business/4333750.stm

Corner, A. (2015, 13 October). After the VW scandal, how can we trust business to act on climate change? *The Guardian*. Retrieved from http://www.theguardian.com/sustainable-business/2015/oct/13/how-companies-can-keep-the-faith-on-climate-change

Reuters. (2015, 17 October). Volkswagen considers cutting temporary worker numbers: works council. *Reuters.com.* Berlin, Germany. Retrieved from http://www.reuters.com/article/us-volkswagen-emissions-employment-idUSKCN0SB0D820151017#JC6gSWMU6Ip5zOBC.99

Chu, Ben. (2016, 25 April). BHS: What's the real story behind the collapse of the 88-year-old department store? *The Independent*. London, UK. Retrieved from https://www.independent.co.uk/news/business/news/bhs-whats-the-real-story-behind-the-collapse-a7000166.html.

BBC (2018, 7 June). Carillion collapse to cost taxpayers £148m. *BBC News.* London, UK. Retrieved from https://www.bbc.co.uk/news/business-44383224

WEBSITES

North Carolina State Ethics Commission (2006). “Actual” vs. “Potential” Conflicts. *N.C. Board of Ethics,* 9 (3), 1. Retrieved from http://www.ethicscommission.nc.gov/library/pdfs/NewsLetters/news09i3042006.pdf.

National Audit Office. (2006). The Closure of MG Rover. Retrieved from https://www.nao.org.uk/report/the-closure-of-mg-rover/

Rogers, K. (2008, 11 November). Directors Duties – Conflicts of Interest: Conflict of Interests and the Related Authorisation Process. *Cripps*. Retrieved from http://www.cripps.co.uk/directors-duties-conflicts-of-interest-2/

Unterberger, A. (2011, 2 June). Seventh Circuit Makes Life Tougher for Directors with Conflicts. *Harvard Law School (HLS) Forum on Corporate Governance and Financial Regulation*. Retrieved from http://corpgov.law.harvard.edu/2011/06/02/seventh-circuit-makes-life-tougher-for-directors-with-conflicts/#more-18318

Scharfman, J. (2012, 6 June). For Chesapeake and Dartmouth, are conflicts of interest really worth it? *Pensions & Investments*. Retrieved from https://www.pionline.com/article/20120606/ONLINE/120609953/for-chesapeake-and-dartmouth-are-conflicts-of-interest-really-worth-it

Noked, N. (2012, 24 November). Conflicts of Interest: Requiring a Closer Governance Focus. *Harvard Law School (HLS) Forum on Corporate Governance and Financial Regulation*. Retrieved from http://corpgov.law.harvard.edu/2012/11/24/conflicts-of-interest-requiring-a-closer-governance-focus/

Bogaert, A. (2013, 18 February). Deux ans après le Médiator, ces experts toujours en conflit d'intérêts. *Terraeco.net*. Retrieved from http://www.terraeco.net/Experts-les-lecons-du-Mediator-ont,48227.html

U.S. Securities and Exchange Commission. (2014, 20 May). SEC Charges Former Deloitte Chief Risk Officer for Violations of Auditor Independence Rules. *SEC.com.* Retrieved from http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541865277

Dictionary.com. (2019). Retrieved from http://dictionary.reference.com/

Royal Charters (2019). *Privy Council*. Retrieved from https://privycouncil.independent.gov.uk/royal-charters/chartered-bodies/

Oxford dictionary. (2019). *Oxforddictionary.com*. Retrieved from http://www.oxforddictionaries.com/definition

Merriam Webster Dictionary. (2019). *Merriam-webster.com*. Retrieved from https://www.merriam-webster.com/dictionary/body%20politic

New Zealand Government Procurement, Quick guide: conflicts of interest. Retrieved from https://www.business.govt.nz/procurement/pdf-library/suppliers/quick-guide-conflicts-of-interest.pdf

BLOGS

Padfield, S. (2014, 23 February). The Separation of Church and for profit Corporations. *Business Law Prof Blog.* Retrieved from http://lawprofessors.typepad.com/business_law/2014/02/the-separation-of-church-and-for-profit-corporations.html

Bainbridge, S. (2010, 21 January). Citizens United v. FEC: Stevens' Pernicious Version of the Concession Theory. *Professorbainbridge.com.* Retrieved from http://www.professorbainbridge.com/professorbainbridgecom/2010/01/citizens-united-v-fec-stevens-pernicious-version-of-the-concession-theory.html

Kaplan, J. The problem with apparent conflicts of interest. *Conflict of Interest Blog*. Retrieved from http://conflictofinterestblog.com/2013/10/the-problem-with-apparent-conflicts-of-interest.html

Clarke, M. (2008, 7 February). Perceived and actual conflicts of interest. *Nautilus*. Retrieved from http://blogs.nature.com/nautilus/2008/02/post_19.html