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TOWARDS A CORPORATE OWNERSHIP THAT IS SUSTAINABLE BY DESIGN

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INTRODUCTION

Ownership confers extraordinary powers. This may come at the expense of non-owners. Every owner is a local monopolist of sorts: with respect to the goods in question, others cannot enjoy them or make use of them. There are good reasons for granting such powers. Ownership gives people a sense of freedom and control – think about how important it can be to own your home or some valuable personal belongings. Ownership also often encourages the productive use of resources and drives economic development. Clear ownership rights prevent endless conflicts between people about who owns what. It thus facilitates social cooperation in a complex society. However, the vulnerability of non-owners remains, especially in contexts where some people own a lot while others own very little. This is particularly true for the main topic of this contribution: corporate ownership.

Corporations own most of the productive assets in the economy. This gives them leverage over the various ('non-owning') stakeholders, like employees, local communities and consumers. In this contribution, we want to discuss how corporate ownership could be designed so that it does not dominate or even empower non-owners. We argue that this requires, first of all, a change in how we perceive ownership itself: as a bundle of rights but also as a bundle of duties against non-owners (section 1). Then, we identify the problem of implementing such an ownership philosophy in the corporate context. Standard business corporations are subject to an extractive tendency, where shareholders put pressure on corporate boards to prioritize their financial interests (section 2). Various alternative ownership forms are available to limit this tendency: steward ownership, member ownership (cooperatives) and state ownership. We discuss these corporate ownership forms in light of various corporate ownership principles that are 'sustainable by design' (sections 3 and 4).

1. OWNERSHIP AS A BUNDLE OF RIGHTS AND DUTIES

Ownership in the Western legal tradition has come to be described as a bundle of rights. A person who is a 'full owner' has extensive power to do whatever they want with the things they own. In essence, the bundle of rights is made up of four types of rights.[1] First, an owner has a right to use their things as they want, choosing any particular purpose for their money, land, patents, or other holdings. This freedom to use even includes a right to destroy these things (which is necessary for some goods, e.g. when we consume food). Second, owners have a right to profit from their use and hence derive an income. Many assets can be productively deployed, and the produce can be sold or rented on the market. The owner has the privilege to receive the income. Third, owners have a right to alienate their holdings. They have the power to sell them, donate them, or even abandon them. The latter two, the rights to profit and alienate, are hugely important in a market economy. Fourth, owners have a right to exclude others from the three foregoing rights. Others have a duty to respect these ownership rights and are barred from using, alienating and profiting from the owners' holdings. Even if a factual interference with the

owner's property is already over and could thus not be banned anymore, the right to exclude gives the owner a subsequent claim for damages.

Historically, these rights have given owners immense social, cultural, economic and political power, especially in contexts where others ('non-owners') lacked access to the same resources. But are there no limits? Indeed, some property theories say that owners can enjoy their rights but always within the limits of the law. The law may set boundaries and thereby impose duties upon owners. This way, the power imbalance between owners and non-owners can be redressed. Analogously with the 'bundle of rights', one could also think of a corresponding 'bundle of duties.' What would these duties be?

Here, we can also think of four duties. First, a duty to care demands the preservation and development of the object of property. We can think of this duty as a liability to exercise one's right to use responsibly, for example, by not harming others or not ruining an object. Second, a duty to share sets boundaries to the right to exclude. Especially if an external use by others does not conflict with the intended use of the owner, then it may be warranted to give others access to one's property (here one can think of Intellectual Property rights or apartment buildings not being used). Third, the power to alienate may be suspended by a duty to sustain , which disables unsustainable changes of legal relations. For example, the selling of a primaeval forest as industrial building land may be in conflict with this duty. Fourth, a duty to distribute relativises the privilege to profit oneself by asking owners to share profits with non-owners.

Each of these duties limits one or more of the owners' rights mentioned above. There is one standard caveat, however. Since laws need to be externally imposed by lawmakers, the realization of these duties in practice depends on the view of lawmakers (political will) and their capacity to make suitable rules and enforce them in practice. Owners often perceive these rules as commands imposed on them - unwelcome limits on their freedom. This duality between the imposition force of the state sovereign and the freedom of private owners is a fundamental tension within liberal-democratic regimes. This tension is not between a so-called 'natural freedom' of the owner and a later external state intervention. Rather, the tensionis part of the ownership structure itself. Both the range of the owners' rights (freedom) and their duties are legally constructed. The practical balancing between these rights and duties works well where lawmakers have the will and capacity to impose duties on owners. Still, it works less well where owners have the will and capacity to minimise or circumvent these state-imposed duties.

With this stage-setting in the general theory of ownership, let's now move to the particular context of corporate ownership.

2. THE PROBLEM OF CORPORATE OWNERSHIP

Corporations are legal persons who can act in their name in the legal system, suing and being sued, signing contracts, and owning property. They lead a separate legal existence from the flesh-and-blood persons (which the law calls 'natural persons') who make these decisions on behalf of the corporation (hereafter: 'the board of directors'). The corporation is also separate from all other persons, which gives this abstraction a real-life existence: investors, employees, suppliers, etc. In line with a long tradition, we use the term 'corporation' widely here. It refers to all incorporated legal entities: public ones (like a municipality), private non-profit ones (such as foundations and associations) and for-profit ones. The latter we call 'business corporations.'

The term 'corporate ownership' is ambiguous. It can refer to the ownership of assets (buildings, machines, patents…) by corporations. But it can also refer to the question whether the corporation is itself owned. Non-profit corporations such as associations or foundations are

non-owned. Similarly, public corporations (like the state or a municipality) are non-owned. However, from the 17th century onwards, with the colonial trading companies as the pioneers, the corporate form is also used for commercial purposes.[2] Such business corporations (or 'joint-stock companies') are a sort of association where the shareholders fulfil a role analogous to members in an association (or citizens in a town or state). Sometimes, it is said that shareholders are 'the owners of the company' because they have control rights: they can choose the board (government) of the corporation, dismiss it when it functions badly, and influence the main policies and strategies of the company. Also, they have economic rights - the right to get a dividend payment.[3]

Now, the legal design of business corporations contains an in-built risk, i.e. that the shareholders treat their company as a money machine, pushing the board to make maximal of their ownership rights (i.e. the company's ownership rights over its assets) to generate profits, which are then extracted for the sake of the financial gain of shareholders. How does this come about? Shareholders have two unique privileges, which together lead to an asymmetry. On the one hand, their investments are shielded from liability from the company's debts. Shares can depreciate if the company does not perform well, yet unlike an entrepreneur operating under their name, shareholders are not liable for settling debts ('downside risk'). On the other hand, the 'upside' of a successful company is potentially all theirs. Shareholders can extract money from the company by getting dividends (or, equivalently, increased share prices via share buybacks). This pressure is serious because of their control of the board in combination with a threat to exit via the stock market. This legal setup (combining limited liability, shareholder control and economic rights) incentivises shareholders to pressure boards to implement strategies which maximise profits by off-loading costs and risks to third parties (stakeholders): employees (low wages, precarious labour conditions), the environment (pollution, extraction of non-renewable natural resources), users (making them addicted to one's products), the state (evading taxes), etc.

Companies whose shareholders and boards feel responsible for the broader society in which the company is embedded don't engage in these strategies. Happily, there are many such companies.[4] But large, footloose companies – both stock-listed companies and those owned by private equity – too often do.[5] They act as if their ownership rights do not come with duties attached. So we must ask: are there corporate structures that don't exhibit this in-built extractive design? Are there structures which are 'sustainable by design' by balancing within the corporate ownership structure the bundle of rights with a bundle of duties?

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3. OWNERSHIP THAT IS SUSTAINABLE BY DESIGN

Corporate ownership that is sustainable by design, we propose, aims at two principles. To understand these principles, it is helpful to consider the corporation as a sort of commons, a nexus of a variety of stakeholders who all contribute to the long-term success of the corporation.[6] In a first step, the corporation's activities generate benefits of all kind for the members of the commons (work and wages, products) as well as, possibly, financial profits. In a second step to the corporation needs to decide about the destination of the profits, if there are any. Our first principle applies to the first step and the second principle applies to the second step.

- Principle of balanced cooperation (or fair distribution): the generation of profits is not accom-

plished through unfairly minimizing the benefits of non-shareholding stakeholders and/or imposing costs and risks on them (even when the law would allow). These benefits, costs and risks must be fairly distributed among all stakeholders.

- Principle of long-term orientation (or prudent extraction): the extraction of profits by shareholders is not forbidden, but it should be careful, i.e. not come at the cost of the long-term survival and flourishing of the company itself and society or nature.

The first principle prescribes that the board, as the legal representative of 'the corporation', acts as a mediator between the various cooperating constituencies.[7] Hence, it must not see itself as only the exclusive servant of one of these groups (the owners, i.e. the shareholders) by putting pressure on the others (the non-owners) but see itself as giving each of these groups a fair share. Fair cooperation could include sharing use rights or distributing profits. In good times, they all flourish; in bad times, they all suffer losses. Hence, here we see the first instantiation of the idea of complementing rights in the corporate ownership structure with a 'bundle of duties'.

> "Fair cooperation could include sharing use rights or distributing profits. In good times, they all flourish; in bad times, they all suffer losses."

The second principle is about the relation between the corporation itself on the one hand and all these groups (and society at large) on the other hand. The corporation as a commons has an interest of its own in being preserved as a corporate entity over time (call this maintaining 'corporate integrity'). This liability to care for corporate integrity may, in particular circumstances, create tension with the concrete interests of any of the cooperating constituencies, even when, in the long run, all constituencies benefit when the corporation survives and flourishes. Retaining profits within the company ensures that the corporation has a buffer as well as the capacity to invest in future activities and measures, ensuring sustainability compliance. A prudent extraction policy demands that the corporate constituencies do not appropriate all the gains, thus leaving the company behind as an empty shell. Therefore, handing out profits to shareholders should only be done when it doesn't threaten these vital interests of the company (and society). This is a second step in making the owning corporation a duty-bearer: implementing a duty to care for itself (to the ultimate benefit of all who cooperate through the corporation) and sustain its social and ecological relations.

4. ALTERNATIVE OWNERSHIP FORMS

But how can these fundamental principles be hard-wired into the corporate structure? For this, we propose two applied principles:

- Principle of purpose-driven control: Control rights must be given to a party legally bound to prioritise the company's purpose over the maximisation of profits, thus fulfilling the principle of fair distribution.
- Principle of responsible profit distribution: Company policy on the distribution of profits to shareholders (or members) must be subject to a stringent test of whether it fulfils the principle of prudent extraction.

In the remainder of this paper, various non-standard ownership forms will be discussed in depth. The three main ones are steward-owned companies, member-owned cooperatives, and state-owned companies. How are the two applied principles fulfilled in each of these non-standard corporate forms?

The principle of purpose-driven control is fulfilled in

steward-owned companies by anchoring the company's purpose into the statutes of the company and giving control rights to a set of stewards, e.g. the board of a controlling foundation that acts as such, who are mandated to act to fulfil the purpose. This is the most explicit form of anchoring purpose-driven control, giving it to a body that is not the shareholders. Whether all stakeholder groups get adequate protection in this structure depends on whether the purpose is clear enough to indicate how the various interests must be balanced or whether the stewards have the will and capacity to maintain this balance.

In both cooperatives and state-owned corporations, control rights lie with shareholders (term used here as including 'members' in cooperatives). Hence, there is a risk that such companies will be tempted to put profits first at the expense of fair treatment of other stakeholder groups. In a cooperative, this risk is mitigated for the membership group, which has shares and a membership stake. Workers' cooperatives, for example, will typically not externalise costs onto workers. However, with respect to non-worker groups (or nature), the cooperative could be tempted to act extractively. In state-owned companies, there is a similar risk, i.e. the state agency or department that exercises control rights treats the company as a cash cow for public budgets by shifting costs and risks to particular stakeholders (or natural integrity). In both cases, the risk must be mitigated by building concern for these stakeholders into the structure.

The principle of responsible shareholder pay-out policy can be anchored in the corporate structure in a straightforward way by implementing a dividend cap. Such a cap determines that only a specific maximum percentage of profits can be handed out as dividends. The statute for Community Interest Companies in the UK has such a cap. CICs are obliged to cap dividends at 35% of profits; the other 65% of their profits must be reinvested in the company. Steward-owned companies do not necessarily work with such a hard cap. When wholly owned by a foundation, the risk of undue pressures to pay out is mitigated by the foundation's non-profit nature. When there are also outside investors with shares – even if these do not give control rights – some pressure to pay out may ensue. Cooperatives and state-owned companies can mitigate this risk by anchoring a distribution of profits in their legal structure. For example, the prominent Basque worker cooperation Mondragon has a policy of spending 10% of profits on charity, putting 45% in the collective capital account and another 45% into the individual member accounts their workers hold at the company.[8] State-owned companies could adopt similar policies.

"The principle of responsible shareholder pay-out policy can be anchored in the corporate structure in a straightforward way by implementing a dividend cap."

5. CONCLUSIONS

Let's take stock.

We have seen that standard business corporations carry an in-built risk, i.e. shareholders use companies to maximise share value at the expense of both the corporation itself and non-shareholding stakeholder groups or society and nature. This is the extractive tendency. Note that ownership power lies in the first instance with the corporation, who owns the corporate assets. However, shareholders have control rights (over the board) and economic rights (to get dividends) and hence have considerable power over the corporation. State policies are then needed to protect vulnerable stakeholder groups (non-owners) and impose duties on the corporation (owner). Where such state policies fail, non-owners are structurally exploited.

Alternative corporate ownership forms aim to hard-wire a balance between the interests of owners and non-owners into the corporate structure. This is 'sustainability by design', which, if successful, relieves pressures on states to regulate corporate behaviour to prevent exploitation.

The key to these alternative ownership forms is a change of control or economic rights: these are no longer in the hands of outside investors. Such investors often have no motive to not behave like a homo economicus, focusing on their short-term financial self-interest. In alternative ownership forms, the public as a whole (state ownership), workers or consumers (cooperative ownership) or a non-profit foundation (steward-ownership) assume the shareholder position.

> "Therefore, we can say that alternative ownership forms fulfil a necessary condition towards 'sustainability by design' by removing the purely financial incentive of outside investors."

But does such a change in the identity of the shareholder group automatically remove the extractive tendency from materialising? No. This is clearest for member-owned cooperatives and state-owned companies, where members can aim to exploit non-members, or the state can exploit specific citizen groups. In steward-owned companies, it depends on the nature of the purpose and how stewards protect this purpose. Therefore, we can say that alternative ownership forms fulfil a necessary condition towards 'sustainability by design' by removing the purely financial incentive of outside investors. This is important but not yet sufficient in itself. Additional safeguards in the legal design are needed to make the state, members or a foundation into owners who act as adequate guardians for the legitimate interests of all corporate constituencies as well as society and nature at large. When these are in place, alternative corporate ownership forms can be vital to a sustainable, non-extractive economy.