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OLD QUESTIONS, NEW CONTEXTS: CORPORATE LAW IN EMERGING NATIONS

Kellye Y. Testy*

While the exponential expansion of the global marketplace in the last few years has brought forth a wealth of new challenges and opportunities for participants,¹ it has also unearthed some old questions worth revisiting. One of those questions concerns the enduring policy debate in corporate law over the fundamental nature and role of the publicly held corporation and the type of law that should govern it. In the United States, this debate has surfaced at several intervals since the early 1930s, when Adolf A. Berle, Jr. and E. Merrick Dodd began vigorously debating the role of the corporation in society.² In the 1960s and 1970s this debate resurfaced as one over the externalities generated by corporate activities—including environmental and workplace hazards, illegal political contributions, and foreign-directed bribes and kickbacks—that the market arguably did not adequately deter.³ The takeover controversies in the 1980s spurred yet another version of essentially the same debate,⁴ and now, in the 1990s, the

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1. See, e.g., Robert Chote, *Economic Integration Holds Key to Growth: More Developing Countries on Course to Catch up with Industrialised Counterparts*, FIN. TIMES, May 8, 1996, at 6; Swati R. Ghosh, *Reverse Linkages: The Growing Importance of Developing Countries. Global Economic Prospects and the Developing Countries*, FIN. & DEV., Mar. 1996, at 38.

2. The Berle-Dodd debate spanned over twenty years. See, e.g., ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 169 (1954); Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932). See generally *THE CORPORATION IN MODERN SOCIETY* (E. Mason ed., 1959).

3. See generally CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975).

4. See generally ROBERT A.G. MONKS & NELL MINOW, *POWER AND ACCOUNTABILITY* (1991).

proliferation of corporate development in emerging nations has created a prime opportunity to renew this debate once again. Along with all of the new and exciting issues to examine within this new context,⁵ the opportunity to revisit the old questions about the extent of corporations' social responsibilities should not be neglected. Indeed, the context in which these corporations are situated,⁶ as well as the fact that the form and content of corporate laws in emerging countries are largely influenced by students of United States corporate law,⁷ make it all the more urgent and necessary to revisit these key issues of corporate responsibility and social justice.⁸

As noted, the debate over the appropriate role of the corporation in society is an old one, often resulting in rather polarized views. Simply put, under one view, the corporation is a private entity, whose duty is to maximize shareholder profits.⁹ Under the contrary view, the corporation

5. Many of those were reviewed during NYLS's symposium where participants were able to discuss many issues regarding bankruptcy and corporate development in emerging nations in the context of a hypothetical problem set in a particular nation.

6. Each nation, of course, has its own unique context in which corporate development takes place. Some of the emerging nations have social situations that are arguably more pressing from a social justice standpoint than are others. This is not to suggest, however, that the United States is not also a nation where increased corporate responsibility could have salutary effects as well. Moreover, in an increasingly global economy, ethical systems and values are bound to collide. Ethical norms and the level of adherence to them can vary substantially from person to person across cultural boundaries, making the project of "global" corporate social responsibility even more complex. For a discussion of this ethical complexity, see Jacob Manakkalathil and Eric Rudolf, *Corporate Social Responsibility in a Globalizing Market*, 60 SAM ADVANCED MGMT. J. 29 (1995), available in WESTLAW 1995 WL 12533259. See also Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327 (1994).

7. See, e.g., Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996) (detailing the process of corporate law development in Russia).

8. Not only is it necessary in terms of elucidating the form of capitalism that should operate within the emerging nations, but also to stimulate discussions at home as well. At present, fewer than five percent of America's retailers have tackled any human rights issues, such as child labor, with regard to the companies with whom they do business. See *Ethical Shopping: Human Rights*, ECONOMIST, June 3, 1995, at 58.

9. This type of view was held by Berle, see *supra* note 2. For another forceful statement of this view, see MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133-34 (1962). The modern "contractarian" view of the corporation is derivative of this viewpoint. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991); ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993); Frank H. Easterbrook & Daniel R. Fischel, *Contractual Freedom in Corporate*

is an economic institution with responsibility for a wider constituency, including society as a whole.¹⁰ These two views stem from differing conceptions of the nature of the corporation itself. Under the profit maximization view, the corporation is a nexus of private contracts merely enabled by the state. Thus, from an economic standpoint, the argument is made that legal rules should be directed primarily at sustaining market forces and enforcing contractual arrangements; legal intervention to advance other goals is inefficient and unnecessary.¹¹ Under the social responsibility view, the corporation is seen as an entity created by the state, whose liability is limited by the state, and is thus subject to regulation by the state for the public's welfare. Under this view, legal rules that seek to protect a particular corporate constituency or society in general are encouraged, especially where that constituency's ability to protect itself is compromised.¹² Although there is a vocal minority in the United States favoring the social responsibility camp,¹³ corporate law in the United States is largely of the enabling variety—the Berle camp has carried the day.¹⁴

While these questions are still debated within United States corporate law, the questions demand reexamination given the proliferation of emerging market economies and corporate formation and activity within

Law: Articles & Comments; The Corporate Contract, 89 COLUM. L. REV. 1416 (1989); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

10. Adherents to some form of this view span an enormous range, from persons who advocate minimal limits on contractual freedom to persons who advocate a proactive corporate duty to improve societal welfare. See, e.g., Lucian A. Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820 (1989); Douglas Branson, *Recent Changes to the Model Business Corporation Act: Death Knells for Main Street Corporation Law*, 72 NEB. L. REV. 258 (1993); William W. Bratton Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989); Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963 (1996); Melvin A. Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461 (1989).

11. See sources cited *supra* notes 2 & 9.

12. See sources cited *supra* notes 2 & 10.

13. I daresay a growing one. Many recent initiatives have been pressed to further corporate social responsibility. See, e.g., Cassel, *supra* note 10 (detailing many recent initiatives).

14. See, e.g., Melvin A. Eisenberg, *The Objective and Conduct of the Corporation and Corporate Structure*, 1994 A.L.I.-A.B.A. COURSE OF STUDY, A.L.I.'S PRINCIPLES OF CORP. GOVERNANCE 1 (stating that the corporation's primary objective should be to enhance corporate profit and shareholder gain within the bounds of the law). A reasonable amount of resources, however, may be devoted to public welfare, humanitarian, educational, and philanthropic purposes. *Id.*

those regions. Given that many of the architects of those countries' corporate laws either are or were influenced by corporate law experts from the United States, it is particularly appropriate that we reexamine these questions on two fronts: first, we should take this opportunity to reflect on our own attitudes toward this issue, with the hope of not only improving our lot, but also with the hope of not urging our mistakes on others, particularly in cases where public confidence in new capitalism may need to be fostered to protect citizens' basic welfare;¹⁵ second, even if we are to conclude that the United States' presently constituted view of corporate law is a sound one, we should carefully consider the additional societal institutions that make our system a fair and efficient one and examine whether they are lacking in developing nations.

A reexamination of the fundamental nature of the corporation, its role in society, and the legal framework that is appropriate for its governance, is a healthy exercise in itself. This opportunity for renewed reflection can be used to seriously question the normative goal of profit maximizing corporate service to society. More particularly, rigorous examination of what qualifies as "profit" is called for. Even assuming that we mean "long-term" as opposed to "short-term" profit, what kinds of things count? Does less pollution qualify? Less racism? Does a corporation maximize profit when workplace policies support family leave? What about paying workers so that they can enjoy a more generous standard of living than minimum wage allows—is that "profit"? And are corporations that refuse to deal with companies who violate human rights, even though they forgo a cheap source of labor or materials, "profiting"? As the distinction between the public and the private continues to collapse, these questions are ones worth considering. Indeed, perhaps if the meaning of profit were to be reassessed, the normative goal of profit maximization might be one around which immense support could coalesce, merging the heretofore rather polarized views of the appropriate role of the corporation in modern society.¹⁶

Even if this kind of searching reexamination of the basic assumptions that underlies corporate law is not done, or does not change corporate law in practice, there is still another task demanding attention before our particular version of corporate law is imported into emerging nations. Close attention must be paid to the particular economic, political, and cultural context in which corporate law is to be situated. If the basic task

15. If corporate law fails to prohibit or punish rampant self-dealing, bribery, corruption and other scandals, the legitimacy of private ownership and support for a market economy can be eroded, creating significant destabilization in the emerging nation's economy.

16. See discussion *supra* notes 8-14 and accompanying text.

of corporate law is to create a governance structure for corporations that promotes an appropriate degree of accountability among the participants,¹⁷ then one needs to examine whether corporate law is to be the primary constraint, or whether other constraints already exist that provide accountability. One of the reasons that the United States' enabling version of corporate law functions as well as it does is that it does not work alone. In the United States, we have, for the most part, well-developed, efficient markets and a judicial system that is, again for the most part, competent and fair. Corporate conduct is constrained by both the market and the knowledge that the courts can and will enforce legal rights. In addition to the market and the courts, many institutions have a role to play in corporate accountability—for instance, the ideology of contractual freedom is strong in this country, and the press is comparatively independent and vigorous. In addition, we have not only corporate laws to govern corporate behavior, but also a host of other laws that channel corporate behavior, including an efficient and sophisticated federal securities regulation scheme, employment and labor laws, tax laws, environmental laws, and ERISA. Thus, because our corporate laws work in tandem with a host of other constraints on corporate behavior, that behavior may be more deeply channeled into socially desirable ends than initially appears to be the case from our purely *corporate* laws.

In emerging nations, on the other hand, many of these institutional constraints will be missing or less well developed.¹⁸ Moreover, the nature and strength of those institutions will vary from nation to nation and from region to region, so making generalizations about the appropriate form and structure of corporate law becomes difficult if not dangerous. Accordingly, close attention to the wider context in which corporate law will operate is needed, because the gaps left by an enabling version of corporate law may be left unfilled or filled differently among various nations.¹⁹ Under this view, the legal rules that are selected for corporate governance in emerging nations are driven less by their internal logic than by the social world in which they will exist.

17. See LEWIS D. SOLOMON ET AL., CORPORATIONS, LAW AND POLICY 9 (3d ed. 1994).

18. See Black & Kraakman, *supra* note 7, for a full development of this argument in the context of Russian corporate law.

19. The emphasis on the particulars of the locality in which the corporate law will function makes clear the need for coordinated effort among and between persons familiar with that culture and experts in corporate law. One cannot operate successfully without the other.

Many complex and interesting questions are presented by emerging market economies and an increasingly international marketplace. As those questions are examined and deliberated, however, the opportunity to revisit some of the core questions of corporate law should not be ignored. The role of the corporation in modern society is one such question worth examining, with the hope that its reexamination will not only be useful for corporate development in emerging nations, but also will help to more fully illuminate the proper scope and nature of the corporation's activities in developed markets as well.