

[Public companies and private enterprise](#) [1]

Written by [Terry Arthur](#) [2] | Tuesday 2 June 2009



Mark Kleinman, City Editor of the Sunday Telegraph, is [worried about the remuneration](#) [3] (including bonuses) of company bosses. Many shareholders are incandescent, but largely powerless to influence the chairmen of remuneration committees ? a group whom Kleinman describes correctly as a new category of City pariahs. So what can be done? One suggestion, says Kleinman, would be to make investor votes on remuneration legally binding, but suspects that this may be unworkable; he prefers the idea of making remuneration committee chairmen stand for re-election each year.

I have a far simpler idea; abolish the Companies Act, now almost 1,000 pages long. Radical? Yes, and rightly so. Unlike politicians, companies (or would-be companies) are perfectly capable of drafting sane constitutional documents and shareholders (or potential shareholders) as well as Stock Exchanges are perfectly capable of deciding whether or not to supply funds or approval on the basis of such documents. All we need is contract law; there is no need for Companies Acts at all ? indeed it is they that prohibit certain investor votes from being legally binding. Government controls over PLCs include not only their constitutional documents, but also the relationships between directors and shareholders (hugely biased to the former - so much so that the famous Higgs report suggested that one director should have special responsibilities to shareholders. Gee thanks!) Government rules also control the hostile takeover market (again favouring incumbent directors), and what issues can be raised and validated at an AGM. They even influence capital structure; the tax system favours high gearing and risk.

But what about insider trading? Simple ? deal with it in the company constitution. To allow such trading, says Richard Epstein, the constitution can provide that ?if you want to deal in the shares of this company please understand that every employee and director is entitled to trade on inside information to their heart?s content. If you do not want to trade with us you are free to buy shares in our competitor which does not allow the option".

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This is far better than making insider dealing a criminal offence (if it is, then so must be insider non-dealing!), which merely serves to incarcerate non-violent people at huge taxpayer expense purely to satisfy macho regulators.

No doubt two ?problems" will be raised to rule these wild notions out of court. The first is to parrot that ?limited liability" status is a gift from government which needs a quid pro quo. But where?s the gift in a voluntary bargain clearly understood amongst all concerned? The second is a similar argument about tax. But the starting point must be why should a ?company", owned by taxpaying shareholders, pay any further tax whatsoever? At the end of the day, however one wraps it up, all tax is paid by individuals.

Fascism as racism is a popular description of the creed of the British National Party ? which may well be correct. But the word fascism applies also to a corporate landscape where companies are in "partnership" with government ? the latter very much the senior partner. In that sense the UK is already fascist.

So, and increasingly so, is the United States. Indeed in their "Securities Analysis"(1987 edition) one of the classic investments books of all time, Graham and Dodd were able to point to some 75 years of Government-sponsored erosion of shareholder rights, which it called "the euthanasia of the shareholder". Pretty much the same "progress" over the same period, as in the UK. Nowadays, the most important quality of senior business executives is that of a lobbyist ? often to promote a monopoly in the relevant industry, or something else that gives executive directors an easy life.

All this is light years away from solving Adam Smith's "Agency problem" ? the separation of ownership and control of a business. How could anyone think that this could be cured by the intervention of another agency ? government. And don't expect, Mr Kleinman, any help from the institutional investors and the major fund managers, both of whom are agents and often PLCs to boot.

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