# *Workers' rights vs 'owners' rights: how structures of corporate law affect the realization of labour rights*

Thesis submitted in accordance with the requirements of the University of Liverpool for the degree of Doctor in Philosophy by

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Abstract

The thesis develops a systematic exposition of the relationship between corporate law and labour rights. The analysis explores the ways in which the legal structuring of the labour relationship through the corporate employer affects the realization of labour rights. The analysis moves beyond the traditional scope of labour law to consider the ways in which corporate, insolvency and competition law uphold hierarchical control over workers across the 'corporate veil' of formally independent legal entities. The study draws on perspectives in the Law and Political Economy (LPE) tradition. Katherina Pistor's concept of the legal 'coding' of capital is adapted to the labour relationship. The coding of capital is analysed as a process through which private law rules are applied to the legal structuring of the social relations of the firm. The impacts of this legal structuring for workers claims to value, job security, and autonomy and voice at work are explored through a series of case examples. 1) The leveraged buyout and the effect of takeovers on rights to collective bargaining and workers share of value. 2) The structure of creditors rights in high yield credit instruments and workers exposure to risk, priority of claims, and rights to worker voice in insolvency. 3) The structuring of the labour relationship across franchise networks and supply chains. The analysis will explore the ways in which rights are shaped by the legal coding of capital: of the forms of corporate property; a process of *capitalization* which structures social relations through law.

# Table of Contents

## List of cases[1]

CLECE SA v Martin Valor (C-463/09) [2011] 2 C.M.L.R.

DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852

Dwyer (UK Franchising) Ltd v Fredbar Ltd, [2022] WL 02346028

Frasers Group Plc v Debenhams Plc [2020] EWHC 1755 (Ch)

Herbert Morris Ltd v. Saxelby [1916] 1 A.C. 688

ICAP Management Services Ltd v Berry, [2017] WL 02391613

Jackson Lloyd Ltd and Mears Group PLC v Mr S Smith & Others, Ucatt, Mr D Williams & Others [2014] UKEAT/0127/13/LA WL 1219555

Kall Kwik Printing (UK) Ltd v Rush, [1996] F.S.R. 114

Leeds United Association Football Club Ltd (In administration) [2007] EWHC 1761 (Ch)

Millam v Print Factory (London) 1991 Ltd [2007] ICR 1331

Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company [1894] AC 535 [565]

Rockfon A/S v Specialarbejderforbundet i Danmark (C-449/93), [1996] I.C.R. 673

Salomon v Salomon & Co Ltd. [1897] A.C. 22 30-31

Shell v Commission (T-11/89) ECLI:EU:T:1992:33

Pakistan International Airline Corp v Times Travel (UK) Ltd, 2021 WL 03634097

United States:

In re Dominos Pizza Inc [2018] S.D.N.Y 16-CV-2492 (AJN)(KNF)

United States v. Richfield Oil Corp. [1951] 99 F. Supp. 280 (S. D. Cal.)

United States v. Arnold, Schwinn & Co [1967] 388 U.S. 365

## List of statutes

United Kingdom:

Bubble Act 1720

Conspiracy and Protection of Property Act 1875

Companies Act 1856

Companies Act 1862

Companies Act 1929

Companies Act 1985

Companies Act 2006

Competition Act 1998

Employment Act 1980

Employment Act 1982

Employment Act 1990

Employment Rights Act 1996

Enterprise Act 2002

Equal Pay Act 1970

Industrial Relations Act 1971

Insolvency Act 1986

Insolvency Rules 2016

Joint Stock Companies Act 1844

Limited Liability Act 1855

Trade Union and Labour Relations (Consolidation) Act 1992

Transfer of Undertakings (Protection of Employment) Regulations 2006

Trade Disputes Act 1906

Trade Union Act 1871

European Union:

Acquired rights directive 2001/23/EC

Collective Redundancies Directive 98/59/EC

Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01

Directive on the protection of employees in the event of the insolvency of their employer 2008/94/EC

United States:

National Labour Relations Act 1935

The Sherman Antitrust Act of 1890

# Introduction

The corporate status of the employer has major implications for the labour relationship and the realization of workers' rights. Workers face a reified corporate 'employer' which obscures the complex legal structuring of the labour relationship through multiple entities and abstract property forms. The labour law concept of the employer obscures the economic reality of the individuals participating in the firm.[2] It tells us little about the structure of rights through which the corporate employer is constituted or the power of the parties involved. These are instead questions of the socio-economic reality of 'the firm'. The firm has no meaning in law, yet its various constituents must transact in the legal system, in most cases through corporations.[3] The aim of the thesis is to get behind the reified employer by unpacking the role of law in upholding this corporate status and the way it affects workers. This proceeds through analysis of the intersecting areas of law and regulation which shape the labour relationship in the capitalist firm; contract, property, corporate, labour, competition and insolvency law. This is animated by a central question: how does the law render workers subject to the decisions and actions of those *with whom they have no legal relationship*?

The periodic eruption of scandals concerning labour rights abuses, corporate failures and boardroom greed suggest structural imbalances in the contemporary labour relationship which go beyond the available correctives and remedies of labour law. In early 2018 the collapse of Carillion - a UK listed multinational corporation providing outsourcing services to the UK government - exposed a deep dysfunctionality in the UK's shareholder centric system of corporate governance. As the House of Commons select committee inquiry would later note, the corporate constituents most empowered in the economic system – Carillion's shareholders – had failed to intervene.[4] The collapse put 45,000 jobs worldwide - 20,000 of which in the UK - directly at risk, with vastly greater numbers affected through the 30,000 suppliers, short term contractors and other creditors to which Carillion owed in excess of £2bn.[5] That the company had total liabilities of nearly £7bn and only £29m in cash at liquidation, had left a pension deficit of £2.6bn, and had paid out over £775m in dividends prior to its collapse, all suggested that the pursuit of 'shareholder value' had in practice entailed the *transfer of risk* on an epic scale.[6] The following year Four Seasons Care – the UK's largest care home provider – went into administration following a round of desperate attempts at recapitalization to cover its vast due debts. Four Seasons had become the largest provider in 2012

[2] Jeremias Prassl, *The Concept of The Employer* (Oxford University Press 2015).
[3] Jean-Philippe Robe, *Property, Power and Politics: Why We Need to Rethink the World Power System* (Bristol University Press 2020).
[4] Business Energy and Industrial Strategy and Work and Pensions Committees, 'Carillion (HC 769)' (2018) 5.
[5] ibid 3.
[6] ibid 4.

following the collapse of Southern Cross Care. Both were chains established by private equity companies via a 'sale and leaseback' process of asset stripping, whereby newly acquired homes were stripped of their property assets and forced to rent them back, the surplus used to fund the acquisition of ever more homes. Wealth transfers to private equity owners across the sector had been matched by rising precarity, understaffing, work intensification, falling pay, statutory wage breaches, declining job quality, and rapid turnover rates for those workers tasked with the actual provision of care in the sector. In an asset rich economy of care marked by constrained revenues, where productivity gains are likely to be experienced as a loss of care time for workers and residents alike, the activities of the private equity 'owners': building chains, dicing assets, and clever use of leverage, looked rather a lot like the extraction and *transfer of value*. The failures at Four Season's, Southern Cross, and Carillion contrasts with corporate success stories elsewhere. In 2018 the tech giant Amazon became the second public company in the world to exceed the $1 Trillion dollar market valuation threshold, with shares hitting $2050.49 each. Amazon's business model of ultra-low margins, huge turnover volume and tech superiority had enabled its rapid expansion and dominance of the emergent online shopping and logistics sector. Amazon's rise has been closely associated with the proliferating allegations of rights violations and bogus self-employment in the new 'gig' economy. Another online company: fashion upstart Boohoo, had enjoyed rapid success since its float in 2014. Boohoo's rapid turnaround times for new styles and ultra-cheap prices – both key selling points for potential investors – were rooted in its almost total domination of the Leicester garment production sector, and the extreme exploitation of the workers therein. When an expose of Boohoo's supply chain practices hit the headlines in late 2020 its share price briefly fell by £2bn. The price rapidly recovered, not least because of the anticipated takeovers of the Debenhams brand, and brands within the Arcadia group; both of which had fallen into insolvency through a confluence of the impact of Covid 19, corporate mismanagement, and the 'Amazon effect' on the UK high street.[7] It appeared that the success of both Boohoo and Amazon in part at least derived from their ability to *externalise* the social costs of production through their respective corporate models. Contemporary economic and labour market trends suggest these examples reflect wider structural imbalances. The share of national income going to labour has declined significantly in both developed and developing countries since the 1980's.[8] The decline of labour share of value added has occurred across the

[7] Ben Crawford, 'Boohoo: Profiting from Poverty?' [2021] Futures of Work <https://futuresofwork.co.uk/2021/03/16/boohoo-profiting-from-poverty/> accessed 13 July 2021.
[8] Alexander Guschanski and Özlem Onaran, 'The Labour Share and Financialisation: Evidence from Publicly Listed Firms' [2018] IDEAS Working Paper Series from RePEc <http://search.proquest.com/docview/2059122144/>.

OECD.[9] In the UK labours' share of value has slowly fallen since the 1970's.[10] The relationship between wages and productivity gains has been broken. Productivity gains measured by real GDP per hour worked have not been matched by real wages, with the wage/productivity gap widening steadily in the period 1970-2006.[11] Wage growth rates have more than halved over the same period, falling from 11% in 1971 to <5% by 2007.[12] The TUC report that between 2008 and 2021 UK workers have lost on average £20,000 in real earnings, and are earning £75 a month less in real terms than in 2008.[13] The dominant labour market trend alongside this erosion of wages has been a shift towards flexible, short term and precarious forms of employment, and diminishing value of pensions as firms shift from 'defined benefit' to 'defined contribution' schemes, and existing schemes have been underfunded.[14] These losses for workers appear to be accruing to shareholders and corporate elites. Growing inequalities in the industrialized nations have seen the emergence of both the 'working poor' and the 'hyper rich', as the proceeds of growth have accrued largely to the wealthiest sections of society.[15] Private equity takeovers have boomed as a result of low interest rates and plentiful capital seeking returns.[16] At the same time large scale redundancies and practices such as 'fire and rehire' have become a major concern. Fragmented models of the employer have become a dominant research agenda within the labour law tradition, and a significant feature of the jobs market. These examples suggest that the legal structuring of the labour relationship across the corporate veil is problematic for the effectiveness of rights. The principle aim of the thesis is to unpack the ways in which the corporation confronts workers as a structure of rights. I contend that the ways in which corporate law can be deployed to structure the firm exacerbates disparities in power between investors and corporate management on one side, and workers on the other. This requires examination of the ways in which the legal architecture of the firm *mediates and reproduces* capitalist social relations.

[9] Riccardo Pariboni and Pasquale Tridico, 'Labour Share Decline, Financialisation and Structural Change' (2019) 43 Cambridge Journal of Economics 1073.
[10] Costas Lapavitsas, *Profiting without Producing: How Finance Exploits Us All* (Verso 2013) 189.
[11] ibid.
[12] ibid 191.
[13] TUC, 'UK Set for "Worst Real Wage Squeeze" in the G7' (2022) <https://tinyurl.com/994a72v5> accessed 10 December 2022.
[14] S Moeller, N Appadu and S Sudarsanam, 'Pensions : Now Something More to Worry about ( for Dealmakers )' (2017) <http://openaccess.city.ac.uk/17099/>.
[15] John Evans and Pierre Habbard, 'From Shareholder Value to Private Equity – the Changing Face of Financialisation of the Economy' (2010) 14 Transfer: European Review of Labour and Research 63.
[16] McKinsey and Company, 'The Rise and Rise of Private Markets: Mckinsey Global Private Markets Review 2018' (2019) <https://tinyurl.com/2twuu4sn>.

## i) The corporate legal architecture and the UK trade union movement

This legal architecture has not been subject to significant contestation by the UK trade union movement. To the extent to which unions have engaged with corporate law, it has taken the form of a debate over the desirability of representation within company board structures versus collective bargaining from without. Trade union engagement with company law must be understood in relation to the dominant historical model of UK labour relations. This has been characterised by a set of mutually reinforcing ideas: collective bargaining as the 'single channel' for mediating struggles within the firm; the distinction between workers contractual claims *against* the corporation and shareholders property rights *within* it, and voluntarism (voluntary self-regulation regarding collective agreements and workers representation) over legalism in the regulation of this. The notion of trade union collective bargaining as the 'single channel' for worker representation has been understood as a historical preference on the part of the UK labour movement for an 'adversarial' stance outside the corporation, with no significant competing functions of worker representation such as a 'second' channel of works councils and a 'third' channel of votes for company boards.[17] The definitive analysis of late 19th and early 20th Century trade union structure and function, the Webb's *Industrial Democracy*, principally understood the core function of trade unions and the concept of 'industrial democracy' to refer to collective bargaining.[18] Otto Kahn-Freund, a dominant figure in post-war UK labour law scholarship described ideas of worker representation within the structures of the corporation as "alien to the trade union movement", to which "the dominant trade union opinion was as averse to the idea as were the employers".[19] Whilst Ewan McGaughey has shown that the history of worker participation in the UK is far more diverse than the 'single channel' narrative might admit, the principle of the single channel as the dominant format for voice holds with notable exceptions.[20] Trade union antipathy to worker voice *within* company structures was not simply a preference for adversarialism, but was tied up with the dominance of the contract/property distinction in UK labour and company law. Since the emergence of the contract of employment in the late 19th Century, the labour relationship has been fundamentally structured around the distinction between the property rights of company 'owners', and the contractual claims of employees.[21] The deep antipathy of the authors of company laws to trade unions, and the courts view that votes within the company were 'a right of property' shaped the dominant view that one's

[17] Ewan Mcgaughey, 'Votes at Work in Britain: Shareholder Monopolisation and the "Single Channel"' (2018) 47 Industrial Law Journal 76, 77.
[18] Otto Kahn-Freund, 'Industrial Democracy' (1977) 6 Industrial Law Journal 65, 71.
[19] ibid 72.
[20] Including worker votes at universities, ports, gas companies, the post, steel and buses Mcgaughey (n 16).
[21] Wanjiru Njoya, *Property in Work:The Employment Relationship in the Anglo-American Firm* (Ashgate: England 2007).

labour was not a sufficient contribution to the business to secure a voice.[22] From the point of view of the labour movement, accepting this distinction was the logical corollary of the principal political objective of achieving 'common ownership of the means of production, distribution and exchange', through nationalisation. The focus on nationalisation indicated a binary state/private understanding of company ownership which would set the dominant model of thinking regarding company ownership for much of the 20th Century.[23]

Developments in corporate organizational forms began to problematize the single channel approach in the early post-war period. At the domestic level, the shift towards corporate conglomerates with multiple production sites controlled at the 'enterprise' level were undermining traditional bargaining arrangements. Otto Kahn-Freund argued that the traditional distinction between the 'social' aims of predominantly plant or regional bargaining structures and the 'economic' decisions made at the enterprise level (over investment, allocation of resources etc.) was collapsing under the new forms of corporate organisation such that "the fate of each worker depends…upon what used to be called economic decisions".[24]Kahn-Freund argued that these transformations in corporate organisation were driving the shift towards demands for worker representation on boards across Europe.[25] New thinking on the left prompted by developments in corporate capitalism had emerged in the late 1960's through the ideas of the Institute for Workers Control (IWC). The IWC explicitly identified both the concentration of physical capital in large conglomerates, and the concentration of financial control within the large investment banks as threats to workers interests. Echoing Kahn-Freund, they identified that powers of decision-making shifting from plant to company, conglomerate or holding company level risked workers being rendered weak before "remote and concentrated management".[26] The IWC favoured workers direct intervention in the running of companies at all levels.[27] They directly identified the implications of the corporation as holder of property rights which "throw[s] a considerable question mark on the traditional assumptions concerning private property itself. We are not now concerned...with risk taking enterprises, carefully guarding their own property. We are concerned with the more insidious and diffuse power of the gigantic international corporations".[28] This diagnosis of the nature of corporate property relations now appears an early warning of the reconfigurations of the labour

[22] Mcgaughey (n 16) 80.
[23] ibid 87.
[24] Kahn-Freund (n 17) 75.
[25] ibid 76.
[26] Hugh Scanlon, 'Workers ' Control and the Transnational Company' The Institute for Workers Control <http://www.socialistrenewal.net/sites/socialistrenewal.net/files/IWC22.pdf>.
[27] Michael Barret-brown, 'Opening the Books' [1968] The Institute for Workers Control <http://www.socialistrenewal.net/sites/socialistrenewal.net/files/IWC4.pdf>.
[28] Scanlon (n 25) 3.

relationship which would follow. In 1976, against a backdrop of extensive industrial struggle, the Bullock Report recommendations brought UK industrial relations close to the establishment of worker representation rights at the level of corporate boards. Reflecting the German model of co-determination company board seats would be split between three equal elements, workers representatives, shareholders representatives and co-opted directors. Responses from business and large sections of the trade union movement were unfavourable. The City company law committee rejected the proposals on the basis of shareholders property rights: "the fundamental basis of the joint stock company system... [is] a system based on the concept that the ultimate authority and control over a company rest with those who provide the capital".[29] Many unions viewed board representation as a flawed diversion from the single channel of collective bargaining, and as potentially a subversion of it through co-optation of worker-directors by business elites.[30] Such concerns were buttressed by a deep suspicion of the role of the law and legislation in the pursuit of workers interests, understood as the tradition of 'voluntarism' in British industrial relations. Voluntarism refers to a system of self-regulation with regards to collective representation rather than legally enforceable minimum standards. Characterised by Otto Kahn Freund as 'collective laissez-faire', voluntarism advocated that negotiation between workers organisations and employers should proceed autonomously of the state.[31] Collective laissez-faire involved "the retreat of the law from industrial relations and of industrial relations from the law".[32] This perspective had become highly influential in the post war period, informing the thinking of British trade unionists, employers, judges and governments of both parties.[33] Yet as Keith Ewing has argued the extension of democracy to the workplace "is not a framework that is well served by the practice of collective laissez faire" but presumes state intervention in constructing institutional structures in order to promote it.[34] Opposition to Bullock on the basis of a preference for voluntarism in instituting worker participation in industry united the conservatives, the CBI, and many trade unions who all in different ways saw it as alien to the British industrial relations tradition.[35] In view of the dramatic fall-off of union representation that was to follow, the 'shareholder revolution' of the 1980's, and the rise of 'shareholder value maximization' as the dominant narrative of corporate governance, unions

[29] Company Law Committee 'A reply to Bullock' cited in Adrian Williamson, 'The Bullock Report on Industrial Democracy and the Post-War Consensus' (2016) 30 Contemporary British History 119, 130 <http://dx.doi.org/10.1080/13619462.2015.1061941>.
[30] ibid 131.
[31] Ruth Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?' (2009) 72 Modern Law Review 220, 221.
[32] quoted in ibid. 221
[33] ibid.
[34] KD Ewing, 'The State and Industrial Relations: "Collective Laissez-Faire" Revisited' (1998) 5 Historical Studies in Industrial Relations 1, 6.
[35] Williamson, 'The Bullock Report on Industrial Democracy and the Post-War Consensus' (n 29) 137.

reliance upon the 'single channel' model looks myopic indeed. In relying upon the tradition of voluntarism the union dissenters to Bullock neglected the role of law in defining the power of the corporate employer. Voluntarism naturalises the parties to industrial struggle: workers and their trade unions against capitalist 'employers', with no attention to the way in which the power of the employer is shaped through the property forms of the corporation. It is of course questionable how far the Bullock proposals would have succeeded in challenging the dramatic shift in power between labour and capital that would unfold in the following decades. The Bullock proposals, and the wider debates regarding single channel representation outside the company against statutory representation inside the company, failed to engage with the implications of the 'insidious and diffuse power' of corporate property faced by workers. The analysis presented here will go deeper than these debates over worker representation to understand how developments at the level of corporate legal structures have served to both *reproduce and transform* dynamics of exploitation in the labour relationship.

Contemporary responses to the issues the IWC and the Bullock proposals sought to address have largely replicated this failure to address the implications of the corporate employer. From the early 1990's onwards a critique of 'shareholder value maximisation' was put forward by 'stakeholder' theorists arguing that shifts in the legal duties of Directors, alongside mechanisms such as worker representation on company boards could re-orientate the firm to meet the needs of its multiple constituencies.[36] Stakeholder theory centred on the idea that corporations are social institutions, and therefore corporate governance arrangements should balance all parties interests.[37] Prominent advocates of stakeholding at the time included John Kay and Will Hutton, with Hutton's book *The State We're In* (advocating for German style co-determination) creating a wave of media and political commentary.[38] This unlikely feat for a book about corporate governance was perhaps indicative of the extent to which the rising power of corporate and financial elites had become matters of public concern. Their work reflected a long-running reformist trend in corporate legal theory traceable back to the ideas of 'entity' theorists, who held that the corporation could ameliorate or resolve the core antagonisms of the labour relationship.[39] The 'stakeholder' model was however far more individualised in concept than the notion of workers collective participation in 'industrial democracy' that had informed the workers movement from the time of the Webb's to the Bullock era. The theory was rooted in the idea that corporate legal and governance structures were

[36] W Hutton, *The State We're In* (Vintage 1996).
[37] Janet Williamson, 'A Trade Union Congress Perspective on the Company Law Review and Corporate Governance Reform since 1997' (2003) 41 British Journal of Industrial Relations 511, 516.
[38] ibid.
[39] AA Berle, *Power without Property: A New Development in American Political Economy* (1959).

rooted not in class conflict, but individual contracting and preferences.[40] This depoliticised vision was embraced by Tony Blair's new Labour government as an idea promising the dissolution of class conflict (including earlier corporatist solutions) into individualised claims. As Blair emphasised the new Labour approach was "based on stakeholding, not an old-fashioned war between bosses and workers".[41] In 1995 the TUC set up a Stakeholder Task Group in recognition of the impact of corporate governance and company law on workers, recommendations from which were adopted by TUC congress in 1996.[42] The TUC's analysis recognised the role of shareholder primacy in company law and the dynamics of the share market as driving an unequal distribution of wealth in listed companies, and argued that shareholder primacy also harmed investment and productivity, reflecting the short-term shareholder interest rather than the long term interest of the company as a whole.[43] Whilst advocating for wider reforms to representation including workers on boards,[44] the most significant opportunity for the TUC to influence reforms came with the Company Law Review 1998-2001 (CLR) which culminated in the Companies Act 2006. For the TUC the most significant aspect of the CLR was the review of the wording of Directors fiduciary duties.[45] They advocated for a formulation reflecting a 'pluralist' conception of the company with the aim of displacing shareholder primacy through a reorientation of duties along stakeholder lines.[46] In practice the TUC ended up supporting the 'enlightened shareholder value' formula preferred by the dominant business and financial interests party to the review. TUC Senior Policy Officer for Corporate Governance Janet Williamson justified support for the new wording on the basis that it "makes the link between stakeholder relationships and shareholder value explicit, thus emphasizing that investing in stakeholder relationships are not optional extras, but an essential part of what directors should do". At the same time Williamson recognized that "the chances of Directors being successfully sued for not following their duties is very low", and that therefore meaningful change would rely upon "some sort of publicity campaign" highlighting the importance of Directors new duties to them.[47] The limited nature and weak enforceability of the reforms was unsurprising. As Collison and others have shown, the CLR process itself closely reflected dominant city and financial interests, a narrow range

[40] Marc Moore and Martin Petrin, *Corporate Governance: Law, Regulation and Theory* (Palgrave 2018) 43.
[41] Blair, quoted in: Simon Hannah, *A Party with Socialists in It: A History of the Labour Left* (Pluto Press 2018) 205.
[42] Williamson, 'A Trade Union Congress Perspective on the Company Law Review and Corporate Governance Reform since 1997' (n 36) 516.
[43] ibid 512.
[44] Janet Williamson, 'All Aboard: Making Worker Representation on Company Boards a Reality' (2016) <https://www.tuc.org.uk/sites/default/files/All_Aboard_2016_0.pdf>.
[45] Williamson, 'A Trade Union Congress Perspective on the Company Law Review and Corporate Governance Reform since 1997' (n 36).
[46] ibid 521.
[47] ibid.

of expertise and opinion, and a presumption in favour of the status quo.[48] There was no trade union representation on the CLR Steering Group, with the TUC relegated to input through the consultation group.[49] This weak consultative position in an elite driven process of corporate governance reform perhaps reflected not only the impacts of the 'shareholder revolution' on workers but the relative decline of trade unionism as a direct-action movement. By contrast to the industrial relations backdrop to Bullock, when some 22 million working days had been lost to strike action in 1972, by 1999 this had fallen to 242,000.[50] Reflecting perhaps the centrality of industrial strife in generating momentum for the Bullock proposals, the relative weakness of the labour movement by the 1990's was matched by an absence of legislative priority in building the 'stakeholder economy'. The more ambitious co-determination reforms advocated for by Kay were never implemented, leaving the CLR and the Companies Act 2006 which emerged from it as the legislative high-water mark of the 'stakeholder' model of the firm. More recently, in 2016 prime minister Theresa May promised to 'put workers on boards'.[51] This apparent commitment to statutory representation later emerged in the 'flexible' and voluntary form of the 2018 corporate governance code recommendation that companies 'should' have board level workforce engagement through either a worker appointed director, a workforce advisory panel, or a designated non-executive director.[52] Despite the limited nature of regulatory reform, the depoliticised and individualised vision of 'stakeholder capitalism' has become embedded in corporate governance discourse. Ironically, 'shareholder value maximization' is widely disparaged. General Electric CEO Jack Welch famously described it as the 'dumbest idea in the world'.[53] Contemporarily large corporations have responded to the covid pandemic, social justice movements such as Black Lives Matter and the climate crisis, with the promise that the pursuit of 'shareholder value' will be guided by the 'purpose' of the 'responsible corporate citizen'.[54] However, against this backdrop of 'stakeholder' narratives, the drive for 'shareholder value maximization' appears to be strangely persistent.

[48] David Collison and others, 'Financialization and Company Law: A Study of the Uk Company Law Review' (2014) 25 Critical Perspectives on Accounting 5 <http://dx.doi.org/10.1016/j.cpa.2012.07.006>.
[49] Williamson, 'A Trade Union Congress Perspective on the Company Law Review and Corporate Governance Reform since 1997' (n 36).
[50] Hannah (n 40) 206.
[51] R Moss, 'Theresa May Promises Worker Representatives on Boards' (*Personnel Today*, 2016) <https://tinyurl.com/msdvx68v> accessed 25 July 2019.
[52] The UK Corporate Goverance Code 2018 Provision 5.
[53] Steve Denning, 'The Dumbest Idea In The World: Maximizing Shareholder Value' (*Forbes*, 2011) <https://tinyurl.com/yc7ey6s9> accessed 5 April 2022.
[54] HJ Gregory, 'The Corporate Purpose Debate: Shareholder Value and Corporate Responsibility in an Era of COVID-19 and Social Unrest' (*Sidley: Insights*, 2020) <https://tinyurl.com/6m36zvcm> accessed 10 October 2021.

## ii) The concentration of corporate and investor power

During the period in which the individualised stakeholder worldview has become dominant, the global economy has seen an enormous concentration in the power of corporations and large investors through the growth of giant firms and concentrated market structures. In the contemporary global economy most economic activity is undertaken within rather than between private economic organizations, especially large, multinational enterprises.[55] In advanced capitalist countries such as the UK, US and Canada large business enterprises (+500 employees) account for a significant proportion (40-50%) of employment and value-added.[56] Numbers of mergers and acquisitions globally has risen from approximately 10,000 per year in 1992 to approximately 50,000 per year by 2018. Between 1992 and 2018, the value of these deals at the global scale has increased from approximately US$ 500 billion to approximately US$ 4 trillion.[57] The number of publicly listed firms has fallen, indicating economies are dominated by fewer, larger firms. In the US the number of publicly listed firms fell from nearly 7000 in 1997 to 3500 in 2013. A similar pattern has occurred in Europe.[58] The number of listed companies in the UK has fallen by 40 per cent from 2008.[59] Over 80% of world trade and 60% of global production is now captured by the supply chains of multinational companies.[60] As firms have consolidated and become larger their profits and revenues have increased by a factor of three.[61] These trends indicate a remarkable consolidation of capital.

The concentration of property at the corporate level has been matched by increasingly consolidated patterns of shareholding through the rise of major institutional investors. Since the late 1960's, institutional investors have become the dominant controlling parties of shares in UK quoted companies, accounting for over 80% of UK public companies aggregate ownership base in 2018.[62] As such, UK corporate governance is firmly the preserve of financial institutions not individual investors.[63] Institutional investors concentrate shareholder power as voting rights are delegated to trustees or fund managers. This concentration of voting rights is often further enhanced through the delegation of management of large proportions of institutional funds (such as pension funds) to the

[55] Geoffrey M Hodgson, 'Knowledge at Work: Some Neoliberal Anachronisms' (2005) 63 Review of Social Economy 547.
[56] D Deakins and M Freel, *Entrepreneurship and Small Firms* (McGraw-Hill 2012).
[57] Jennifer Clapp and Joseph Purugganan, 'Contextualizing Corporate Control in the Agrifood and Extractive Sectors' [2020] Globalizations 1, 1266.
[58] ibid. It should be noted that the rise of private equity ownership over this period may also be a significant factor
[59] J Hill, 'UK Listing Review' (2021) <https://www.gov.uk/government/publications/uk-listings-review>.
[60] 'Supply Chains Resources Hub' (*ITUC*) <https://www.ituc-csi.org/supply-chains-resources-hub> accessed 10 June 2020.
[61] Clapp and Purugganan (n 56).
[62] Moore and Petrin (n 39) 103.
[63] ibid.

major mutual funds, under the management of professional fund managers with enormous proprietary and governance influence over investee companies.[64] Recent years have seen a shift of capital into 'passive' index funds. By 2017 the three big 'passive' asset managers (Blackrock, Vanguard, State Street) held nearly $11 Trillion assets under management.[65] Combined as an investor block the big three are the largest shareholder in 88% of S&P 500 firms.[66] It is estimated that only 10% of US equity investment is done by activist traders assessing market fundamentals of individual firms and investing accordingly.[67] The rise of institutional investors and push to index funds has led to 'common ownership' where a small group of the largest asset management companies collectively constitute the largest shareholder in most of world's largest publicly traded firms.[68] Passive funds are 'passive' in the sense that they invest according to existing market performance metrics. They are not however passive as investors; major institutional investors like Blackrock are activist, both behind the scenes and through voting, largely in favour of shareholder value maximisation strategies.[69] These investment patterns influence corporate decisions on mergers. The rise in institutional investment in index funds has led to a major influx of capital to large firms giving funding and leverage to purchase rivals.[70] Together these processes have the effect of a double concentration: a small group of financial companies are major shareholders in a small number of giant global firms. Workers face these concentrated, extended and overlapping structures of capital in the workplace, but they do not face them as the 'employer'. These developments raise questions as to the scope for workers to meaningfully intervene in 'governance' arrangements to secure rights, whether through statutory employment law, board 'stakeholder' nominees, or traditional industrial relations mechanisms.

### iii) Labour's capital and 'shareholder democracy'

A different and perhaps more significant challenge to the property relations of the corporation has emerged in recent years in the form of 'labour's capital'. As described by David Webber in an influential recent text, sections of the US labour movement have sought to pursue struggles for

[64] ibid.
[65] J Fichtner, E Heemskerk and A Leaver, 'If This Is Capitalism, Where Are the Price Signals?: The Glacial Effects of Passive Investment' (*Sheffield Political Economy Research Institute blog*, 2018) <http://speri.dept.shef.ac.uk/2018/09/03/if-this-is-capitalism-where-are-the-price-signals-the-glacial-effects-of-passive-investment/>.
[66] ibid.
[67] ibid.
[68] Azar, J., Schmalz, M. C., & Tecu, I. (2018). Anti-competitive effects of common ownership. Journal of Finance, 73(4), 1513–1565 – Look up not Mendeley linked ref.
[69] Fichtner, Heemskerk and Leaver (n 64).
[70] Clapp and Purugganan (n 56). (original ref: Clapp, J. (2019). The rise of financial investment and common ownership in agrifood firms. Review of International Political Economy, 26(4), 604–629. https://doi.org/10.1080/09692290.2019.1597755)

better outcomes for workers as activist shareholders through their position as controllers of significant chunks of pension fund capital.[71] In the UK the TUC have pursued shareholder activist strategies through the 'Trade Union Share Owners' (TUSO) initiative, coordinating union controlled pension funds and generating public reports on fund activism to enable pension trustees to demand more responsible investment practices from fund managers.[72] From a strategic perspective within particular rights struggles these activities have some potential for driving change. For example, in the wake of revelations of rights abuses at the Shirebrook warehouse of Sports Direct, TUSO managed to build a shareholder coalition in support of a (TUSO tabled) resolution calling for the board to commission an independent review of human capital management strategy.[73] However, as a model of worker intervention into the legal structures of the corporation this approach has significant drawbacks. Studies of US unions as pension fund activists have suggested that where union activism seeks to further traditional union aims such as organising and collective bargaining, shareholder opposition and share market dynamics prevents success.[74] Union activism has been more successful regarding "classic corporate governance issues" such as executive pay, and 'shareholder rights' issues.[75] Many of the successes cited by Webber are in fact enhancements to shareholder rights. By comparison to the UK, US boards have significant ability to prevent unwanted shareholder interventionism. Concentration of voting rights amongst board 'insider' shareholders, 'poison pill' takeover defences, and staggered boards provide directors with considerable protection.[76] Union pension fund activists have therefore often pursued greater shareholder rights as part of a strategy to enhance their influence over corporate boards.[77] The activism of 'labours capital' has been focused on *expanding* the rights of investors, reflecting ideas of a 'shareholder democracy'.

The concept of 'shareholder democracy' is problematic. It relies upon and thus reinforces the contract/property distinction in UK company law and the idea that property ownership is the only rightful basis for democratic rights in the company. It reflects the 'ownership society' as the

[71] D Webber, *The Rise of the Working-Class Shareholder: Labor's Last Best Weapon* (Harvard University Press 2018).
[72] Trade Union Share Owners, 'Trade Union Voting and Engagement Guidelines' (2013) <https://www.tuc.org.uk/sites/default/files/TUC_Trade_Union_Voting_and_Engagement_Guidelines_March_2013.pdf>.
[73] Janet Williamson, 'Unions and Investors Come Together to Call Time on Poor Employment Practices at Sports Direct' (*Touchstone*, 2016) <https://touchstoneblog.org.uk/2016/09/unions-investors-come-together-call-time-poor-employment-practices-sports-direct/> accessed 5 April 2022.
[74] Schwab, S. J., & Thomas, R. S. (1998). Realigning Corporate Governance: Shareholder Activism by Labor Unions. Michigan Law Review, 96(4), 1018. https://doi.org/10.2307/1290082
[75] Ibid
[76] Moore and Petrin (n 39) 84, 86, 278.
[77] Stewart J Schwab and Randall S Thomas, 'Realigning Corporate Governance: Shareholder Activism by Labor Unions' (1998) 96 Michigan Law Review 1018.

legitimising discourse of the Thatcher era 'shareholder revolution', and the associated processes of privatisation and individualization.[78] It is also empirically flawed. The ONS Wealth and Assets survey shows how concentrated both financial and pensions wealth are within the richest segments of the population:

- The top 10% of households own 74% of net financial wealth (cash in banks, equities, bonds etc), and 53% of total private pension wealth.
- The top 20% account for 83% of financial wealth and 73% of private pension wealth.[79]

As such the concentration of rights to vote in share ownership is an incredibly *undemocratic* approach to economic decision making in general, enfranchising only a tiny proportion of the population. In addition, the proportion of UK listed company shares held directly by UK pension funds has dropped dramatically: from almost 1 in 3 in 1990, to less than 1 in 25 by 2018. The TUC calculate that UK pension funds in total (including indirect holdings) account for less than 6% of UK shares.[80] The success of union shareholder resolutions therefore depends upon broad coalition building, as well as a 'shareholder value' rationale such as the reputational risk of failing to tackle exploitation, as exemplified in the case of Sports Direct. Yet prevailing patterns in shareholder voting suggest that these partnerships may be rare. In the wake of the 2008 crisis, narratives of a 'shareholder spring'[81] emerged amongst city and political commentators, emphasising an emergent responsible shareholder activism to shore up confidence in the shareholder primacy model which had been "severely shaken" by the GFC.[82] Contrary to this narrative, following the financial crisis, by 2019 shareholder dissent had hit a 10-year low. During the 2019 AGM season 97% of shareholders in FTSE 350 UK firms voted with the board.[83] During the 2018 FTSE 350 AGM season only 25% of companies had one or more 'significant dissenting vote' (with greater than 20% opposition). Of the 135 resolutions which received significant dissent only 12 failed, 5 of which were board proposals to remove shareholder prioritisation rights on new share issues. Only 4 remuneration reports, and one

[78] Amy Edwards, '"Manufacturing Capitalists": The Wider Share Ownership Council and the Problem of "Popular Capitalism", 1958-92' (2016) 27 Twentieth Century British History 100.
[79] Office for National Statistics, 'Wealth in Great Britain Wave 5: 2014 to 2016' (2018) <https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/wealthingreatbritainwave5/2014to2016>.
[80] TUC, The High Pay Centre and Commonwealth, 'Do Dividends Pay Our Pensions?' (2022) <https://www.tuc.org.uk/research-analysis/reports/do-dividends-pay-our-pensions>.
[81] Kate Burgess and Dan McCrum, 'Boards Wake up to a Shareholder Spring' *The Financial Times* (May 2012) <https://www.ft.com/content/a284e414-95ee-11e1-a163-00144feab49a>.
[82] European Commission, 'Corporate Governance in Financial Institutions and Remuneration Policies (Green Paper)' (2010) 52010DC0284 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52010DC0284>.
[83] Minerva Analytics, 'Briefing: 2019 UK Voting Review' (2019).

remuneration policy (which actually sets pay) failed. One re-appointment resolution failed.[84] The Investment Association Significant Opposition Register shows that since 2017 only 8 re-appointments and one remuneration policy across the circa 600 firms on the FTSE all share index have received +50% opposing votes.[85] Shareholders overwhelmingly vote with the board. Whilst worker-shareholder coalitions of interest may arise at given junctures, these strategies likely have far less purchase where distributional conflict is greater. The strategic pursuit of gains for workers through 'labour's capital' represents a significant departure from the managerialism of the stakeholder model, and the focus on board level representation by presenting a challenge at the level of property. Yet in doing so it upholds shareholder property itself through support for shareholder primacy prerogatives and legal norms. In doing so it sidesteps the question of workers' rights in relation to the corporation *as workers*.

### iv) Workers' rights and legal 'coding'

My approach diverges from the above perspectives. I intend to examine the ways in which the corporation as a structure of rights generates a disparity of power between investors and corporate management on one side, and workers on the other. I am interested in the ways in which the corporation as a property rights holder, and the rights structures of the property forms it issues as equity and debt instruments intersect in ways which enhances the power of corporate elites over workers. My approach is to explore how core dimensions of corporate law underpin these problematics. These core dimensions are corporate legal personality, limited liability, freely transferable shares, shareholder 'ownership' and delegated management.[86] I do not take these as a set of universal 'core principles' as claimed by Henry Hansman and Reinier Kraakman, but rather as a set of contested and contestable norms which nevertheless have significant ramifications for workers. I examine the corporation as a private law *tool* which can be deployed, alongside the basic rules of contract, property and insolvency law in ways which shape the institutional structure of the firm and the power relations between workers and investors. In this my perspective borrows from the analysis of 'legal coding' developed by Katherina Pistor.[87] I *adapt* Pistor's argument that 'capital' itself is constituted or 'coded' in law to analysis of the labour relationship. My approach draws on the Law and Political Economy (LPE) perspective within which Pistor's work is situated. However, I

[84] Lexis Corporate PSL, 'Market Tracker Trend Report: AGM Season 2018' <https://www.lexisnexis.co.uk/blog/docs/default-source/corporate-law-documents/agm-report-final-7-12-18.pdf?sfvrsn=2219c684_2>.
[85] The Investment Association, 'Public Register' <https://www.theia.org/public-register> accessed 20 September 2019.
[86] Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 Georgetown Law Journal 439.
[87] Katharina Pistor, *The Code of Capital: How Law Creates Wealth and Inequality* (Princeton University Press 2019).

foreground the labour relationship as a site of struggle as it relates to processes of legal development reflecting a Marxian political economy perspective. As such my approach *brings class relations in* to legal coding analysis, thus challenging Pistor's thesis on the autonomy of private law. This is an innovative use of this approach. Pistor's insights on the role of private law in structuring and securing 'capital' are explored in the context of production, revealing the ways in which the legal structuring of capital through the corporation underpins contemporary problems faced by workers. My analysis will explore the ways in which both the labour process and the distribution of the value generated by labour shape and in turn are shaped by a process of legal coding *as capital* through forms of corporate property; a process of *capitalization* which structures social relations through law. I analyse the legal coding of the corporation and its forms of property – the asset owning entities, the share, and the corporate debt instruments – and the rights structures embedded in them and demonstrate the impact of these property claims upon worker's value, security and freedom. This represents an original contribution towards Marxist debates on the role of law in reproducing capitalist social relations. My analysis draws out tensions in the analytical distinction between production and circulation in Marxist accounts of exploitation, which is problematised by the legal structuring of social relations in the contemporary corporate economy. The purpose of this analysis is to identify points of intervention, contestation, and resistance in this process. In contrast to perspectives that emphasise the pure logic of contractual voluntarism in these processes, I emphasise the crucial role of state power and regulation in upholding particular kinds of corporate property relations. In contrast to stakeholder perspectives which approach labour law and corporate law as *complementary* areas of law, I argue labour law's critical normative functions are constantly threatened by innovative applications of private legal ordering. I suggest that the implications of legal coding problematise the distinction between the 'social' sphere of worker's protection – encompassed by statutory employment and labour law protections, and the 'economic' sphere of decision making - of corporate, contract, property and commercial law. The problematic distinction of these spheres, as identified both by Kahn-Freud and the *Institute for Workers Control* in the post-war period, is increasingly untenable in the contemporary corporate economy, especially where labour rights are narrowed to a set of statutory minimums rather than asserted through workers collective power. I explore the ways in which corporate, insolvency and competition law shape structures of control over workers to which labour and employment law provide limited recourse to. This represents a significant contribution to debates concerning the legal parameters of the field of labour law, and the role of law in constructing the wider economic relations in which labour law is understood to intervene. The thesis contributes by reframing debates concerning the 'financialization' and 'fragmentation' of the employer. By placing corporate law, and the corporate

employer at the centre of analysis, the links between these phenomena are made explicit at the level of rights. This contrasts to the tendency in the labour law literature to treat such dynamics as the background economic conditions to which labour law must respond. Increasingly, workers interests, risk exposures, and the labour process itself are significantly determined by the decisions of those – whether investors, lead firms, franchisors or others - with whom workers have no legal relationship, who are, in Steinbaum's phrase "economically if not legally their boss".[88] I shall show how the corporation and its property forms go to the heart of this problematic and paradoxical distinction: both the central role of law in these structures and its failure to provide effective recourse or remedy.

### v) Chapter outline

Chapter 1 presents a review and critique of the dominant theories of corporate law. I firstly discuss the ways in which the legal emergence of the shareholder corporation gave rise to the 'entity theory'. My analysis draws on Marxian theoretical perspectives to argue against a naïve view of the corporation as a social institution with significant autonomy from its shareholder owners. I then describe how the later 'contractarian' theorists would, from the 1970's onwards attempt to re-write the latent hierarchies of the corporation in terms of pure contractual voluntarism. I show how both the 'entity' and 'contractarian' theories, including the 'stakeholder' variant, obscure – in different ways – the property relations of the corporation. The dominant theories of corporate law are demonstrated to conceal normative preferences for particular types of social ordering. The chapter introduces a different way of thinking about the legal development of the corporation: through the intersect of class relations, the state and private law. I introduce Katherina Pistor's concept of legal coding. I argue Pistor's approach lacks an adequate understanding of capital as not only a legal property but as a *social relation*. Analysis of the legal coding of capital must bring in the labour relationship.

Chapter 2 develops analysis of the legal dimensions of the labour relationship and the *form* of rights embedded through corporate law. The chapter delineates the legal dimensions of the labour relationship through three forms of legal direction: contract, property rights and statutory regulation. These are explored as they relate to collective and individual modes of regulation, the normative objects of labour law, and the wider political economy of regulation. I identify struggles over value, job security (including the extent to which work is precarious), and autonomy at work as critical

[88] Marshall Steinbaum, 'Antitrust, the Gig Economy, and Labor Market Power' (2019) 82 Law and Contemporary Problems 45, 55.

dimensions of rights. These rights struggles are understood to reflect the relational dimensions of wage labour, reflected in the dominant mode of contractual relations. As such labour law regulation is shown to reflect a person-centered notion of property. The structuring of corporate law-mediated property abstracts from this, depersonalizing and destabilizing the labour relationship. I argue that, by assuming the person-centered notion of property and rights, labour law reifies the employer and fails to deal with the corporation.

Chapter 3 sets out the theoretical and methodological framework, and the research methods employed. I locate the study within the inter-disciplinary 'Law and Political Economy' (LPE) tradition and discuss how this perspective intersects with Marxist perspectives on law. My methodology is described. I propose to develop a systematic analysis of the effects of core principles of corporate law on the realisation of labour rights. The analysis develops at the intersection of three domains of social action: private law coding, state regulation, and class relations, at the level of the labour relationship. This is developed in the chapters to follow through a series of case studies exploring the impacts of corporate property, financial and organizational forms on the labour relationship.

Chapter 4 explores the takeover bid, and in particular the leveraged buyout (LBO) as an example of the way in which shareholders rights drive value transfers from workers to shareholders. The chapter explores the LBO as a *structure of rights*, and the takeover as a moment of the *crystallization* of shareholders rights through which transfers of value from workers to shareholders are secured. The chapter represents an original contribution to the labour law literature on takeovers, which focuses on the question of 'shareholder primacy' in corporate governance, reflecting the assumptions of the agency theory and the 'separation thesis' of Berle and Means. Corporate law is shown to widely diverge from such normative framings. The legal coding of the LBO is shown to enable direct shareholder control and wealth transfers. The model erodes norms of labour law, most crucially the model of the firm which underpins collective bargaining rights. Trade union contestation of the model has focused on political rather than industrial strategies; campaigning and regulatory advocacy which have demonstrably failed.

Chapter 5 moves from the focus on equity to the debt side of the corporate balance sheet, analysing the legal dynamics of debt instruments as property claims over the value generated in production. The legal structuring of creditors' claims is considered in relation to the ways in which it enables *value extraction* by investors and the *transfer of risk* to workers. The chapter explores the ways in which the priority of workers claims in insolvency have been subordinated to new forms of high-risk high-yield debt, coded for priority *and* free transferability, the genesis of which is significantly the funding of corporate control transactions. Workers claims have been shifted into the sphere of

'social policy' discourse and social security mechanisms. This has led to a *socialization of the risks* of the corporate model, and an *externalization* of workers from corporate insolvency proceedings. I show how these transformations are deeply tied up both with the rise of private equity as a dominant model of ownership, and the wider conditions of protracted economic crisis under which this has occurred, revealing the economic drivers underlying these legal transformations. The question of creditor rights as a mechanism for value extraction and the implications of this for workers is completely under-explored in the literature. As such the chapter represents an original contribution to a significant contemporary issue.

Chapter 6 examines the legal coding of the labour relationship at the level of 'fragmented' organizational structures in franchise networks and supply chains. I critique notions of 'fragmentation' in the labour law literature and suggest a focus on the ways in which legal structuring enables the consolidation of corporate power *through* fragmented organizational forms, which I reframe as a dynamic of 'fragmentation-consolidation'. I explore the ways in which the labour relationship is distributed 'across the corporate veil' in franchising and supply chain structures. I look at how the role of law in commodifying the labour process as intangible property and the problems this poses for effective rights. Drawing on the work of Sanjukta Paul, the chapter engages with the intersect of corporate law and competition law and considers the extent to which competition law regulates concentrations of corporate power and practices of vertical domination and arm's length control. Law is shown to contribute to dynamics of exploitation across fragmented forms by *securing* intangible forms of capital across formally independent entities, and *channeling* logics of competition in ways which harm workers. Applying Paul's analysis of US antitrust to the UK context represents an original contribution to this growing literature.

# Chapter 1: Theories of the corporation



## Introduction

This chapter charts the emergence and development of the dominant theories of corporate law in relation to the historical development of the corporation. The chapter will address a number of recurrent themes in the body of corporate law theory: the nature of shareholder property rights, the degree of 'externalisation' of shareholders in company law and economic reality, and the autonomy of corporate management and the corporate 'entity'. These questions are addressed through analysis of the two main strands of thought regarding the corporation; the 'entity' theory which conceptualises the corporation in institutionalist terms, as the embodiment of the public interest in economic organization and the 'contractarian' theory which reduces the corporation to legal shorthand for a set of individual contracting practices. I argue that, in different ways the contractarian and entity theories obscure the property relations of the corporation. Following Robert Cox, and the critical theory tradition my analysis starts from the perspective that "theory is

always *for* someone, and *for* some purpose".[89] I examine the ways in which these theoretical accounts construct normative justifications for the corporation *as a bearer of rights* through idealised abstractions of the 'public' (entity) and 'private' (contractarianism) dimensions of economic and legal interaction. My focus is on the distinctly normative character of legal theory, and the ways in which theories of the corporation relate to prevailing political and economic contexts and structural pressures and transformations in capitalism: the emergence of large joint stock companies, the expansion of liquid stock markets, the globalization of capital, and the rising power of finance. I offer an alternative framework for understanding the legal development of the corporate form in relation to these dynamics which recognises the intersecting roles of the state, class relations and private law.

Section 1 addresses the 'entity' theory, and related 'grant' or 'concession' theories. The claim of the entity theory that social collectives have a public character which should rightly be subject to forms of democratic ordering have clear value. However I argue that the key exponents of the entity theory fail to recognise the implications of shareholder property rights in relation to the corporation, and therefore endorse an apolitical managerialism revealing a normative preference for shareholder primacy. Section 2 concerns the 'contractarian' theory which reduces the corporation to legal shorthand for a set of individual contracting practices. I argue that the claims of contractarian theory - that the corporation is a sphere of private, individual contractual autonomy – are unsustainable due to the power relations concealed by the language of contract and the legal power conferred through the corporate legal person. The hierarchy of property rights is revealed in the contradictions of corporate law; the corporate entity is upheld by the courts for the purposes of shareholder protection but is practically reducible to the shareholder interest for the purposes of value extraction. This apparent contradiction reveals the corporation as a legal tool which buttresses the power of property in production. Section 3 introduces 'Law and Political Economy' (LPE) perspectives which reveal the political contingency at the heart of the private law rules, and the role of class interests in shaping legal development. I introduce the work of Katherina Pistor and the concept of 'legal coding' as a driver of legal development. The development of private law in the interests of the powerful is, I argue, a more useful explanatory tool for the contemporary uses of the corporation than either of the dominant strands of corporate law theory discussed. The question of the relative 'autonomy' of law in Pistor's perspective sets up a tension between her concept of legal 'coding', and political economy perspectives which see law as a reflection of capitalist social relations. This tension shall be explored in the forthcoming chapters. Note: The discussion below

[89] Robert W Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory' (1981) 10 Millenium: Journal of International Studies 178.

draws largely on Anglo-US scholarship. Whilst there are significant differences between UK and US corporate law, the core characteristics of the model, empirical trends, and the debates in corporate legal and governance scholarship are closely related. As such theoretical and empirical examples from both countries are utilized in a complementary way in the analysis.

## 1.1 The entity theory

### 1.1.1 The 'real entity' theory

Entity perspectives of the corporate law conceptualise the corporation as a social institution and are concerned with what this means for the legal treatment of the corporation and the extent to which its forms of ordering fall within the ambit and purposes of the state. This perspective was first put forward by German jurist Otto von Gierke who viewed the corporation as having both a private and public character deriving from its existence as a social body. Since the state is the all-encompassing social body, in Gierke's view the governance of the internal relations of corporations falls within the public law of the state.[90] Gierke's work was translated into English in 1905 and took on wide resonance in the common law world.[91] Gierke's ideas are reflected in perspectives which emphasise the role of the state in the 'grant' of incorporation rights, also known as the 'concession' theory. This perspective was expressed by US legal theorist Merrick Dodd based on the idea that business activity is *permitted and encouraged by law*, and this occurs because it is of service to the community, rather than because it is a source of profit to its owners.[92] The fact that state law grants corporations advantages such as limited liability, legal personality and perpetual existence is understood as the state granting such concession for the carrying on of certain business activities.[93]As such private property in the corporation is considered as being put to public use *through the granting of legal concessions* and is therefore thought to be subject to public prerogatives.

The long history of the corporation in English law, dating back to the early colonial charter corporations shows the centrality of state power for the granting of corporate privileges. Indeed the colonial corporations chartered from the early 16th Century onwards were hybrid vehicles for crown and elite private interests.[94] The British state enormously widened access to incorporation rights through the 19th Century, beginning with the repeal of the Bubble Act of 1720, which had

[90] Opemiposi Adegbulu, 'Articles Making Corporate Law Great Again : Deconstructing and Identifying Public Interest in Corporate Theories and Corporate Entity Theories' (2018) 33 Australian Journal of Corporate Law 1, 20.
[91] Simon Deakin, 'Tony Lawson's Theory of the Corporation: Towards a Social Ontology of Law' (2017) 41 Cambridge Journal of Economics 1505, 1513.
[92] EM Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45 Harvard Law Review 1150 <https://tinyurl.com/2p94vw3p>.
[93] Paul Mahoney, 'Contract or Concession--An Essay on the History of Corporate Law' (2000) 34 Georgia Law Review 873 <https://tinyurl.com/5n6w88df>.
[94] David Whyte, 'Regimes of Permission and State-Corporate Crime' (2014) 3 State Crime Journal 237, 242.

stringently limited access to incorporation following the collapse of the South Sea Company in the early 1700's on a wave of speculative trading.[95] The repeal was followed by the introduction of incorporation by registration in 1844, and the introduction of general limited liability in 1855.[96] The Companies Act of 1856 significantly liberalised the registration process of the 1844 Act, enabling a simple process of registration for a company with a minimum requirement of seven shareholder members.[97] The liberalization of access saw a rapid growth of newly incorporated firms. Between 1866 and 1874 6,660 new corporations were registered, by the beginning of the 20th Century there were 40,000.[98] Yet the idea of the corporation as a "mere creature of law" was at odds with ideas that the corporation was a 'real' social entity, which could not be contained within the walls of its charter.[99] This perspective was advanced not only with regards to the business function of the corporation. On the left of British politics, Harold Laski saw incorporation as a mechanism for strengthening the role of social collectives. He advocated the extension of corporate legal status to social collectives as an expression of freedom of association, supporting the autonomy of social institutions from the state.[100] Emphasising a diversity of 'voluntary associations' such as sports clubs, trade unions, or business firms, Laski argued that justice required a recognition of the social effects of collective entities. Collectives have a "characteristic of mind", and a will to which individual 'agents' actions are directed.[101] In recognising the socio-legal 'reality' of collectives Laski saw the potential for empowering social organisations to challenge existing hierarchies.

The implication – and central argument – of the entity theorists was that the law must reflect the social facts it tries to explain; "The entities the law must recognise are those which act as such, for to act in unified fashion is - formality apart - to act as a corporation".[102] As such corporate law should reflect the social and economic reality of the business firms to which it applies. US statesman and legal theorist A.A. Berle critiqued the gap between the legal treatment and economic reality of the corporation in his 'theory of enterprise entity'. Berle sought to construct a doctrine of economic reality, from the "scattered rules" of courts responses to this question. The proliferation of multiple corporate entities across the singular business firm was particularly problematic, diverging from the "original conception of the corporation...built around a sovereign grant of certain attributes of personality to a definable group, engaged in an enterprise" under which laws the multiplication of

[95] ibid 243.
[96] Joint Stock Companies Act 1844, Limited Liability Act 1855
[97] Frank Carrigan, *The Parallel Historical Path of Company and Labour Law*, vol 32 (2011) 37.
[98] Whyte (n 93) 243.
[99] Paul Mahoney, 'Contract or Concession--An Essay on the History of Corporate Law' (2000) 34 Georgia Law Review 873.
[100] Harold J Laski, 'The Personality of Associations' (1916) 29 Harvard Law Review 404, 404.
[101] ibid 416.
[102] ibid 422.

personalities would be illegal.[103] These "paper personalities" therefore should be "set aside" and the courts should reconstruct the "single enterprise" out of the assets and liabilities of the multiple entities where they are "owned…operated and maintained" as such.[104] Debates in the social ontology of law have continued to interrogate the implications of the 'social reality' of the corporation: the relationship between a notional collective and the legal concepts to which it relates. Lawson has recently rearticulated the real entity perspective, arguing that a corporation is a 'community' in the sense that it is an emergent totality or structure, originating in the interactions of human agents and the rights and obligations which emerge from these.[105] However, the gap between this abstract theorization of the corporation as a 'social institution' and the actual application of corporate law is enormous. The legal and economic history of the emergence of the modern corporation tells a very different story.

### 1.1.2 The legal transformation of the share and the doctrine of corporate legal personality

As Paddy Ireland has shown, the legal development of corporate entity relates not to abstract legal theoretical formulations but to the intersection of legal and economic dynamics in the development of capitalism. For Ireland the legal form of the shareholder corporation emerges from the economic form of the joint stock company, the legal reconceptualization of the share, and state backing for limited liability.

The economic form of the Joint Stock Company (JSC) characterised by multiple passive shareholder-partners was the basis for the emergent legal form of the corporation. The large JSC's had developed as associations pooling the capital of members, characterised by the economic characteristics of a large number of members, a separation of ownership and management functions, transferability of shares. Joint Stock Companies were seen as 'public' versions of private partnerships until the middle of the 19th Century, with the distinction made on quantitative (numbers of members) not qualitative grounds.[106] This economic form was not dependent upon legal status, as many were unincorporated through the early 19th Century.[107] Ireland has shown that the legal transformation of the share was a crucial factor in the emergence of the modern doctrine

[103] AA Berle, 'The Theory of Enterprise Entity' (1947) 47 Columbia Law Review 343, 344.
[104] ibid 344–45.
[105] Tony Lawson and Tony Lawson, 'The Nature of the Firm and Peculiarities of the Corporation * †' [2019] The Nature of Social Reality 83, 29.
[106] Ireland, P. (2010) Limited liability, shareholder rights and the problem of corporate irresponsibility. *Cambridge Journal of Economics* 2010, 34, 837–856 p.846 Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) 62 Modern Law Review 32, 40.
[107] Paddy Ireland, 'Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality' (1996) 17 Journal of Legal History 41, 45.

of separate personality.[108]The original legal form of the share was that of an equitable interest in a company's assets, implying an identification between a company and its members.[109] Economic developments in the form of the development of liquid markets for shares from the 1830's onwards facilitated the legal reconceptualization of the share. The landmark ruling in this process was the 1837 decision in *Bligh v Brent* in which the prevailing view had been that the "shareholder has an estate of the same nature as the company" was rejected.[110] Since *Bligh* the shareholder has been viewed to have interests only in the profits of the company, with no interest in the company assets.[111] As such the share became a pure title to revenue, with associated political rights as per the company constitution.[112] This transformed it from a direct interest in the company's assets into a legal object of property in its own right; 'intangible share capital', opening up a legal space between the company as asset owner and the shareholder as share owner.[113] Shareholders were released from their ties to the company and its assets and the JSC share became a tradeable right to profit with its own value in the marketplace.[114] Crucially, this process was not dependent upon the doctrine of corporate legal personality, as the share as property form independent of the assets was upheld in cases of *unincorporated* joint stock companies which hinged upon the nature of the JSC share itself.[115] Ireland argues it was this shift – the emergence of the share as an form of property autonomous from the firm – that facilitated the externalisation of shareholders from the firm, enabling the logic of separate personality – the company as sole owner of its assets – to fully develop.[116] As such the notion of the company as a reified entity, an 'it', *was not prior to but dependent upon* changes in the economic and legal nature of shareholding towards increasingly detached, *rentier* shareholders.

This was facilitated by the introduction of general limited liability in 1855 which enabled the degree of shareholder supervision of the company decrease. Creditors would now have to seek payments from 'the company' as a separate, property owning entity, as opposed to taking direct

[108] Paddy Ireland, IAN Grigg-spall and Dave Kelly, 'The Conceptual Foundations of Modern Company Law' (1987) 14 Journal of Law and Society 149, 69.
[109] Ireland, 'Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality' (n 106) 67.
[110] Bligh v Brent 1837 (2 Y & C Ex 268).
[111] Ireland, Grigg-spall and Kelly (n 107) 152.
[112] ibid 155–59.
[113] Ireland (1999) p.43
[114] Ireland, 'Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality' (n 106) 69.
[115] Ireland, Grigg-spall and Kelly (n 107) 153.
[116] Ireland, 'Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality' (n 106).

action against shareholders.[117]This change, combined with the rise of the fully 'paid-up share'[118]saw a shift from "a *de jure* regime of limited liability to a *de facto* regime of no liability".[119]Whilst JSC shareholders had never really been active industrial capitalists 'inside' the company, the degree of supervision declined over the century.[120] This enabled increasingly diversified holdings of securities, which was facilitated by the rise of financial intermediaries, modern financial reporting and increasingly liquid markets.[121] The cumulative effect of these legal and economic transformations in was the shift of shareholders by the late 19th Century "from active participants to passive investors...money capitalists standing outside the company" and subsequently, the "de-personification [of the firm]...ceasing to be an association and…becoming an institution".[122] As the courts came to accept the implications of legal personality and removing restrictions on asset partitioning, the idea of the corporation as merely the 'aggregate' of its members, or a legal label for their collective activities came to be displaced by the idea that the collective aspect of the corporation represented a meaningful 'entity' with a social reality beyond the sum of its parts.

This account demonstrates the centrality of intersecting economic, political and legal processes at the level of shareholder property in the emergence of the modern doctrine of corporate legal personality. In providing state backing for incorporation and limited liability the state facilitated the emergence of new forms of privately minted money capital and the expansion of the credit system, which developed through the legal reconceptualization of the share. The doctrine of legal personality was fully realised as the counterpart to these new forms of capital.

### 1.1.3 The 'separation thesis'

The shift of the capitalist owner of production to the passive rentier 'outside' the firm led to claims that the corporate form reflected a transformation of capitalist property relations, opening up the firm as a social institution through the 'externalization of the shareholder'. Berle argued that the nature of shareholder ownership had been transformed by the emergence of the widely held public corporation. Lacking effective managerial control, and free to exchange their shares for cash, shareholders had opted for liquidity rather than control.[123]He argued that the externalisation of the shareholder implied that the firm was a "locus of social power" in its own right. The idea of the firm

[117] Ireland (2010) p.846
[118] Until the mid-19th Century the price of shares was only partially paid up, so that companies could 'call-up' additional share capital if needed, meaning in effect shareholders carried residual liabilities. Ibid p.844
[119] Ireland (2010) p.847
[120] Ireland (1999) p.
[121] Ibid p.44
[122] Ibid p.42
[123] Moore and Petrin (n 39) 26.

as an 'object' of shareholder property gives way to a view of the firm as a social institution.[124] Berle claimed that the exercise of corporate power had been separated from the underlying property rights of the nominal owners, opening up a 'separation of ownership and control' which empowered a new technocratic managerial class to make corporate decisions in the broadest public interest.[125]Whilst Berle recognised that this 'power without property' was problematic, including in relation to the rising power of small numbers of investment managers over company boards, he argued that – despite the distinctly public character of corporate actions – it was preferable for the avoidance of 'statist' mechanisms of control (in this he was drawing a distinction from the corporatist models emerging in France, Germany and Japan).[126] Instead a "public consensus" or national set of moral standards and expectations about business policies could be "internalized" by the "corporate conscience" of business managers, who would become a kind of "non-statist civil service".[127]Private production would be governed for public benefit. In this way the entity theory paved the way for ideas of 'corporate social responsibility', and later stakeholder models of the corporation. This 'managerialist' theory of the firm also had implications for the labour relationship. The managerialist view claimed that the displacement of shareholders with the 'non-propertied' interests of technocratic non-owner managers are not in conflict with those of employees as capital has been taken out of the equation, therefore the basis of conflict between capital and labour central to Marxist critiques of capitalism would be suppressed.[128]

The idea of the corporation as a quasi-public institution became widespread as a result of Berle and Means 1967 study into the extent of outsider shareholding of US corporations, and the highly dispersed nature of US stockholding. The study claimed that increasingly dispersed stockholdings had increased the power of corporate managers relative to shareholders, to the extent that 44% of the 200 largest US companies were 'managerially controlled'.[129] From a legal perspective the 'externalisation' of shareholders from the company as a result of the modern doctrine of separate personality was far from total. Whilst the principles of corporate legal personality and limited liability set up a legal separation of the shareholder from the company and its assets, company law continued to grant them residual control rights; most crucially the monopoly of the vote in the company meeting, and the right to have the company run solely in the shareholder

[124] ibid 27.
[125] Berle (n 38).
[126] ibid.
[127] ibid.
[128] M De Vroey, 'PART I: The Corporation and The Labor Process: The Separation of Ownership and Control in Large Corporations' (1975) 7 Review of Radical Political Economics 1, 1.
[129] Any company in which the majority shareholder owned less than 20% of the equity was considered to be managerially controlled. A.A. Berle and G. Means, The Modern Corporation and Private Property, Harcourt, Brace and World: New York, 1967

interest. This presents something of a paradox for the notion of the 'real' corporate entity; only one group of its constituents are granted the power to control it. Berle's argument was that the *legal* control rights retained by shareholders had become essentially inoperable due to the vast *economic* dispersion of holdings of any given company. The empirical case for this 'economic' separation was challenged on the basis of a 'fractionalist' argument put forwards by sociologist Maurice Zeitlin. Zeitlin argued against the numerical metric of Berle and Means, and demonstrated that functional control of a corporation where most holdings were highly dispersed was possible with only a 5% shareholding, and that 40% of America's top 500 companies were controlled by a minimum 10% interest.[130] Marxist economist Michael De Vroey drew out the implications of this further. De Vroey described three levels of capitalist ownership in the corporation: 1) Possession (the ability to put the means of production to work – management) 2) Ownership as a relationship of production (economic ownership: the power to assign the use of corporate objects and dispose of the products so obtained) 3) Legal ownership (holding legal title of shares).[131] On this basis De Vroey delineated a twofold dimension to the separation thesis. Firstly, the separation of 'possession' from 'economic ownership' is only a *functional shift* in the forms in which capitalist control of production is organised. Secondly, the split between small and large stock holders, wherein small holders have 'legal ownership' but not 'economic ownership', under highly dispersed conditions merely means that ever smaller proportions of stock holding are required for economic control, whilst multiple small 'legal owners' provide the ever increasing volumes of capital needed for accumulation.[132] On this basis powerful financiers were able to control multiple companies.[133] Furthermore, as Paul Sweezy described the 'functional shift' in forms raised by De Vroey is simply the delegation of power to make capital function; we should not confuse "making decisions within a given frame and deciding what goals are imposed by this frame on those working within it. The ultimate purpose of enterprise is determined not by any individual or group but by the very nature of the business system, or, as Marxists would say, the nature of capital as self-expanding value.".[134] As Ireland has argued, the property form of the share deeply ties together the fates of the 'industrial capital' of the corporation and the 'money capital' of the share. Using Marx's analysis of the emergence of 'money-capital', Ireland shows how the share as a form of credit facilitated the emergence of the distinct functions of the 'money capitalists' -passive rentier shareholders – and 'industrial capitalists' directly involved in production.[135] The share as money capital enables capitalists to withdraw from

[130] Talbot
[131] The three levels of ownership are taken from Bettelheim. De Vroey (n 127) 3.
[132] ibid 4.
[133] ibid 3.
[134] Paul Sweezy quoted in ibid 4.
[135] Ireland, Grigg-spall and Kelly (n 107).

production which becomes dominated by managers, to the sphere of circulation - the credit system, upon which capital accumulation is dependant.[136]Yet this withdrawal from production does not open up an autonomous space for the firm to function free from proprietary interests. The capitalisation of the share determines its price based not upon the value of the company assets but by the profits generated by them, and the associated wage labour-capital struggle over surplus value.[137]As such, despite its status as saleable property in its own right the contingent and variable nature of the return on the share links it closely to the function of the industrial capital of the company and the returns on its assets.[138] For Ireland then both the reified company and the autonomous share-as-property are phenomenal forms which are traceable to struggles both between wage labour and capital within production, and between fractions of capital (industrial and money).[139] Therefore the apparent autonomy of the corporate entity conceals the fact that it is "but the personification of industrial capital and an entity subject to its relentless logic".[140] Analysis of the 'separation thesis' then suggests the externalization of the shareholder is but a functional shift in the ways in which capital is organised which gives power to concentrations of capital even under conditions of highly dispersed shareholding. Ownership must be understood as both a legal and economic relation, particularly in the context of the corporate property form which mediates relations between the spheres of money capital and industrial capital.

### 1.1.4 Economic reality, the corporate entity and the corporate veil

As we have seen, the principle of limited liability emerged to facilitate the pooling of investment capital in large JSC's, yet in its application across the plurality of organizational forms it quickly became divorced from any kind of economic reality analysis. The corporate legal person has been consistently upheld by the UK courts for the purposes of shareholder protection since the landmark *Salomon v Salomon* case of 1897. Whilst corporate legal personality long predated this case, the ruling in *Salomon* was significant as it made clear that company Directors and shareholders could legitimately *intentionally* use the corporate entity to shield themselves from liabilities.[141] The case concerned the question of whether the majority shareholder in a company could be held personally liable for the company's debt. The initial finding of the Court of Appeal held that the company was a 'myth', with the majority of the incorporators (who were the majority shareholder Salomon's family

[136] ibid 154–55.
[137] ibid 157.
[138] ibid 160.
[139] ibid.
[140] Ireland, 'Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality' (n 106) 69.
[141] L Roach, *Card and James' Business Law* (3rd edn, Oxford University Press 2014) 546.

members) mere 'puppets' in contradiction of the true intent of the Companies Act 1862.[142] This was overturned by the House of Lords who held that it was essential to the 'artificial creation' enacted by that legislation that the law "should recognise only that artificial existence - quite apart from the motives or conduct of individual corporators".[143] As such the reasoning in *Salomon* stands firmly on the 'artificial creation' of the 1862 Act. This is highly problematic for perspectives which treat the corporate entity as essentially a private law phenomenon, a point discussed further below. McGaughey has argued that the *Salomon* case established a 'theory of interpretative literalism' regarding the provisions of corporate legal personality in the companies acts.[144] This formalistic judicial approach continues to this day. In 2016 the Scottish Supreme Court refused to impose civil liability onto a sole shareholder-Director for a company's failure to take out insurance to cover injuries to employees, despite the clear injustice to the injured employee who went uncompensated.[145] The majority cited the lack of express statutory intent in the Employment Liability Act 1969 to look beyond the corporate entity.[146] Dissenting Lord Toulson argued the majority failed to consider the "function, substance and effect" of the statutory provisions (of the ELA 1969) in "real terms", reflecting a choice of formalism over realism in interpretation of statutory language. In construing the statute to place a duty on the company only this failed to uphold the legislative purpose of the protective (insurance) legislation.[147] The centrality of statutory intent demonstrates the ways in which (with few exceptions) the corporate entity will be robustly upheld by the courts unless the state has expressly mandated otherwise. The jurisprudence of the 'corporate veil' doctrine since *Salomon* has been the subject of an extensive body of academic and legal commentary and analysis which need not be recounted in detail here. Suffice to say at this point that the principle of corporate liability is upheld with few exceptions. As Petrin and Choudhary note, the expansion of veil piercing doctrine in the UK was effectively ended with the 1989 decision in *Adams v Cape Industries plc* which limited the doctrine to three grounds; statutory or contractual intent, instances where the corporation is utilised to perpetuate a fraud, or where the company is a mere façade used to evade a contractual obligation, or where a subsidiary acts as a parents agent.[148] This formalist treatment of the corporate legal person is highly problematic for the 'economic reality' arguments of the entity theory. This is clear in the treatment of multiple legal personalities within corporate groups and the limited application of the concept of 'enterprise liability'. This

[142] Salomon v Salomon & Co Ltd. [1897] A.C. 22 30-31
[143] ibid 30-31
[144] Ewan McGaughey, 'Donoghue v. Salomon in the High Court' (2013) 951 SSRN Electronic Journal 1, 1.
[145] *Campbell v Peter Gordon Joiners Ltd.* [2016] A.C. 1513
[146] ibid [6]
[147] ibid [27]-[30] (Toulson LJ)
[148] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 775 <https://doi.org/10.1007/s40804-018-0121-7>.

implies the courts reconstructing the real 'enterprise entity' out of the assets and liabilities of the multiple legal entities in relation to the economic fact of its relationship with 'outsiders'.[149] As Collins has shown the corporation contradicts this theory at common law, which lacks any kind of 'general principle' for application of collective responsibility where integrated economic organisations have multiple legal identities.[150] A corporate group has no singular identity in law.[151]There are exceptional mechanisms which can be deployed such as vicarious liability, non-delegable duties, exceptions to privity of contract, shadow Directors, and long-term contractual relations which each offer partial mechanisms for overcoming the 'capital boundary problem' as Collins describes it.[152] However, the courts are limited in the ability to defeat the power of capital to organise itself in ways which reduce or eliminate liabilities arising from productive activities.[153] The UK courts willingness to link legal personality to economic reality through conceptions of 'enterprise liability' reached a high point in the 1970's under L J Denning's 'single economic unit theory', which attached parental liability for actions of a subsidiary.[154]Denning's approach however lacked clear criteria for its application and despite retaining some utility in veil piercing jurisprudence, the theory has been heavily criticised and has not developed into a coherent legal doctrine.[155] There are few notable exceptions. McGaughey argues that in *Chandler v Cape* the court diverged from 'interpretative literalism', by looking at legal personality as a 'restricted exception' to the law of obligations, which is only justifiable where all parties are able to choose to opt-out of protection. In *Chandler* the parent company was held liable for compensating employees of its wholly owned subsidiary who had been exposed to asbestos in their employment. The ruling suggests an orientation towards the economic reality of the relationships between the parties; employees could not be expected to contract for future compensation in circumstances of injury and the (subsidiary) employers insolvency, and the general rule of tort – that individuals are liable for the actions of third parties where they may exercise control – was upheld.[156] As McGaughey emphasises treating legal personality as a 'justified exception' opens the possibility that the exception must be justified in every case.[157]

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[149] ibid pp.347-9

[150] ibid p.732

[151] It is noted that the concept of an 'undertaking' in EU competition law, and for the purposes of TUPE has been defined by the European courts as referring to an 'economic' not 'legal' unit. The implications of this are explored later in the thesis.

[152] Hugh Collins, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53 The Modern Law Review 731, 738.

[153] Ibid p.738

[154] DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852

[155] Cheng, T. K. (2011) The corporate veil doctrine revisited: a comparative study of the English and the U.S corporate veil doctrines. *International and Comparative Law Review* 329

[156] McGaughey (2013)

[157] ibid

The economic case for the 'separation thesis' rests on a particular type of firm; the large, vertically integrated, publicly quoted corporation. Yet the core conceptual framework of company law has long been applied to more diverse forms. The basic conceptual structure of company law which emerged from the combination of the single-entity JSC economic form with the legal principles of separate personality and limited liability has changed little over time, despite its application to radically different economic forms, such as small business concerns where the company and its owner are to all intents and purposes the same, and multi-entity corporate groups and multi-national companies.[158] The conditions under which firms can incorporate have become progressively more liberal almost everywhere.[159] The company does not need to correspond with any particular organisational structures to incorporate.[160] The incorporated 'company' no longer denotes an economic form, but merely a legal one.[161] In the UK, and in many other jurisdictions companies can be formed with a single shareholder-director. Shell and holding companies, which do not employ any workers are commonplace, and used to structure operations in ways which are legally beneficial to the owners. Many workplaces are legally bisected by multiple corporate entities which would be invisible to the observer, or casual participant in the work being performed, yet have significant impacts upon the rights of the workers involved. Laski's invocation that the law "must recognise those collectives that act as such"[162] is a far cry from the contemporary experiences of workers who try to challenge the legal boundaries of their employment.

### 1.1.5 The fiduciary model and the 'company interest'

One key dimension of the entity theory is the idea that the corporation, as the embodiment of a collective of interests, therefore *transcends* those aggregate private interests. As such it must be governed in the interests of those affected by it, not only employees, but others such as local communities.[163] On this basis a set of mechanisms are mandated which grant greater discretionary authority to corporate managers, and guide the uses of their power to respond to the interests of other participants and the achievement of publicly determined objectives.[164] This corresponds to the 'fiduciary' model of the corporation in stakeholder theory, which has been the basis for the ongoing debates around Director's duties in UK company law referred to in the introduction.[165] These

[158] Ireland (1999) p.44
[159] Deakin, 'Tony Lawson's Theory of the Corporation: Towards a Social Ontology of Law' (n 90) 1514.
[160] ibid.
[161] Ireland, 'Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality' (n 106) 45.
[162] Laski (n 99) 422.
[163] Moore and Petrin (n 39) 28.
[164] ibid.
[165] Hansmann and Kraakman (n 85) 447.

debates centre around a notion of the 'company interest' as codified in law, which Directors are required to uphold, and the potential for it to be extended beyond the narrow shareholder interest.

Much has been made of the 'enlightened shareholder value' formulation adopted in the Companies Act 2006, which was held to extend the sphere of Directors obligations beyond the pursuit of pure profit for shareholders.[166] Yet the Act is clear that board decision making must serve above all the shareholder interest. This is clear in s.172 which 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 [i.e. ordinary shareholders] as a whole'.[167] In doing so Directors should have regard to a number of stakeholder interests including employees, customers, the community and impacts upon the environment.[168] The hierarchy of the shareholder interest is clear, the interests of non-shareholder constituencies are not a business objective in themselves, but a means towards enhancing the success of the business and the shareholder wealth.[169] As Moore and Petrin argue, despite the extensive attention upon the new formulation of duties in the Act, it is a "trivial legal innovation" which in fact "relegates" the employee interest in comparison to the preceding Companies Act 1985 which established "lexical parity" between the shareholder and employee interest.[170] As noted in the introduction, the advocates of the new duties acknowledged that given the absence of rights of action to enforce these duties (as non-members of the company) the chances of enforcement are extremely low. Nevertheless a recent case concerning Director liability has raised the possibility that the 'company interest' as framed through the 2006 Act may suggest a new trend in UK company law. The recent *DJ Houghton v Antusis* case is particularly interesting from the point of view of the 'entity' theory. Liability for statutory breaches of employment law was attached to the Director (and sole shareholder) of a company employing migrant workers to catch chickens.[171]Employees of the company who had suffered extensive violations of statutory rights brought a claim against the Company Directors following liquidation. An officer of the company would not normally be held liable for causing the company to commit statutory breaches – if acting 'bona fide' and within the scope of their authority. However the officers' actions in relation to his duties towards the company which would decide whether such actions were bona fide.[172]As such Directors duties under s 172 were relevant. In light of the

[166] Sarah Clarke, 'The Expansion of a Director's Duty to Act in the Interests of the Company' (*Thomson Reuters*, 2020) <https://tinyurl.com/2sn8stee> accessed 12 April 2022.
[167] Companies Act 2006 c.46 s 172 (1).
[168] ibid s 172 (1) (a)-(e).
[169] Moore and Petrin (n 39) 144.
[170] ibid 146.

[172] Antuzis v DJ Houghton Catching Services Ltd, 2019 WL 01508704 [114]

provisions the court held that the Directors actions had ruined the reputation of the company "in the eyes of the community".[173] Whilst the breaches had been motivated by shareholder profit maximization, materially they had harmed the company interest.[174] This included the employee interest which had been harmed by the collapse of the company. This provided a route for ascribing personal liability and provided a remedy for the workers who had suffered so extensively.[175] Whilst not a case of 'veil piercing' as such, the ruling articulated the intersection of the company interest, its public reputation and the public and democratic nature of statutory protections which would appear to imply a broader public interest in the actions of companies. Paradoxically, it is unlikely that the statutory breaches would have been grounds for personal liability had the company (and therefore the Director/shareholder concerned) prospered from such violations. As such it demonstrates the difficulties of separating the company interest from the shareholder interest where the hierarchy of the shareholder interest is retained and rights of action in the company are the preserve of shareholders. Contra the entity theory, and notwithstanding these few notable exceptions, the judicial treatment of the corporate legal entity suggests not only its divorce from underlying economic reality, but a contradictory dynamic wherein the corporate entity is real for the purposes of shareholder protection, whilst simultaneously being reducible to the shareholder interest.

### 1.1.6 Post-war capitalism and the 'managerial' corporation

Whilst the 'separation thesis' of Berle and Means may be empirically qualified by the fractionalist critique, and may reflect an ontological lack of depth in its analysis of capitalist forms, the idea of the 'managerial' corporation *was* reflected in wider autonomy for corporate managers in the post-war period. Berle's idea that corporate management had 'power without property' reflected a particular claim regarding the corporate economy of the time, in which he argued market mechanisms exert only a limited degree of control over corporate management.[176] That is to say, whether in product, labour or capital markets major corporations have the market power to affect the level at which prices are set. Corporate management can (to a degree), raise prices of products without risking a collapse in sales, cut wages without a collapse in recruitment or restrict dividends without risking capital flight. Certainly, the relative autonomy of management in relation to finance is widely recognised within corporate governance literature as characteristic of the period of 'managerial

[173] Ibid [124]
[174] Ibid [127]
[175] Clarke (n 165).
[176] Overton H Taylor, 'Reviewed Work ( s ): Power without Property : A New Development in American Political Economy by Adolf A. Berle' (1959) 59 Columbia Law Review 1101.

capitalism' which emerged through the early 20th Century and survived into the post-war period.[177] Increasingly dispersed shareholding and liquid markets allowed shareholders to exercise preferences largely through 'exit' rather than 'voice'.[178] Manager's autonomy increasingly enabled the use of retained funds to meet the firm's financial needs, further diminishing reliance on capital investment.[179]On this basis corporations in both the US and UK can be seen to have been increasingly self-sufficient from the 1920's onwards, and the position of finance over production relatively weak into the post-war period.[180]The substantial restrictions and regulation of international capital flows under the Bretton Woods agreements also directly weakened the power of finance and financial property owners.[181]The managerialist theories then reflect a period where corporate management may indeed have had greater discretion to support interests of 'insider' interests such as labour over the (quasi) 'external' interests of shareholders. Yet as De Vroey's analysis shows the nature of capitalist 'ownership' derives from both economic *and* legal forms. The formal legal structures of governance changed little under 'managerial capitalism'. The legal reconceptualization of the corporation as an autonomous 'social institution' free from private proprietary interests would have required a significant reformulation of shareholders rights and director's duties which never occurred.[182] As Ireland points out, the 'corporation as quasi-social entity' view which dominated policy discourses in the post-war years was never matched by the legal changes to Director's fiduciary duties which would have made it legal reality.[183] Rather, the 'entity' account reflected the relatively weak power of finance in this period.[184] As described in the introduction, in this period the most significant challenge to the structure of UK company law (as proposed in the Bullock Report) was never implemented, significantly because of a lack of belief within the labour movement that changes to company law were a priority. Berle's view that the nature of shareholder property rights had been transformed in the large corporation did not extend to advocacy of the significant legal changes it implied. The particularity of the economic context which underpinned the managerialist theory is brought sharply into focus by the transformations that followed it. Indeed, in reifying the corporate entity, and claiming the 'separation thesis' had resolved the labour-capital distributional conflict within the firm, the managerialist theories may have played an ideological role, upholding the existing distribution of property rights in the

[177] H Gospel and A Pendleton, *Corporate Governance and Labour Management: An International Comparison*.
[178] ibid 7.
[179] ibid.
[180] Paddy Ireland, 'Financialization and Corporate Governance' [2012] SSRN Electronic Journal 1, 14–17.
[181] ibid 16.
[182] ibid 14–15.
[183] Ireland, P. (2012). Financialization and Corporate Governance. *SSRN Electronic Journal.* https://doi.org/10.2139/ssrn.2068478 p.14
[184] Ibid

corporation through the claim that capitalist property relations had been transcended. As such the claims of the 'separation thesis', and the entity perspective more broadly may have obscured the need for a challenge by workers to the legal structure of shareholder property rights at exactly the point at which it was most needed.

### 1.1.7 Summary

I have described the emergence of the 'entity theory' of the firm and its relationship to the economic form of the large joint stock corporation and ideas of the 'externalisation' of the shareholder. I have argued that the corporation is not a 'neutral' social institution but rather is bound up in class relations and the labour relationship. The 'externalization' of the shareholder is in practice only a functional shift in the way that capital functions, enabling the expansion of the credit system through the new forms of shareholder and corporate property. The 'external' passive rentier shareholder is a feature of a distinct *economic* form; the large joint stock company with highly dispersed shareholdings, yet the structure of ownership of the corporation may diverge widely from this model with few *legal* implications and can even be dominated by a single individual shareholder whilst retaining core legal characteristics such as limited liability. The economic reality assumptions of the entity theory were shown to be empirically flawed and the corporate entity subject to as contradictory logic where it is strong for the purposes of shareholder protection, yet simultaneously reducible to the shareholder interest. The Marxist perspectives of Ireland and De Vroey provide an analysis of the relationship between shareholders and corporate management which critique the technical managerialism of the entity theory. External shareholders can be understood as 'money capitalists' in the sphere of circulation, who are linked to 'industrial capitalists' in production through (formal) 'legal ownership',[185] economic ownership (actual direct control), and the market imperatives of share price valuation. Understanding the property relations of the corporation requires attention to both legal and economic dynamics. The period of 'managerial capitalism' did not entail a challenge to the legal structure of shareholder property rights and served instead to reify the corporation as an autonomous social institution malleable to the public good, in line with the claims of the entity theory.

[185] The question of shareholder 'ownership' is contested by legal scholars who object that shareholders own their 'shares' and nothing more: since the corporation is a legal person and therefore cannot be owned. I shall deal with this debate later in the thesis.

## 1.2 The contractarian theory

The body of theory I refer to as 'contractarian' here was developed by US based financial economists and corporate lawyers from the early 1970's onwards within the 'law and economics' movement associated with the Chicago school of law and economics, which applied neoclassical economic theory to corporate and antitrust law.[186]Contractarian theory has dominated corporate governance scholarship in the US for decades, and the logic of the contractarian position is held to underpin corporate governance thinking and policy making in the UK, having "general descriptive relevance when applied to rationalize the UK's corporate governance landscape".[187] The contractarian theory of the firm can be understood as an important subfield of neoliberal economic theory which emphasizes the superiority of de-centralised market governance over statist and non-statist institutional forms.[188] Its emergence was heavily informed by the separation thesis of the Berle and Means corporation, and more broadly the post-war form of capitalism that had seen capital tied down by the Bretton woods system, the power of organized labour and the Keynesian interventionist state. Where Berle had viewed the emergent gap between the property rights of shareholders and managerial power as an opportunity for a more socially oriented form of production, the Law and Economics school saw an inefficient impediment to market governance.

The core claim of the contractarian theory is that the sole purpose of the business firm should be to maximise wealth for shareholders, on the basis that this maximises efficiency of allocation of economic resources (capital, labour and material) and therefore the social good.[189] For the contractarian theorists the most prominent risk to the capitalist economic order was the growth of state regulation of economic activity in the name of social interests, in particular regulation that took the corporate entity as its object. As Milton Friedman famously claimed in 1970, "the social responsibility of business is to increase its profits".[190]The rejection of political modes of governance of corporate behaviour stems from the claim that the basic provisions of corporate law had evolved as expressions of market efficiency.[191] The notion that the corporation has 'social responsibility', or any kind of 'objective function' for the purposes of regulation is rejected.[192] In particular, regulatory

[186] Sanford M Jacoby, 'Finance and Labor: Perspectives on Risk, Inequality, and Democracy' (2008) 30 Comparative Labour Law & Policy Journal 17, 32.
[187] Moore and Petrin (n 39) 30.
[188] ibid.
[189] Moore and Petrin (n 39).
[190] Milton Friedman, 'The Social Responsibility of Business Is to Increase Its Profits' [1970] *The New York Times Magazine*.
[191] John Armour and others, 'Ch1 - What Is Corporate Law?', *The Anatomy of Corporate Law* (2017).
[192] WH Jensen, M.C.; Meckling, 'Theory of the Firm: Managerial Behavior, Agency Cost, and Capital Structure' (1976) 3 Journal of Financial Economics 305, 311.

interventions in the core legal structures of corporate law are opposed by contractarian theorists on the basis that corporate law has emerged as 'facilitative law' which simply codifies common contracting practices in order to provide certainty through 'default rules' which contracting parties select in ordering business transactions.[193] The common characteristics of corporate law, it is claimed, have emerged in response "to the economic exigencies of the large modern business enterprise. Thus, corporate law everywhere must, of necessity, provide for them".[194] Corporate law is understood as facilitating the economic choices of economic actors, through the provision of a set of standard form contracts, codified where appropriate through 'enabling statutes'.[195]Codification in law occurs solely to reduce transaction costs by bringing uniformity and predictability, saving parties the time and cost of constructing arrangements contractually.[196] Despite this latent normative and political content the contractarian theory is positioned as objective and scientific, based in the epistemology and methods of mainstream economics. The core dimensions of the contractarian perspective of corporate law were set out as a set of 'core features' in an influential article in 2001 by Henry Hansmann and Reiner Kraakman which announced the "end of history for corporate law" as legal systems purportedly settled and converged around this shareholder centric model of the corporation.[197] These features are corporate legal personality, shareholder 'ownership', delegated management, freely transferable shares and limited liability.

Below I describe the ways in which the contractarian theory accounts for and seeks to justify and legitimate the shareholder corporation below, with reference to these 'core features'. I draw out the contradiction between the contractarian ontology of horizontal free contracting and the empirical context of vast concentrations of corporate and financial power. I argue that the development of the contractarian theory represents a deeply normative project, seeking to rewrite the corporations hierarchical concentration of power in terms of horizontal free contracting. I question the extent to which the era of financialization and 'shareholder value' can be attributed to reforms driven by the agency theory and suggest instead that the theory simply served to legitimate the power of finance and secure core features of corporate law in the interests of investors.

### 1.2.1 The disappearing corporation

In 1937 economist and legal theorist Ronald Coase identified a problem with neoclassical economics account of the way that markets coordinated economic interaction. Coase claimed that it failed to

[193] Hansmann and Kraakman (n 85).
[194] Armour and others (n 190) 1.
[195] Lawrence S Zacharias, Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard: London 1991) 2.
[196] Zacharias, Easterbrook and Fischel (n 194).
[197] Hansmann and Kraakman (n 85).

account for the existence of vertically integrated firms. Theoretically, the market pricing mechanism alone should be able to efficiently coordinate separate factors of production.[198] Yet the economy was dominated by vast corporate actors. Amidst the "ocean of unconscious co-operation" of individual contracting, hierarchical, integrated firms emerge as "islands of conscious *power*…like lumps of butter coagulating in a pail of buttermilk."[199]The boundaries of the firm mark the limits of the price mechanism of the market, and the beginning of a hierarchical internal order, dominated by the figure of the entrepreneur as purchaser, organiser and manager of the factors of production.[200] From the individualist ontology of neoclassical economics this apparent sphere 'beyond' the market, within which free contracting relations gave way to a status order, appeared anomalous. Coase's answer to this conundrum was that firms arise due to the transaction costs of using the pricing mechanism to coordinate production.[201] Coase identified a set of costs encountered in organizing production among individual contractors: the cost of discovering relevant prices for each factor of production (land, labour and capital), and the cost of negotiating and concluding separate contracts for *every* act of exchange in production. Coase held that the vertically integrated firm emerged out of the need to reduce these costs. Through the establishment of the firm these costs are massively reduced whereby "for this series of contracts is substituted one".[202]The corporate contract supplants the multitude of individual agreements bringing together the individual factors of production, arising not as a result of the wage-labour/capital relation, or from statutory fiat, but simply due to the rational structuring of individual choices by the contracting costs of market transactions. The claim that transaction costs account for the existence of economic institutions in a contract and market based social order was embraced by the later Chicago School theorists; apparently hierarchical economic structures could be analysed purely in terms of individual contracting behaviour. Through micro-economic theory, neoclassical economics could account for the enduring nature of institutions whilst retaining its individualist ontology.[203] It followed that the relevant legal rules and institutions should be analysed according to the logic of individual contracting and minimising transaction costs; legal rules should be subject to the individualised test of market efficiency. Financial economists Michael Jensen and William Meckling applied this thinking to the corporate legal person, arguing in an influential 1976 paper that, "most organizations are simply *legal fictions* which serve as a *nexus for a set of contracting relationships* among individuals".[204] The corporation is one such 'fiction',

[198] Ronald Coase, 'The Nature of the Firm' (1937) 4 Economica <https://tinyurl.com/4dttbyww>.
[199] D.H Robertson quoted in Ibid. My emphasis
[200] Coase (n 197).
[201] ibid.
[202] ibid 4.
[203] L Herrine, 'Markets: Collective Bargaining All the Way Down' (*LPE Blog*, 2021) <https://lpeproject.org/blog/markets-collective-bargaining-all-the-way-down/>.
[204] Jensen, M.C.; Meckling (n 191) 311.

utilised by business firms due to the efficiencies it offers as a common contractual counterparty.[205] The corporate entity is reduced to a 'legal fiction' facilitating individual contracts. In addition, corporate law is understood to provide an 'asset partitioning' and 'entity shielding' function by partitioning the corporate assets from the shareholders own property. This is achieved through the principles of 'shareholder lock-in', the rule that shareholders may not withdraw assets at will, and limited liability which ensures the corporations creditors will remain focused on the corporate assets due to the lack of recourse to shareholders personal wealth.[206]

### 1.2.2 Re-writing hierarchy

The Law and Economics scholars fiercely diverged from Coase on one point in particular; they emphatically rejected the hierarchical – and so implicitly political - nature of the internal order of the firm. Writing in 1975 economist's Armen Alchian and Harold Demsetz sought to redraw Coase's firm in terms of contracting equals characterising the firm as an instance of 'team production', absent any power relations: "The firm...has no power of fiat, no authority, no disciplinary action any different in the slightest degree from any ordinary market contracting between any two people".[207] The only powers to 'punish' are that of withholding future business or seeking redress in the courts for breach of contract. In this regard the employer-employee relationship is no different to that of a customer and their grocer; one can 'fire' their grocer by ceasing to purchase from them or sue them for selling faulty produce.[208] Coase's firm/market distinction, based upon the internal hierarchy of the firm, is dissolved into the corporation as *pure market interaction*. Jensen and Meckling would build on this account, identifying a particular subset of transaction costs as central concerns for the business corporation. They argued that corporate managers were the 'agents' of shareholders, contracted to run the company on their behalf. This 'agency theory' embeds several assumptions. Firstly the assumption of 'shareholder ownership'. Ownership is understood in economic not legal terms here: as legally the 'fiction' of the corporation is the owner of the assets. Shareholder 'ownership' is legitimised through the claim that capital markets allocating capital to the most efficient companies via the price signals of shareholder returns.[209] As such shareholders should be granted 'property' rights in company law such as rights in relation to dividends, rights to residual revenues when the firm is wound up, and the right to appoint the board and to approve major

[205] Armour and others (n 190) 5.
[206] ibid 103.
[207] Armen Alchian and Harold Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62 The American Economic Review 777, 778.
[208] ibid.
[209] Frank H Easterbrook and Daniel R Fischel, 'Corporate Control Transactions' (2006) 91 The Yale Law Journal 698.

transactions.[210] This assumes – in line with Friedman's claim – that the capital market can accurately price the social value of organisational arrangements and that profit is the pure expression of socially desirable production. These rights must be the preserve of shareholders who are unique in that they not only "bear the costs and benefits of the firm's decisions" but are "not strongly protected by contract", due to the variable nature of shareholder returns.[211] These assumptions of the unique exposure of shareholders are of course highly questionable and are explored further in chapter 2. The ability of shareholders to withdraw from oversight of managers also lowers the cost of capital as investors are able to diversify their holdings, but must be protected by the principle of limited liability in order to do so.[212] It is understood that shareholder oversight will be limited in widely held firms; therefore shareholders 'delegate management' to the board.[213] This withdrawal requires however that property rights also be allocated to corporate management on the basis that incentives to make savings and increase firm wealth are enhanced.[214] Therefore the agency or monitoring costs to external shareholders are reduced by allocation of equity stakes to company management. The central concern of the agency model is concerned with ensuring that the organisation and management of corporate activity should be subject to the disciplinary pressures of capital markets.

### 1.2.3 The social order and the epistemic order

The contractarian theorists redrawing of the corporation in terms of individual contracting ignores the way in which the corporation enables the concentration of property rights. Jean Philippe Robe has described the way in which the ideological framework of liberalism justified strong private property rights as a decentralization of property, of decisional authority, and so of power from the state to individuals.[215] The "spirit" of the liberal constitution as conceived in the late 18th century was the political ideal of a republic of small owners; "the means of production diffused within society as a whole". The industrial revolution, and the *legal revolution* which accompanied it gave rise to the shareholder corporation and the concentration of property rights in large enterprises.[216] The transformation in organizational form enabled by the corporation radically changed the effect of strong property rights from decentralization to concentration.[217]The corporate legal person enables

[210] Armour and others (n 190) 13; Simon Deakin and Giles Slinger, 'Hostile Takeovers, Corporate Law, and the Theory of the Firm' (1997) 24 Journal of Law and Society 125.
[211] Armour and others (n 190) 12.
[212] ibid 9.
[213] ibid 11.
[214] E Frech, H, 'The Property Rights Theory of the Firm : Empirical Results from a Natural Experiment' (1976) 84 Journal of Political Economy 143, 144.
[215] Robe (n 2).
[216] ibid 25.
[217] Jean-Philippe Robé and Ralf Rogowski, 'Multinational Enterprises: The Constitution of a Pluralistic Legal Order' [1997] Global law without a state 45, 71.

the concentration of property rights to an almost unlimited degree.[218] Given the dominant understanding of the neoliberal era as being defined by 'individualism' and a 'market' driven social order (drawing on the political imaginary of early liberalism) the concentration of corporate property rights appears problematic. Birch has engaged with this dissonance by distinguishing the 'epistemic order' (specific economic, legal and managerial claims about the role of business) in particular periods of capitalist development from the 'social order' (the actual emergence and dominance of specific business formations).[219] Neoliberalism's 'epistemic order' is contractarian. This demonstrates the importance of law, and particularly contract law to neoliberalism. The neoliberal social order - despite claims of the powers of the market - has entailed the legitimation of corporate monopoly and concentrations of market power whether this distorts the market or not.[220] As described in the introduction recent decades have seen an enormous concentration of corporate and investor power. Such patterns of 'double concentration' reveal small numbers of individual Directors and fund managers controlling huge concentrations of wealth. We do not live in the world of the economic imaginary of liberalism; the market society of independent producers and sellers, but a corporate, organisational society with distinct hierarchies and duties.[221] This contradiction hinges directly upon framings of the corporation. As such reconstructing the corporation in terms of pure market exchange between individuals was crucial to mediating neoliberalism's epistemic and social order. The ways in which law can be understood to correspond to either the epistemic or social order, and the ways in which this 'gap' may be understood are explored further in what follows.

### 1.2.4 Legitimizing the power of finance

The contractarian theory, and the 'agency model' of the corporation are strongly associated with the expansion of the power of investors and the era of 'financialization' and 'shareholder value'. From the 1960's onwards 'managerial capitalism' is understood to have shifted to 'conglomerate capitalism' as corporate managers used acquisitions to build large and diverse enterprises.[222] The 1980's saw a surge of economic and legal reforms in both developed and emerging markets which prioritized markets over governments in allocating economic resources.[223] The period of expansion

[218] Robe (n 2) 25.
[219] Kean Birch, 'Market vs . Contract ? The Implications of Contractual Theories of Corporate Governance to the Analysis of Neoliberalism' (2016) 16 107, 114.
[220] ibid 107.
[221] David Cieply, 'Beyond Public and Private: Toward a Political Theory of the Corporation' (2013) 107 American Political Science Review 139, 140.
[222] Gospel and Pendleton (n 176).
[223] Pistor (n 86) 1.

of control of financial markets over production is associated with a shift towards 'financial capitalism' or 'shareholder capitalism', and the associated notion of a process of 'financialization'.[224]

At the firm level, financialization is understood as the growing power of investors and capital markets to influence decision making and governance arrangements within firms.[225] Management priorities have increasingly been aligned towards meeting the conditions for strong performance on financial markets. Primarily this has involved aligning CEO and shareholder interests through the orientation of Directors primary duties and remuneration packages towards maximising share price and shareholder returns, and the threat of takeovers pushing management to pursue stock price maximisation properties.[226]This is bolstered by rising investor activism and the threat of takeovers in an active market for corporate control.[227]Financial performance targets claiming to drive 'shareholder value' set by capital market actors (i.e by analysts, banks and fund managers) drive constant corporate restructuring of organizational size and form, including outsourcing, fragmentation and mergers, labour lay-offs and capital 'retirement'.[228]These processes enable the capture of increasing proportions of company surpluses by shareholders and senior executives (and financial managers -fees) through dividends, rising share prices, stock option remuneration packages and share price performance related pay.[229] These transformations at the firm level: managerial priorities, financialized incentives, targets, and exposure to the corporate control market are associated with the agency theory model of corporate governance and attempts to reduce 'agency costs'.

The 'shareholder value' corporate model is widely understood to be an outcome of agency theory's impact upon corporate governance regulation and corporate management practice, rooted in idea of value maximisation as a social good, and shareholder value as the only metric of this.[230] This perspective neglects the material dimension of the transformations since the late 1970's, principally the rapid expansion of capital markets. As described above, the power of finance over firms is strongly linked to the increasingly concentrated power of shareholders through the rise of institutional investors since the early 1970's, and the activist strategies pursued by professional managers in charge of these funds.[231] As Aglietta and Reberioux argue, financialization is driven by

[224] Gospel and Pendleton (n 176) 7.
[225] Wanjiru Njoya, 'Corporate Governance and the Employment Relationship: The Fissured Workplace in Canada and the United Kingdom' (2014) 37 Comparative Labor Law & Policy Journal 121.
[226] Simon Deakin, 'Rise of Finance' (2015) 1 8, 68.
[227] Lapavitsas 2013 p.158
[228] James Perry and Andreas Nölke, 'The Political Economy of International Accounting Standards' (2006) 13 Review of International Political Economy 559.
[229] Jacoby (n 185).
[230] Robe (n 2) 316.
[231] Jacoby (n 185); Ireland, 'Financialization and Corporate Governance' (n 179); Moore and Petrin (n 39).

two core trends: the expanding liquidity of capital markets and the rise of concentrated power of investment funds within these markets.[232] Neither of these phenomena are traceable to theories of corporate governance. One of the core distinctions drawn between different systems in corporate governance theory is between 'insider' systems characterised by concentrated 'blockholder' ownership, which gives strong investor 'voice' but more restricted ability to 'exit' investments, and 'outsider' systems which limit investor voice due to high diversification, but provide immediate exit options through market liquidity.[233] Yet clearly, in view of Zeitlin's analysis of the power granted to even small concentrations of capital under diversified systems, and the immense rise in both liquidity *and* concentration, todays investment managers enjoy significant exit *and* voice options. Reducing shareholders 'agency costs' would appear an unlikely priority under such conditions. As Sanford has argued, agency theory provided an *economic rationale* for the emergent dominant practices of the finance over production "It offered an economic rationale for hostile bids, for stock options, and for other governance changes intended to raise shareholder influence."[234] The era of 'financialization' is recognized to have had negative impacts upon investment in the productive capacities of firms as shareholder returns have been prioritized over the needs of production, raising questions over the core claims of the agency model.[235] In this context the contractarian theory appears as an alibi for the growing power of finance. Major institutional investors were able to shape corporate law and governance mechanisms, embedding agency theory and the 'shareholder value' principle in corporate governance codes, which became a kind of "constitution for the market after Reagan and Thatcher".[236] Within the UK this has taken the form of over 30 years of soft law regulation enhancing shareholder 'stewardship' and oversight. The law on Directors duties, supervision by non-executive directors, executive compensation arrangements (such as the shareholder 'say on pay'), and an open market for corporate control have been aimed at these ends.[237] The concept of 'corporate governance' as a set of soft law mechanism for shaping market driven practices clearly reflects the contractarian preference for 'facilitative law' over direct regulation. Yet these quasi-legal mechanisms can be read as an expression of the power of finance. In contrast to the core structures of corporate law these developments appear relatively superficial. It is important to distinguish the discourse of 'shareholder value' - as the leitmotif of the period of financialization - from the legal foundations of shareholder primacy. As Hansman and Kraakman

[232] Michel Aglietta and A Reberioux, *Corporate Governance Adrift: A Critique of Shareholder Value* (Edward Elgar 2005) 1.
[233] Gospel and Pendleton (n 173)
[234] Jacoby (n 185) 32.
[235] Lapavitsas (n 9).
[236] Julie Froud and others, *Financialization and Strategy* (Routledge 2006) 5.
[237] John Armour, Simon Deakin and Suzanne J Konzelmann, 'Shareholder Primacy and the Trajectory of UK Corporate Governance' (2003) 41 British Journal of Industrial Relations 531, 533.

helpfully identify, the shareholder corporation is built upon limited liability, corporate legal personality, transferability of shares, shareholder 'ownership' rights of control, and a management function tied to the interests of money capital. As Paddy Ireland has argued, the period of financialization has simply allowed shareholders to exercise the rights they already possessed *more effectively*.[238] On this reading the claims of the contractarian theory can be seen to be about securing core features of corporate law in the interests of investors.

## 1.3 Critical perspectives on property and law

This section develops an alternative perspective of the corporation distinct from the entity and contractarian approaches. This is approached first through critical analysis of the underlying assumptions regarding the nature of property rights in the contractarian theory. I then set out how critical perspectives in 'Law and Political Economy' complement Irelands Marxist analysis, and provide a framework for understanding the class dimensions of the corporation.

The contractarian theory is based on an *economic* account of contract and property rights rooted in the methodological individualism of neoclassical economics. Economic interactions are conceptualised as a series of contractual 'bargains', where everyone negotiates to their maximum obtainable beneficial outcome. Contracts need not be express or legally binding agreements, but rather are understood as 'vehicles for exchange' which align the interests of owners of various economic inputs.[239] Property rights are held to emerge through this process of rational contracting. Mainstream economic theory claims that contracting behaviour in markets call property rights into existence, as people contract to set up institutions enforcing entitlements to resources in order to facilitate investment, production and exchange.[240] The private contractual mechanism is the method for the specification of property rights and associated rights of control in production, and the determination of the costs and rewards thereby produced.[241] By treating property rights as the outcome of free contracting, orthodox economic theory effaces any role of social class or hierarchy in their formation.

This depoliticising account of contract and property stands in contrast to accounts which emphasise the political character of private law. The political character of private law was a central concern of the American 'legal realist' tradition of legal scholarship, and more recently articulated by scholars from a 'Law and Political Economy' (LPE) theoretical perspective which draws on this

[238] Ireland, 'Financialization and Corporate Governance' (n 179) 14.
[239] Deakin, S. Slinger, G. (1997) Hostile Takeovers, Corporate Law, and the Theory of the Firm, *Journal of Law and Society* 124 (1997) p.125
[240] J Getzler, 'Theories of Property and Economic Development' (1996) 26 The Journal of Interdisciplinary History 639 <http://www.jstor.org/stable/205045>.
[241] Jensen, M.C.; Meckling (n 191) 307.

tradition. Legal realists have long emphasised the social and political nature of property rights, and the role of law in their creation.[242]Historically, in holding that a given 'thing' can be an object of private property, whether land, a corporation, or a brand name, has entailed the creation of new sources of economic wealth or power.[243] Where mainstream economics defines itself as the study of 'scarcity',[244] this legal dimension indicates that scarcity may be created by privatizing common resources. Property rights develop in relation to concrete developments in capitalism and have been shaped throughout by capitalist social relations. In Marx's account of 'primitive accumulation' the origins of the private property regime underlying the capitalist order was instantiated through the acquisition of common resources by wealthy landowners. In stark contrast to notions of free contract, property rights were instantiated through the violent enclosures of common land and the removal of the rights of tenant farmers.[245] Katherina Pistor has shown how this process, through which the concepts of the common law were created by and for the ruling classes, has continued to this day.[246] Writing from an LPE perspective, Pistor has shown how the private law rules of property, contract, corporate, collateral, trust and bankruptcy law have been strategically applied by the solicitors of the wealthy to legally 'code' or create different forms of property in order to maximise and protect wealth.[247] Pistor sets out how 'capital' is coded in law. Capital is a "legal property assigned a pecuniary value in expectation of a likely future pecuniary income".[248] Citing the Old institutionalist economists Veblen and Commons she shows how capital as 'an asset's income yielding capacity' developed legally in the US, with the late 19th Century courts shifting from a principle of property as the right of exclusion (of an object), to the right of an asset holder to future revenues.[249] This legal coding can be 'grafted onto' ever new assets as wealth owners seek new ways to protect and enhance their wealth.[250] Through practices of 'coding' elites play a significant role in shaping the private law rules which constitute the playing field of economic activity: with major distributional outcomes.[251] Pistor distinguishes two broad functions of company lawyers, one as legal 'engineers' tasked with *legally securing* the business structure according to the desires of entrepreneurs. The lawyer as engineer navigates regulations and structures transactions to minimise

[242] Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15 Legal Studies Forum 327.
[243] Cohen F S., 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia Law Review 809, 816.
[244] L Robbins, *An Essay on the Nature and Significance of Economic Science* (Mises Institute 2007) 15 <https://www.google.co.uk/books/edition/An_Essay_on_the_Nature_and_Significance/nySoIkOgWQ4C?hl=en&gbpv=1&printsec=frontcover>.
[245] Mazzucato p.48
[246] Pistor (n 86).
[247] ibid.
[248] ibid 12.
[249] ibid.
[250] ibid 5.
[251] Pistor (n 86).

costs; cloaking new ideas in the existing legal 'code'.[252]The 'Master coders' however go beyond this function, combining the raw materials of private law to create new legal devices; new ways of *legally coding* assets in ways which are beneficial for their owners.[253] The development of private law has a highly autonomous character. Pistor's legal coding largely takes place in private solicitor's offices, with only occasional airing in court or parliaments.[254] At the same time the state is a crucial actor for Pistor, as ultimately legal claims must be upheld. Coding practices are dependent upon the backing of the state's coercive law powers, subject only to the political question of which private claims to property governments have been willing to underwrite.[255]Such decisions reflect prevailing political-economies and the interests embedded within them.[256]

This contradicts the underlying assumptions of both the entity and contractarian theorists regarding legal development. In contrast to the entity theory the law does not develop as a process which simply proceeds towards the recognition and description of 'social facts' such as the 'real' corporate entity as an emergent social form of productive organization. Dodd's assumption that the law followed the institutionalist logic of the corporate 'real entity' was based in the assumption that legal development follows public preferences. Dodd held that "public opinion…which ultimately makes law" was shifting towards perspective of corporation as an institution which has a social service as well as profit making function.[257] The assumption that legal institutions embody public preferences is explicitly replicated (albeit in economistic terms) by the contractarian theory, which holds that corporate law has developed as the best way of meeting individual preferences through which the social good is expressed. The evolution of private law expresses the *de facto* public interest through securing patterns of rational, efficient free contracting. Pistor however argues that it is through the autonomy of private law that private forms of ordering *diverge* from basic social norms. Private rights become increasingly dislodged from the normative preferences of the citizenry.[258] This is the development and deployment of law as state backed private power. Indeed, both the contractarian and entity theories conceal normative preferences for particular modes of social hierarchy. Berle and Means 'separation thesis' obscured capitalist property relations through a reified managerial class serving the public interest. The 'law and economics' movement sought, via Coase's concept of 'transaction costs', to secure both the individualist ontology of neoclassical

[252] ibid 163.
[253] ibid 164–65.
[254] ibid 19.
[255] ibid.
[256] Pistor (n 86).
[257] Dodd (n 91) 1148.
[258] Pistor (n 86) 208.

economics and the political claims of neoliberalism (the free individual in the marketplace), by rewriting corporate hierarchies as free contract.

Perhaps surprisingly – for a book whose central thesis is that wealthy elites have consistently controlled legal processes to support their own enrichment – Pistor claims the 'code of capital' can "explain the political economy of capitalism without having to construct class identities, as Marxists feel compelled to do."[259] Indeed the capital-labour relationship is conspicuously absent from the book. From a Marxist perspective, the analysis remains firmly embedded in the sphere of circulation - capital as a tradeable asset, as derivatives, trusts and loans – rather than the sphere of production. Whilst recognizing that the legal coding of the corporation can confer privileges on shareholders vis a vis workers "and other contractual creditors", the role of surplus value produced by labour in underpinning the value of the multiple forms of capital in circulation is rejected.[260]In fact, Pistor argues the 'code of capital' is available to workers themselves; such as the freelancer who can *capitalize* their labour through establishing a corporate entity and receiving dividends instead of a salary.[261]This is revealing; the definition of 'capital' as a strictly *legal* property comes at the cost of understanding it as a *social relation*. Yet the freelancer will likely *still only have their labour to sell,* beneficial tax arrangements or not. Despite recognizing the centrality of the coding of titles to future revenues as assets, the source of these revenues in the labour relationship is not discussed. Marx's own definition of capital as "private property in the produce of foreign labor"[262] encompasses the contradictory characteristics of capital as both a social relation and a material commodity.[263] Yet, in focusing on the reproduction of capital in industrial production, Marx's definition struggles to capture the vast proliferation of forms of financial property. Whilst Marx recognised that capital could be sold on markets, the sphere of 'circulation' of capital is *analytically separate* from that of 'production'.[264] Pistor develops this relational dimension through analysis of capital as the properties legal coding can confer upon an asset to their owner's advantage *vis a vis* other potential claimants, and the critical role of state power in deciding what type of property claims to uphold.[265] Yet in 'the code of capital' Pistor eschews analysis of the labour relationship, and labour as a source of value.

[259] Pistor (n 86).
[260] ibid 10.
[261] ibid 11.
[262] Marx, K. (1968 [1844]). Ökonomisch-philosophische Manuskripte aus dem Jahre 1844. In K. Marx & F. Engels (Eds.), Werke, Ergänzungsband: Schriften bis 1844 (pp. 465–588). Berlin: Dietz Verlag. Quoted in Leon Wansleben, 'Capitalization and Its Legal Friends' [2020] Accounting, Economics and Law: A Convivium 1. p.3
[263] ibid 3.
[264] ibid.
[265] Pistor (n 86).

Paddy Ireland's analysis of the emergence of the share as a property form rooted in corporate production brings analysis of the spheres of production and circulation together, demonstrating the role of law in securing the particularly modern forms of industrial and money capital through the legal form of the shareholder corporation.[266] Ireland's account of the emergence of the legal form of the share as a property asset characterised solely by its 'income yielding capacity' reflects a process legal coding applied to the economic form of the JSC share. The share became property through the process of legal reconceptualization of share ownership from non-reassignable 'choses in action': contractual rights *in personam* between parties entering into a relationship, becoming an *interest in revenues* through ownership of the share as an alienable property form *in rem* (against all others).[267] Ireland shows how this legal process *secures* the emergent forms of industrial and money capital *through* the corporation and the share as new sources of wealth. Irelands Marxist approach also points towards the development of law and institutional forms in the context of the process of *capital accumulation*: the particular dynamics of which are understood to drive social phenomena and particular capitalist forms. It is this that generates the dynamic's of class which Pistor, as well as the entity and contractarian theorists ignore. This perspective of the development of corporate law rules is distinct from both the entity and contractarian theories which both ultimately claim corporate law reflects the social interest in the organization of production, along lines which can be more or less fair, or more or less efficient. Ireland's perspective points to need to understand the development of corporate law from the perspective of the needs of finance: of the drive of money capital to accumulate itself: securing investor interests in relation to those of workers. Analysis must then attend to how processes of legal coding relate to labour. Coding cannot be merely the preserve of legal professionals and abstract financial forms but must touch the ground in the workplace. I propose to build on the work of both Ireland and Pistor in what follows, setting out an analysis of the contemporary property forms linked to the corporation, with a focus on the role of legal coding of corporate structures and property forms as they stand in relation to the labour relationship.

## Conclusion

This chapter has set out the different ways in which the dominant theories of corporate law obscure the property relations of the corporation. This reflects the normative character of legal and economic theory which relates to prevailing political projects in concrete social and economic contexts. I describe an alternative framework for understanding the corporation through intersect of class relations, the state and private law. Pistor's concept of legal development through elite

[266] Ireland, Grigg-spall and Kelly (n 107).
[267] ibid 155.

practices of coding is distinct from the entity theory which holds that law corresponds to economic institutions as social facts, and the normative preferences of society. Equally it contrasts with the contractarian perspective which holds that law recognises socially beneficial patterns of contracting. Yet Pistor eschews the centrality of labour and defines 'capital' as a strictly legal property, at the cost of understanding it as a social relation. Marx's relational definition of capital is rooted in labour, but analytically separates production from circulation, which is problematic for understanding contemporary corporate forms. Analysis of the legal coding of capital must therefore look to how these practices are bound up with the labour relationship.

# Chapter 2: The corporation and the legal foundations of the labour relationship



## Introduction

In this chapter I consider how labour law functions to assert the corporation as the employer, and how this works to privilege the corporate employer in the workplace and the labour market. As described in the introduction, key labour market trends such as the rising levels of risk borne by workers (including job security and precarious work), declining access to representation and voice, and rising income inequality pose enormous challenges for labour law. These trends call into question the ability of labour law to achieve its normative goals: increasing equality of income distribution, providing a meaningful voice in the workplace over working terms and conditions, securing a measure of job stability and security, and securing human dignity in the workplace. The chapter explores the ways in which these contemporary problems for labour law can be traced to the form of rights we find in the corporation.

The chapter contributes to the thesis in the following ways. The Chapter will delineate the legal dimensions of the labour relationship through three forms of legal direction: contract, property rights, and statutory regulation. I examine the normative dimensions of these core structures of labour law. I identify struggles over value, job security (including the extent to which work is precarious), and autonomy and freedom at work as critical dimensions of rights. These legal forms are considered in relation to collective and individual modes of regulation and contextualised within the wider political economy of state regulatory regimes, with a focus on the shift from the post-war period to the neoliberal era. This analysis forms a baseline understanding of the structure of rights within the corporate law mediated labour relationship, which will underpin the empirical chapters to follow. I argue that labour law intervenes in property rights based upon a 'person centred' notion of property which is at odds with the way in which capital is structured through corporate law. Collective modes of regulation mount a challenge to property but are constrained by the *form* of rights *in personam*. Thus the foundational structures of labour law are increasingly problematised in the contemporary economic context dominated by large, fragmented and financialised firms within which labour relations are driven by the logic of corporate law mediated property. By assuming the person-centred notion of property and rights, labour law reifies the employer and fails to deal with the corporation.

Section 1 deals with the common law and statutory dimensions of contractual labour regulation. I discuss the normative claims of the critical labour law tradition, the Marxian critique of the form of rights in liberal law and elaborate the limited extent to which the labour relationship can be understood through the conceptual frame of freedom of contract. Section 2 explores how labour rights within the corporation are conceptualised in the literature with particular reference to ideas of 'property in work'. Drawing on the work of Jean-Philippe Robe and Christoph Menke I critique the stakeholder literature which seeks to reconcile the structure of rights in corporate law with the normative dimension of labour law. This critique focuses on the idea of property as a 'bundle of rights' and of labour rights as 'property in work'. I emphasise property as a form of legal power grounded in the 'right to exclude'; mediated through contract, as a 'private' mode of legislative authority. Section 3 considers rights in the collective mode of regulation. Drawing on Judy Fudge's model of the 'Standard Employment Relationship' in the post-war period I look at the ways in which the collective mode of rights underpinned a horizontally extended form of regulation which went far beyond the bilateral logic of contract and the unitary model of the employer. I introduce the ideas of Boyer and the regulationist school of Marxism to explain how this regulatory regime was tied into the wider dynamics of political economy at the time and to explain the shift away from state support for collective regulation. I explore arguments that suggest collective action has a logic that is

problematised by the shift into the legal form of rights in an economy dominated by corporate actors. Section 4 explores the ways in which the structuring of the labour relationship through corporate law-mediated property erodes the normative function of labour law. The problematics of the corporate employer are discussed in relation to questions of 'fragmentation' and 'financialization' in the contemporary labour law literature. I argue that the core characteristics of corporate law mediated property intensifies imbalances in the labour relationship.

## 2.1 Contract, status, and the normative foundations of labour law

This section engages with the centrality of the contract of employment to labour law. I argue that labour law's critical tradition has been built around problematising the idea of the labour relationship as contractual, and a *partial* rejection of the private/public distinction in liberal law. At the same time the contract of employment has remained ontologically central. Labour law's normative function has been built around the contract of employment, with a focus on the indeterminacy of the labour contract reflecting Marx's critique of exploitation at the level of production. The contractual form is problematic for securing workers share of value, job security and autonomy at work. The ontology of contract reflects a person-centred notion of property. These characteristics of labour law have precluded engagement with questions of the wider economic and legal structures such as the corporate nature of the employer.

### 2.1.1 Labour laws critical tradition

The contract of employment is understood to be the conceptual centrepiece of labour law.[268] It envisages the labour relationship as a bilateral relationship between the worker and an employing entity which is almost invariably a juridical person which the law allows to contract.[269] The contractarian theory discussed in the previous chapter, and economic orthodoxy more broadly, presents an image of society as composed of freely contracting individuals who have no essential dependency upon others, only a set of preferences to be rationally bargained for: "contract means…voluntary and unanimous agreement among affected parties…Investors, employees, and others can participate or go elsewhere".[270] Abba Lerner highlighted how focusing on contractual relations negates the problems posed by underlying power disparities. A contractual agreement presents itself as a 'solved political problem', as the relative power of the parties is eclipsed through

[268] Simon Deakin, 'What Exactly Is Happening to the Contract of Employment? Reflections on Mark Freedland and Nicola Kountouris's Legal Construction of Personal Work Relations' (2013) 7 Jerusalem Review of Legal Studies 135, 137.
[269] Ibid
[270] Zacharias, Easterbrook and Fischel (n 194) 15.

a formal agreement of exchange.[271] This contractarian ontology reflects the central presupposition of liberal law; that control of the means of production does not constitute a power within the sphere of concern of public law.[272] As described in Chapter 1, this is reflected in the way in which neoclassical economics understands property rights, and is explicitly restated in the contractarian theory of the corporation. The labour contract- as all other contracts - is understood as an exchange between equal individuals transacting in the marketplace. It is not considered to be the case that parties' choices are constrained by unequal distribution of resources in ways which have implications for freedom of contract. Yet the idea of the labour relationship as being contractual in nature has always been problematic.[273] Prominent labour law scholars have argued that it is not possible to give an account of the employment relationship using the logic of contract alone, given that the contract of employment exhibits elements of both private law transactional exchange *and* public law status relationship, agreement *and* command.[274] This suggests that, contra the contractarian theory – and liberal thought more broadly – that property rights in the labour relationship are a significant source of power.

This contrast, between the formal equality of legal individuals and the stark, property-based hierarchies of economic interaction has been the basis of long-standing critique of bourgeois rights in the Marxist tradition. Engaging with this asymmetry is also the normative foundation for the regulatory and redistributive functions of labour law, understood both as a body of law and a field of legal scholarship.[275] The critical labour law tradition is takes as its starting point the critique of the logic of the employment contract as horizontal free exchange relationship. As Ruth Dukes argues, labour law is distinct from other legal disciplines in that its mainstream tradition takes a critical perspective.[276] Early labour law scholars recognised that the employment relationship was only formally a contractual exchange relationship, but substantively a relationship of economic domination.[277] This distinction between the formal and substantive dimensions of law links the tradition closely to Marx's analysis of the labour relationship as structured through liberal law. Marx critiqued the inherent contradiction of liberal rights forms, which both secure formal equality in the public sphere (equality under the law) whilst removing the question of substantive equality in the

[271] Lerner, A (1972), "The Economics and Politics of Consumer Sovereignty", American Economic Review 62(2): 258-66 cited in Bowles (see n.27)
[272] Robé and Rogowski (n 216) 71.
[273] M Freedland, *The Personal Employment Contract.* (Oxford University Press 2003).
[274] S Deakin and F Wilkinson, *The Law of the Labour Market* (Oxford University Press 2005) 37.
[275] Ruth Dukes, '19 . Critical Labour Law : Then and Now' 345. Dukes argues that the tradition of labour law scholarship is rooted in concerns with asymmetry of power, and antagonism of interest, between employers and employees.
[276] ibid 345.
[277] ibid.

sphere of civil society from the ambit of politics and public law.[278] Under these conditions the wage-labourer is formally free to exchange his most immediate possession - his labour capacity – through contractual agreement without the complex status orientated regulations of feudal society.[279] Yet due to the private nature of property in capitalist society the 'free' labourer is actually compelled to sell their labour as it is the only consistent form of income, giving them little control over the terms under which they sell their labour power.[280] As the commodity for sale is embodied in the person selling it, the appearance of a purchase of a commodity (labour power) entails the acquisition of a right over the person solely capable of exercising it; the equal freedom enjoyed by both sides is revealed to be superficial.[281] The worker's wage dependency, and the risk of being thrown out of their employment to join the 'reserve army of the unemployed' renders them subject to the authority of the employer.[282] Marx argued that employers purchase worker's time, not their work. Therefore, an employee's effort is not secured by contractual exchange but is an 'extraction', as wages are not linked to labour effort.[283] Perhaps surprisingly, this account is reflected in Coase's theory of the firm. The firm itself is constituted in order to benefit from the differential between market and wage rates. As such labour contracts are 'incomplete' due to the tension between the desire of the entrepreneur to secure labour power at lower than the cost of transacting externally, and the uncertainty of the demands of production. This gap can only be closed by securing dependent labour through incomplete labour contracts. In practice this entails the replacement of the order of 'contract' with a hierarchy of status. Indeed Coase argues that the law of master and servant verifies his theory regarding the suspension of the contractual mechanism at the boundary of the firm.[284] This contractual 'incompleteness' for Marx reflects the 'indeterminacy' of labour power: the contract to sell labour power must be open ended because the precise amount of effort to be extracted cannot be 'fixed' before the engagement of workers in the labour process.[285] Labour process theory argues that it is this very indeterminacy that is generative of the conflictual and disciplinary dynamics of the labour relationship expressed through the managerial drive to control labour to secure surplus value. These disciplinary dynamics between labour and capital within firms are intensified through competition between firms which generates an endless efficiency drive

[278] Christoph Menke, *Critique of Rights* (Polity Press 2020) 1.
[279] Christiaan Boonen, 'Limits to the Politics of Subjective Rights: Reading Marx After Lefort' [2019] Law and Critique <https://doi.org/10.1007/s10978-019-09238-7>.
[280] ibid.
[281] Christoph Menke, 'Law and Domination' [2017] Critical Theory in Critical Times 117, 120.
[282] D Harvey, *A Companion to Marx's Capital* (Verso 2018) 650.
[283] S Bowles, 'Marx and Modern Microeconomics' (2018) <https://voxeu.org/article/marx-and-modern-microeconomics>.
[284] Hodgson (n 54).
[285] Chris Smith, 'The Double Indeterminacy of Labour Power: Labour Effort and Labour Mobility' (2006) 20 Work, Employment and Society 389, 390.

which seeks to maximize the speed and intensity of the tasks performed.[286] So for Marx labour contracts are 'incomplete' as a *necessary condition* of capitalist production. Whilst Coase approaches this as a problem of contracting efficiencies, the implication reflects a core point from Marx; that power is an essential aspect of the working of the capitalist economy.[287]

Therefore, contrary to liberal law, control of the means of production is the central locus of social power. For Marx, this relationship of domination at the level of production is fundamental to the political economy of capitalism, as labour is the sole source of value in production, and appropriation of surplus value from labour is the only source of profit. The relationship between labour and capital at the point of production is the most fundamental expression of the social relations of capitalism. Marx's understanding of exploitation underlying formally equal relations of exchange is specifically tied to the exchange labour power due to the unique problems of the commodification of labour power. Exchange relations in the sphere of circulation are considered to be exchanges of equal value. Exploitation in exchange relations is understood to play out at the level of production. In the exchange of labour power, freedom of contract turns from a normative order of equal freedom to a mechanism that both conceals and enables social domination.[288] In contrast to this formal equality of rights underpinning the liberal law, labour law seeks to introduce a substantive measure of equality into the labour relationship. As Dukes argues, the labour law tradition is based upon a *partial rejection* of the private/public distinction in liberal law.[289] This has taken the form of the development of *public law* mechanisms seeking to balance the property rights of the employer, including statutory contractual regulation. The contract of employment has also developed unique features distinct from other types of contract at common law. This legal development is discussed below with reference to questions of workers share of value, job security, and autonomy in the workplace.

### 2.1.2 The relational labour contract

The indeterminacy of the labour relationship and its status dimensions reveal a highly interpersonal or relational character. This is reflected in the contractual mode of regulation which is based upon bilateral rights *in personam*. Whilst labour law's critical foundations directly problematize the very idea of the 'contractual' labour relationship, the contract of employment has been the 'fulcrum' of

[286] Ben Selwyn, 'Social Upgrading and Labour in Global Production Networks: A Critique and an Alternative Conception' (2013) 17 Competition and Change 75.
[287] Bowles (n 283).
[288] Menke (n 281) 121.
[289] Dukes (n 275) 347.

labour law's regulatory functions. The historical development of the contract of employment has been shaped both by the status relationship of the law of master and servant, and by the imposition of statutory terms seeking to restrict the most exploitative implications of commodified labour. As such the regulatory role of the contract of employment encompasses mechanisms both of labour control and of labour protection. The property rights of the employer are both *secured and qualified* by the rights attaching to the contract of employment, reflecting the *partial* rejection of liberal categories of law.

Control over labour is rooted in the status dimension of the employment relationship understood in terms of subordination or dependency as an outcome of unequal property relations under capitalism. As Carrigan has shown the subordination of labour was secured through the contract of employment as it emerged in the 19th Century via the right to control test and judicially implied terms. In seeking to define the new parameters for the wage labour relationship the judiciary drew from the law of Master and Servant to establish the 'control test', comprising both the 'exclusive service' of the worker and the employer's right to control the work, reproducing the subordination of labour of the previous era.[290] The status obligations of master and servant - of obedience, loyalty and fidelity were morphed into the common law contract of employment through the judicial mechanism of implied terms. Implied terms supplied the legal sanction for reserving full authority of direction and control to the employer.[291] The emergence of the contract of employment in the 19th Century heyday of laissez faire and free market thinking did not result in the development of purely voluntary exchange relations under the mantra of freedom of contract but reproduced significant elements of the old order: a status order inhabiting the language of contract.[292]

In turn this very status dimension has been the central basis around which the protective norms of the employment contract have been developed. The contract of employment has diverged from the principles of contract law as a special area of private law subject to regulation based upon instrumental welfare considerations.[293]The fundamental principle of private law – that the law should not assess the fairness of contracts – has been contradicted by regulation imposed with exactly that aim.[294] The contract of employment has evolved through the judicial and legislative imposition of substantive legal norms (beyond the contractual fundamentals of the obligation to work, and pay wages) into contracts as a corrective for the weak bargaining power of labour and the

[290] Carrigan (n 96) 26–7.
[291] ibid 30.
[292] Carrigan (n 96).
[293] 'Regulating Contracts. Hugh Collins. © Oxford University Press 1999. Published 1999 by Oxford University Press.' 8.
[294] ibid.

subsequent risk of exploitation.[295] Whilst the relationship is contractual in the sense that its formation and termination are formally dependent upon the volition of the parties (contractual agreement), its substance is determined by legal norms outside the contractual freedom of the parties (legal regulation).[296] The common law has developed a wide range of contractually implied obligations of employers over time. Employers have duties to: maintain trust and confidence, to pay for work done, to indemnify employees for costs incurred in the course of their work, to maintain confidentiality and to take 'reasonable care' in matters of health and safety.[297] These implied duties are rooted in the status dimensions of the contract of employment, and follow from the subordination of labour to the property rights of the employer. Statutorily imposed employment rights which are tied to, but free standing of, the employment contract are now wide ranging, including requirements around working time and paid holiday, the minimum wage, obligations to insure, rights to parental leave and rights concerning transfers of ownership. These extensive forms of social protection do not however resolve the fundamental questions posed by the indeterminacy of labour power: the asymmetrical struggle over value produced, the open ended subordination to the requirements of the labour process, and the risk of being excluded from the means of subsistence.

The question of job security is dominated by contractual volition. Regulation has not overcome this dimension. The judicial reasoning regarding the right to dismiss in the English common law was derived from the protection of the property rights of the employer and expressed through the conceptual frame of 'freedom of contract'.[298] From the point of view of the common law contracting for job security is therefore problematic. The very notion of a contract is predicated upon the volition of the parties.[299] In the US, where the employment 'at-will' doctrine holds, the law presumes that any contract which purports to be permanent is 'at-will' and therefore unilaterally terminable.[300] In the English common law employment is terminable according to the 'reasonable notice' rule, failure to comply with which constitutes breach of contract through 'wrongful dismissal'; historically employers had the right to give notice for any reason, as such the common

[295] Otto Kahn-Freund, 'A Note on Status and Contract in British Labour Law' (1967) 30 The Modern Law Review 635.
[296] ibid 640.
[297] Practical Law Employment, 'Implied Terms in Employment Contracts' (*Thompson Reuters Practical Law*) <https://tinyurl.com/3zavhfxy>.
[298] Njoya (n 20) 26. The difference between the 'employment at will' doctrine in the US and the 'reasonable notice' doctrine in the UK was minimal at this time, with lower status workers dismissed with as little as 1 minutes notice.
[299] Kahn-Freund (n 295) 640.
[300] Katherine Van Wezel Stone, 'Policing Employment Contracts within the Nexus-of-Contracts Firm Author ( s ): Katherine van Wezel Stone Source : The University of Toronto Law Journal , Vol . 43 , No . 3 , Special Issue on Corporate Stakeholder Debate : The Classical Theory and Its Crit' (2019) 43 353, 372.

law of contract is limited in providing dismissal protections.[301] Notions of 'unfair' dismissal entered UK law through statute in 1971 informed by International Labour Organisation standards which provided a limited exception to contract law by imputing a set of reasons which may be unfair.[302] However the law generally supports economic dismissals and the managerial prerogative to dismiss as a cost cutting measure. Whilst this is reflected in international and European law (with significant variation in terms of restrictions upon this principle), the US and UK have around the lowest levels of employment security legislation in the world, and this is significantly due to the continuing influence of private law concepts particularly freedom of contract.[303] The contemporary rise in asymmetric contracts which secure labour power, and control, without any offer of continuity or guaranteed work demonstrates the shaky foundations of contractual job security. The volition of the parties (mutuality of obligation) is the main legal test regarding use of zero hours contracts, though the power of employers to keep workers on call in order to meet fluctuations in demand is well documented, highlighting the fundamental power disparity arising from the right to exclude potential contractors from the resources of production. Under such conditions workers may also face enhanced exposure to risks, lacking basic protections such as sick pay, as the experiences of many workers driven to work despite ill health during the recent Covid 19 pandemic demonstrates.[304] The contemporary rise in the practice of 'fire and rehire' also indicates how contractual fragility can translate into declining terms and conditions. Labour economists have expressed this relational dependence upon interpersonal expectations through the idea of 'implicit contracts'. For example, young workers are observed to accept below market wages early on in an employment in the hope that this will be reciprocated as deferred (higher than market rate) compensation in older age.[305] Similarly, effort expended but uncompensated is reconceptualised as an 'implicit contract' or understanding between workers and employers that loyalty and hard work would be rewarded by continuity of employment and promotion.[306]

Contracting for a fair share of the value generated in production is demonstrated to be problematic by the nature of the capitalist firm, the indeterminacy of labour power, and the idea of employee's effort as an extraction driven by the right to exclude. The status dimensions of the contract of employment intensify this, and pose fundamental problems of freedom, autonomy and

[301] S Deakin and W Njoya, 'The Legal Framework of Employment Relations' in P Blyton (ed), *The SAGE Handbook of Industrial Relations* (SAGE 2008).
[302] ibid 291–2.
[303] ibid 292–4.
[304] TUC *Sick pay for all* (2020) https://www.tuc.org.uk/research-analysis/reports/sick-pay-all
[305] Marleen A O'Connor, 'Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers' (1990) 69 NCL Rev. 1189, 365.
[306] O'Connor (n 305); Stone (n 300).

voice at work due to the logic of subordination and control. Contracting for job security is problematic, and protections in this area lean almost entirely on statutorily imputed norms. These limits to the labour contract point to the relational dimension of the contract and its performance. In the contract of employment, the worker enters into a status relationship via contractual agreement. The limited, specific contractual rights *in personam* give way to the open textured status order of obedience and control. The labour contract is thus a highly relational or *interpersonal* contract, expressing the labour relationship as a bilateral contract between *persons*.

### 2.1.3 Labour law and the nature of the employer

Labour law addresses the relationship between the individual worker and 'the employer'. The nature of the employer: whether a branch of the state, a single entity limited liability company, or a publicly listed multinational corporation, is not considered relevant for the purposes of labour law.
This arises due to the centrality of the contract of employment which conceptualises the labour relationship as a bilateral agreement between legal persons. The labour law tradition of academic scholarship has not – with some notable exceptions – concerned itself with questions of corporate law and the corporate nature of the employer. Prassl has engaged with this idea through identifying the problem of the 'unitary model' of the employer at common law, identified as the person in an employment contract who pays the wages and issues instructions.[307] The unitary model is held to be under pressure from the trend of 'fragmentation' of the unitary model through atypical forms of employment and changing organizational forms.[308] This problem has been the subject of an extensive literature which is discussed further below. Suffice to say for now that the concern of this literature is the way in which labour law can be adapted to capture changing structures of employment, and in particular to extend the reach of the employment contract to ensure social protections are secured.

Yet this very problem indicates a wider failure of labour law and legal scholarship as it relates to the wider economic and legal structures within which labour laws legal institutions are embedded. As Karl Klare has argued the labour law tradition is grounded in a 'job-based' conception of employment, which embeds a series of assumptions about labour subordination and managerial

[307] Prassl (n 1).
[308] Einat Albin and Jeremias Prassl, 'Fragmenting Work, Fragmented Regulation' [2016] The contract of employment 209.

control, rooted in the employment contract as entailing elements of both freedom and coercion.[309] From this perspective the nature of the employer appears relatively unimportant. Moreover, Klare argues this focus has precluded engagement with the 'background rules' which structure the fields upon which distributive conflict between capital and labour plays out: property, contract, tort, corporate and trade and investment law are either not considered at all, or are treated as "answering to an inflexible logic embedded in capitalism".[310] Labour law is seen as a "contingent political artefact superimposed on an immutable private law background".[311] Klare identifies this as a legacy of 'voluntarism' and 'industrial pluralism' which accepted the private public split, and failed to theorize the role of private law as an aspect of society's regulatory regime for work, employment and labour markets.[312] The privileging of the contract of employment over other types of contract and legal forms reveals a narrow scope for workers' rights. As described above, labour law's partial rejection of liberal law: the acceptance of the contract/property distinction at the heart of the labour contract looks from this perspective like a failure to seriously engage with the private law rules through which the property rights of 'the employer' are structured, most obviously the nature of the corporate employer. In doing so, labour law upholds liberal law's distinctions. As described in the introduction, the tradition of voluntarism appears in part to naturalise the parties to industrial relations and the labour contract. Reflecting Marx's prioritization of production, labour law's foundational structures cede the legal structuring of the wider economic domain to the contractual logic of private law liberalism.

## 2.2: Property in work?

A significant body of scholarship has however developed which seeks to understand the position of workers within the theories of the corporation. As described in the introduction, ideas that participants in the capitalist firm could be understood as contractual 'stakeholders' in production emerged as a counterbalance to the contractarian theory from the late 1980's onwards. This perspective has also extended to claims that through contractual and statutory regulation the law has steadily come to recognise worker's 'property in work'. This section critiques this literature on the basis that it fails to recognise the characteristics of property rights in liberal law, ultimately re-writing them in economistic contractarian terms. Drawing on the work of Jean Philippe Robe I argue

[309] Karl Klare, 'Klare, K. "The Horizons of Transformative Labour and Employment Law" in Labour Law in an Era of Globalization. Joanne Conaghan, Richard Michael Fischl and Karl Klare. © Oxford University Press 2000. Published 2000 by Oxford University Press.' 13.
[310] ibid 14.
[311] ibid.
[312] ibid 15.

that the nature of property rights is fundamentally the unspecified right to 'make the rules'. Regulation is only a limited exception to this.

### 2.2.1 The corporation as commons?

Simon Deakin has attempted to address the nature of workers claims in the firm as a type of property right through conceptualising the corporation as 'commons'.[313] Deakins analysis begins with the observation that the agency theory of the firm is legally wrong. The legal system does not recognise shareholders as the corporation's 'owners' (since the corporation is a legal person and cannot be owned), nor does it view corporate management as the agents of shareholders (they are agents of the corporation).[314] This gives rise to the troubling idea that the corporation is 'ownerless' (troubling due to the centrality of property rights in theoretical understandings of market economies). Instead, Deakin argues, rights are constituted through "multiple, overlapping property-type claims" at the level of the business enterprise or firm.[315] The corporation therefore is reconceptualized as a 'commons'; a "shared resource whose sustainability depends upon the participation of multiple constituencies in its governance".[316] At the level of corporate law, Deakin argues that the damaging shareholder centric model of the firm is a product of the dominance of agency theory, which misconceives the nature of the property rights in the firm. This can be rebalanced through the development of new legal models of the firm which can shape its legal totality: as an outcome not only of corporate law, but employment, insolvency, competition, tort and tax law, which serve to "adjust and reconcile" the multiple property-type claims.[317] This perspective is situated within a longer trend of legal theory which seeks to excavate ideas of 'property in work' in the statutory and judicial development of the employment relationship. Njoya has shown how notions of 'job property' have influenced the development of employee protections.[318] Davies and Freedland have described the rise and fall of the doctrine of 'job property' established by Lord Denning in relation to the Industrial Relations Act 1971 which 'gives an employee a right in his job which is akin to a right in property'.[319] This was part of a broader idea which emerged through the 1960's that statutory rights to redundancy and dismissal compensation

[313] Simon Deakin, 'The Corporation as Commons : Rethinking Property Rights , Governance and Sustainability in the Business Enterprise' 339.
[314] ibid 367.
[315] ibid.
[316] W Njoya and A Carse, 'Labour Law as the Law of the Business Enterprise' in A Bogg and others (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 312.
[317] Deakin, 'The Corporation as Commons : Rethinking Property Rights , Governance and Sustainability in the Business Enterprise' (n 313) 367.
[318] Njoya (n 20).
[319] Paul Davies and M Freedland, *Labour Law: Text and Materials* (2nd Editio, Weidenfeld and Nicolson 1984) 428.

were reflective of property rights in jobs.[320] Njoya and Carse identify notions of 'job property' as an important dimension of labour law which can support attempts to "reconceptualize the corporation as a resource that can contribute to the overall welfare of society...[through] alternative theories that emphasise the productive function of cooperation amongst all stakeholders". This can shape judicial understandings of the normative "obligations, responsibilities and commitment" between the corporation, its stakeholders and the wider society in ways which can "expand ideals of fairness" through purposive interpretation of protective legislation, in a way that reflects the true value of worker's claims and interests in the enterprise.[321] The authors draw on Deakin's conception of the firm as constituted through multiple, overlapping property claims, on the basis of "the empirical fact that all stakeholders have investments in the corporation that give rise to claims akin to property rights in relation to corporate assets".[322] That all parties have a degree of investment in the organised productive activity in which they engage is indisputable, if banal. But the claim that this is recognised through 'property or property like claims' is to substitute a normative ideal of property for the legal structure of property rights.

The stakeholder perspective is based upon an idea of property as a 'bundle of rights'. Robe has criticised this perspective for failing to recognize the fundamental character of property rights as rights of autonomy. The bundle of rights perspective treats property as a myriad of rights *in personam*: 'personal rights' amongst individual persons. But Robe argues that the fundamental attribute of a property right is that it is held *in rem*, against the whole world.[323] Property is not a series of discrete entitlements but a singular fundamental one: the right of autonomous decision held against all others regarding the object of property.[324] Property is "a right as a matter of principle with '*bundles of limits*'".[325] In the context of the business enterprise, property rights are the basis for decisional autonomy; the employer commands because he has property rights in the workplace, the employee obeys because he has contractually agreed to. Absent commands which are explicitly prohibited through positive law, the employer is indirectly authorized to create norms for the conduct of its business in a form of constitutionally accepted private government.[326] Crucially these powers of rule setting *do not arise through the joint exercise of freedom of contract.*[327] The identity of who obeys and who commands in the employment contract is derived not from the content of

[320] Njoya (n 20) 60.
[321] Njoya and Carse (n 316) 313.
[322] ibid 312.
[323] Robe (n 2) 80.
[324] ibid.
[325] ibid 82.
[326] Robé and Rogowski (n 216) 68.
[327] Robe (n 2) 71.

the contract but from who owns the assets used in the production process to which the contract pertains.[328] Property creates a fundamentally different legal position between the two parties to the employment contract; those who accept work from the owner of property will have to obey the rules set by the owner of property as long as they are in compliance with the employment contract and laws: "Property is not only inequality in terms of *wealth*; it is also inequality in terms of *legal power*".[329]The right of the holder of property rights *is not the same right* as that of the contracting employee. This is the fundamental power to make the rules, and to exclude those who do not comply.

The logic of property is distinct then from statutory regulation, and positive law. Regulation of contracts can only ever be a partial intervention in property rights; it reduces decisional authority in a specific and limited way. As Robe argues, property rights are not conditional, rights do not come with 'responsibilities': "Nothing which is prohibited to the holder of property rights derives from what is authorized to him; it is what remains to him which result from what is specifically prohibited".[330] As Menke shows bourgeois law limits itself to the negative: all rights are prohibitions but its goal is permissive; all that is not prohibited is permitted, liberal law "create[s] zones of permission by means of prohibitions".[331] From this point of view, compensation for termination of employment falls far short of a 'property right'. The 'real owner' makes the dismissal, the statutory exception requires this right of autonomy is partially constrained by the requirement to pay compensation. Indeed, as Njoya and Carse point out the Denning doctrine appears exceptional from a contemporary perspective given that the law displays an "excessive deference to managerial prerogative" to make economic dismissals.[332] The idea that statutory claims are 'property like' lends an equivalence to the rights claims of all firm participants. This leads to the perspective that labour law and corporate law are 'complementary areas of law'.[333]

### 2.2.2 Summary

The structure of rights in the corporation cannot be understood as a series of overlapping property like rights. The nature of private law rights of property and contract differs fundamentally in form and content from rights established as regulation. Robe's analysis turns the concept of 'incomplete contracts' on its head: the missing content is the prerogative of the property rights holder. Backed

[328] ibid.
[329] Robe (n 1) 70
[330] Robé and Rogowski (n 216) 59.
[331] Menke (n 278) 12.
[332] Njoya and Carse (n 316) 313. Of course this then raises the question of in whose interest the 'managerial prerogative' is exercised. I deal with the intersection of shareholder and corporate property rights in detail in the following chapter.
[333] Njoya (n 224).

by the power of the state this is nothing less than *private legislative authority.* The stakeholder theory deploys a contractarian theoretical perspective in which the discrete nature of property claims is missed and the neoclassical worldview of the different 'factors of production' competing on a level (or perfectible) playing field is reproduced. Deakin's analysis effectively reproduces this through conceptualising property as a 'bundle of rights'. Law is viewed as a means of specifying stakeholder claims in the firm. As such the property based hierarchy of the corporation can be theorised away, or reversed through corporate governance arrangements which recognise the contribution of employees to the firm's value. Given the relationship between 'corporate governance' and the formations of concentrated property wealth on capital markets described in chapter 1, such transformations would appear unlikely. The point here is not to reify liberal law's distinctions nor to claim an absolute primacy of property rights. The actualization of rights emerges only in the context of real social relations. Menke's analysis remains firmly in the dimension of the individual subject not the collective or institutional dimension of rights to which I now turn.

## 2.3 Collective and institutional dimensions of labour regulation

This section considers the ways in which trade unionism as a collective *mode* of regulation of the labour relationship relates to the legal *forms* of contract, property and statutory regulation. These dynamics are contextualised within the wider political economy of labour regulation of the post war period in the UK. I engage with Judy Fudge's account of the regulatory and institutional nexus underpinning the 'Standard Employment Relationship' (SER); the central normative model of employment built around the contract of employment, strong collective labour rights and the welfare state. I introduce the ideas of Boyer and the regulationist school of Marxism to explain how this regulatory regime was tied into the wider dynamics of political economy at the time, and to explain the shift away from state support for collective regulation. The post-war context and the SER are used to demonstrate how the collective mode of regulation in this period achieved a horizontally extended form of regulation which went far beyond the bilateral logic of contract and the unitary model of the employer. At the same time, I explore arguments that suggest collective action has a logic that is problematised by the legal form of rights. The shift into law risks breaking down the collective into a set of individual contractual claims. This is reflected in the trajectory of legislation since 1971 which ties collective and individual rights closely to the unitary model, which ultimately serves to reify the corporate employer.

### 2.3.1 The emancipation of trade unionism

The emergence of collective rights in labour law must be understood in the context of a political and social struggle for rights, in which individuals collectively leveraged civil (contractual) and political

(voting) rights to achieve certain social and economic rights. The emergence of collective bargaining through trade unions enabled workers not only to counterbalance the power of the employer at the workplace level, but to combine to raise their social and economic status and claim certain social rights. The turning point towards respect for freedom of association rights was the extension of the voting franchise to working men in 1867, which doubled the electorate and brought a degree of political clout to the working classes for the first time.[334] Until the mid-19th Century 'laws against combinations' passed by parliament and upheld by the judiciary had ensured that workers attempting to collectively negotiate with their employers were likely to be punished. Andrew Moretta has argued that the common law had developed a principle, expressed through offences such as conspiracy and unlawful assembly , that "workers must not be allowed to bargain collectively".[335] The emancipation of the trade unions over the period from 1824 to 1906 entailed the removal of legal impediments to labour organizing,[336] most significantly the Trade Union Act 1871 which exempted labour organizing from charges of criminal conspiracy in 'restraint of trade' and repealed existing legislation regarding unions. The Conspiracy and Protection of Property Act 1875 legalised picketing, and the Trade Disputes Act 1906 exempted unions from liability for damages for business losses in relation to industrial action, underpinning if only in negative terms a 'right to strike' in UK law, facilitating the emergence of the 'countervailing power' of the workers.[337] In this context the contractual status of worker's enhanced the possibilities for contesting the social and economic power of employers. The right to terminate contracts underpinned workers freedom to strike (which was considered breach of contract), therefore the right to terminate contracts underpinned collective bargaining.[338] In this period the principal legal characteristic of collective rights was the removal of legal impediments to labour organizing.

### 2.3.2 The 'Standard Employment Relationship'

Judy Fudge has described how the post-war period saw the emergence of a regulatory institutional nexus built around the contract of employment, which became the central normative model for labour law across developed capitalist countries: the 'standard employment relationship' (SER).[339] The basic regulatory function of the SER was to provide a "stable, socially protected, dependent ,full time job...the basic conditions of which (working time, pay, social transfers) are regulated to a

[334] Andrew Moretta, 'Benchmarking Workplace Rights' 37.
[335] ibid 36–37.
[336] Ewing (n 33) 4.
[337] ibid.
[338] Njoya (n 20) 33.
[339] Judy Fudge, 'The Future of the Standard Employment Relationship: Labour Law, New Institutional Economics and Old Power Resource Theory' (2017) 59 Journal of Industrial Relations 374.

minimum level by collective agreement or by labour and/or social security law".[340] Whilst the contract of employment was the central fulcrum for the SER, the commodification of labour through contracting became significantly delimited by strong trade unionism and state support for collective bargaining.[341] As such the SER entailed collective regulation of contracts on issues of job security, working conditions and pay. The SER rested upon a particular nexus of labour market institutional actors: the large manufacturing firm, the Keynesian state committed to full employment and social welfare, and autonomous trade unions.[342] Workers structural power was enhanced in this period by the lack of 'exit options' for capital internationally under conditions of limited market liquidity and capital controls. This related to the state's power over finance. The restrictions and regulation of international capital flows under the Bretton Woods agreements strengthened the ability of the Keynesian state to conduct domestic economic management in the public interest.[343] As described in chapter 1, these restrictions, combined with the increasing ability of firms to self-finance through use of retained funds, significantly weakened the position of finance over production in this period. The large vertically integrated firm was both protected and embedded in national territories through the state mechanisms of protective tariff walls and control over financial markets.[344] This enabled a tempered form of oligopolistic competition amongst the major corporations.[345] This both reduced incentives to seek profitability through intensification of work and provided conditions favourable to labour organizing. Under these arrangements full employment through Keynesian demand side economics reduced the ability of businesses to compete on labour costs. The nominal wage was insulated from the pressure of the 'reserve army' of the unemployed.[346] Nominal wage increases were linked to the steep productivity gains made over this period.[347] This was complemented both by improved social security provisions which set the minimum terms of entry to the labour market. Public spending and welfare reduced the volatility of the economy.[348] Intra-firm price competition on labour costs was further suppressed by use of wages councils, sectoral collective agreements, and extension laws spreading collective rates to non-unionised firms, enhancing the negotiating position

[340] ibid 377. It should be noted that the SER can only represent a partial account of labour relations in the post-war period. The employment experience of many, in particular women and ethnic minority workers fell, as well as white male workers in precarious sectors will have fallen outside the collectively regulated model, not to mention workers outside the advanced western capitalist states. I describe it here in order to highlight the political-institutional dynamics of effective regulation of contractual labour.
[341] ibid 376.
[342] ibid.
[343] Ireland, 'Financialization and Corporate Governance' (n 179) 16.
[344] Fudge (n 339) 380.
[345] Robert Boyer, 'Marx's Legacy, Régulation Theory and Contemporary Capitalism' (2018) 30 Review of Political Economy 284, 300.
[346] ibid 296.
[347] ibid 299.
[348] ibid.

of workers as 'low road' competition strategies were closed off.[349] Both the incentives and legal options for firms to compete on labour costs were dramatically reduced.[350] Mechanisms such as extension and sectoral agreements extended the scope of regulation horizontally across the economy beyond the single entity employer. Unions negotiated on social security issues at the national level shaping the conditions of unemployment and the terms of entry to the labour market. Organized workers could shape terms and conditions beyond the individual firm, not only through extension or sectoral agreements, but by secondary action. Worker's associational power was enhanced under conditions conducive to extracting gains from capital: enhancing associational power as the benefits to labour organizing materialized through bargaining strength and effective action. The logic of regulated contracts gave way to principles of solidarity and class consciousness which superseded employment relations *in personam* in important dimensions. The SER was simultaneously contractual *and* highly regulated by norms and institutions, embedding principles of class solidarity.[351]

### 2.3.3 Regulatory 'regimes of accumulation'

These arrangements were not simply the rational outcomes of technical economic processes, but represented a political response to social demands, based upon the reconfiguration of class power and redefined interests of industrialists, workers and state elites in the aftermath of the war.[352] The compromise was facilitated by the period of fast and steady growth driven by post-war reconstruction which served to mitigate and transform intrinsic class conflicts.[353] As Boyer and the regulationist school of Marxism show, the particular regulatory dynamics of any given era can be understood as dimensions of a particular 'regime of accumulation' – in which the state, in relation to the prevailing constellation of social forces in which regulatory modes secures - for a time - the conditions necessary for stable capital accumulation. Social regulation functions as a mediating force which may dilute but ultimately secures property rights by providing a degree of stability which minimizes the damaging aspects of an unequal class society. State regulatory modes supported collective regulation as part of a successful accumulation regime loosely understood as 'fordist' capitalism under which rising wages were linked to consumer driven growth.[354] Yet the regulationist approach  sees any such regime as time-limited due to the conflicting dynamics of capitalist

[349] Klare (n 309) 8.
[350] Ibid 8.
[351] Fudge (n 339) 376.
[352] Boyer (n 345) 301.
[353] ibid.

[354] ibid.

growth.[355] Even though protective labour market institutions may be beneficial to capital accumulation, as accumulation proceeds over time the institutions are undermined by class conflict, capitalist competition and accumulation itself, leading to a periodical breakdown of the relevant set of institutions, a fall in the profit rate and the collapse of accumulation, overcome by construction of new set of institutions.[356] The post-war compromise between capital and labour did not survive the economic turmoil of the 1970s. From 1968 onwards capital had been looking for ways out of the social contract, and a number of firms, industries and business associations converted to the objective of the liberalization of capitalism through de-regulation and the expansion of markets at home and abroad.[357] At the same time the search for enhanced returns pushed capital to cross borders eroding the domestic oligopolistic competition by introducing international competitive pressures.[358] By the 1970s, the high post-war growth which had provided both high profitability and real incomes growth had run out of road. The limits to growth, and the stagnation of productivity growth undermined the capital-labour compromise.[359] Workers continued to push for rising living standards as expected under the post-war settlement, yet now such demands became a squeeze on profitability.[360] The oil price shock, industrial conflict and high inflation discredited the politics of consensus.[361] It collapsed completely after 1979 when the Thatcher government opted for inflation control over full employment and state financed welfare.[362] The 1980's saw almost all the central elements of the post-war social contract revoked or undermined across the developed western economies: politically guaranteed full employment, collective society-wide wage formation negotiated with trade unions, worker participation at workplace or enterprise level, state control of key industries, universal social rights protected from competition, tax and income policies to tightly limit inequality, and government cyclical and industrial policies to secure steady growth.[363] Boyer argues the hierarchy of the state - and the relative power of wage labour – over finance was reversed in the shift into a 'finance-led' accumulation regime in the US and UK from the 1990's onwards, under which finance capital dominates the state and demands flexible wage-labour.[364]

[355] Boyer (n 345).
[356] T McDonaugh, 'Social Structures of Accumulation: A Marxist Comparison of Capitalisms?' in M Ebenau, I Bruff and C May (eds), *New Directions in comparative capitalisms research: critical and global perspectives* 121.
[357] Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (2nd edn, Verso 2017) 23–27.
[358] Boyer (n 345) 300.
[359] ibid 299.
[360] Streeck (n 357) 25.
[361] Williamson, 'The Bullock Report on Industrial Democracy and the Post-War Consensus' (n 29) 121.
[362] ibid.
[363] Streeck (n 357) 28.
[364] Boyer (n 345) 302.

### 2.3.4 The mode of regulation and the form of rights

Over the same period labour relations were shifting from Kahn-Freund's 'collective laissez faire' towards more direct forms of legal regulation. The state shifted to heavily regulating and restricting trade union rights. The focus of industrial action was narrowed to the single employer, and to a reduced range of issues. A series of acts of parliament made secondary action unlawful, prohibiting secondary picketing (away from the workplace)[365] and secondary action (action against other employers).[366] Action was increasingly restricted to the 'own' employer.[367] The definition of what constitutes a 'trade dispute' was further restricted with 'political' strikes - for example against privatization being removed from the definition.[368] The definition of a trade dispute is critical as UK labour law does not provide a right to strike, but rather provides exempted circumstances where workers and unions have immunity from prosecution where industrial action is taken 'in contemplation or furtherance of a trade dispute'.[369] These restrictions reflected not only a narrowing of union immunities from prosecution but a shift in the locus of lawful action to the single entity employer. As Robert Knox has argued, the net effect of the shift into legal regulation in this period was to discipline and encourage unions "to act as 'economic-corporate' organizations, whose sole function was to represent their member's immediate interests as against their *immediate employers*".[370] The increasing restrictions on industrial action described above were accompanied by a shift towards resolving disputes through the industrial (later 'employment') tribunal with the power to hear unfair dismissal cases. The tribunal was introduced by the 1971 Industrial Relations Act as part of a wider set of measures aimed at tightening legal regulation over industrial action. The unions opposed the act taking the view that making the fairness of dismissals a legal matter favour the side who could afford the best legal counsel.[371] The effect was the beginning of a process of 'juridification' as regulation of dismissals and other matters shifted towards tribunal use. The expansion of individual labour rights attached to the contract of employment over this period, alongside the decline in union coverage and power saw the role of unions (and so workers) shift from 'rule-makers' through collective bargaining to 'rule-enforcers'; policing rules made elsewhere.[372]

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[365] Employment Act 1980
[366] Employment Act 1990
[367] Employment Act 1982
[368] Employment Act 1982
[369] Trade Disputes Act 1906
[370] Robert Knox, 'Law, Neoliberalism and the Constitution of Political Subjectivity: The Case of Organised Labour' [2016] Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project 95, 106 My emphasis.
[371] https://tribunemag.co.uk/2022/06/trade-union-laws-rmt-strike-industrial-relations-legislation
[372] KD Ewing, 'Review: The Death of Labour Law ?' (1988) 8 Oxford Journal of Legal Studies 293, 299.

The horizontal effects of collective regulation across the economy along the lines of class solidarity that had been the hallmark of the SER was reduced through constraints which tied action to the single entity employer. At the same time the decline in industrial action and individualization of disputes shifted the regulatory onus back to the bilateral contract of employment. The institutional transformation identified by the regulationist school was reflected at the level of legal regulation. This shift in the regulatory regime indicates a critical point of differentiation between rights established through statutory regulation and private law rights. Menke argues that legal regulation diverges from the autonomy of subjective rights in the sense that it places limitations *pursuant to the broad aims* of public regulation. These broad aims are expressed as the 'bundle of limits' identified by Robe. This distinction of form places constraints on the ways in which rights claims rooted in statute intervene in property. These tensions can be seen in the way that collective bargaining is constructed in the form (and formalism) of rights. Sinzheimer argued that by bargaining collectively, employers and unions do not enter contractual relations but "engage in the autonomous creation of norms governing the relations of third parties".[373]In this idealised, autonomous mode of bargaining (also reflected in Kahn-Freud's notion of collective laissez faire) the absent role of law means neither the parties to negotiation, nor its content are prescribed. Outcomes are decided by the power the parties can bring to the dispute. Where workers can exert collective power, the collective dimension of labour law challenges the autonomous rights of property in a way which cannot be said to simply reflect the existing (regulatory) order. There is nothing that is *per se* formal or contractual in the nature of worker's collective power. It does not necessarily reify the employer or the corporation. The history of secondary action or general strikes makes this clear. Nor should the content of workers collective claims necessarily be delimited to a narrow range of pay and conditions. But the shift into *rights* claims entails a shift into contractual relations.[374] In the institutionalization of collective bargaining rights both the normative content of regulation and the identities of the parties must become fixed. The formalism of rights claims prevents political arguments entering a juridical dispute.[375] In Christodoulidis' example, workers striking for democratic workplace control, upon entering the legal system find their claims broken down into a binary of legal work-related claims and illegal political claims; the broad political conflict is fragmented into a series of workplace disputes.[376] The ILO's principles of collective bargaining demonstrate this well. Bargaining may proceed across a broad range of subjects concerning both

[373] Dukes (n 275) 347. this is tied to ideas of legal pluralism + voluntarism: in OKF and Sinzheimer, which comes back to the point that voluntarism naturalises the parties/the corp. Maybe just vol. negates the ways in which the c. form transforms power dynamics
[374] D'Souza cited in Boonen
[375] Boonen (n 279).
[376] Christodoulidis cited in ibid.

working conditions (working time, overtime, rest, wages etc) and also elements of 'managerial' control (staff reductions, changing hours) which go beyond the terms of employment, yet they must be 'primarily or essentially' questions relating to conditions of employment.[377] At the same time, formalism produces certain identities – such as 'employer', or 'bargaining unit' which may be extremely disadvantageous to one side of the dispute. The ILO's principles emphasise free and voluntary negotiation, free choice of bargaining level (within any given organizational structure) and minimal intervention by the authorities. These principles formalise participation rights in the collective mode of regulation. Yet this approach reproduces an economic imaginary of equal participants. Formalism, in reducing disputes to contractual relations depoliticises both the content of claims and the nature of the parties. Regulatory rights instruments intervene to secure processes which can contribute to substantive outcomes, but in doing so remove the substantive political content: the power of the parties and the way it is distributed. By contrast, the autonomy of property rights is not subject – as a matter of principle - to the 'public goals' of regulation.

The decline of the SER reflects the limits to the transformations of the post-war order. In extending the regulation of the contract of employment, the post-war transformation of UK labour law did not fundamentally intervene in legal foundations of the system. As described in chapter 1 there was little to no change at the level of rights within the corporation, reflecting the entity perspective and a failure to seriously challenge the structure of shareholder's rights. Under the SER, labour law reproduced the legal subordination of labour to managerial prerogatives and the property-based hierarchy of the earlier era.[378] The introduction of social regulation enabled the hierarchy of property rights above workers rights to be maintained, whilst enabling a tempering of the dominance of property through the deployment of relatively autonomous collective action in a broadly supportive regulatory framework. The post-war regime did not directly regulate the collective mode but supported it. The shift from contract as the predominant mode of regulation to the collective model of the SER suggests that under certain institutional conditions the dominance of property rights is reduced. Yet the SER model did not fundamentally alter the legal structure of property rights in the firm, but only sought to partially re-balance them.

[377] H Gernigon, B. Odero, A. Guido, 'ILO Principles Concerning Collective Bargaining' (2000) 139 International Labour Review 34, 40.
[378] Fudge (n 339) 380.

## 2.4 Corporate-law mediated property and the labour relationship

The withdrawal of the SER regime: from the post-war extension of the reach of labour regulation horizontally across the economy, to the narrow, individual and vertical contractual form has been matched by a paradoxical transformation on the side of capital. The period of the shift towards bilateral contracting has been marked by the apparent 'financialization' and 'fragmentation' of the employer, both implying enhancement of power of actors not party to the contract of employment. In this section I argue that the corporation as a structure of rights should be analytically central in trying to comprehend these dynamics. I argue that the corporation as property right's holder breaks down categories of liberal law. Corporate-law mediated property breaks with labour law's 'person centred' notion of property.

### 2.4.1 Labour law, fragmentation and financialization

The centrality of the contract of employment to labour law has become increasingly problematised in recent years, in particular in relation to ideas of the 'fragmentation' of the 'unitary model' of the employer.[379] The fragmentation of the firm refers to an extensive process from the 1980's onwards of the vertical disintegration of corporate organisational forms through arrangements such as sub-contracting, franchising and networks of supply chains.[380] Albin and Prassl have described this as the "disintegration of the firm", as "bureaucratised models" diminish and organisations minimise their core activities, preferring to buy-in services (including labour, through the use of agency workers, subcontractors and zero-hours contracts) externally leading to "looser, networked patterns" and new organisational forms.[381] David Weil has characterised this phenomenon as the 'fissured workplace'. This allows firms to focus on core competences, discard workers and reduce costs.[382] These processes change how the firm is organised, and how work is contracted in ways which undermine the standard employment relationship, and have contributed to a weakening of workers' bargaining power through erosion and de-centralisation.[383] The 'displacement problem' which the SER sought to mitigate: the escape from the sphere of labour law regulation into low wage, deregulated and non-unionized labour markets domestically or overseas has been reinstated by contemporary developments.[384] The rising intrusion of capital markets into firm governance, under

[379] Albin and Prassl (n 308).
[380] Njoya (n 224) 121.
[381] Albin and Prassl (n 308) 213.
[382] David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It.* (Harvard University Press 2014) 10.
[383] Fudge (n 339) 382.
[384] Klare (n 309) 8.

the rubric of 'financialization' is also understood as key driver of fragmentation.[385] As described in chapter 1, financialization is understood to have radically enhanced the power of financial market actors over decision making and governance arrangements to the ends of maximising shareholder returns. For Fudge, financialization is the principal factor eroding the large vertically integrated firm and the SER as the rise in shareholder value pressures unleashed by capital market de-regulation drives corporate restructuring to promote shareholder value.[386]

The obvious characteristic unifying 'fragmentation' and 'financialization' is that both entail the exercise of power over workers by actors who are not formal parties to the contract of employment. Yet the literature does not largely regard this as an effect of corporate legal personality as such, or indeed, as a problem which is equally applicable within the traditional large vertically integrated firm from which labour law draws its legal imaginary. Reflecting Klare's argument above, the labour law literature approach to fragmentation and financialization tends to see them as transformations of the economic background to which labour law regulation must then respond.[387] The work of Prassl exemplifies this. Whilst Prassl's critique of the unitary model, and reconceptualization of the employer in 'multiparty settings' directly identifies these dynamics, the wider political economy in which these organizational and legal transformations have occurred is absent.[388] Prassl adopts a 'functional' approach, which is contrasted against the formalism of English law. Such functionalism assumes that legal forms follow social functions in a relatively unproblematic manner. This negates the contradictory dynamics of the labour relationship (and its forms of regulation) driven by its grounding in capitalist property relations.

As described above, the labour relationship and labour regulation mediate capitalist property relations. This does not *necessarily* imply a shared economic interest in well-functioning labour market institutions. As the regulationist school demonstrate, such an interest in a stable regulatory regime may emerge for a time but this will ultimately be subject to the contradictory pressures of expanding accumulation. At the level of 'rights' the scope for functional alignment under these conditions is problematized by the way that rights secured through statutory regulation differ from those of property. Regulation may secure opportunities for individuals, and specific and limited exceptions to the autonomy of property rights.[389] But the right of subjective rights and the

[385] Weil (n 382); Njoya (n 224); Fudge (n 339); Jacoby (n 185).
[386] Fudge (n 339) 382.
[387] Collins (n 151); Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) <https://academic.oup.com/ojls/article-abstract/10/3/353/1399137> accessed 30 October 2018.
[388] Jeremias Francis Benedict Baruch Prassl, 'The Notion of the Employer in Multilateral Organisational Settings' (University of Oxford 2012).
[389] Robe (n 2) 15; Menke (n 278).

right of statutory regulation are qualitatively different; the former securing individual autonomy, the latter being bound to the specific goals of public regulation. For Menke private law subjective rights are characterised by the autonomy of the rights holder; rights as the authorization of the new: to act in a way that is not constrained by the 'general goal of regulation'. Menke understands rights as power: the normative power to prevail in a given situation the power to make the rules, to make (and change) the law in relation to the unbound sphere of the new. For Pistor this form of the subjective legal right is essential for capitalism, and constitutive of the political order which protects it; "private law is imbricated with a constitutional order that has elevated subjective private rights to foundational principles".[390] The subjective right underpins the autonomy of private law, which becomes the 'law of rights' whatever its content, enabling private legal orders to push the boundaries of rights to breach basic social norms.[391] This opens up the space through which private rights – which are nonetheless dependent upon state power – become 'dislodged' from the social preferences of the citizenry.[392] The ability to strategically apply the normatively hollow right enables asset owners to bestow certain legal properties upon assets, 'and do so as a matter of private, not public, choice', is the basis of inequalities of power and wealth.[393] From this perspective legal dynamics cannot be understood in terms of normative functional alignment of institutional forms, but conflict and normative divergence in different institutional settings. Moreover, this obscures the central problematic of the corporation as the holder of subjective rights.

### 2.4.2 The corporation as the property rights holder

Labour law has remained rooted in the contract property distinction, acquiescing in the fundamental categories of liberal law: most fundamentally the right of the property owner to make the rules. Yet the corporation itself transgresses and breaks down the categories of liberal law.

In contrast to decentralization of power – liberalism's central justification for strong property rights – the corporation concentrates property rights, and therefore private decisional authority, to a potentially unlimited scale.[394] Yet this concentration of property is also its fragmentation; corporate law enables the parcelling up of the asset base across multiple entities under common ownership to enable maximum leveraging of assets and minimization of monitoring, taxation and regulatory costs.[395] The corporate legal person is potentially immortal, enabling the endless accumulation of

[390] Pistor (n 86) 209. Pistor's states this holds true in both the US and UK, in Germany and other countries other competing principles – such as the social welfare state have balanced this but shift is away from these models.
[391] ibid.
[392] ibid 208.
[393] ibid 209.
[394] Robé and Rogowski (n 216) 57.
[395] Pistor (n 86) 47.

assets.[396]Yet it is also increasingly ephemeral. The average lifespan of an S&P 500 company in the US has fallen from 67 years in the 1920s to just 15 years today. UK listings have followed a similar pattern.[397] It is an immortal possessed of rights, yet can be eliminated at the stroke of a pen. The corporation as the property holder reflects the property-based logic of status, yet its relations are depersonalized. As David Whyte has shown depersonalization is expressed through the separation of functions across the corporate structure, roles which nevertheless remain bound by the corporate hierarchy as an expression of its dominant values; shareholder value and the profit imperative.[398] Shareholders and Directors are also legally distanced from the impacts of their decisions.[399] Limited liability severs a key relational dimension within the hierarchy, enabling Directors and shareholders to pursue profitability and have their profits protected from the claims of those impacted in the process. This separation is not only formal but physical: the shareholder or Director is likely far removed from the sites of production, the extension of autocratic relations across vast corporate bureaucracies removes the interpersonal *human* dimension of relations.[400]. Ireland's analysis demonstrates how corporate-law mediated property depersonalizes the social relations of the firm. The corporate property forms of shares, loans or bonds; rooted in titles to revenue constitute not an object but a relationship. This is expressed in Marx's notion of "fictitious capital" in the formation of which "capital more and more acquires a material form, is [increasingly] transformed from a relationship into a thing".[401]This 'thing' which embodies the social relationship comes to be perceived as an object with innately self-expanding and self-reproducing form of value; money capital appears to have an inherent ability to command interest as a result of the agreement between individuals (money and industrial capitalists) quite separate to the circuit of productive capital.[402] Critically, Ireland argues that this shows how under conditions of developed capitalism, class relations are depersonalized, and become embodied in reified 'things'; such as the share as autonomous property.[403]

Nowhere is this reification more apparent than labour law's legal imaginary. Because of this, the dynamic of alienable property destabilizes the labour relationship. Expectations of secure employment, promotion and wage growth over time may be undercut by restructures, takeovers' or

[396] David Whyte, *Ecocide: Kill the Corporation before It Kills Us* (Manchester University Press 2020).
[397] R Watson, 'Why Companies Die' (*Imperial College Business School: Blog*, 2017) <https://www.imperial.ac.uk/business-school/blogs/executive-education/why-companies-die/> accessed 3 December 2021.
[398] Whyte (n 396) 58.
[399] ibid 59.
[400] ibid.
[401] Marx quoted in Ireland, Grigg-spall and Kelly (n 107) 156.
[402] ibid.
[403] ibid 162.

shareholder value pressures.[404] Fluctuations in share price driven by speculative activity may shape decision making by corporate management in ways which affect workers; yet there is no legal relation between workers and these shareholders, whose right to alienate their shares nonetheless is a source of power. More than this, the formation of workers' associational power may be significantly undercut. Constraints on the exit options for capital were a significant part of the SER period. As Wolfgang Streeck has argued, the 'capital strike' of the late 1970s was a significant attempt to discipline workers.[405] Market property is thus a significant weapon in relation to organised labour. The 'exit' option for workers – the right to withdraw their labour – is constrained by the enormous challenges of organizing, gaining recognition, conducting ballots and securing adequate participation in strike action, even within the most amenable legal environment. The 'exit' option for an investment manager trading in a liquid market is immeasurably simpler. At the level of corporate organizational structure, the nature of corporate law mediated property is also highly destabilizing to workers structural and associational power. As demonstrated by the literature on 'fragmentation', the splitting of the competencies of control from the formal 'employer' harms organizing and bargaining efforts.[406] From a bargaining perspective, the ability of the corporate owner to structure production using multiple legal entities is a source of power which workers organisations find hard to match. Workers seeking the optimal bargaining unit within the firm, or seeking to counter the effects of fragmentation by organising across the supply chain for example face a much steeper task.

## 2.5 Conclusion

The legal imaginary of labour law is bound up with a 'person-centred' perspective of property rights which is at odds with the basic features of the corporation. Corporate law-mediated property abstracts from, depersonalizes and destabilizes the labour relationship. The foundational structures of labour law are fundamentally challenged by the corporate economy. The twin pathologies of contemporary capitalism: 'fragmentation' and 'financialization' are deeply linked. Control over firms is parcelled up across multiple intersecting corporate entities and forms of financial property. The outcome is ever more complex financial and organisational structures which abstract the powers of control ever further from the site of the performance of labour, placing the controllers ever further from effective challenge. These dynamics must be understood as inherently linked to the corporate legal person, the nature of corporate-law mediated property, and the corporation as the holder of subjective rights.

[404] Stone (n 300).
[405] Streeck (n 357) 27.
[406] Hila Shamir, 'Unionizing Subcontracted Labor' (2017) 17 Theoretical Inquiries in Law 229.

The autonomy of property and private law identified by Robe and Menke and legitimated on grounds of decentralization and freedom in liberal thought engender the very opposite in the contemporary corporate economy. Corporate property as 'private sphere' is a gross contradiction enabled by liberal law. Liberal laws distinctions must not be reified and legitimated but challenged. However, reformist attempts to 'reimagine' the corporation reproduce the mistakes of the entity theorists in the post-war period as described in Chapter 1. Collective challenges to the dominance of property is problematised by the formalism of rights which naturalises the parties and removes the concrete context of political and economic power. The foundational structures of labour law reify the employer and fail to deal with the corporation. The rest of the thesis seeks to get behind this reification.

# Chapter 3: Theory and methodology



## 3.1 Situating the study

This is a socio-legal study, and my approach is strongly influenced by the work of scholars in the field of 'Law and Political Economy' (LPE). LPE has emerged in recent years as a broad interdisciplinary field of study which brings together critical approaches to law with the critical political economy tradition. Diverse perspectives are brought together through a central emphasis upon power relations and dynamics of inequality in the political and juridical (re)production of economic outcomes.[407] LPE rejects the notion that law, politics, or economics are pure disciplines. In this regard it reflects the approach of classical political economy, in particular the irreducibility of social relations to economic relations.[408] This contrasts with Law and Economics which reduces legal and political phenomena to the economic formula of rational choice theory. My approach is sociological in the sense that it foregrounds the social relations of production, which are viewed as non-reducible to pure economic phenomena. Reflecting the normative tradition of critical social theory, LPE takes a historical perspective which seeks to understand the power relations underlying processes of socialization,[409]in particular "how relations of power are legally and politically configured and reconfigured over time and in distinct periods, and how in turn this conditions the

[407] Michael A Wilkinson and Hjalte Lokdam, 'Law and Political Economy' [2018] Ssrn.
[408] Wolfgang Streeck, *How Will Capitalism End? Essays on a Failing System* (Verso: London 2016) 202.
[409] Christian May and Andreas Nolke, 'Critical Institutionalism in Studies of Comparative Capitalisms: Conceptual Considerations and Research Programme' in M Ebenau, I Bruff and C May (eds), *New Directions in comparative capitalisms research: critical and global perspectives*.

development of the economy."[410] The economy is understood both as a juridico-political construct, and as the outcome of multiple sites of social struggle along lines of class, gender, race, national interests and many others.[411] My approach draws on critical institutionalist economic perspectives rooted in the 'socio-theoretical' institutionalist tradition.[412] The 'socio-theoretical' perspective views the economy not just as an ensemble of rational transactions but as a complex system, brought about by the multiple and contradictory developments in the process of growth.[413] The institutional forms which structure economic systems reflect not pure efficiency prerogatives but historically and socially developed 'settled habits of thought'.[414] Such processes of socialization have associated power relations; critical social theory shows us that societal dynamics are driven by power, conflict, action, social stratification and subjectification.[415] This is distinct from neoclassical economics which understands economic interactions in terms of free contract and rational utility maximisation, and identities as exogenous to economic interaction. Critical institutionalism also diverges from mainstream institutionalist approaches such as 'Varieties of Capitalism' (VoC) and New Institutionalist Economics (NIE). These perspectives obscure processes of socialization and their associated power relations through treating institutions as objective social facts which stabilize and universalize contemporary structures.[416] Contrary to this economistic depiction of socio-economic structures as "technical arrangements for economic convenience", these forms are socially, historically and politically contingent, with significant ramifications for the social distribution of power, status, and life chances.[417] As described in Chapter 2, changing corporate organisational forms and financial and firm structures are understood in part as the outcomes of power dynamics between capital and labour. In the process of organizational change these forms may reproduce and intensify existing hierarchies, and/or present new opportunities to challenge given power relations by, for example, creating new sources of workers' structural and associational power. Labour market institutions cannot be understood as expressions of normative functional alignment but rather as contingent arrangements mediating conflict and normative divergence, generated across separate but interlinked institutional settings (the capital market, the board room, the shop floor, the household). A critical institutionalist perspective seeks to uncover the role of asymmetrical power

[410] Wilkinson, M. A. and Lokdam, H. Law and Political Economy. LSE Law, Society and Economy Working Papers 7/2018. London School of Economics and Political Science Law Department www.lse.ac.uk/collections/law/wps/wps.htm
[411] Wilkinson and Lokdam (n 407) 12.
[412] May and Nolke (n 409).
[413] ibid 86.
[414] Veblen quoted in ibid 86–7.
[415] ibid 90.
[416] ibid.
[417] Streeck (n 408) 204.

relations in the historical emergence and reproduction of capitalist institutions.[418] An LPE approach foregrounds the role of law and politics in the dynamics of institutional development and change.

## 3.2 Ontology: Coding, class and capital

In chapter 1 I introduced the work of Katherina Pistor and her notion of legal 'coding' as a process through which private law rules are strategically applied by the solicitors of the wealthy to legally 'code' or create 'capital', understood as forms of revenue yielding assets, in order to maximise and protect wealth.[419] Pistor's analysis of the coding of capital focuses on the role of legal professionalism within a structural hierarchy wherein legal elites code assets in ways which are relatively remote from the interests or conditions of workers. I contrasted this with Marx's understanding of capital as a relational form of property rooted in the labour relationship. Where Marx's notion of capital is firmly grounded in the sphere of production, Pistor's focus is the abstract property forms in the sphere of circulation. I argued Ireland's analysis of the legal development of the share and the corporate legal person bridges the gap between the two: revealing the share as a reified property form, the value of which is based in the relations of production. I propose to build on the work of both Ireland and Pistor, setting out an analysis of the contemporary property forms linked to the corporation, with a focus on the role of legal coding in processes of 'capitalization' through which abstract property claims over value are secured in relation to workers' claims and the structuring of the workplace and the labour process through law. This theoretical and analytical framing requires some additional conceptual development.

### Value

The analytical focus foregrounds the link between labour and value. Marx's labour theory of value is highly contested, indeed even many contemporary Marxist economists reject it as a general model of pricing and distribution.[420] As Ireland has shown, the rise of exchange and market dominated ideologies in the mid-19th Century, which accompanied the reification of titles to revenue such as the share into forms of autonomous property, broke the link between labour and value which had been common to classical political economy. This led to the fetishization of money capital forms as 'self-creating value'.[421] Under contemporary conditions of 'financialization' and its associated impacts upon labour, the ideological nature of marginalist theories of value could not be more apparent. The neoclassical account claims that wages and profits reflect the 'marginal productivity' of labour and capital: each gets exactly what they are worth in a free market. Yet the data on wages and productivity gains suggests claims that wages reflect marginal productivity are deeply flawed.

[418] May and Nolke (n 409).
[419] Pistor (n 86).
[420] Bowles (n 283).
[421] Ireland, Grigg-spall and Kelly (n 107) 157.

Marginal Productivity Theory holds that wages will rise with productivity in free market economies, yet we see large gaps between wages and productivity gains in multiple OECD countries – with gains going to profits at the expense of wages, even in highly competitive, nominally free market economies.[422] Conversely periods where wage-productivity gains have been close have been marked by high levels of state intervention and unionization.[423]Profits account for the bulk of the gap between labour productivity and real compensation, as such the opening up of productivity gaps strongly suggest an upwards distributional shift towards capital in direct contravention of MPT.[424] These indicate that power in distributional conflict between capital and labour is a significant determinant of wage and profit returns. From the perspective of the analysis presented here this power is bound up with the legal structure of rights through which parties seek to secure their gains. Marxist perspectives on value also make an important distinction between 'realized' value; the surplus labour value which is realized as profit through sale of goods on the market, and 'fictitious capital'; surplus capital speculatively seeking returns on capital markets which has not been through the production process. Fictitious capital is therefore 'unrealized' value, a speculative *claim upon future labour*.[425] This future orientated nature drives conflict in the labour relationship as capitalists seek to realize the value of these speculative claims.[426] For all these reasons my approach foregrounds the analytical link between labour and value. This does not reflect the labour theory of value as an empirical method of modelling prices and profits, but as an "ontological and political" tool; a way of framing value as relational and contested, value as *a site of struggle*.[427]

## Capital accumulation

A Marxist approach looks at the development of law and institutional forms specifically in the context of the process of *capital accumulation*, the particular dynamics of which are understood to drive social phenomena and patterns of institutional formation and change: in particular with regard to the labour relationship. These dynamics are understood here in relation to an understanding of capitalism as "a dynamic of socio-economic inequality, conditioned by politically and legally

[422] Directorate for financial and enterprise affairs competition committee, 'Competition Concerns in Labour Markets – Background Note' (2019).
[423] Jamee Moudud, 'Libertarian Doublespeak: Obscuring Distributional Struggles Under the Banner of "Economic Liberty"' (*Law and Political Economy*, 2018) <https://lpeblog.org/2018/04/23/libertarian-doublespeak-obscuring-distributional-struggles-under-the-banner-of-economic-liberty/#more-642> accessed 18 May 2020.
[424] ibid.
[425] Rebecca Carson, 'Fictitious Capital and the Re-Emergence of Personal Forms of Domination' (2017) 1 Continental Thought & Theory - A Journal of Intellectual Freedomtal 566, 566.
[426] ibid 567.
[427] Steffen Böhm and Chris Land, 'The New "Hidden Abode": Reflections on Value and Labour in the New Economy' (2012) 60 Sociological Review 217, 222.

constituted relations of power, rather than an 'iron law' of the capitalist economic system".[428] However, Marxian perspectives emphasise a number of tendencies of capitalist economic development which suggest that dynamics of inequality and conflict will be persistent. Terence McDonaugh, drawing on the Marxian 'stage theoretic' tradition which is concerned with the institutional reproduction of capitalism over time identifies 5 such tendencies of capitalism:

- Capitalist accumulation attempts to *expand the boundaries* of the capitalist system
- Capitalist accumulation persistently increases the size of large corporations and *concentrates the control and ownership* of capital
- Capital accumulation *spreads wage labour* as the prevalent system of production, draws a *larger proportion* of the population into wage labour, and *replenishes* the reserve pool of wage-labour
- Capitalist accumulation *continually changes the labour process*
- Workers respond to *defend themselves* against the effects of capitalist accumulation through activities and struggles[429]

These dynamic processes of capitalist economic development emphasise the restless dynamic of capitalism as it intersects with the labour force. Critically for my perspective this analysis emphasises the pressures of constant change and conflict over the institutional structures within which the labour relationship is embedded. These constant pressures mean the interests of workers will not simply be met by a rational and linear process of economic development but will depend upon the ways in which power relations are institutionalised in a dynamically changing context.

As described in chapter 2 these inequalities of power are understood as struggles over value, job security, and decisional authority over the organisation of the labour process and workers' freedom and autonomy in the workplace. This perspective draws on labour process theory. Labour process analysis looks at how the inequality of market relations under capitalism is carried across into the workplace, and how the inequalities of capitalist social relations shape the structuring of work. Labour process theory links the indeterminacy of labour within the firm, to the conditioning relations of competition in the wider capitalist economy which drive exploitation within production.[430] The capitalist labour process is understood to exist within two sets of mutually conditioning relations: competition between firms and the employment of labour by capital. Firms

[428] Wilkinson and Lokdam (n 407) 2.
[429] McDonaugh (n 356) 122–23.
[430] Chris Smith, 'The Short Overview of the Labour Process Perspective and History of the International Labour Process Conference' (2008).

relate through competition which generates an endless efficiency drive which seeks to maximize the speed and intensity of the tasks performed.[431] LPT analysis looks at the drivers of work restructuring in the market, and the implementation of this at the level of production and the limits and resistances to this within the labour relationship. My approach is fundamentally concerned with the workplace, and tries to draw out the relationship between the structuring of corporate property and asset forms in law and the labour process in the workplace.

The ability of individual workers to combine and deploy effective countervailing power can be understood in terms of workers structural and associational power. Structural power refers to the latent power of workers given position in the production process and thus their potential to disrupt it. The vulnerability of production to disruptions, arising from the way in which production is structured, the demands placed upon production, and the way this intersects with local labour market characteristics, determines the 'structural power' of labour, through the threat of strike action.[432] Associational power refers to the power that comes from the actual formation of collective organisation of workers.[433] Structural power must be realized through associational power, with the ability to organize effectively across the given structure of production in order to extract concessions from capital.[434] These factors in turn relate to how power relations are institutionalized politically, economically and socially at any given time. The shift from latent structural power to associational power in the workplace is shaped by the legal context in which labour organizing occurs.

### Capitalization

This expanded perspective of ‘coding’ yields a more expansive understanding of ‘capital’ and its formation through the process of ‘capitalization’. As Wansleben has highlighted practices of coding must be understood in relation to particular class formations. Wansleben highlights the relevance of Branko Milanovic's work on 'liberal meritocratic capitalism' which shows that whilst contemporary inequalities have been clearly marked by the concentration of the returns on capital into the hands of the few, this has been paralleled by a trend in class formation where "people who are capital-rich also tend to be labor-rich".[435] This points to the role of hard-working elite professionals providing management and other services to business; services to capital, who are able to secure an increasing proportion of the wealth generated. This points to the work or labour of coding capital in elite professions such as accountancy, management and law. As such the coding of capital in top law firms must be understood as interrelated to other economic, organizational, and political processes

[431] Selwyn (n 286).
[432] ibid 85.
[433] ibid 78.
[434] ibid 84.
[435] Wansleben (n 262) 8.

through which its effects are realized.[436] Coding practices then for me refer not only to the coding of abstract forms of financial property but to the ways in which these forms are secured through the structuring of work and the workplace. Wansleben's more expansive notion of class recognizes the work of accumulation: the active effort in defining and employing capital. Capital can then be understood both as an asset with monetary value which entails future rewards, and the processes of its creation (capitalization) through practices of accountancy, management and law, which are themselves embedded in social, political and economic structures which themselves facilitate dynamics of inequality.[437]

## The corporation, the firm and the market

As I set out in chapter 1, the corporation should not be reified as a social institution, nor reduced to a cluster of contracts. Following Robe, the corporation – understood as the corporate legal entity, entitled to act in the legal system, and to own assets, enter into contracts and incur liabilities – should be understood as a *legal structuring device*.[438] This is not the 'legal fiction' account of Jensen and Meckling. Rather the corporation is understood as a legal structuring device with powerful social ordering implications: a legal form through which a particular type of social relations is realised. The corporation is not a firm. The firm is understood as an economic organisation, corporations are one of a number of legal institutions used to structure firms.[439]The firm is not a juridical person and as such cannot transact in the legal system. Corporate, property and contract law are used to structure the economic activity of firms and enable them to operate in the legal system.[440] Equally this does not mean the firm is merely a 'nexus of contracts'. Firms will be structured through intersecting contracts between either singular or numerous corporate legal persons, and multiple contracting parties. But, for Robe, a firm is distinct from open contracting in markets (such as a single instance consumer purchase contract) as it entails the exercise of *authority*. The *authority structure* of the firm is secured through its legal structure, but is not reducible to it, arising from both economic power and formally constituted rights, enabling those empowered in the authority structure to issue *orders* and exercise *control* in ways which are not observed in horizontal, one-off market exchanges.[441] The firm, therefore, *is not the market*. This distinction, well recognised by Marx, restated in neoclassical terms by Coase, and vehemently rejected by 'Law and Economics' is crucial as it problematizes neoliberal framings of a market driven social order. This distinction between the legal device, and the economic enterprises which it structures is crucial, as it reflects the wide

[436] ibid.
[437] Wansleben (n 262).
[438] Jean Philippe Robé, 'The Legal Structure of the Firm' (2011) 1 Accounting, Economics and Law.
[439] ibid.
[440] ibid 5.
[441] Robe (n 2) 212.

divergence of the uses of the corporate legal form from any specific underlying economic activity (for example use of shell companies for tax evasion purposes). For clarity I use the term 'corporation' to refer to the legal entity and 'firm', 'business' and 'enterprise' interchangeably to refer to economic organisations. Utilising the notion of the corporation as legal device opens up the analysis of multiple different organisational forms, and different ownership and corporate governance structures, enabling analysis of how corporate privileges shape outcomes in different economic institutional settings: the large publicly listed corporation, the multinational enterprise, the supply chain, the franchise, the local independent corner shop, without conflating these differing contexts under a singular rubric of 'the corporation'. At the same time it enables the analysis of the way in which such forms of economic organisation *are themselves the outcomes* of the power relations between workers and capital owners which those very corporate privileges condition. Following Deakin, the legal model of 'the firm' is wider than the corporation, encompassing labour and employment law, competition law, tax law, insolvency law, and securities regulation.[442] Understanding the legal structuring of the labour relationship therefore entails engagement with these legal and regulatory regimes.

## 3.3 Epistemology: Law and social relations

The LPE approach looks at how economic outcomes are legally and politically configured. In doing so it draws on the traditions of legal realism and critical legal studies. These perspectives are distinct from positivist approaches in the sociology of law such as the 'law and society' tradition which view law as a set of social practices and relations concretised into customs and norms by repeated observance.[443] Law and society sees law as a 'dependant variable', to which objective meaning could be ascribed through positivist social enquiry.[444] By contrast the LPE tradition starts from the understanding that the institutions, methods and principles which make up 'law' are not given social objects which can be studied unproblematically. Rather, since a legal system has no function in itself - only the role its plays in the society in which it exists - it therefore can only be understood in relation to the particular political, social and economic order within which it operates.[445] The political nature of the formation of these rules means that they are also at least in part the outcomes of the

[442] Deakin, 'The Corporation as Commons : Rethinking Property Rights , Governance and Sustainability in the Business Enterprise' (n 313).
[443] Andrew Frazer, 'Industrial Relations and the Sociological Study of Labour Law' (2009) 19 Labour & Industry: a journal of the social and economic relations of work 73, 12.
[444] Christopher Tomlins, 'Framing the Field of Law ' s Disciplinary Encounters : A Historical Narrative Author ( s ): Christopher Tomlins Published by : Wiley on Behalf of the Law and Society Association Stable URL : Http://Www.Jstor.Org/Stable/3115128 A Historical Narrative Prolo' (2017) 34 911, 960.
[445] Wade Mansell, *A Critical Introduction to Law* (Routledge 2015) vii.

very conflicts which they condition.[446] In rejecting any objective correlation between law and social reality the possibility of law as a source of social power is uncovered. Critical legal studies scholars understand law as a system by which the social world is translated: "the law way of seeing the world".[447] The ability to frame social relations in particular ways through the language of law, and secure a given interpretation through the courts *is itself* a source of social power. Legal institutions, procedures and rules are understood as "contingent and socially constructed phenomena...which have a function related both to the economic structure and the division of wealth within our society and to the ideology of those with power in that society".[448] Yet this very contingency raises the question of the extent to which law is *autonomous* from the social institutional domains in which it intervenes is raised. In Pistor's analysis, law (or the legal coding of capital at least) appears as relatively autonomous from broader society, developing in elite and rarified settings with little contestation from the courts, the legislature, or wider society. Adopting a Marxist perspective requires engagement with the ways in which the law relates to capitalist social relations. Marxist approaches to law have been criticized as adopting a reductive or superficial understanding of the law, seeing it as a purely surface level phenomenon reflecting or sanctioning the underlying relations of production.[449] Christodoulidis and Goldoni have shown that this is a reductive depiction of the Marxian view of law. The reductive account suggests that the economic base (the class relations of production) determine the 'superstructure' of politics and law. From this perspective law is directly determined by and operates in alignment with the mode of production: a tool to sustain, regulate and legitimize capitalist economic and social relations.[450] However, Marx only claimed that institutional forms were determined by class relations 'in the last instance', the 'relative autonomy of law' opens up law as 'power', and so as contested and contestable, within the broad frame of capitalist accumulation.[451]

This 'relative autonomy' opens a gap between the law and the core institutional forms of the economy. Law can be a barrier to transformations demanded by capital accumulation, or a facilitator of them. In chapter 2, I introduced Menke's idea of the relative autonomy of private law. This implies significant autonomy of individuals to create new forms of legally secured private ordering, such as new types of intangible property, or new corporate organizational structures. Menke argues the granting of rights by liberal law confers power on individuals, as rights are "the capacity to obligate

[446] Kennedy (n 242) 336.
[447] Mansell (n 445) 126.
[448] ibid 8.
[449] Emilio Christodoulidis and Marco Goldoni, 'Marxism and the Political Economy of Law' [2019] Research Handbook on Critical Legal Theory 95.
[450] ibid 95.
[451] ibid 96–97.

others". Thus it becomes likely that "one actor in a social relationship will be in a position to carry out his own will despite resistance".[452] From the perspective of social relations, this raises the question of how far new forms of private ordering are resisted or contested by workers. Therefore, understanding the relationship of law to the labour relationship requires attention to points of *contestation* of processes of legal change. At the same time this raises the question of domains of social action. Rights matter as they create opportunities for action, but they do so in particular social domains of action. The separation of the 'social' sphere of labour regulation from the 'economic' sphere of business decision making is a problem for contestation of practices held to belong to the latter. How far the processes of legal coding are visible from and contestable from the workplace level, and through given *forms* of labour rights is an important element of the analysis.

## 3.4 Methodology and methods

My methodology is to develop a systematic analysis of the effects of core principles of corporate law on the realisation of labour rights. I critically engage with the five 'core principles' of Anglo-American corporate law as set out by Henry Hansmann and Reinier Kraakman in their influential 2001 article 'The end of history for corporate law'.[453] These core principles are: shareholder ownership, limited liability, corporate legal personality, delegated management and freely transferable shares. As described above, these are not taken as foundational legal principles but used heuristically to generate a focus on critical economic characteristics of the shareholder corporation. I develop a series of case study examples of forms of corporate organizational and financial structuring in order to identify the broader implications of these core principles for workers' rights. My understanding of workers' rights, as described in chapter 2, emphasises the power dynamics underlying effective rights, and the critical role of countervailing workers power through collective action in the furtherance of rights. I set out three broad categories across which struggles for rights play out: security of jobs, autonomy at work, and struggles over value produced. I shall examine how these struggles are shaped through the legal structuring of the corporation and processes of legal coding. The core concern is with the ways in which that the core features of corporate law are integral to the power of corporate elites both to *secure* new forms of private ordering and norms of practice, and to *breach* established workplace, employment law, and industrial relations norms in ways which undercut effective rights.

Katherina Pistor's idea of legal coding is, for the reasons set out above, a problematic theoretical approach. However, as a methodological approach it has great promise, providing a basis for categorising the ways in which principles of law seek to reinforce social power. Pistor argues that the

[452] Menke (n 278) 125.
[453] Hansmann and Kraakman (n 85).

private law rules of contract, corporate, insolvency, property, collateral and trust law are utilised to code the assets of the wealthy in ways which protect and enhance their wealth. Asset holders interests are secured through coding of assets to have four particular attributes:

- **Priority:** Priority rights rank claims over an asset, enabling the holder to withdraw it from a common pool and privatize it, ultimately conferring ownership (property rights). Property rights confer title to an owner and enable them to withdraw their asset regardless of other creditors' claims, but title may not be sufficient when things go wrong: such as insolvency. Under such conditions the priority of claims is important.[454]
- **Durability:** Legal coding for durability extends the life span of asset by insulating them from others claims. The corporation and the trust are the most common forms of coding for durability.[455]
- **Universality:** Provides that contracts between two parties are recognised by all others. This requires that claims will be upheld by a third-party guarantor: the state.[456]
- **Convertibility:** The right to freely transfer an asset. This enables the circulation of property. Convertibility ultimately denotes the ability to convert an asset into state backed cash, either through sale (implying liquid markets) or other forms of guarantee.[457]

For Pistor securing these attributes is a dynamic process in a world of incomplete contracts (which always fail to capture aspects of reality), obtained through the constant innovation of lawyers seeking to innovate in the coding of capital. I propose to utilise this concept of coding capital as a set of relational 'attributes' applied through forms of private ordering to draw out the ways in which the attributes of corporate legal structuring relate to workers. However, as well as bringing in a focus on labour in processes of legal coding I examine the regulatory regimes within which such practices of private ordering occur. As described in Chapter 2, property rights and state regulation intersect as 'zones of permission' for the exercise of private legal authority. Mapping the contours of these permissions as they relate to corporate power over workers is a central contribution of the thesis. Therefore, the analysis draws together three domains of social action; private law coding, state regulation, and class relations at the level of the labour relationship.

Exploring the legal coding of the corporation as it shapes the labour relationship is a novel use of this approach. This approach has the additional benefit of generating a highly accessible and comprehensible way of understanding the effects of corporate law, which will support the aim of

[454] Pistor (n 86) 13–14.
[455] ibid 14.
[456] ibid 14–15.
[457] ibid 15.

translating findings into policy recommendations, and in particular the aim of generating engagement with issues of corporate law within the trade union movement. As described above, my approach explicitly foregrounds dynamics of conflict and antagonism between shareholders and workers interests. In doing so my approach to empirical work will be orientated to exploring and analysing examples of such conflict, suggesting a clear selection bias over examples of mutuality of interest and consensus. I believe this bias is defensible on the basis of my theoretical perspective of the capitalist labour relationship and dynamics of economic development set out above, which suggests dynamics of conflict and inequality are persistent features of the political economy of capitalism.

### 3.4.1 Methods

#### *Literature review*

At the outset of the study I engaged in an extensive review of the bodies of literature with potential relevance to the research question. The review itself encompassed literature in the fields of: industrial relations, financial economics, corporate law, labour law, corporate governance, new institutional economics, economic sociology, sociology of law, and political economy. Chapters 1 and 2 were the outcomes of this process, for which I distilled the most relevant theoretical perspectives with particular focus on the distinction between economic and sociological theories of law.

#### *Preliminary case studies*

The research process began with a set of empirical case studies informed by the core research question: how does the corporate form influence labour relations? These were developed in dialogue with the CASE partner the Institute of Employment Rights. These studies generated the core themes for the substantive chapters which follow. The first case study looked at the impacts of private equity ownership models in the UK care home sector.[458] This indicated the extent to which perspectives on corporate law in the literature were rooted in the model of the large, publicly listed company. The private equity model exhibits characteristics of concentrated equity ownership which emphasize the contradictions of the corporate legal person. The impacts of private equity takeovers on workers generated a focus on the takeover as a particular moment of crystallization of shareholders' rights which is the theme of chapter 4. The second case study analyzed the collapse of Carillion under huge volumes of debt, revealing processes of risk shifting from shareholders onto workers who face losses following corporate insolvency.[459] This, alongside the central role of debt in

[458] Ben Crawford, 'The Care Home Crisis Is a Labour Rights Issue' [2019] Futures of Work <https://futuresofwork.co.uk/2019/07/31/the-care-home-crisis-is-a-labour-rights-issue/>.
[459] Ben Crawford and David Whyte, 'Workers Rights versus Shareholder Value in the Outsourcing Sector' [2019] Futures of Work <https://futuresofwork.co.uk/2019/01/25/workers-rights-versus-shareholder-value-in-the-outsourcing-sector/>.

the private equity model, indicated that a focus purely on shareholders' rights and the property form of the share missed the critical role of creditors' rights and credit instruments as a particular form of money-capital. This generated the focus on corporate insolvency as a particular moment of crystallization of creditor rights in relation to workers, and the processes of transformation of creditors' rights which have underpinned the expansion of the private equity model, which became the theme of chapter 5. The third case study explored the impact of Amazon in the parcel delivery sector, and drew analogies with franchise models, and the problems for workers facing 'fragmented' organizational forms.[460] The fourth case study concerned 'fast fashion' company BooHoo and the extensive abuses in their garment manufacturing supply chain.[461] Both cases exhibited dimensions of hierarchical control across formally independent entities and a logic of 'fragmentation-concentration' where dominant or monopolistic firms were able to direct the labour process at arm's length. This generated the theme for chapter 6.

### *Data and sources*

Analysis will draw primarily on secondary literature, as well as relevant case law and documentary data sources. This includes:

Shareholder voting data from Investment Association public register and Lexis Market Tracker reports.

Westlaw keyword searches including the terms as follows:

Chapter 4: Leveraged buyout; Takeovers; Directors duties; Directors conflict of interest; Directors liability; Employment; Shadow directors; ultra vires; Opco Propco; Share purchases; Change of control; Undertakings; Transfer of undertakings; Collective redundancies; Employee consultation; Groups of companies; Subsidiary companies; Information and consultation procedures; Associated employers.

Chapter 5: Debenhams PLC; Insolvency; Covenant lite loan; Unlawful dividends; Protective award

Chapter 6: Franchise agreements; Termination; Breach of contract; Trade marks; Inequality of bargaining power; Restraint of trade; Restrictive covenants; Employment status; non-competition covenants; Goodwill Competition law; Abuse of dominant position; Supply of goods; Vertical Agreements; Buyer power; Retailers; Undertakings; Groups of companies; Subsidiary companies; Associated employers; Equal pay

[460] This case study was not published, findings are included in chapter 6
[461] Crawford, 'Boohoo: Profiting from Poverty?' (n 6).

Systematic google searches (including but not limited to): The data on trade union responses to private equity and industrial disputes was based upon systematic google searches encompassing combinations of the terms: “trade union” “private equity” “dispute” “negotiate” “negotiation” “strike” “private equity” “leveraged buyout” “consultation” “collective bargaining”.

Systematic google scholar searches (including but not limited to): for data on impacts of LBO’s, private equity and leverage on labour encompassing the search terms: “leveraged buyout” “workers rights” “wage effects” “labour rights” “union recognition” “TUPE” “acquired rights directive” “whole business securitization” “Financial economics” “collective bargaining” “leverage” “trade unions” “mergers and acquisitions” “pensions” “takeovers” “shareholder activism” “insolvency” “liquidation” “administration” “company voluntary arrangement”

Systematic google scholar searches for literature on competition law and labour: “UK competition law” “vertical agreements” “employment rights” “labour rights” “franchising” “supply chain” “antitrust” “labor rights” “comparative antitrust law” “comparative competition law” “UK” “US” “independent contractors” “gig economy” “coordination rights”

Hansard parliamentary debates: TUPE and share capital transfers (Private Equity Bill), Carillion.

Parliamentary Select Committee reports, Competition and Markets Authority Reports, Gangmasters Licensing Authority Reports.

Statista searches for debt data: “corporate debt” “rating” “type” “debt to financial assets ratio” “asset based lending” “global corporate debt” “private equity” “value” ”deals” “assets under management” “Europe” “United Kingdom”

Companies house data on: McDonalds UK (Persons with significant control), Debenhams Retail Limited/Debenhams UK plc (Administrators progress reports, Statement of affairs, Group of companies accounts), Phones 4U (Administrators progress reports, Statement of affairs, Group of companies accounts), Morrisons (Group of companies accounts) ASDA Group Ltd (Group of companies accounts). BooHoo Plc (Group of companies accounts, Prospectus) Carillion PLC (Group of companies accounts)

Company annual reports: BooHoo group plc, ASDA, Morrisons, Carillion plc

Bank of England Financial Stability Reports 2018-2021

Extensive media sources. Predominantly Financial Times searches by company.

A full list of secondary sources is included in the bibliography.

# Chapter 4: Coding the Leveraged Buyout

## Introduction

The private equity takeovers market is booming.[462] Recent years have seen a wave of record size leveraged buyouts of major UK corporations. In 2020 a private equity consortium took control of ASDA from Walmart in a record £6.8bn leveraged buyout. The Issa brothers EG Capital group, partnered with TDR Capital, stumped up just 12% of the purchase price in equity (£800m), the rest being funded by debt finance and asset disposals, including the sale and leaseback of ASDA's distribution centres and the spin-off of forecourts to EG.[463] The size of the deal was swiftly eclipsed in 2021 when US private equity firm Clayton Dubilier and Rice (CD&R) took Morrisons supermarket private, following a bidding war which saw its valuation pushed to £7bn, a premium of 60% on the pre-bid share price.[464] This has been accompanied by muted yet familiar concerns raised by unions and politicians regarding high debt, asset stripping and potential impacts upon workers. When the success of the CD&R bid for Morrisons was confirmed a number of MP's claimed that they would be "keeping an eye" on the new equity holders to make sure the company was not asset stripped.[465] The GMB union accused the ASDA buyout consortium of asset stripping during the bid process and called for reassurances on job security immediately following the takeover.[466] Yet no prospect of opposing the buyout through industrial means appears to have been attempted. Within months GMB would be vowing to fight up to 3000 possible redundancies as 5000 jobs were put into redundancy consultation.[467] The question of workers' ability to resist the impacts of the takeovers market had come to public prominence 10 years previously following the Kraft acquisition of Cadbury's in 2010. Cadbury's reputation as a good employer and long history of production in the UK prompted fears that the new owners would unravel Cadbury's 'stakeholder' orientation. The

[462] A note on terminology here. By 'private equity' I am referring not only to the industry definition of private equity as an 'asset class', which refers to equity finance capital raised on private markets, but also to the Private Equity fund's which comprise this finance capital, and the private equity firms which raise, manage, invest, and benefit from these funds, and the model through which these actors acquire and manage target companies. Private equity firms finance acquisition of portfolio firms through raising 'private debt' finance (a distinct asset class) and combining it with private equity finance, in a takeover model known as a 'leveraged buy-out' (LBO).

[463] R Smith and K Wiggins, 'Billionaire Asda Buyers to Stump up Less than £800m to Clinch £6.8bn Takeover' *Financial Times* (February 2021) <https://www.ft.com/content/79964b33-2406-41c8-8f24-4ff5552f1669>.

[464] Zoe Wood, 'Morrisons Strikes £7bn Takeover Deal with US Private Equity Group' *The Guardian* (August 2021) <https://www.theguardian.com/business/2021/aug/19/morrisons-strikes-7bn-takeover-deal-with-us-private-equity-group>.

[465] B Mercer, 'CD&R Called to Reassure MPs over Morrisons Takeover' (*Pensions Expert*, 2021) <https://www.pensions-expert.com/DB-Derisking/CD-R-called-to-reassure-MPs-over-Morrisons-takeover?ct=true> accessed 2 November 2021.

[466] 'Asda Sale and Leaseback Plan "Nothing More than Asset Stripping"' (*GMB Union: News*, 2020) <https://www.gmb.org.uk/news/asda-sale-and-leaseback-plan-nothing-more-asset-stripping> accessed 5 November 2021.

[467] 'GMB Vows to Fight as Asda Announces More than 3,700 Potential Job Losses' (*GMB Union: News*, 2021) <https://www.gmb.org.uk/news/gmb-vows-fight-asda-announces-more-3700-potential-job-losses> accessed 2 November 2021.

takeover was highly leveraged, with Kraft paying £11.4bn for Cadbury using £7bn of debt, and promising to make £450m savings a year by 2012, raising concerns about job and pay cuts.[468] Cadbury's had announced the closure of its Somerdale plant and transfer of production to a new plant in Poland - with the loss of 500 jobs - prior to the Kraft bid. Kraft promised in its bid to keep the plant open, and that the UK would be a "net beneficiary in terms of jobs".[469] Unite, representing the majority of Cadbury employees sought specific commitments on compulsory redundancies, site closures, pension scheme commitments and terms and conditions which were not forthcoming, save a promised of no compulsory redundancies for 2 years.[470] One week following the finalisation of the takeover Kraft reversed its commitment on Somerdale, then in December 2011 announced 200 jobs would go at sites at Bournville, Birmingham, Chirk in Wrexham, north Wales, and Marlbrook in Herefordshire through voluntary redundancies and redeployment.[471] The move caused public outcry, led to Kraft being admonished by the Takeover panel, and a number of changes being made to the Takeover code. Yet 10 years on, the ability of workers and unions appears little improved during buyouts.

This chapter explores the takeover bid, and in particular the Leveraged Buyout (LBO), as an example of the way in which the share, and its relation to the corporate assets, functions to drive value transfers from workers to shareholders. The chapter explores the LBO as a *structure of rights*, and the takeover as a moment of the *crystallization* of shareholders' rights through which transfers of value from workers to shareholders are secured. Building upon the literature on the private equity model as a set of financial and managerial practices which affect workers, I show how these practices relate to the model's foundations in corporate law which secure protection from liability whilst enabling control and value extraction for shareholders. The chapter contributes to the thesis in the following ways. The example of the LBO demonstrates how basic principles of corporate law can be applied to code the firm and its assets in ways that maximize value transfers from workers to shareholder's by undercutting existing norms, in particular the normative model of the firm which underpins collective bargaining rights. The legal coding of the LBO is shown to enable direct shareholder control and wealth transfers by isolating the corporate assets from workers claims. The model secures concentrated control, diversification, and limited liability. Compliance with *formalised governance practices* upholding the formal independence of entities is central to securing the

[468] T Webb, 'Unions Square up to Kraft to Demand Pay Rise for Cadbury Workers' *The Guardian* (March 2010) <https://www.theguardian.com/business/2010/mar/04/cadbury-kraft-union>.
[469] Commons Business and Skills Committee, 'Mergers , Acquisitions and Takeovers: The Takeover of Cadbury by Kraft' 13.
[470] ibid.
[471] Zoe Wood, 'Kraft to Shed 200 British Jobs but Denies Breaching No-Cuts Pledge to MPs' *The Guardian* (December 2011) <https://www.theguardian.com/business/2011/dec/06/kraft-axes-200-uk-jobs>.

corporate veil. The LBO model shows how asset structuring across entities matters for workers through the legal isolation of workers claims from the productive assets of the firm. This is linked to processes of liberalization of the corporate entity which have transferred power to concentrated shareholder's and large creditors and transferred risk to workers. The regulatory framework is shown to support the crystallization of shareholders property rights at the point of takeovers and upholds the property form of the share in a hierarchy over workers claims. Worker's power is shown to be eroded through constant restructuring and value extraction. Trade union contestation of the model has focused on political rather than industrial strategies; campaigning and regulatory advocacy which are shown to have failed. The chapter represents an original contribution to the labour law literature on takeovers, which focuses on the question of 'shareholder primacy' in corporate governance, reflecting the assumptions of the agency theory and the 'separation thesis' of Berle and Means. The LBO reveals how corporate law diverges from such normative framings. The chapter extends my critique of both the contractarian theory and 'stakeholder' and 'entity' conceptions of the corporation. In contrast to the 'nexus of contracts' the analysis in this chapter reveals a distinct hierarchy of the property rights of shareholders over workers, upheld through corporate law and takeover regulation. In contrast to the reified corporate entity it demonstrates the ways in which corporate law mediates the labour relationship in ways which *depersonalize* and *destabilize* relations, having legal implications for the effectiveness of rights and shaping the structural and associational power of workers in relation to the owners of capital.

Section 1 reviews the literature on the impacts of takeovers and the LBO model to establish a baseline of evidence of impacts on workers. I argue that the labour law literature on takeovers is dominated by perspectives grounded in the legal imaginary of the Berle and Means corporation and the agency theory assumption that the principle point of conflict in company law is between shareholders and Directors, with an assumed neutrality of the board in relation to workers. Section 2 describes the 'coding' of the firm in the LBO model as an overlapping set of legal, financial, governance and management practices and strategies through which equity control is concentrated, value extraction is driven, and risk is externalised. I show how the model subverts the idea of the 'relational' dynamics of concentrated ownership, isolates firm assets from workers claims, and embeds direct control whilst maintaining limited liability through formalised governance practices. Section 3 explores how this model impacts upon collective bargaining, consultation, and TUPE rights. The labour law regulatory framework is shown to uphold simultaneously the formal corporate employer and the property rights of shareholders. I discuss the extent to which the model has been subject to contestation by trade unions through legal, political and industrial relations mechanisms.

Section 4 discusses the role of takeover regulation and the limited extent of regulatory reforms and sets out concluding arguments.

## 4.1 Literature and evidence review

### 4.1.1 Takeover regulation and the separation thesis

Dominant approaches to the study of the takeovers market have been rooted in the question of efficiency. Hansman and Kraakman's 'end of history for corporate law' thesis holds (reflecting the broader contractarian perspective) that institutional development is driven by a 'survival of the fittest' logic, with the most efficient organizational and legal models rising to dominance through their ability to deliver shareholder returns and so to attract capital.[472] The takeovers market is seen as a critical mechanism for driving efficiency. Following the logic of agency theory, an active takeover market is seen as essential to disciplining management to maximise profitability and reduce agency costs.[473] Underperforming management will be spotted by capital market participants inducing a drop in the share price and incentivising a takeover bid and replacement with more effective management. All managers therefore are driven to optimise profitability cost cutting to deliver shareholder value, reducing agency costs for all shareholders.[474] This efficiency logic has come under significant challenge. Njoya sets out the empirical shortcomings of the efficiency account for shareholder primacy in takeovers, and the divergences between US and UK law on takeovers (principally the powers of US Boards of Directors to frustrate bids) and suggests it is hard to explain these dimensions from a perspective of an institutional 'survival of the fittest' drive towards maximum efficiency, as claimed by Hansman and Kraakman in their 'end of history for corporate law' thesis.[475] Njoya finds that the gap in the efficiency account suggests that the evolution of the 'shareholder primacy norm' in company law and takeover regulation is more 'open ended' than is usually thought and as such is potentially open to realignment with employee interests.[476] Deakin and Slinger's analysis of the economic data on hostile takeovers demonstrates no relationship between takeovers and performance and concludes that economic analysis provides much more limited support for a shareholder-oriented model of company law, suggesting a space for a shift to a more stakeholder orientated model.[477] Nyombi looks at the Takeover Code as the "source of shareholder primacy", with an emphasis on shareholders right to determine the outcome of a bid as

[472] Hansmann and Kraakman (n 85).
[473] Zacharias, Easterbrook and Fischel (n 194).
[474] Moore and Petrin (n 39) 270.
[475] Njoya (n 20) 111–113.
[476] ibid 112.
[477] Deakin and Slinger (n 209).

enshrined under Rule 21 of the code, the 'board neutrality' principle.[478] The 'board neutrality' rule prevents boards from acting to frustrate bids through the use of takeover defences (such as US style 'poison pills'), and requires that the board 'must act in the interests of the company as a whole *and must not deny the holders of securities the opportunity to decide* on the merits of the bid'.[479] For Nyombi, Rule 21 is understood as the source of shareholder primacy as it "invites shareholders to make a decision on the strategic direction of the company…due to Rule 21, shareholders are *elevated from their position as financiers* to decision makers".[480] The purpose of Nyombi's study is to evaluate the impacts of takeovers on employees and generate proposals for reform. Yet the framing of the problem is centred on the legal position of the board in relation to shareholders. Armour, Deakin and Konzelman's study of the case of Rover goes beyond this board centric perspective, arguing that that the collectivisation of statutory individual employment law claims during restructures can serve to give unions financial leverage against bidders during negotiations, providing a balance of stakeholder interests. The authors agree that UK takeovers and corporate governance regulation is heavily shareholder centric but argue that workers are able to leverage statutory rights claims at the point of takeovers to shape outcomes as a form of corporate governance 'beyond the core'. The union was able to use failure to consult claims, plus an existing no redundancies agreement (the total value of which was estimated to be up to £300m – in the context of a prospective purchase price of £50m) to prevent the sale to company which would have dismembered Rover and enacted high redundancies, with the sale instead going to the unions preferred bidder following the agreed withdrawal of the non-consultation claims.[481] The authors argue that the collectivisation of rights at the point of the bid "effect[ed] a transformation of individual property rights into a unified asset pool".[482] This is interesting from a union strategic perspective as it approaches workers' claims as a form of capital to leverage, replicate or contest shareholder rights. Yet workers statutory claims are not comparable to the decisional authority of the board and shareholders in relation to the capital of the firm. Compliance with consultation provisions requires only that workers be consulted: they give 'voice' not decisional authority. The right to be consulted is not a property right comparable to a shareholders decisional authority over their shares. The costs of non-compliance with statutory legislation are frequently absorbed by the corporation and accepted as the costs of doing business. During insolvency consultation

[478] Chrispas Nyombi, 'Takeovers and the Protection of Non-Shareholding Stakeholders' Interests in the UK' 11 <https://ezp.lib.unimelb.edu.au/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=edsble&AN=edsble.684071&site=eds-live&scope=site>.
[479] The Panel on Takeovers and Mergers, 'The Takeover Code'. General principle 3 and Rule 21
[480] Nyombi, 'Takeovers and the Protection of Non-Shareholding Stakeholders' Interests in the UK' (n 478) 11. my emphasis
[481] Armour, Deakin and Konzelmann (n 237) 543–545.
[482] ibid 543.

requirements are often avoided in a cost-benefit analysis that prioritises keeping the company running smoothly over consulting with employee representatives - even where fines incurred by this may be significant.[483] As was demonstrated in the recent case of P&O ferries, large corporations may be willing to risk large fines to achieve desired restructuring aims, which points towards the liability structure as an important facet for consideration.

In focusing on the question of 'shareholder primacy' in corporate governance these studies reflect the 'separation thesis' and the agency model. Understanding corporate law as it effects workers requires a move beyond the legal imaginary of Berle and Means. As is shown below, takeovers, and in particular the LBO demonstrate the *relative unity* of the shareholder corporation, the *direct* relationship between the share and the corporate assets, and the *formal* nature of 'separation' as a mechanism of the corporate veil. These characteristics of corporate law can be used to structure the labour relationship in ways which drive transfers of wealth to shareholders.

### 4.1.2 Impact of takeovers on workers

Empirical studies in the financial economics literature – grounded in the agency perspective - have demonstrated that takeovers serve to transfer wealth from workers to shareholders. Where takeovers are successful, the mechanism for wealth transfers shifts from a market disciplinary (threat) effect upon management, to the direct exercise of shareholder control rights. The difference between the company's market capitalisation pre-acquisition, and the final amount paid is known as the 'share premium'. In a takeover of a publicly quoted firm (or a division of one) it is the control rights held by incumbent shareholders which are the target of the bidder, and the main source of the value of the shares as expressed in the 'share premium' paid. It is held that the price paid for a publicly quoted company in a takeover exceeds the market price set by (notionally efficient) capital markets due to the shared belief between acquiring and incumbent shareholders that there is greater value to be realised by the acquisition of a *controlling* interest in the company.[484] Therefore, it is anticipated that the purchaser of the equities will be able to realise greater value from the firm than the incumbent equity holders through restructuring, cost cutting or investment. Acquisition of 100% of the shares is not needed for effective 'control'. The Takeover Code considers a holding of 30% to be 'effective control', given at this level all special resolutions can be defeated, and the holder in practice could likely succeed in passing most general resolutions.[485] Where an individual or group of shareholders reach the 30% threshold they are required to make a 'fair' purchase offer to

[483] TUC, 'What Lessons Can We Learn from Carillion-and What Changes Do We Need to Make?' (2018) 8 <https://www.tuc.org.uk/sites/default/files/Lessons from Carillion report.pdf>.
[484] Moore and Petrin (n 39) 268.
[485] The Panel on Takeovers and Mergers, 'The Takeover Code' (13th edn 2021) Rule 9.1(a).

all minority shareholders.[486] Where 50%+ of the target shareholders agree the offer is carried as unconditional. Most takeover bids are aiming for 100% of voting rights, which requires 90% approval to squeeze out minority holders.[487] Bids which fall short of acquiring the total equities can still drive significant transfers of wealth. The failed Heinz Kraft bid for Unilever generated shareholder value driven restructuring. 3G are a private equity firm well known for aggressive cost cutting following acquisitions in the packaged food sector. The industry impact of 3G's earlier acquisition at Heinz was described by a Rabobank analyst thus: "Many in the industry have been surprised (scared!) by the size of the savings squeezed out of Heinz, a company that was previously considered well-run and efficient…This has left them sifting through their own business operations for savings knowing that if they do not, they might just find themselves on the menu of private equity".[488] The bid had an immediate impact upon Unilever, who announced a "comprehensive review of options available to accelerate delivery of value for the benefit of our shareholders", including potential asset sales, and would boost operating profit margins towards the steeper margins of Kraft Heinz.[489] The subsequent review lead to the sale of Unilever's spreads division to Kohlberg Kravis Roberts in an $8bn LBO,[490] as well as a number of other asset sales and factory closures and job losses across Port Sunlight, Warrington and Norwich in 2019 and 2020.[491] Fortune magazine described the wider ripple effect of 3G's aggressive approach: "The entire food industry is "3G-ing" itself before Kraft Heinz can do it to the companies".[492]

Studies in the financial economics literature suggest that transfers from labour are a significant source of share premiums. Bhagat et. al. find layoffs explain 10-20% of takeover premium from US hostile takeovers during 1980's.[493] Li's analysis of US mergers finds that job destruction and wage cuts following takeovers are a major source of share premiums paid, based upon the anticipation by target firm shareholders of future productivity gains through reduced costs and

[486] ibid Rule 9.1(b).
[487] s 979 (1) Companies Act 2006 c.46.
[488] 'Heinz, Mondelez and the Private Equity Effect' (*IUF private equity buyout watch*, 2014) <http://www.iufdocuments.org/buyoutwatch/2014/03/heinz_mondelez_and_the_private.html> accessed 6 August 2020.
[489] Scheherazade and Daneshkhu, 'Unilever to Review Business Following Kraft Heinz Bid' *Financial Times* (22 February 2017) <https://www.ft.com/content/f8cbb840-f901-11e6-9516-2d969e0d3b65>.
[490] Andy Coyne, 'What Will KKR Do with the Former Unilever Spreads Division?' (*Just Food*, 2017) <https://www.just-food.com/analysis/what-will-kkr-do-with-the-former-unilever-spreads-division_id138406.aspx> accessed 8 April 2021.
[491] '"Hard Hit" for Warrington as Unilever Shuts Another Century-Old Factory' (*Unite the Union*, 2020) <https://www.unitetheunion.org/news-events/news/2020/march/hard-hit-for-warrington-as-unilever-shuts-another-century-old-factory/> accessed 8 April 2021.
[492] G Colvin, 'How Kraft Heinz Plans to Build a New Global Food Giant' [2019] *Fortune* <https://fortune.com/longform/kraft-heinz-merger-3g-capital/>.
[493] Sanjai Bhagat and others, 'Hostile Takeovers in the 1980s: The Return to Corporate Specialization' (1990) 1990 Brookings Papers on Economic Activity. Microeconomics 1.

capital expenditure.[494] In a striking paper Farooq and Ahmad find that across 46 countries between 1992-2010 countries with stronger collective bargaining structures (based upon union density rates and collective agreement coverage) were strongly associated with higher levels (frequency and volume) of M&A activity.[495] The authors conclude that higher collective bargaining coverage acts to incentivise M&A. Firms covered by collective bargaining are the source of higher 'takeover premiums' as proxied through announcement returns of target firms, on the basis that higher employment and wage levels of firms with collective agreements are transferred to shareholders, based upon the assumption that wages will be cut post takeover: "all else equal, collective bargaining protections generate substantial gains for target shareholders".[496] The positive relationship between M&A and collective bargaining was found to be higher in labour intensive industries: consistent with view that firm attractiveness for M&A is linked to operational gains of cost cutting.[497] Incumbent shareholders anticipate the gains to be made through transfers from workers to future equity and debt holders and accrue a proportion of these future transfers in exchange for their shares. Higher share premiums will result in a higher purchase price and therefore higher leverage, which translates into a greater squeeze on future value. This data points towards the takeover as a point of crystallization of shareholders 'residual' rights, and as mechanism for value transfers.

### 4.1.3 Impacts of the Leveraged Buyout on workers

The literature on Private Equity and the LBO model and its impacts upon workers predominantly splits down into a binary 'good private equity/bad private equity' debate concerning the impact upon jobs, wages and investment at the micro (firm) or macro-economic level. The data on job destruction and creation from LBO's is mixed. Whilst a some studies have indicated significant negative job impacts,[498] others show no significant employment effects,[499] or early job losses followed by employment growth. The employment impacts vary widely by type and sector of acquisition, and are highly cyclical.[500] The data on wage effects and distribution across the firm are

[494] Xiaoyang Li, 'Productivity, Restructuring, and the Gains from Takeovers' (2013) 109 Journal of Financial Economics 250 <http://dx.doi.org/10.1016/j.jfineco.2013.02.011>.
[495] Muhammad Farooq Ahmad and Thomas Lambert, 'Collective Bargaining and Mergers and Acquisitions Activity around the World' (2019) 99 Journal of Banking and Finance 21.
[496] ibid.
[497] ibid.
[498] 'The Globalization of Alternative Investments Working Papers Volume 1: The Global Economic Impact of Private Equity Report 2008' (2008) <papers3://publication/uuid/05F2F6D5-5747-4D7F-A561-F71DB244CD66>.
[499] Kevin Amess and Mike Wright, 'The Wage and Employment Effects of Leveraged Buyouts in the UK' (2007) 14 International Journal of the Economics of Business.
[500] Steven J Davis and others, 'Private Equity, Jobs, and Productivity' (2014) 104 American Economic Review 4184.

much clearer. Studies have shown a pattern of reduced earnings per worker across all buyout types,[501] falling wages post buyout,[502] negative impacts on wage growth post-LBO,[503] and significant upwards distributional shift in remuneration towards the level of senior management.[504] Regarding executive compensation it is notable that earnings per worker rise by 11% in LBO transactions where targets are a division of a larger firm.[505] This likely reflects divisional manager pay, as management positions become executives with much higher pay and equity stakes in new stand-alone firm.[506] As shown by Davis, such Divisional targets also suffered high job losses, suggesting transfers from ordinary workers to management.[507] Other studies emphasise the social and economic benefits of the investment raised on private markets, and evidence productivity gains at firms targeted by PE.[508] Proponents of the PE model argue that it delivers productivity gains in target firms generating broader economic benefits. Numerous studies find productivity improvements as an outcome of LBOs, but very few explore the question of whether these gains are shared with workers.[509] Amess and Wright suggest that wage losses may serve to realign wages with marginal productivity, as LBOs present opportunities to renegotiate wages.[510] This should mean that productivity increases are accompanied by wage gains. At the firm level Davis finds an increase in total factor productivity arising from post-acquisition restructuring with PE firms more aggressive in closing lower productivity sites and more likely to open new higher productivity sites. These gains were not however shared with workers, with a prevailing pattern of reduced earnings per worker at target firms post buyout.[511]The wage effects of LBOs described above strongly suggest that any greater value realised through enhanced productivity is not shared with workers. These studies principally approach private equity as an independent variable contrasted to publicly listed (or non-LBO private) ownership.

As Froud and Williams identify there are many variables in the LBO model so looking for general effects is flawed. The metrics of success or failure are dependent on sectoral, temporal and cyclical aspects. The more severe impacts of LBOs may often not be felt for years until changes in

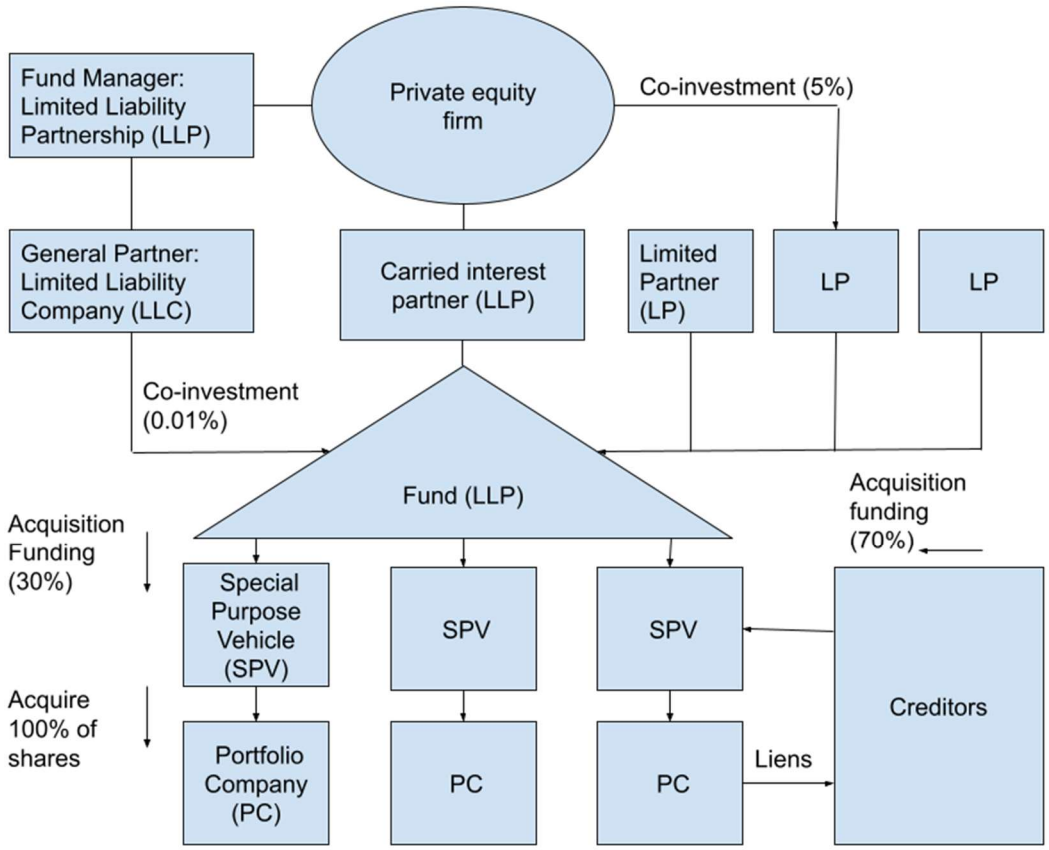
[501] ibid; Steven J Davis and others, 'The Social Impact of Private Equity Over the Economic Cycle'.
[502] Davis and others (n 500).
[503] Amess and Wright (n 499); Manfred Antoni, Ernst Maug and Stefan Obernberger, 'Private Equity and Human Capital Risk' (2019) 133 Journal of Financial Economics 634 <https://doi.org/10.1016/j.jfineco.2019.04.010>.
[504] Davis and others (n 500).
[505] Davis and others (n 501).
[506] ibid 28.
[507] ibid 29.
[508] Mike Wright, John Gilligan and Kevin Amess, 'The Economic Impact of Private Equity: What We Know and What We Would like to Know' (2009) 11 Venture Capital 1.
[509] Davis and others (n 501).
[510] Amess and Wright (n 499) 181.
[511] Davis and others (n 500) 3986.

market conditions leave asset stripped firms exposed.[512] For the authors, the principle characteristic of the model is the way it contributes to value extraction and capture by a managerial elite of general partners who run Private Equity funds and senior operational managers in portfolio firms.[513] The PE model is understood primarily here as a set of managerial techniques of 'financial engineering' for value extraction. This is consistent with a broad tendency to understand the PE model as a symptom of 'financialization', understood as a power shift from labour to capital arising from the growing prominence and deregulation of capital markets and labour markets, and the growing power of 'financial intermediaries' to influence employment relations.[514] Financialization is also understood to have driven a reconceptualization of the firm from an organization producing a specific set of goods or services to a bunch of tradeable assets, a principal characteristic of the private equity model.[515] The financial and managerial practices and the wealth transfers that they drive however rest upon particular legal, political and social foundations within which the labour relationship is constituted. The following section analyses the corporate law dimensions of this as they shape the labour relationship.

[512] Julie Froud and Karel Williams, 'Private Equity and the Culture of Value Extraction' (2007) 12 New Political Economy 405.
[513] ibid 409.
[514] Arne L Kalleberg, 'Financialization, Private Equity, and Employment Relations in the United States' (2015) 42 Work and Occupations 216; Rosemary Batt and Eileen Appelbaum, 'The Impact of Financialization on Management and Employment Outcomes' [2013] SSRN Electronic Journal; Andrew Watt and Béla Galgóczi, 'Financial Capitalism and Private Equity – a New Regime ?' 15 189.
[515] N Fligstein, *The Transformation of Corporate Control* (Harvard University Press 1990).

## 4.2 Coding the LBO

Diagram 1[516]




### 4.2.1 The equity

For my purposes here, the private equity model refers to an investment business model adopted by a financial company, whereby the capital of a number of institutional and individual investors is pooled, to the purpose of purchasing the total (or a controlling %) of shares of a number of privately or publicly held companies, usually utilising a high proportion of debt (a 70/30 debt to equity ratio is common).[517] The capital structure of the LBO reflects a rearrangement of the structure of claims within the firm. The principal effect is a concentration of the equity holding. In switching out equity

[516] This is a consolidated version of 2 diagrams and additional data from: Gregory Brown, 'Debt and Leverage in Private Equity : A Survey of Existing Results and New Findings' (2021). and BVCA, 'The Importance of UK Limited Partnerships for Private Equity & Venture Capital' 1.

[517] Andrew Watt, 'The Impact of Private Equity on European Companies and Workers: Key Issues and a Review of the Evidence' (2008).This definition excludes 'Venture Capital' and other similar forms of private equity which target start-ups for investment, which are different in their strategy and impact upon firms.

for debt claims, equity holders get to control 100% of the shares and attached voting rights. In the transaction creditors are granted certain priority rights. These include fixed payments (interest), which are backed by mechanisms through which creditors can trigger insolvency proceedings in which creditors have priority claims over shareholders. Priority claims and rights in insolvency are the subject of Chapter 5, for now it is sufficient to say that the concentrated shareholding structure of the LBO relies upon the ability to grant priority claims to firm revenues as part of the acquisition process. Returns to equity, whether derived from operational gains, or the resale of the business at the exit point, will be reaped entirely by the concentrated equity holding. Targets are acquired with the intention to sell within the life of the fund.[518] As shown in diagram 1, the use of debt enables the fund to take control of 100% of the target firms equity with less than 1/3$^{rd}$ of the capital required. In the Issa brothers/TDR takeover of ASDA the new equity owners took control despite contributing only 12% of the total price. This enables concentrated control of a number of portfolio companies, typically ranging from 5-14 in a given fund, with many large funds holding significantly more (up to 200).[519] The fund is structured as a Limited Liability Partnership. Passive investors take the position of Limited Partners (LP's), and the PE firm behind the fund (the 'sponsor') nominates a General Partner (GP) to manage the fund. LP's are a mix of institutional investors and High Net Worth Individuals. LP's are diversified at the level of the fund (which holds multiple companies), and typically will invest in multiple funds also.[520] Funds typically run for 10 years, with an investment period of up to 6 years, and typically hold target companies for 5 years.[521]

Perspectives across financial economics, the varieties of capitalism, and stakeholder theories of corporate governance focus on the distinction between 'outsider/market' systems financed by capital markets and 'insider/relational' systems financed by large insider investors and banks.[522] Outsider systems are understood to promote the shareholder interest through the threat of 'exit': the sale of shares hitting values and potentially leading to takeovers.[523] Diversified holdings and liquid markets limit exposures to single firm losses and drive risk appetite and short-term profit maximization focus. Concentrated holdings are understood to generate long term, stable

[518] Trends are increasingly for 'follow on funds' where fund participants can retain holdings in companies where desirable.
[519] Andy Jones, 'Number of Portfolio Companies per PE Firm' (*Private Equity Info*, 2019) <https://blog.privateequityinfo.com/index.php/2019/08/26/number-of-portfolio-companies-per-pe-firm/> accessed 5 November 2021; Andy Jones, 'Number of Active Portfolio Companies per Private Equity Firm – Industry Stats' (*Private Equity Info*, 2018) <https://blog.privateequityinfo.com/index.php/2018/07/02/number-of-active-portfolio-companies-per-private-equity-firm-industry-stats/> accessed 5 November 2021.
[520] John Gilligan and Mike Wright, *Private Equity Demystified: An Explanatory Guide* (2020).
[521] ibid.
[522] Gospel and Pendleton (n 176) 3–5.
[523] ibid 5.

relationships between corporate management and investors as part of more 'relational' systems of governance, driven in part by the concentrated exposure of corporate ownership which limits 'exit' options.[524] The PE model neatly subverts these assumptions. The structure of the fund, and the liquidity of the PE capital market gives a liquid quality to concentrated ownership, both through diversification and a 'buy-to-sell' model. This has been intensified in recent years by a trend towards LP's trading out holdings during the lifetime of the fund.[525]

Concentrated control is also the means through which particular strategies for maximising returns can be achieved via control at multiple levels of the firms operational, financial and governance structure.[526] The acquired firms are restructured with the aim of extracting dividends, fees, and re-selling at a higher price, with the resultant profits distributed between the investors and practitioners within the PE firm.[527]In some cases an early pay-out is financed by further borrowing against company assets, known as a 'dividend recapitalization'.[528] The rearrangement of claims in the firm through use of debt therefore serves (from the point of view of equity) to pull future revenue forward. Financing equity payments through debt transforms unspecified future claims of unknown magnitudes into quantified payments in the present, in exchange for granting fixed creditor claims to future revenues. Traditionally equity claims in a listed firm are understood to reflect only a claim on a proportion of future (realised) profits – as and when declared by corporate management. The dominant legal opinion is that there is no "right to a dividend" (only a proportion of what is declared).[529] Shareholders are only 'residual claimants'.[530] The LBO model would appear to subvert this perspective given the large scale transfer of fixed rights to revenue which are required to finance the bidders equity purchase at the outset, and during the ownership period through a dividend recapitalization. Shareholders may not have a right to a dividend directly but can seize a large chunk of future returns in exchange for granting fixed claims.

The PE model therefore transforms traditional characteristics of equity in a number of ways. The model combines both concentrated control and diversification. Equity holders are exposed to only a small proportion (30%) of the total capital cost of their holdings. The risk exposure traditionally associated with concentrated holdings is reduced, both through diversification and opportunities for exit. Equity holders unfixed claims to future revenues crystallise in the present via

[524] ibid 5–7.
[525] Brown (n 516).
[526] Moore and Petrin (n 39) 272.
[527] Watt (n 517) 553.
[528] ibid.
[529] Lynn A Stout and others, 'The Modern Corporation Statement on Company Law' [2018] SSRN Electronic Journal 1.
[530] Jensen, M.C.; Meckling (n 191).

the switching out for debt claims. As such concentrated equity holding and diversification through the fund incentivises value extraction in the shortest possible time. Concentrated holdings reflect broader pattern of concentration at the level of capital markets, and patterns of portfolio holdings in publicly held firms (as described in the introduction).

### 4.2.2 The entity and the assets

Entity shielding is considered one of the critical functions of corporate legal personality which protects the firm assets from shareholders' claims.[531] Deakin argues that the asset partitioning and entity shielding functions of corporate law protects and sustains the asset pool as a collective source of productive value into which workers' claims to wage or job protection can be routed.[532] The LBO model suggests a different trajectory: the liberalization of the corporate entity to dissect firm assets across the corporate structure to be used as security to raise cheap debt finance. Through this process claims are isolated across different corporate entities. This can have direct impact upon workers' claims. Through the LBO, asset partitioning is used to expose firm assets to market logic of competition, to reduce the corporate asset pool to which workers' claims are routed, and to intensify work and place downwards pressure on wages. As Bryan, Martin and Rafferty have argued, securitization of assets can intensify competition between capitals by subjecting assets to competitive valuation in the marketplace, with the effect of intensifying pressure on labour as 'variable capital' based upon the indeterminacy of labour power.[533]

The impact of private equity ownership on workers in the UK care home sector is a clear example of these dynamics. The securitization of care home assets had major impacts upon target firms' financial condition which translated directly into declining pay, terms and conditions in the sector. The model adopted took two principal forms. In the straight LBO model in which debt finance was used to acquire the total equity of the firm, the resulting debt burden placed enormous pressure on target firms. In the case of Four Seasons the 2012 buyout by Terra Firma Capital Partners attached a new net debt of £565m to the group, requiring the company to service £52m a year in interest payments, generating significant financial problems and forcing a run of home closures.[534] In the second common structure PE firms used aggressive asset partitioning models to 'asset-strip' care providers of their property assets. Control of the valuable property assets of individual care homes was a key driver of private equity expansion in the sector. Target companies

[531] Armour and others (n 190).
[532] Deakin, 'The Corporation as Commons : Rethinking Property Rights , Governance and Sustainability in the Business Enterprise' (n 313).
[533] Dick Bryan, Randy Martin and Mike Rafferty, 'Financialization and Marx: Giving Labor and Capital a Financial Makeover' (2009) 41 Review of Radical Political Economics 458, 461–2.
[534] Diane Burns and others, 'CRESC Public Interest Report WHERE DOES THE MONEY GO ? Financialised Chains and the Crisis in Residential Care' 34.

were restructured along the 'OpCo-PropCo' model, wherein property assets are transferred outside the operational company (OpCo) to a separate property holding company (PropCo). In this structure the property assets are sold to the PropCo which takes out property loans to finance the purchase, which are in turn serviced by the rental income from the operational business.[535] The OpCo loses a property asset and gains a rent burden. Both are controlled by an SPV controlled by the acquiring PE firm. Control of the OpCo can be used to make transfers to investors via the PropCo, both through the payment of rents or through financing improvements to the property.[536] Asset restructuring removed assets and cash from the business generating financial pressures which impact upon staff pay terms and conditions.[537] Through the process of 'sale and leaseback' the care firm itself loses an asset and is locked into a rising rent bill. The investors have a valuable property asset, isolated from the risks of the productive activity of the care firm, whilst workers claims to value are under constant pressure in the cash poor operational company. The structure also dramatically shifts risk away from shareholders. As Horton points out, the sale and leaseback strategy pursued by Blackstone in the case of Southern Cross allowed investors to recover outlays and profit immediately on the PropCo, and keep a 'call option' on the OpCo: if the business proved profitable under its new financial constraints then they can exercise the option to buy the equity, if the business is failing due to the imposed asset restructure then their exposure is limited.[538] The example of the private equity model in the care sector demonstrates that the 'entity shielding' function of corporate law can be deployed not to defend the firm assets and participants from expropriation, but rather to drive transfers from workers to shareholders. The basic principle of *Bligh* that shareholders have no interest in assets but only in profits is eroded by direct control over the corporate assets which are treated as shareholder property.

### *The liberalization of the entity*

The paradoxical dimensions of the LBO – the use of firm assets to fund share acquisitions – was recognised by the Greene Committee in 1926 and was prohibited by the 1929 Companies Act ban on 'financial assistance'. Giving 'financial assistance' to an acquiring party is prohibited for PLC's and was banned for all companies for much of the 20th Century, rooted in legislatures conviction that it is abusive to use a targets cash flows and assets to repay a loan used for that targets acquisition.[539] The

[535] C Fanner, M Lambers and M Shaw, 'Leveraged Buyouts' (*Thompson Reuters Practical Law*, 2007) <https://uk.practicallaw.thomsonreuters.com/2-242-4954?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 11 March 2021.
[536] 'OpCo/PropCo Structures in Practice' (*BDO UK: Insights*, 2019) <https://www.bdo.co.uk/en-gb/insights/tax/tax-support-for-professionals/opco-propco-structures-in-practice>.
[537] Jo Grady and Melanie Simms, 'Trade Unions and the Challenge of Fostering Solidarities in an Era of Financialisation' [2018] Economic and Industrial Democracy 10.
[538] Amy Eleanor Horton, 'Financialisation of Care: Investment and Organising in the UK and US' 1, 109.
[539] Moore and Petrin (n 39) 277.

prohibition was rooted in protecting creditors and minority shareholders from 'asset stripping takeovers', and the moral hazard exemplified by the incentive of acquiring shareholders (due to the high gearing) to transfer wealth from the company (and so other creditors) to themselves.[540] Both private and public companies were within scope of the ban until 1981, when the UK removed private companies from scope and instituted the 'whitewash procedure' designed to ensure capital maintenance by requiring Directors to state the company would be able to pay its debts for 12 months following the acquisition, that net assets would not be reduced, and to give shareholders a say in the process.[541] This relaxation has been identified as a factor in the LBO boom in the 1980's as it made it easier for buyout financiers to achieve security.[542] The whitewash procedure was subsequently repealed in reforms to the CA 2006 in 2008 which abolished financial assistance restrictions for privately held companies.[543] The ban for PLC's remains, largely as a result of the EU Second Company Law Directive, and as such may well be repealed.[544] The Modern Company Law Review (MCLR) took the view that the FA prohibition was essentially concerned with capital maintenance and the risk of a company's asset base deteriorating as a result of an LBO to the detriment of existing creditors. On this basis they reasoned that since ordinary corporate transactions – such as asset sales and dividend payments – could have this effect (subject to restrictions imposed on fraudulent and wrongful trading by insolvency law, and Directors duties), the ban on FA was unnecessary.[545] The de-regulation of FA then sits within a wider relaxation of the rules on capital maintenance.[546]

The Greene Committee prohibition on financial assistance originates in the Lords decision *Trevor v Whitworth* which found a company's buyback of its own shares to be *ultra vires* the company.[547] The Committee extended the analogy to a company providing financial assistance for the purchase of its own shares, on the basis that both acts entailed a depletion of the companies issued share capital other than through the ordinary conduct of its business.[548] The *ultra vires* doctrine had emerged in the late 19th Century as a form of shareholder protection – specifically to

[540] Elke Hellinx, *Are Sinners Lending to Sinners ? Financial Assistance in Belgium and the UK - An Elegy* (2016) 1048.
[541] Eilis Ferran, 'Regulation of Private Equity - Backed Leveraged Buyout Activity in Europe' [2011] SSRN Electronic Journal 21.
[542] ibid.
[543] s 677 - 683 Companies Act 2006 c.46.
[544] Moore notes remaining UK prohibition on statute books largely as a result of EU corporate law.
[545] The Company Law Review Steering Group, 'Modern Company Law: Developing the Framework Chapter' 233.
[546] The Company Law Review Steering Group (n 545). 233
[547] REF
[548] Aiman Nariman and Mohd Sulaiman, 'A CROSS-JURISDICTIONAL STUDY OF FINANCIAL ASSISTANCE PROVISIONS AND PROPOSALS - CONVERGENCE OF CONCEPTS?' [2005] Law Asia Journal.

protect outsider shareholders in the large JSC's from the misuse of their company by its officers, and to protect the state and society by holding companies to the purposes for which they were created.[549] For example in *Ashbury Railway Carriages & Iron Co v Riche* the investment by a railway carriage manufacturer to engage in financing a new railway in Belgium was *ultra vires* and void as the contract could not fall under the company objects.[550] Ultra vires was not only a form of shareholder and creditor protection, but served in principle to balance public and private interest in statutory companies, preventing the misappropriation of company assets.[551] The public element of the doctrine began to be eroded when it was confirmed that *ultra vires* actions could be brought within the capacity of the company by ratification of its members.[552] The doctrine was steadily eroded by both judicial and legislative means through the 20th Century, as it was increasingly viewed to be an impediment to economic activity.[553] The doctrine has been effectively abolished by the abolition of objects clauses in the Companies Act 2006.[554]

Whilst the *ultra vires* doctrine was never a mechanism for worker protection as such, Talbot argues that its decline has empowered controlling shareholders and corporate elites against all other parties including employees.[555] This is reflected in the impacts of the repeal of the financial assistance prohibition. Discussion of impacts of LBOs on employees are largely absent from the literature on FA, and completely absent from the MCLR. The literature reflects a contractarian perspective. Contractual measures, such as use of protective covenants in bond agreements are presented as a preferable mechanism to protect creditors than a ban on FA.[556] Hellinx does however note that such protections are less effective for 'pseudo-voluntary creditors'; those who "voluntarily extend credit to the company…[but are] not in a position to negotiate any meaningful contractual protection in their relationship with the company".[557] This describes well the situation of workers who not only face losses during liquidation and insolvency[558] but whose wages terms and conditions will ultimately be affected by asset stripping takeovers.

The erosion of the ultra vires doctrine and the financial assistance prohibitions represents a liberalisation of uses of the corporation's property rights. In the care sector the entity shielding

[549] Ibid p.411
[550] LE Talbot, ' Critical Corporate Governance and the Demise of the Ultra Vires Doctrine ' (2009) 38 Common Law World Review 170, 171.
[551] Chrispas Nyombi, 'The Gradual Erosion of the Ultra Vires Doctrine in English Company Law' 348.
[552] Nyombi, C. (2014) p.348
[553] Ibid
[554] Nyombi p.348
[555] Talbot (n 550) 195.
[556] Hellinx (n 540) 1048.
[557] ibid.
[558] I discuss these impacts further in the Priority rights section below.

function was turned to isolate the valuable property assets from workers claims. This was part of a process of asset stripping that had very little to do with the activity of 'care'. In removing restrictions on what companies can do with their assets the logic of the corporation as the 'hollow form' tool of shareholders is intensified. The shift to emphasis on contractual protections for creditors exemplifies the problems of this. From the perspective of workers, the 'contractual' mechanisms for protection in the Modern Company Law Review is not a turn to 'contract' as it hinges upon the power of large creditors to secure their interests against expropriation by shareholders. Protection of interests through contract relies upon power in the contractual relationship which individual workers do not have. The enhanced contractual freedom of the corporate entity in fact shifts power to dominant shareholders (and creditors). The reforms reflect the neoliberal logic of law: the expansion of contractual freedoms which in practice grants power to concentrations of capital.

### 4.2.4 Control, liability and 'delegated management'

This section looks at the intersecting principles of delegated management and limited liability. In the contractarian account limited liability is held to enable reduced shareholder supervision of investments and so increases diversification, liquidity and reduces the 'cost of capital'.[559] Management is 'delegated' management to the company board understood to be acting as shareholders agents.[560] Stakeholder perspectives hold that the principle of delegated management reflects the legal reality of corporate personality and functions to shield the entity from shareholder intervention, including through the risk of incurring liability as a manager as the price of excessive interventionism.[561] Deakins argues that the principle of delegated management ensures that shareholder rights to manage the firm assets are 'nearly zero'.[562] The example of the LBO reveals wide divergence from these claims. Private equity companies directly manage portfolio companies whilst retaining protection from liability. This relies upon both careful legal structuring, and compliance with governance practices which uphold independence of portfolio company boards as a *formality only.*

#### *The fund and acquisition structure*

The design of the acquisition structure is aimed at ensuring liability is held at the lowest possible level: the target firm, and/or the Special Purpose Vehicle (SPV). As shown in Diagram 1, the fund

[559] Armour and others (n 190).
[560] ibid.
[561] Robe (n 2) 232.
[562] Deakin, 'The Corporation as Commons : Rethinking Property Rights , Governance and Sustainability in the Business Enterprise' (n 313) 359.

itself is structured as a Limited Partnership. UK limited partnerships are one of the most common fund structures and are cited by industry bodies as a major reason the UK is the second biggest global hub for PE/VC after the US.[563] Passive investors take the position of Limited Partners, and the PE firm takes the position of General Partner. As the GP is liable for all partnership debts the GP is itself usually an LLC, with the human managers of the fund taking the position of shareholders within the (GP) LLC.[564] The passive investors have no liability for any debts incurred at the level of the fund, and the PE firm's exposure is limited to the assets of the GP. The co-investment from the PE firm itself is routed through the LPs. The chief benefit of LLP structures is that the decision-making GP typically only owns 0.1% of the equity of the partnership, so this is all that is at risk.[565] The more substantive co-investment of around 5% made by the sponsor is routed through the LPs. Robe likens the use of a limited partnership to that of a 'fuse'; if something goes wrong down the investment chain losses are limited to the tiny amount of capital held by the GP.[566] At the level of the acquisition vehicle the SPV is typically a specially incorporated 'NewCo' with no existing liabilities. The fund will inject equity into the SPV via a Holding company and the SPV will acquire the targets equity. The GP will typically delegate management to the 'Fund Manager' LLP in which the PE firm (sponsor) executives are the partners.[567] The sponsor will indirectly control the target company whilst remaining at least 4-5 times removed from the direct shareholding (Sponsor/GP/Holdco/SPV/Target). Even without this elaborate structure, the controlling parties are protected through the basic principle of separate legal personality of entities in a corporate group. The additional tiers allow additional insulation and the structuring of capital through fuses to ensure the fund itself is 'bankruptcy remote', meaning no liabilities for failures down the chain will reach it.[568]

### *Capital structure and managerial strategies*

The sponsors control over portfolio companies is embedded through the capital structure, and through a set of mechanisms for direct management. The use of debt in the capital structure is used to lock-in particular managerial strategies. Rossman highlights three strategies pursued by GP's in restructuring acquired firms:

[563] BVCA (n 516).
[564] Brown (n 516) 3.
[565] Robe (n 2) 264.
[566] ibid.
[567] BVCA (n 516).
[568] Robe (n 2) 264.

1) Cost cutting measures to boost profits. Extraordinary rates of return are sought through aggressive cost-cutting through lay-offs, outsourcing and subcontracting of jobs and the substitution of temporary for permanent employment.[569]
2) Management of assets and cash flow designed to maximize cash flow relative to asset utilization, seeking to minimize the working capital utilised and turn it over more frequently. Achieved through consolidation-based restructuring: sale/shuttering of some operations, exit of 'non-core' activities, consolidation of fixed assets.[570]
3) Leveraged finance itself and the means to extract accumulated equity.[571]

These strategies are rooted in the leverage ratio of equity to debt in the capital structure. The leverage ratio compares total liabilities (including outstanding pension and employee benefit schemes) to cash flow (as approximated by EBITDA).[572] The leverage ratio is a key determinant of the scale and speed of the restructuring applied by the new owners.[573] The higher the leverage ratio, the greater the cash flow diverted to cover interest and debt repayments, and the greater operational restructuring to meet target payments. This is enforced through the nature of the fixed debt claims attached in the buyout. Compliance with debt covenants quickly becomes a CEO's primary concern following an LBO.[574] Reducing the leverage ratio through the first two strategies generates headroom for the use of the capital structure to extract accumulated equity, such as through a dividend recapitalisation keeping borrowing to a maximum until exit.[575]

Control over the firm is not limited to the level of financial structure. Legally, control is embedded via the company articles which set out the capital structure and the various classes of equity and debt, and the shareholders' agreement which sets out the governance structure (board structure, sub-committees, appointment procedures etc).[576] Critically the agreement will contain a schedule which sets out key decisions which cannot be taken without the sponsors approval, and a set of warranties and restrictive covenants given by the management team.[577] This entails a set of veto rights across a broad range of issues. These powers of control do however entail a risk of

[569] Ron Blum and Peter Rossman, 'Leveraged Buyouts, Restructuring and Collective Bargaining' (2009) 1 International Journal of Labour Research 164.
[570] ibid 165.
[571] ibid 163.
[572] ibid 161.
[573] ibid 166.
[574] Prassl (n 388) 90.
[575] Blum and Rossman (n 569) 168.
[576] Prassl (n 388) 94.
[577] ibid.

liability. UK company law embeds the principle of board independence backed by Directors duties which are owed to the company. As described above, the risk to directors of approving LBO transactions has been reduced through the repeal of the whitewash procedure. But they must act in the company interest and exercise independent judgement.[578] Director's risk personal liability if pursuit of a strategy entails breaching duties to company. More importantly for the sponsor, controlling parties may be found to be 'shadow directors'. A 'Shadow Director' is defined as "a person in accordance with whose directions or instructions the directors of the company are accustomed to act".[579] Dominant shareholders are at risk of being found to be shadow directors and assuming liability as directors. Almost all provisions of the Companies Act which apply to directors apply to shadow directors and they are subject to the common law duties of directors including fiduciary duties to act in the company's best interests.[580] Yet in practice the use of these provisions amounts only to the rare occasion when a minority shareholder brings proceedings on behalf of the company, or more commonly when the company has gone into insolvent liquidation and the liquidator is seeking recovery of funds from parties connected with the company.[581] The key risk for sponsors is where they give directions to portfolio companies. In practice holding companies will not be shadow directors if governance procedures at the level of the portfolio company are followed, in particular ensuring all decisions are considered and taken by the portfolio company board.[582] As such the independence of judgement of the board is in practice less than substantive, rather requiring compliance with formalised governance practices. Nonetheless, as Prassl points out the more sophisticated PE management companies take care to limit direct veto powers to the most exceptional items, and instead phrase directions as advice.[583] Such 'advice' is of course backed up by the powers to remove board members should they not perform in the desired fashion. Prassl demonstrates the ways in which PE firms dominate remuneration decision making, including through requirements for approval for appointments above a given wage threshold (c £50,000) and the domination of remuneration sub-committees by PE appointees. Where direction of management is particularly risky – such as regarding mass redundancies - PE companies may shift from formalised governance practices to more informal methods of communication such as phone calls or lunch meetings.[584]

[578] Companies Act 2006 c.46 s173 (1).
[579] ibid s251 (1).
[580] Westlaw UK, 'Shadow Directors' (*Thomson Reuters : Westlaw Edge UK*, 2021).
[581] ibid.The latter example will be discussed further in Chapter 5
[582] MJ Preston, G Antonazzo and M James, 'UK: Directors' Duties: Private Equity Responsibilities To Portfolio Companies' (*Mondaq*, 2020) <https://www.mondaq.com/uk/coronavirus-covid-19/939326/directors39-duties-private-equity-responsibilities-to-portfolio-companies> accessed 13 May 2022.
[583] Prassl (n 388) 96.
[584] ibid 106–8.

The formal separation of roles and functions between shareholders and directors does not require that these are carried out by different people. Sponsors have nominees in multiple overlapping roles across the corporate structure. More importantly, in common with listed firms, directors at all levels from portfolio company to sponsor are incentivised through capital ownership. As Jensen argues from the agency perspective, tight alignment of interests across corporate management and equity holders is a key feature of the PE model through the granting of large equity stakes, incentivising employment changes where they yield returns to capital.[585] Takeovers reveal the extent of the shared interest of managers and shareholders. In the takeover of UK technology company ARM by Softbank the board benefitted enormously from the 43% share premium Softbank paid, with the ARM Chief Executive and Chief Operating Officer making a cool £33m between them.[586] The Executive Directors of Morrisons shareholdings gained significantly from the CD&R buyout and the 60% share premium. The 2021 annual report lists the 3 Executive Directors as holding an interest in a total of 13.6 m shares.[587] The value on the last day before bid interest was disclosed (187p) totals £24.2m.[588] The final CD&R bid price agreed shares at 287p,[589] valuing the Executive Directors (January 2021) holdings at £39m, with the 3 having enjoyed a £14.8m boost to the value of their holdings due to the bidding war. CEO David Potts holding alone increased in value by over £8m. From this perspective the principle of 'board neutrality' during takeovers appears to be a relatively trivial facet of 'shareholder primacy'. Management will likely act as shareholders because they almost always are shareholders.

### 4.2.5 Summary

The capital structure of the LBO significantly changes the nature of equity holdings. The LBO enables shareholders to pull unrealized value forwards and withdraw dividends through granting fixed claims on future labour. The model demonstrates how shareholders can benefit from concentrated control whilst retaining diverse holdings within funds. The asset partitioning and entity shielding functions of the corporate entity are deployed not to protect the firm from shareholder claims but to package the firm up to 'mint' cheap debt finance for shareholder returns backed by priority claims. Legal constraints on these practices have been reduced in a steady process of liberalization of the

[585] Michael C Jensen and William H Meckling, 'Can the Corporation Survive?' (2006) 34 Financial Analysts Journal 31.
[586] Acuity Analysis, 'Reform of the UK's Regulations on Mergers, Takeovers and Shareholders for the Longer-Term' (2018) 28 <www.acuityanalysis.org%0A>.
[587] Morrisons, 'Morrisons Annual Report 2020/21' [2020] Annual Report 2020 166 <http://www.morrisons-corporate.com/Documents/Annual-Report-2012-13.pdf>.
[588] 'Historic Prices' (*Shares Magazine*) <https://www.sharesmagazine.co.uk/shares/share/MRW/historic-prices?startDate=18-06-2021&endDate=18-06-2021&submitbtn=Filter> accessed 10 November 2021.
[589] A O'Brian, 'CD&R Wins Takeover Battle for Morrisons at Auction with £7bn Bid' (*City A.M*, 2021) <https://www.cityam.com/cdr-wins-takeover-battle-for-morrisons-at-auction-with-7bn-bid/> accessed 11 October 2021.

corporate entity which has empowered the strongest 'contractual' parties – large shareholders and creditors. Workers claims are subject to downwards pressure where firm assets are stripped, and are isolated from revenues generated by asset ownership. Equity holders are both strongly insulated from risk through both the general principle of limited liability, and the uses of the LLP form. At the same time equity holders can exercise extensive power to reshape the firm, its assets, and deploy strategies with major implications for workers. The principle of delegated management as a facet of corporate independence appears reducible to formalised governance practices. Power is only *formally* constituted at the board level. These legal characteristics underpin an economic model based upon extracting shareholder returns in the shortest possible time. These characteristics clearly have major implications for workers, trade unions, and understandings of the firm upon which collective bargaining rights are based.

## 4.3 The LBO and bargaining rights

The leveraged buyout model has major implications not only for individual workers, but for the effectiveness of collective bargaining rights. As I shall argue, the LBO model demonstrates the deeply flawed way in which collective bargaining rights rest upon assumptions about the reified 'firm' and 'employer' which fail to recognise the way in which corporate law functions. The LBO enables the pre-distribution of claims, transfers risk to workers and erodes bargaining power. Bargaining rights fail to challenge the model in part through voluntarism regarding bargaining level. TUPE and consultation rights uphold the formalistic approach to board independence.

### 4.3.1 Bargaining power: leverage and labour

Highly leveraged capital structures have direct implications for the bargaining power of unions. Rossman emphasises that repeat buyouts erode bargaining power as the financial condition of the firm is worsened and downwards pressure on costs is pushed onto workers due to high debt.[590] This should be understood in the wider context in which employers use debt in a strategic manner to undermine union bargaining power. The use of leverage substantially transforms the financial situation of the firm in ways disadvantageous to labour. The leverage ratio not only drives restructuring but shifts bargaining power dramatically to the employer. There is extensive evidence, largely from US studies in the financial economics literature, that high leverage negatively impacts the bargaining position of labour, and that firms actively use leverage to oppose workers' pay claims. Matsa notes that the dominant corporate finance paradigm assumes capital structure is an outcome

[590] Blum and Rossman (n 569) 161.

of tax/liability factors, yet bargaining power *vis a vis* workers is a significant factor.[591] His 2010 study of firm behaviour across the US showed that collective bargaining coverage and pro-union laws were related to higher firm leverage.[592] A study of non-financial firms listed on the South Korean stock market found that firms with the highest collective bargaining coverage had the highest leverage, and those with the lowest coverage the lowest leverage, indicating firms strategically used debt finance against union power.[593] US unions are more likely to strike and win in wage negotiations if debt has been decreasing. Firms are likely to make large increases in leverage after a strike, especially a successful strike – not in relation to investments but to improve the firm's bargaining position.[594] US firms that experience a strike also subsequently invest more internationally and in right-to-work states where unions are afforded fewer legal protections, and they increase their disposal of production units that are located in states where strikes have occurred.[595] The strategic use of debt by employers is understood to relate to the threat of default, potential bankruptcy and job losses. Firms bargaining with workers exploit high leverage to restrain wages through threat of default.[596] As Wilson notes, "managers can use high leverage and costly bankruptcy to win wage concessions from workers".[597] This effect on bargaining was also identified in a 2019 US study which found a strong negative relationship between leverage and average labour earnings. Leverage affects the wage bargain as it increases the chances of default, so the expected surplus to be shared between the firm and workers falls, as does the wage.[598]

Whilst these studies have been significantly US focused, the principal mechanisms may be considered to be applicable in the UK context. Since the strategic use of debt by equity holders rests upon the threat of insolvency, rights during insolvency are a key variable which matter across different legal systems including the US and UK. This question is considered further in Chapter 5 discussion of priority rights. The second key feature is limited liability. It can be assumed equity holders pursuing high risk strategies through use of high leverage operate on the basis that they will not be liable further than their equity stake. Withdrawing equity and substituting debt transfers

[591] David A Matsa, 'Capital Structure as a Strategic Variable: Evidence from Collective Bargaining' (2010) 65 Journal of Finance 1197.
[592] ibid.
[593] Chil Sun Choi, Pando Sohn and Ji Yong Seo, 'Relationship between Leverage and the Bargaining Power of Labor Unions: Evidence from Theoretical and Empirical Perspectives' (2016) 43 Estudios de Economia 53.
[594] BW Myers and A Saretto, 'Does Capital Structure Affect the Behavior of Nonfinancial Stakeholders? An Empirical Investigation into Leverage and Union Strikes' (2015) 62 Management Science <https://pubsonline.informs.org/doi/pdf/10.1287/mnsc.2015.2267>.
[595] ibid.
[596] Ryan Michaels, T Beau Page and Toni M Whited, 'Labor and Capital Dynamics under Financing Frictions' (2019) 23 Review of Finance 279.
[597] Wilson, L. 'Hard debt, soft CEOs, and union rents' REF
[598] Michaels, Beau Page and Whited (n 596) 314.

wealth behind the veil of limited liability: money in the bank is safer than money in the firm. The strategic debt model points then to the centrality of the corporate legal person in shifting risk to workers: it is predicated upon the assumption that workers losses in insolvency are likely to be greater than those of equity holders, and that this is a source of power for shareholders vis a vis workers taking industrial action. Workers associational power is reduced as the gains from bargaining and industrial action are reduced, and the risks and potential losses increased. This suggests that the use of high leverage in the PE model puts organised labour at a significant disadvantage as an automatic outcome of the LBO transaction, and that this is underpinned by the liability structure of corporate law.

### 4.3.2 Impact upon the bargaining model

Collective bargaining is understood as negotiation over the distribution of the surplus generated by the firm and its returns to different constituencies; workers, shareholders and investors. Workers bargain with employers for their share of firm revenues, based upon realised value (annual profits) and projected profitability. Yet, as described above, it is these revenues which are packaged up and sold off as fixed claims in the LBO transaction. A significant proportion of the future revenues of the firm are simply removed from contestation either through the granting of fixed creditor claims (straight LBO), or the partitioning of revenue yielding assets across the corporate structure (for example OpCo-PropCo). At the same time equity holders pursue strategies for maximum extraction of remaining funds in the shortest possible time. At the point of the transaction workers have no bargaining rights with the bidder yet the capital structure adopted entails a large-scale transfer of value to creditors fixed claims in order to fund the incoming equity holders share purchase, in ways which in turn underpins managerial strategies with huge implications for workers. The principal point of contact for unions during takeovers is the existing company management who must grant any new securities required over the corporate assets. However, in a takeover situation it is not corporate management who decide upon a bid, but the incumbent shareholders. This latter point is developed further in Section 4. For now, it is sufficient to point out that from a bargaining perspective the deeply contradictory nature of the lack of a legal relationship with shareholders is drawn in sharp relief: workers have no bargaining rights with any of the parties with decisional authority over the transaction which may, nevertheless have significant implications for pay, terms and conditions.

The absence of a legal relationship between workers organizations and shareholders has been highlighted by unions arguing they have found themselves subject to decision making by ‘invisible employers’. The IUF 'Workers’ Guide to Private Equity Buyouts' highlights examples wherein workers’ organizations have pushed upon Private Equity owners to enter into bargaining

rounds they have faced responses that these companies are only involved in refinancing the firm or are just a 'shareholder' with no control over company decision making.[599] TUC evidence also cited instances where unions have found themselves negotiating with management which is "no longer the prime decision making body in the company".[600] This affects unions as the absence of legal recognition of change in ownership means PE firms have no responsibility as an employer in the bargaining process. Unions report that when pushed to negotiate PE funds have claimed they are just a shareholder or just involved in 'refinancing'.[601] PE funds claim not to be an employer but an 'asset class', and current law and regulation upholds this fiction.[602] As the IUF highlight, there is an imperative for the development of a legal framework which recognizes PE firms and other majority shareholders as employers, and binds them into laws and regulation on trade union rights and collective bargaining. This reflects two major absences in regulation of bargaining: the question of bargaining 'level' within a corporate group, and the lack of application of regulation for (TUPE) transfers to share sales.

### 4.3.3 Bargaining level and consultation rights

The ILOs principles of collective bargaining emphasise free and voluntary negotiation and free choice of bargaining level within any given organizational structure.[603] Choice of 'level' refers not only to economy wide or sectoral arrangements, but also "an enterprise or group of enterprises, or an establishment or factory".[604] The determination of the bargaining level should be left to the parties and not imposed by law. The Committee on Freedom of Association has stated that employer refusal to bargain at a given level is not an infringement of Freedom of Association, and that bargaining level should be decided by "mutual agreement".[605] This undercuts effective negotiation in a corporate group structure – of which the PE acquisition structure should be considered a form. As described in Chapter 2, UK labour law consistently reifies 'the employer', as such bargaining rights legislation makes no reference to the question of 'level' within a corporate group. These principles formalise participation rights in the collective mode of regulation. Yet the preference for voluntarism reproduces an economic imaginary of equal participants. The corporate nature of actors and the

[599] 'A Workers ' Guide to Private Equity Buyouts' (2007) <https://www.iuf.org/wp-content/uploads/2007-A-Workers-Guide-to-Private-Equity-Buyouts.pdf>.
[600] 'Private Equity - a TUC Perspective' (*TUC Research and Analysis*, 2007) <https://www.tuc.org.uk/research-analysis/reports/private-equity-tuc-perspective>.
[601] 'A Workers ' Guide to Private Equity Buyouts' (n 599) 17.
[602] ibid 19.
[603] Gernigon, B. Odero, A. Guido (n 377).
[604] ibid 42.
[605] International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (Revised) Edition. Geneva.' (1996). Para 853. Cited in Gernigon, B. Odero, A. Guido (n 377).

hierarchical authority structure of the firm disappears. The authority to negotiate at the level of local management is unlikely to be sufficient.

The question of level within a group structure has also arisen in the case of consultation rights. Constraints upon the 'level' of rights in corporate group structures are also apparent in the approach of the ECJ to consultation rights. In *Akavan v Fujitsu* the court made clear that consultation rights are held at the level of the employer and liability does not catch parents. The ECJ have been clear that an undertaking which controls the employer, even if it can take decisions which are binding on the latter, does not have the status of employer.[606] The judgement references the European Commission which has stated that it was not the intention of the Collective Redundancies Directive 98/59 "to restrict the freedom of such a group to organise their activities in the way which they think best suits their needs".[607] Following Rockfon, the Directive does not constrain the ability to allocate powers relating to management of personnel in the way best suited to the needs of the group.[608] Managerial independence is not however required for liability to be retained at the unit level. In Rockfon the Court stated that the definition of 'establishment', as the unit to which workers were assigned and made redundant from, did not require "for the unit to be endowed with a management which could independently effect collective redundancies".[609] Whilst the purposes of the Directive must not be frustrated – a consultation process must take place – there appears to be little requirement that the process binds the actors with decisional authority.[610]

### 4.3.4 TUPE rights, the corporate entity and the definition of a transfer

Regulations covering transfers of undertakings do not apply to private equity takeovers, or any takeover that is based upon a share transaction rather than an asset sale. Within the UK TUPE regulations, and the EU Acquired Rights Directive from which they derive, share transfers are not treated as a change in ownership for the purposes of the regulation. Provisions under the Acquired Rights Directive apply to transfers of an undertaking between 'one person and another', requiring the legal identity of the employer to change. In the case of share capital transfers, the legal identity of the employer (usually a corporation) remains the same. The legislation therefore provides no consultation or information rights to employees, nor protections relating to redundancies or

[606] Akavan Erityisalojen Keskusliitto AEK ry v Fujitsu Siemens Computers Oy (2009) C-44/08, [2009] IRLR 944 [58]
[607] Ibid [59]
[608] Rockfon A/S v Specialarbejderforbundet i Danmark (C-449/93), [1996] I.C.R. 673 Star pages *678
[609] Rockfon A/S v Specialarbejderforbundet i Danmark (C-449/93), [1996] I.C.R. 673 Star pages *673-74
[610] With reference to the ECJ and Commission positions on TUPE and CRD rights, it should be recognised that this occurs in a context where employee participation is provided for through other mechanisms at multiple levels through works councils and EWC's, as well as varying levels of co-determination and/or sectoral bargaining rights. These have not however been immune to impacts of the PE model - a point to which I return.

changes to terms and conditions arising from the change in ownership. The European Court of Justice has affirmed the need for a change in the "legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer".[611] The ETUC response to the Commission 2007 review questionnaire called for measures provided in the Directive covering transfers of rights and obligations, notification by transferor, protection of the status and function of worker representation, and the information and consultation provisions to be extended to cases of change of ownership through share purchases.[612] The Commission reaffirmed that "The transfer of ownership of the majority of the shares in an undertaking or a change in the majority of shareholders does not constitute a transfer because the legal personality of the employer is unchanged", the ETUC proposals were not justified "at this stage", as although a change in corporate control could lead to changes in the undertaking, "the employees position vis a vis the employer is unchanged".[613]

The UK courts have emphasised that the TUPE legislation is to be construed purposively, flexibly and with a focus on substance not form.[614] Yet in *Brookes v Borough Care Services* the EAT held the exclusion applies even if the employer has deliberately chosen the share acquisition route in favour of a business transfer to avoid the operation of the TUPE provisions.[615] In this case a local authority had set up a company limited by guarantee (Borough Care Services (BCS)) and transferred ownership of the homes from the local authority to the company, a process through which TUPE provisions were complied with. Pending the privatisation of the service by sale the bidder identified that it was financially desirable for employees terms and conditions to be renegotiated. The share transfer route was therefore followed to avoid being caught by the 1981 regulations. The route was chosen to impose a legal entity to protect CLS from liability: "It was essential to provide CLS with the protection of a separate legal entity since the second respondent, CLS, was responsible for the running of other centres and organisations".[616] The bid was completed via the total resignation of the BCS board and replacement by the members of CLS (as BCS had no share capital: whilst not strictly a share transfer as a company limited by guarantee it was treated by the tribunal and court of appeal as such). The 334 employees of BCS brought claims to the industrial tribunal for unlawful deductions of wages and unfair dismissal, which were rejected on grounds of lack of application of

[611] Berg V Besselsen [1990] ICR 396, CLECE SA v Martin Valor (C-463/09) [2011] 2 C.M.L.R. 30
[612]European Commission, 'Report on Council Directive 2001/23/EC of 12 March 2001 - Transfer of Undertakings' (2007) Annexe 1 Question 4. ETUC submission mentioned referred to: Council Directive 2001/23/EC art 3(1) 3(2) 6, 7.
[613] European Commission (n 612) 3–4.
[614] MJ Garnham, ICAP Management Services Ltd v Berry, 2017 WL 02391613 [41]
[615] Brookes v Borough Care Services 1998 IRLR 636

[616] Brookes and Others v Borough Care Services Ltd. and Another [1998] I.C.R 1198

TUPE. At the Court of Appeal the applicants argued that BCS and CLS should be considered a 'single economic unit' as a purposive approach to the 1981 regulations required, and that the control exercised by CLS indicated, and that the court should 'pierce the corporate veil' as BCS had been used expressly to avoid statutory obligations. The appeal was dismissed on the grounds that it was contrary to the fundamental principle that a company was a legal person and citing a lack of statutory intent in the regulations to apply under share transfers.[617]

Where new owners attempt to integrate acquired firms into existing businesses TUPE may apply. In *Millam v Print Factory* the Court of Appeal held that where new company owners engage in 'handling of a significant element of the management' this goes beyond the actions of a mere shareholder and therefore TUPE could apply.[618] In practice however the impacts of *Millam* apply largely where businesses are significantly integrated following buyouts. In *ICAP Management Services Ltd v Berry* [2017] EWHC 1321 (QB), the court considered *Millam* stating the focus on whether 'day to day running of business' had changed hands mattered, not whether the corporate structure had changed. Moses LJ emphasised that the "mere fact of control" will not be sufficient to establish the transfer of the business.[619] Oversight and strategic management, implementation of cost saving measures, 'rationalization' of services, strategic target setting, replacement of governance and management structures, and replacement of Directors are all considered to be 'above' the level of the 'day to day' and as such not considered to be relevant competencies of an employer for the purposes of a transfer.[620] The importance of formalised governance processes is made clear by contrasting *ICAP* to *Jackson Lloyd Ltd* in which the major changes imposed by a parent were carried out without meetings of the subsidiary or reference to the subsidiary's internal mechanisms for effecting change, and the ET and EAT both held that a TUPE transfer had taken place. That the entire board of the subsidiary had been replaced by the new parents nominees was not at issue, rather the lack of formalised processes at the subsidiary board level.[621]

### 4.3.5 Political and industrial contestation

In the UK attempts have been made to legislate to close the gap in TUPE. A House of Lords select committee came out in favour of including share sales in its 1995-96 session report on the Acquired

[617] Brookes and Others v Borough Care Services Ltd. and Another [1998] I.C.R 1198
[618] Millam v Print Factory (London) 1991 Ltd [2007] ICR 1331

[619] ICAP Management Services Limited v Dean Berry and BGC Services (Holdings) LLP [13]
[620] Ibid [88-91]
[621] Jackson Lloyd Ltd and Mears Group PLC v Mr S Smith & Others, Ucatt, Mr D Williams & Others [2014] UKEAT/0127/13/LA WL 1219555 cited in ibid [80]-[81]

Rights Directive (ARD), but when the ARD was amended in 1998, share sales were not included.[622] In 2008 John Heppell MP introduced the 'Private Equity Bill' to the house, a private members bill aimed at extending TUPE to close the gap. Opponents to the Bill stressed that it was both unnecessary as all rights attach to the legal employer so would not be breached by share sales, and economically harmful as it imposed excessive regulatory hurdles upon firms making acquisitions. As Heppell pithily pointed out it could not be both.[623] Heppell failed to win support for the Bill from any of the main parties, including the incumbent labour government. Conservative opposition to the bill focused on the impact on the PE industry, and provisions within the bill which would enable unions to seek a court injunction on a share sale until consultation obligations had been satisfied, obligations held to be "too onerous for the [share] market".[624] Others argued – citing the European Commission position - on the basis of continuity, and that the purpose of TUPE had been to fill the contractual void occurring under asset purchases.[625] The government declined to support the bill stating the provisions exceeded those of TUPE.[626] The principle point made by both the European Commission, and within the UK parliamentary debate is the continuity of workers' legal status during share transactions. TUPE applies under circumstances where contracts would otherwise be terminated, bringing continuity and preserving rights. This problem is not considered to arise where the corporate employer does not change. It is interesting to consider the theoretical perspective of the contractarian theorists here. From this perspective, it is legal personality that enables simultaneous transfer of all contracts by way of share transfer: it enables the firms 'bundle of contracts' to be transferred *as a whole*. The principal contribution of legal personality is that it enables this to happen *without the consent of the contracting parties*, and as such preserves the default rule that reassignment of contracts requires parties' consent.[627] This is of course, the precise distinction between an transfer via asset sale and a transfer of shares; the latter not requiring consent of the contracting parties. In the absence of the entity, capital owners would be required to agree transfers with all parties, enabling scrutiny of new owners and their intentions within the firm. As such the function of the corporation is recognised as providing an exemption from the basic rules of contract law. Whilst this may be legally incorrect, in the sense that the corporation is the contracting party, it also reveals a key element by which the corporation confers power. In the case of *Brookes*, the use

[622] Personnel Today 'TUPE and share sale takeovers' 05/07/2005 accessed 25/01/19 https://www.personneltoday.com/hr/tupe-and-share-sale-takeovers/

[623] HC Private Equity (Transfer of Undertakings and Protection of Employment) Bill Deb 7 March 2008 vol 472 col 2031

[624] Ibid col 2054
[625] Ibid col 2057, 2082
[626] Ibid 2088
[627] Armour and others (n 190) 10.

of corporate entity to avoid liability for regulatory risks attendant to changes in contracts of employment is clear. Whilst enforced changes to contracts are a feature of the employment relationship (in particular evident in the recent rise of 'fire and rehire' tactics), it is the change in ownership which was significant: the right of shareholders to alienate their shareholding, including the contractual control rights attached to their shares, without consent of other contracting parties, is the basis upon which new owners with a new finance and business model were able to take charge leading to variations in workers' contracts. In arguing on the basis of continuity of contracts, and TUPE as a necessary corrective for asset sales only, contributions to the debate missed the fundamental point about the impact of the financial structure of bids on workers and unions. The centrality of free transferability of shares as a 'core principle' of corporate law indicates the scale of the challenge facing attempts to close the gap in TUPE. As became evident in the parliamentary debate provisions for a transfer based upon controlling shareholding could quickly catch publicly listed firms and interrupt share trading in public equities markets, a level of radicalism Heppell appeared not to have anticipated and was unprepared to defend.[628]

### *Industrial contestation?*

Given the extent to which the LBO model threatens collective bargaining norms, trade unions have sought to contest the model. However what is evident is that contestation has been largely political through campaigning and calls for greater regulation of the model, rather than through the use of industrial relations. Systematic searches revealed numerous instances of unions citing the impact of private equity ownership, but very little evidence of contestation of the LBO at the point of buyouts.[629] Evans and Habbard note that trade union responses to financialization have largely broken down into two strategies; attempts to mobilise labours capital, and regulatory advocacy.[630] Unions have engaged in fairly extensive political contestation and regulatory advocacy in response to the rise of the PE model. TUC evidence to the treasury select committee included calls for the closure of the gap in TUPE, improved information and disclosure requirements to reflect plcs, and changes to tax rules which incentivise use of debt.[631] T&G (now Unite) evidence to the select committee included calls for information and consultation rights timing to shift - to before any decision on the takeover is made by target management. For guaranteed maintenance of terms and conditions for 5 years (cited as the average holding period for a PE portfolio firm), and provisions for

[628] Rt Current and others, 'HC 567–I Private Equity Tenth Report of Session 2006–07 Volume I Report, Together with Formal Minutes' (2007) I House of Commons <www.parliament.uk/parliamentary_committees/treasury_committee/treasury_co>2054.
[629] Search method and terms detailed in Chapter 3 Section 5
[630] Evans and Habbard (n 14).
[631] 'Private Equity - a TUC Perspective' (n 600).

enhanced redundancy backed by a PE firm funded 'guarantee fund'.[632] The private members bill brought by Heppell was developed in consultation with Jack Dromey (former Deputy General Secretary of T&G).

The GMB union engaged in political campaigning over the actions of Permira over redundancies at the AA and Birdseye. Clark's study of the GMB s campaign at AA indicates the limits of political contestation. GMB had been de-recognised immediately following the 2004 buyout of AA by Permira.[633] This included writing to parliamentarians asking for support to brand Permira an 'asset stripper' through a parliamentary motion.[634] GMB also worked with others including the ITUC and IUF to highlight the impacts of PE and the gaps in TUPE, with regulatory change in this area a key campaign aim. The campaign was focused around protests to raise media awareness, and a campaign for legislative changes, including attempts to get the issue onto the Labour Party policy forum 2007, and the Heppell Bill of 2008.[635] As Clark highlights in his study of the GMB campaign against Permira, the union were successful in generating media and political interest in the issue, but from a workplace perspective it was a failure.[636] Limited success was made, with Permira agreeing to re-recognise GMB, but this was shortly foreclosed following another PE takeover of AA by PE backed Saga, with the new equity holder dissociating itself from the re-recognition commitment and ceasing all negotiations.[637]

Searches revealed instances of unions striking post acquisition over restructuring or pay. Examples include the 2021 Clarks strike following 2020 acquisition by Hong Kong Capital Partners, [638] and strike action at Pork Farms over pay following the 2020 PE buyout by PAI Partners of parent Addo Food Group.[639] In 2014 70 care workers took part in the longest strike in the history of social care following transfer from Doncaster NHS Trust to private equity owned Care UK, who cut wages

[632] 'Supplementary Memorandum Submitted by T&G' (*Select Committee on Treasury Written Evidence*, 2007) <https://publications.parliament.uk/pa/cm200607/cmselect/cmtreasy/567/567we49.htm> accessed 3 March 2022.
[633] Ian Clark, 'Private Equity, "Union Recognition" and Value Extraction at the Automobile Association: The GMB as an Emergency Service?' (2011) 42 Industrial Relations Journal 36.
[634] Helen Newell, 'Unions Target Private Equity Companies in Campaign against Asset Stripping' (*Eurofound*, 2007) <https://www.eurofound.europa.eu/publications/article/2007/unions-target-private-equity-companies-in-campaign-against-asset-stripping>.
[635] Clark (n 633) 46–47.
[636] ibid 48.
[637] ibid.
[638] S Coote, 'The Mystery of Profit and Loss: Clarks Strikers Speak Out' (*Counterfire*, 2021) <https://www.counterfire.org/news/22739-the-mystery-of-profit-and-loss-clarks-strikers-speak-out>.
[639] J Brigstock, 'Pork Farms Owner Issues Statement as Nottingham Bakery Staff to Strike over Pay' *Nottingham Post* (22 March 2022) <https://www.nottinghampost.com/news/nottingham-news/pork-farms-owner-issues-statement-6841174>.

by 35%.[640] However, Horton observes that the care unions did not mount a significant challenge to financialization and wealth transfers to PE owners from residents, workers and the state.[641] Care unions adopted an approach of working with care companies to call for better funding for care, paradoxically so given that greater funding for sector would likely drive further financialization and buyouts.[642] The unions adopted a partnership model discouraging member activism or use of industrial action, and failed to address extraction from workers by owners.[643] As described in the Chapter introduction, the GMB union accused the ASDA buyout consortium of 'asset stripping' during the bid process and called for reassurances on job security immediately following the takeover. GMB have had no collective bargaining recognition in ASDA stores since it was de-recognised in the late 1990's and signed a partnership agreement instead. ASDA workers faced imposition of new contractual terms under 'contract 6' in the run up to the proposed merger with Sainsbury's, under threat of dismissal including reduced paid breaks, reduced night shift premiums, reduced holidays and greater flexibility for the employer regarding shift patterns.[644] The contract has been linked to Walmart seeking an exit sale. GMB opposed the imposition and were involved in consultation but did not take industrial action.[645] Following the blocking of the merger by the CMA, the Issa brothers/TDR Capital takeover was announced. No prospect of opposing the buyout through industrial means appears to have been attempted. Within 6 months of the takeover GMB were faced with 5000 jobs being put into redundancy consultation with up to 3000 possible cuts.[646] The loss of skilled roles has also been significant with 1,200 baker job cuts announced April 2021 in shift away from freshly baked products.[647] GMB have a recognition agreement within the ASDA distribution centres, the real estate for which was sold off as part of the acquisition. The distribution centres were viewed as being the most valuable part of the business. Despite accusations of asset stripping no industrial action was taken in relation to the buyout. Distribution centre workers have since voted for strike action over pay, leading to an improved offer and acceptance by the union.[648] So whilst the GMB have some industrial strength within the distribution centres, this has not been turned to defending the assets with which they work. It is worth noting in this context that the

[640] 'Care UK Workers to Vote on Proposals to End Strike' *Unison: News* (10 November 2014) <https://www.unison.org.uk/news/article/2014/11/care-uk-workers-to-vote-on-proposals-to-end-strike/>.
[641] Horton (n 538) 98.
[642] Burns and others (n 534).
[643] Horton (n 538) 154.
[644] SP Asda Walmart (Contract Imposition) Deb 29 October 2019
[645] Ibid
[646] 'GMB Vows to Fight as Asda Announces More than 3,700 Potential Job Losses' (n 467).
[647] '1,200 Threatened Jobs at Asda Bakeries Must Be Saved' *GMB Union: News* (15 April 2021) <https://www.gmb.org.uk/news/1200-threatened-jobs-asda-bakeries-must-be-saved>.
[648] 'Thousands of Asda Workers Vote in Favour of Strike Action in Pay Ballot' *GMB Union: News* (2022) <https://www.gmb.org.uk/news/thousands-asda-workers-vote-favour-strike-action-pay-ballot>.

distribution centres were the basis for the historic equal pay claim for ASDA cashiers. Should the centres be sold off completely then the pay claim would end.

The pattern of union contestation is a tendency to engage in regulatory advocacy and political contestation (through protests and media work) in order to challenge some of the legal foundations of the model, with a focus on information rights, TUPE protections, and ending the tax advantages which incentivise use of debt. Industrial relations contestation appears to have focused on opposing the impacts when they fall, rather than challenging the PE model at the point of a takeover. In some cases, notably GMB/ASDA (stores), and the care sector, use of partnership models appears to have blunted any chances of a strong industrial response.

### 4.3.6 Summary

The basic premiss of the bargaining model of the firm - negotiation over distribution of surpluses - is challenged by the LBO model, through which fixed claims are allocated by equity holders to finance transfers to shareholders. The use of leverage substantially transforms the financial situation of the firm in ways disadvantageous to labour. The leverage ratio not only drives restructuring but shifts bargaining power dramatically to the employer. The evidence from studies in financial economics suggests that this is in some cases a strategy adopted by corporate management and equity holders to weaken union bargaining power. This strategy is in turn grounded in the liability structure of the corporation and the relatively greater losses workers face in insolvency. Whether intentional or not, consistent with the wage effects of LBO's described in Section 1, the distributable surplus falls with negative impacts on pay. Bargaining and consultation rights are rooted in the employer and fail to deal with the basic structure of corporate law and the formal independence of group entities. Free choice of bargaining level confers power upon corporate actors enabling actors with decisional authority to remain formally outside negotiations - potentially constraining outcomes or destabilizing agreements. Consultation and TUPE rights uphold the formalism of ‘board independence’ upon which the private equity model relies. The lack of applicability of TUPE rights to share transfers has been subject to political contestation by unions within UK and EU political forums. These proposals have been rejected, significantly on the grounds of continuity of workers contractual protections. As shown in *Brookes*, this is a basic function of the corporate entity which confers significant advantages to shareholders. Judicial responses have relied upon basic corporate veil principles, buttressed by a distinction between 'management' and 'control' which in practice appears reducible to compliance with formalised governance practices. Employees’ interests are framed within the 'day to day' business of management in contrast to the wide range of strategic and operational decision making considered to be 'above' this. The distinction between ‘day to day’ management of employment and the authority structures which condition it appears as a normative

distinction in UK labour law. Union contestation strategies have been political using protest and regulatory advocacy. Whilst unions may fight the impacts of the LBO model, few appear to have challenged the model itself through industrial struggle. Unions have not challenged asset stripping of firms, even where they have significant industrial strength (such as ASDA distribution centres, and the care sector). The case of Rover is notable as an example where unions sought to deploy rights claims as a form of leverage capital to shape outcomes, although this relied upon a rare combination of large statutory claims and strong collective agreement provisions (no redundancies). The following section discusses the extent to which contestation strategies have yielded reforms, with a focus on takeover regulation, and concludes the chapter.

## 4.4 Regulatory reforms

After the Kraft/Cadbury controversy, the Code Committee recommended changes "to take more account of the positions of persons who are affected by takeovers *in addition to offeree shareholders*".[649] The reforms targeted the quality of bid disclosures (requiring a negative affirmation if no changes affecting employees were planned) and enhanced information rights, requiring directors to inform employee reps of right to give an opinion on the offer, and to make information on the offer available.[650] As such the reforms were strongly board centric; focusing on the recommendation process and content, rather than mechanisms for empowering workers in relation to shareholders. The language of the reforms appears to rule out the possibility that the interests of shareholders and workers may conflict. The scope for workers to intervene in the bid process is limited to the right to submit an opinion to the board prior to its decision to recommend.[651] To inform this, bidders are required by the Takeover code to state objectives concerning continued employment of employees in the merged company, including a negative affirmation of no changes are planned.[652] Yet, as emphasised by Deakin this is usually satisfied by a 'boilerplate' reference in the offer document to shareholders stating the bidder will uphold existing legal rights, and gives no greater right to consult employees than otherwise, and has been of little significance.[653] The reforms in no way challenged the vesting of decisional authority in shareholders via the right to alienate their shares, or extended rights to negotiate or consult with workers during the bid process.[654] The

[649] 'Review of Certain Aspects of the Regulation of Takeover Bids: Response Statement By the Code Committee of the Panel Following the Consultation on PCP 2011 / 1' (2011) 1 <https://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/RS201101.pdf>.
[650] ibid 87.
[651] The Panel on Takeovers and Mergers (n 479) Rule 25.9.
[652] Rule 2.7(c) (concerning content of firm offer announcement) and Rule 24.2 ibid
[653] Armour, Deakin and Konzelmann (n 237) 542.
[654] Practical Law Corporate, 'Employment Issues on a Takeover' (*Thomson Reuters Practical Law*) <https://tinyurl.com/24tzyn9e> accessed 12 September 2020.

regulatory advocacy of the unions in the period to 2008 was a failure. On the question of TUPE, the Treasury Select Committee Report simply requested the government clarify the application of TUPE to share transfers.[655] The report recommended no legislative or binding regulatory measures.[656] The principal outcome was an endorsement of the Walker Report which recommended industry self-regulation via a code of practice, which was adopted by the BVCA as a voluntary code (the Walker Guidelines), principally focused on information and disclosures.[657] In an apparent nod to PE firms pseudo-employer status Walker recommended that GP annual reports should include "the philosophy of their approach to employees and the working environment in their portfolio companies".[658]

## 4.5 Conclusion

The dominant literature approaches takeovers from the perspective of 'shareholder primacy', understood in terms of the relationship between shareholders and directors, and the extent of constraints which prevent directors acting in the interest of employees rather than shareholders during bids. I have attempted to show something deeper through the example of the LBO. The LBO demonstrates how careful legal coding through the basic rules of corporate law enables the combined benefits of relative liquidity, limited capital exposure, concentrated control and zero liability, which are deployed to pull unrealised value forwards. This poses enormous challenges for workers to respond to the dynamics of the takeovers market and the convertibility of the share, which arise as a result of the legal structuring of the shareholder corporation. The legal imaginary of collective bargaining rights remains indebted to the 'separation thesis' and a perspective of the firm in which struggles over value take place is understood as a stable equilibrium for multiple overlapping claims. The use of leverage to disadvantage workers, and in particular organised labour points to the liability structure of corporate law.

The transferability of the share and its extension to greater areas of the economy via the PE model hits workers' ability to respond as a result of this legal structuring. As described in Chapter 3, Pistor designates 'convertibility' as a particular attribute of an asset's legal coding, which enables it to be freely circulated in exchange and convertibility into state currency.[659] Convertibility into currency through sale is the distinguishing characteristic of the fully transferable share. The growth of the LBO model and practices of securitization have expanded this logic both horizontally across

[655] Current and others (n 628) 3.
[656] Current and others (n 628).
[657] 'The Walker Guidelines and Private Equity Reporting Group (PERG)' (*BVCA*) <https://tinyurl.com/2vur9hmm> accessed 12 August 2020.
[658] Current and others (n 628) 31.
[659] Pistor (n 86) 78.

the economy, as small and medium size enterprises become subject to financialized ownership, and vertically within firms, as equity holders partition the firm into bundles of marketable assets. Worker claims are marginalized and put under pressure as variable capital through aggressive asset partitioning. Whilst the extension of TUPE rights would likely have only a limited impact in challenging the LBO model, it points towards something quite fundamental about the corporation: the lack of a legal relationship between workers and shareholders. Closing the gap could in practice entail something very significant: imposing limitations - for the purposes of worker protection - on shareholders rights to alienate their shares. The reluctance of legislatures to grasp this nettle perhaps indicates that this would be a fundamental challenge to the established structuring of rights through corporate law.

# Chapter 5: Coding the corporate debt



## Introduction

The LBO model described in the previous chapter cannot be understood without analysis of the structures of creditors rights and the ways in which they face workers via the corporate entity. These rights are generally understood to crystallize upon insolvency. This chapter therefore shifts analysis from the takeover as a 'moment' of the crystallization of rights to a different moment: insolvency restructuring and liquidation. The central aim of the chapter is to explore how workers' rights to job security, pay and pensions, and voice rights in insolvency processes are affected by the legal coding of creditor claims over value through the corporation. Pistor argues that investors in credit assets seek two things; *priority* claims which enable the withdrawal or 'privatization' of an asset, conferring ownership claims and therefore control of the asset over and above other potential claimants, and

*convertibility*; the ability to sell off risky assets when things go wrong.[660] As described in chapter 4, the convertibility of the share poses a fundamental problem for workers facing the takeover market. As I shall show the rise of the private equity model as a dominant model of corporate ownership has entailed transformations not only in the legal coding of the share but also of credit instruments in terms of both *convertibility and priority*, with significant implications for workers. The legal structuring of creditors claims is considered in relation to the ways in which it enables *surplus value extraction* by investors and the *transfer of risk* to workers, through increased exposures to job loss from insolvency and liquidation risk, and amplified exposure to economic cyclicality and crisis. Workers face *endemic precarity* through endless rounds of financial restructuring.

The chapter contributes to the thesis development in the following ways. The legal coding of creditor claims for *convertibility* is analysed as a mechanism of risk transfer which simultaneously underpins credit market liquidity and drives credit bubbles, enabling diversification of risk for investors and intensification of risk for workers. Legal coding of creditor claims for *priority* is analysed as a mechanism to enhance decisional authority and secure investor returns, which has come at the expense of the priority of workers' claims. The regulatory framework is shown to have reflected this trajectory, shifting workers' claims from the economic sphere of contestation at the firm level, into the sphere of social policy and social security mechanisms. This, I argue has led to a *socialization of the risks* of the corporate model, and an *externalization of workers* from corporate insolvency proceedings. The insolvency regime appears to be driven by risks emanating from capital markets and the need to protect the system of secured lending, rather than questions of securing workers' rights and voice during insolvency proceedings. The traditional distinction between equity and debt, which is crucial from the perspective of insolvency law (and from the perspective of collective bargaining as shown in chapter 4), has been eroded by these transformations. As I shall show, this erosion goes to the heart of the problems for workers facing the corporate employer: the way it erodes clear inside/outside distinctions within the corporation, functioning both as a holder of subjective rights *and* as a nexus for market-centred property. I show how these transformations are deeply tied up both with the rise of private equity as a dominant model of ownership, and the wider conditions of protracted economic crisis under which this has occurred. The legal transformations at the level of the labour relationship are thusly linked to contemporary dynamics of capital accumulation and the search for profit in a secularly stagnating economy. I argue the shifting of workers claims into social security mechanisms, whilst having the benefits of providing some guaranteed payments, also has the effect of depoliticizing the underlying extractive corporate

[660] ibid 13–15.

models and limiting contestation by workers and unions. The question of creditor rights as a mechanism for value extraction and the implications of this for workers is completely under-explored in the literature. As such the chapter represents an original contribution to a significant contemporary issue. This analysis of the role of creditors also draws out a new dimension to the critique of the liberal notion of the separation of ownership and control, and the central role of abstract property forms in mediating the social relations of the corporation.

Questions of employee rights in insolvency have been approached from the perspective of 'employees as creditors' in the corporate law and corporate insolvency literature. As described in Chapter 4 in relation to the erosion of 'financial assistance' regulation, the position of workers as creditors is often either ignored, treated as peripheral to changes in company law, or presumed to be accounted for by labour law provisions. Workers are considered contractual and so 'voluntary' creditors capable of negotiating their exposure to risk.[661] Scholarship in corporate insolvency law has however recognised that workers face significant constraints in dealing with risk: employees paid in arrears often have little choice but to provide credit to their employer, are ill positioned to adjust credit rates or take account of default risks, or to diversify or spread risks, and usually cannot intervene in decision making which creates risk exposures.[662] This indicates a fundamental disparity between the position of workers and that of (finance) creditors. However, despite these characteristics, within this literature labour is viewed as one of a number of creditors which include the various providers of money capital to the firm including shareholders. The approach adopted here diverges from this by adopting a Marxist perspective which foregrounds the labour-capital distinction.

The question of the nature and distribution of risk in the contemporary corporate economy has been a prominent theme in the literature on marketization and financialization (in particular since the 2008 global financial crisis) which has explored the intensification of risks emanating from financial markets to workers and households, and the limited extent to which workers can mitigate this.[663] The proliferation of market risks under globalised and financialized capitalism which has given rise to ideas of a mutualization of risk through its distribution and diversification. As Bryan, Martin and Rafferty have shown, the process of financialization has entailed both a dispersion of risk whilst simultaneously requiring that workers and households act as a "shock absorber of last resort".[664] Stability for workers then demands that workers participate in financialised mechanisms

[661] Petrin and Choudhury (n 147).
[662] Vanessa Finch, 'The Pari Passu Principle', *Corporate Insolvency Law* (2nd Edition, Cambridge University Press 2012) 608–610.
[663] Bryan, Martin and Rafferty (n 533).
[664] IMF 2005 quoted in ibid 468.

such as new insurance products to on sell risk. The authors' Marxian analysis indicates the limits of labours ability to do this, the limits to "labour as capital": in contrast to the liquidity of financial wealth, the largest component of household wealth is labour power which households cannot sell claims to; in practice labour carries unknown and therefore un-hedgeable risk.[665] The distinction opened up here between the liquidity and convertibility of capital vs labour is a core theme in this chapter and throughout the thesis. The chapter contributes to this debate from the perspective of rights at the workplace level, and the related question of control and workplace democracy in responding to corporate and financial generation of risks.

The potential risks and losses to workers generated by the corporate economy have come to be predominantly understood and responded to through the lens of 'social policy'. Crouch and Keune have shown that state responses to the rising social risks from marketization and financialization have been predominantly approached through social policy perspectives which tend to focus on the need for welfare states to respond to reflect changes in socio-economic risks, the drivers of which are left outside the scope of analysis.[666] The authors point to the need to look beyond traditional welfare perspectives at the full range of policy and institutional mechanisms which determine the distribution of risk, including collective bargaining and the role of forms of credit in generating and dissipating risk.[667] The traditional social policy perspective fails to address the ways in which the corporate economy is related to the production of social risks, and the role of the state in propping up this transfer of risk. As I shall show, the ways in which debt and liabilities are structured is an issue for workers welfare and for workers rights, but this falls well outside the traditional framing of the sphere of social policy and social protection. State responses to mitigating workers risk have increasingly shifted towards emphasising social security and insurance mechanisms over priority rights and effective voice and representation at the point of insolvency. I argue that priority rights are related to questions of voice and power in insolvency processes because priority secures *property rights* in a property centric economic system. Whilst social security mechanisms provide some security in the form of minimum pay-outs to workers after corporate failures, it also opens a space of permission for high-risk approaches to value extraction by capital investors and a wider transfer of risk to workers and the state. Furthermore, such approaches reflect the displacement or retreat of workers from the exercise of decisional authority at the level of

[665] Whilst certain professionals may well purchase income insurance policies, this is shown not to be a viable option for workers in general, particularly those on low or middle incomes ibid.
[666] Colin Crouch and Maarten Keune, 'The Governance of Economic Uncertainty: Beyond the "New Social Risks" Analysis' [2013] The Politics of the New Welfare State.
[667] ibid.

production, with the effect of continued erosion of workers structural and associational power and of the mechanisms and principles of economic democracy.

The question of workers' rights in insolvency and liquidation has received very limited attention in the labour law literature. The principle point of departure here has been the tension between the imperatives of corporate rescue and the rights of workers during insolvency restructures and liquidation.[668] Armour and Deakin argue that workers' position in insolvency has been significantly improved through the implementation of the Acquired Rights Directive and the Collective Redundancies Directive which, taken together, grant rights which recognise employees "firm specific human capital" and "property like claims" which are analogous to the claims of secured creditors in insolvency.[669] These claims can be leveraged by employees to shape outcomes from insolvency in ways which are efficiency enhancing. Nyombi goes further and states that the ARD, CRD and the Insolvency Directive together give employees a property claim on companies, placing them in a "highly enviable position" during insolvency.[670] In contrast, I argue that the legal structuring of workers' claims vs investors in insolvency empowers investors as the 'property' holders – understood in Robe's terms as decisional authority and rights of exclusion – and erodes workers power and the strength of consultation mechanisms by shifting workers claims into social security and insurance mechanisms at the expense of a meaningful say. As Deakin's work on takeovers shows (the case of Rover discussed in Chapter 4), the ability to leverage rights claims as capital is crucial for translating weak consultation rights into the concrete power to shape outcomes. Moreover, in focusing on the statutory improvements to workers' positions, these accounts miss developments on the side of capital; they neglect the role of private law in subverting the statutory hierarchy via the proliferation of new forms of credit and highly leveraged capital structures. Aside from the work by Deakin cited above there has been no comprehensive examination within the labour law literature of the ability of workers to leverage rights claims as 'capital'. The analysis developed here builds upon the work of Deakin representing an important contribution to this debate.

Section 1 explores the distinction between debt and equity claims, firstly as understood in the academic literature, before exploring the erosion of the distinction in contemporary corporate structures. I describe how the clarity of distinction between equity and debt claims has been eroded by the changing legal coding of credit instruments to reveal overlapping, sometimes competing and

[668] Chrispas Nyombi, 'Employees' Rights during Insolvency' (2013) 55 International Journal of Law and Management 417; John Armour and Simon Deakin, 'Insolvency and Employment Protection: The Mixed Effects of the Acquired Rights Directive' (2002) 22 International Review of Law and Economics 443.
[669] Armour and Deakin (n 668) 445.
[670] Nyombi, 'Employees' Rights during Insolvency' (n 668).

complementary claims to maximise extraction of value between a range of financial actors. This erosion of the distinction is shown to be a central attribute of the corporate form and the way it breaks down hard insider/outsider distinctions by separating the exercise of control from liability. The erosion of such distinctions is a significant aspect of the problematic of the corporate form from the perspective of workers. Section 2 looks at workers claims in insolvency and describes the way in which the priority dimension of claims has been downgraded in favour of social security provisions drawing on the National Insurance Fund. I set out the possible implications of this for workers' power in insolvency processes. Section 3 describes two significant trends in the coding of credit instruments: the shift towards priority of claims in the rights structure of high yield bonds, and the shift towards the convertibility of loans in the leveraged and syndicated loans market. I show how these transformations are deeply tied up both with the rise of private equity as a dominant model of ownership, and the wider conditions of protracted economic crisis under which this has occurred, revealing the economic drivers underlying these legal transformations. I demonstrate these transformations with two case examples. Case 1 considers the example of Phones 4U in private equity ownership and subsequently in liquidation. Case 2 focuses on the Debenhams LBO and subsequent liquidation. Section 4 sets out analysis of these cases and the wider trends which they are linked to, from the perspective of workers. I focus on the ways in which the rights structure of credit instruments and the wider corporate model serves to transfer and intensify bubble tendencies of financial markets onto workers. I also set out the ways in which the 'property' claims of creditors are reducible to power relations in the firm at particular points in time and suggest that challenging these claims should be an aim of organized labour.

## 5.1 The equity/debt distinction

### 5.1.1 Theoretical perspectives on the equity/debt distinction

What is the difference between equity and debt claims against the corporation, and why does it matter from the perspective of workers? Finance theory treats equity and debt in terms of functional equivalence. Equity and debt are understood as a range of contractual claims whose value varies in different ways in relation to the value of the issuer's assets.[671] Securities are recognised by their cash flows: debt by a fixed stream of interest payments, equity by dividends.[672] The financial structure provides a mechanism through which investors can divide the risks and rewards of the enterprise according to their preferences: generating a spectrum of tailored claims distinguishable

[671] Robert Flannigan, 'The Debt-Equity Distinction' [1994] Banking and Finance Law Review 462.
[672] F Modigliani and MH Miller, 'The Cost of Capital, Corporation Finance and the Theory of Investment' [1958] A.E.R 261.

by differences of degree, not of kind.[673] From this perspective the role of law is marginal; conforming to the contractarian minima of facilitating contracting efficiencies. This contractarian perspective obscures the legal basis of these claims and the associated hierarchies and power relations among participants in firm activity. The 'Law and Finance' literature goes beyond this purely economistic perspective in drawing the distinction upon the legal mechanisms through which claims can be enforced. Thus, equity holders receive dividends *because* shareholders can vote out Directors, and creditors are repaid *because* they can repossess collateral.[674] The set of rights possessed; insider voting rights or outsider repossession mechanisms define the claims. The normative orientation of 'law and finance' appears to be *improved investor protection* understood in terms of the rights of both shareholders and secured creditors over and above corporate management and (less explicitly) over workers. For example in international comparative analysis La Porta scores Mexico a 'zero' for creditor rights for giving workers and social constituencies absolute priority over secured creditors in insolvency restructuring.[675] The legal protections afforded investors are understood as being linked to economic development through enabling the expansion of a countries capital markets.[676]

In the corporate law literature De Fontenay notes that the privileging of equity over debt is "ubiquitous" despite the fact that corporate debt markets "swamp" the equity markets in size.[677] Traditionally corporate governance analysis has not focused upon creditor influence, being instead focused on shareholder centric corporate law arrangements, predominantly understood through the frame of agency theory and manager-shareholder conflict.[678] Creditors are afforded little role in this standard model of corporate law. Creditors rights – like workers - are understood to be defined by their contracts, unlike shareholders who are granted control rights as the 'residual claimants'. This is rooted in the differing agency costs arising from debt and equity claims.[679] Creditors enjoy no special status under corporate law, being assumed to passively observe corporate activities whilst collecting interest payments.[680] Under agency perspectives on corporate governance, both creditors and workers, as holders of fixed claims are externalised from the sphere of corporate governance. One effect of this is that the emergence of 'stakeholder' approaches to corporate governance has tended to treat workers and creditors as part of a relatively undifferentiated 'stakeholder' group, with the

[673] Flannigan (n 671) 462.
[674] Rafael La Porta and others, 'Law and Finance' (1998) 106 Journal of Political Economy 1114.
[675] ibid 1134.
[676] Rafael La Porta and others, 'Legal Determinants of External Finance' (1997) 52 The Journal of Finance.
[677] Elisabeth de Fontenay, 'Do the Securities Laws Matter? The Rise of the Leveraged Loan Market' [2014] SSRN Electronic Journal.
[678] Frederick Tung, 'Leverage in the Board Room: The Unsung Influence of Private Lenders in Corporate Governance' (2009) 57 UCLA Law Review 115.
[679] Jensen, M.C.; Meckling (n 191).
[680] Tung (n 678) 119.

assumption of an aligned interest in 'good corporate governance'. Corporate governance research has increasingly come to recognise the role of creditors, not only through episodic creditor interventions when the firm is in serious trouble, but as a routine feature during the ordinary course of business, through the strong tools lenders have to influence decision making.[681] Creditors are often seen as providing a counterbalance to shareholder control in ways which are beneficial for workers. For example credit instruments which enable creditors to impose operating conditions which oblige the firm to develop its strategy and operations are understood as beneficial for stakeholders.[682] Tung argues that financial innovation which has blurred the line between debt and equity has increasingly made the shareholder centred frame 'obsolete'.[683] The 'stakeholder' perspective of creditors is reflected in perspectives in the 'varieties of capitalism' (VoC) literature, which tends to juxtapose the purported characteristics of debt finance (large bank financiers providing 'patient capital' and close monitoring such as in the German 'Rhenish model'), to the characteristics of equity finance, in particular the characterisation of short-termist shareholder systems built on capital market finance.[684] Trade Union contributions to policy debates on corporate governance have also been dominated by the stakeholder perspective of creditors. Shareholder dividends and Director's remuneration are typically the focal point of criticism, and in the case of corporate failure workers and creditors are often presented together as the wronged parties of the shareholder centric corporate governance regime.[685]

This perspective of creditors as long-termist stakeholders appears flawed in a contemporary corporate economy which is increasingly dominated by highly leveraged extractive ownership models such as private equity. Highly leveraged lending has imposed huge costs on firms and is often implicated in tipping firms into insolvency restructures and liquidation. Moreover, the supply of credit has been critical for financing corporate control transactions such as LBOs. The social hierarchies of creditor-debtor also indicate a dimension of class: those with loanable money capital (and the ability to put it to work) and those without. This raises the question as whether debt payments need to be understood in the same light as dividends; as mechanisms for channelling surplus value, rather than simply a way of meeting the investment needs of business. From a Marxist perspective, the line of distinction is not between workers/creditors and shareholders, but between

[681] Tung (n 678).
[682] Tuulikki Haaranen and Tahir M Nisar, 'Innovative Ways of Raising Funds and Adding Value: A Stakeholder Approach to Whole Business Securitization' (2011) 54 Business Horizons 457 <http://dx.doi.org/10.1016/j.bushor.2011.05.001>.
[683] Tung (n 678) 122.
[684] Perry and Nölke (n 227) 561.
[685] See for example: TUC (n 483); Williamson, 'A Trade Union Congress Perspective on the Company Law Review and Corporate Governance Reform since 1997' (n 36); Williamson, 'All Aboard: Making Worker Representation on Company Boards a Reality' (n 43).

provides of labour and providers of money capital. Paddy Ireland has approached the question of the equity-debt distinction from this perspective. As Ireland has pointed out, the shareholder and debenture holder are 'rigidly separated' in legal theory, yet merge into each other in economic reality.[686] The sharp line in legal theory is between those inside the company with rights in it, and creditors outside the company with rights against it - those who 'own' and those who are 'owed'.[687] In economic reality this distinction significantly disappears given the extent to which passive rentier shareholders and 'outsider' debenture holders resemble each other, under conditions of liquidity in which the 'property nexus' between assets and shares (which existed in the early days of emergence of company law) has been increasingly displaced.[688] Both debenture holders and shareholders are understood (economically) as pure money capitalists "external to companies and the production process itself", yet legally the 'janus faced' share continues to straddle the industrial capital-money capital distinction.[689] For Ireland the "mutation of private property" that this exemplifies would be best remedied by shareholders to become fully *legally* externalised from the firm – like creditors – shedding their control rights to reflect their economic status as fully externalised pure money capitalists.[690] This would be a step towards completing the project of de-personification of the corporation begun in the 19th Century, reflecting the true – social - nature of corporate assets.[691] Yet trends in the corporate economy appear to run counter to this. As described in Chapter 4, the LBO model entails the use of concentrated control rights of shareholders to directly dispose over the corporate assets. Has the 'property-nexus' returned under contemporary conditions? The centrality of debt finance to the LBO model would suggest not, indicating that the control of PE managers over portfolio firms is enabled by the ability to secure large quantities of passive rentier capital. At the same time, as the above discussion indicates, the categorization of debt as fully externalised money capital has significantly been broken down. Creditors are increasingly empowered in shaping corporate decision making and contemporary corporate finance appears to be composed of a spectrum of intangible property forms which run the full spectrum blending characteristics of priority, convertibility, intervention, and control rights. The trajectory then is less one of a shift of shareholders towards the position of pure debenture holders, and more a blurring of the boundaries of both in ways which have given rise to the concentration of social power in the hands of small groups of investment and corporate managers. The legal development of intangible forms of property tied to the firm did not end with the legal reconceptualization of the share but continues to

[686] Ireland, 'Company Law and the Myth of Shareholder Ownership' (n 105) 33.
[687] ibid.
[688] ibid 48.
[689] ibid 47.
[690] ibid 57.
[691] ibid.

this day. There is a need therefore to build upon Irelands analysis through extending analysis of these credit property forms as mechanisms for surplus value appropriation, and the role of both corporate and insolvency law in these processes of transformation.

### 5.1.2 The corporation and the shareholder-creditor-worker relationship

How does the corporate entity shape the relationship between shareholders, creditors and workers in ways which matter for understanding the equity-debt distinction from the perspective of workers? Flannigan has shown how the 'classic' understanding of the debt-equity distinction is traceable to questions of liability in the law of partnership. The core characteristics of each are thus:

- **Classic equity**: *permanent* capital at *risk of loss* exchanged for rights to participation in the *control* and the *residual gain* of an undertaking. Equity holders risk that equity will either appreciate or be lost, its returns being *contingent on performance*.
- **Classic debt**: capital advanced for a *fixed* return *without participation rights*. Creditors have rights to recover original principle, which is *not contingent on performance* or other factors. No positive control powers so *cannot affect the risk of the undertaking*.[692]

Whilst inevitably both are exposed to a degree of risk of the enterprise, the 'floor risk' or enterprise viability, only equity is exposed to the performance risk above the floor risk of viability.[693] As Flannigan shows, the legal character of this classic distinction is rooted in partnership law, and the question of the distinction between a debtor-creditor relationship and a partnership relationship. This was crucial as partners were jointly and severally liable for all debts of the enterprise. The 19th Century caselaw suggests that taking a share of the profit was the principle criteria for partnership, being understood as indicating common cause: sharing the contingency risk of the venture. Sharing profit (contingency risk) was however prima facie but not conclusive. The question of carrying on business in common with others was also linked to the aim or ability to *assume or define the risk* of contingent gain through sharing in control and therefore defining the risk of the undertaking.[694] In contrast to the corporation then, partnerships required a fixed claim and investor passivity in exchange for limited liability. Passivity is not a requirement for shareholding (as Ireland shows the corporate form was designed for passive rentier JSC investors from the outset) but nor is there any assumption that shareholders will partake in control. The contribution of the corporate form then was to erode this dimension of the equity-debt distinction, as clear insider-outsider distinctions disappeared as a result of shareholder limited liability.

[692] Flannigan (n 671) 451–2.
[693] ibid 452.
[694] ibid 454.

Equity and debt instruments now blend many of the defining characteristics of the 'classic' distinction. Senior creditors may exercise control through loan covenants which control and restrict the actions of management during the ordinary course of business.[695] Financial covenants provide specific financial benchmarks which borrowers must fulfil during the period of the loan. These covenants protect the asset values underlying their claims and specify triggers for insolvency. These typically may specify minimum net worth, maximum debt/earnings, minimum cash flow, and levels of capital expenditure. They may include 'sweep covenants' requiring payments when cash pile threshold is exceeded.[696] Certain types of bonds have in-built contractual priority measures in the form of prohibitions on subordination to other debts. Creditors may also hold veto powers over significant transactions such as change of control, sale or grant of liens on assets, major acquisitions or mergers, or change of nature of business. [697] As such, creditor's influence can often be seen to exceed that of many shareholders, shaping fundamental business financing, investment and operational decisions. Creditors with lower priority in the capital structure are compensated either through high interest rates or 'equity-like' mechanisms to capture potential gains (they are exposed to the contingency risk of the enterprise). For example providers of 'mezzanine' finance, who typically retain security but are subordinated to senior debt and therefore assume higher risk typically balance this through high rates and a 'warrant' option to buy equities to capture future upside benefits.[698] Unsecured credit forms such as 'Payment in kind' notes (PIK notes) allow payment (including interest) to be deferred for a number of years. Interest is added as more debt at the end of the loan. As all payments are deferred and the debt is subordinated to all others interests rates are extremely high (up to 20%).[699] The combination of high rates and deferred payment and low seniority exposes holders very directly to the contingency risk of the business as returns are contingent upon success. Conversely, securities such as preference shares can be understood as a kind of 'debt-like' form of equity. Preference shares emerged as a mechanism for raising capital under difficult circumstances, with the offer of a fully functioning share plus preferential dividend and capital recovery rights. As Flannigan highlights, over time, issuers were able to reduce this superior package to simply a preferential dividend and no voting rights, which passive investors were happy to purchase.[700] The preference share can be used to tailor returns form LBOs. In the buyout of Heinz by 3G Capital and Warren Buffet's Berkshire Hathaway Capital Partners the nominal amount

[695] Tung (n 678) 155.
[696] ibid 157.
[697] ibid.
[698] Fanner, Lambers and Shaw (n 535).
[699] ibid.
[700] Flannigan (n 671) 458. Extensive use of preference shares is notable amongst US tech companies seeking to retain concentrated control whilst accessing capital market finance.

of debt was low for an LBO, with only 42% debt ($12bn out of $28bn paid). The deal however included $8bn preferred stock for Berkshire Hathaway paying 9% plus share options.[701] The holders get a debt-like fixed claim from the outset, plus voting rights and options to capture future upside through optional claims on future profits.[702]

### 5.1.3 Summary

The relationship between shareholders, creditors and workers mediated through the corporation must be understood through the labour/capital distinction at the heart of the labour relationship. The stakeholder perspective obscures this, grounded as it is in a shareholder centric understanding of corporate governance. Yet creditors cannot be understood solely as fully externalised money capitalists. Creditors, like shareholders, may both define and share in the contingency risk of the business whilst remaining insulated from any of the liabilities this activity may incur. Their exposure is limited to the principal advanced. As described in Chapter 4, the combination of control, limited liability and the potential for uncapped gains incentivises equity-holders to shift risk onto other parties. The erosion of the distinction is an outcome of the corporate legal person and the way it erases sharp insider/outsider distinctions. The corporation breaks down the equity/debt distinction through lack of inside/outside distinctions, and that it is this very lack of hard lines (which enable its use as linchpin for market-centred property forms) that is the advantage of the corporate form for investors in relation to workers, as is demonstrated by the range of debt and equity types blending grades of speculative capital with grades of control and priority. Yet, as insolvency law shows the rights structures of both debt and equity instrument matter. The principle mechanism for securing creditor interests is different to that of equity: fixed claims to be paid monies owed during the ordinary course of business backed by the ability to trigger insolvency proceedings, and relative hierarchy in control and asset realizations from such proceedings. These rights are grounded not in corporate law, but insolvency law, for which the equity-debt distinction is fundamental. The rights of creditors over workers – both during ordinary times and times of financial distress – can only be understood through what happens in insolvency and the ways in which rights are grounded in insolvency law. The next section looks at the mechanisms of worker protection and the ways in which risks and losses are shifted to workers in insolvency law. [703]

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[701] 'The More Things Change: Heinz and the Varieties of Private Equity Buyout' (*IUF private equity buyout watch*, 2013) <http://www.iufdocuments.org/buyoutwatch/2013/03/the_more_things_change_heinz_a.html#more>.

[702] Dividends to preferred stockholders can be skipped if the company cannot pay a dividend, but typically accumulate if missed, requiring payout before any common stock dividends, they also have priority over common stock (only) in liquidation.

[703] Practical Law Restructuring and Insolvency, 'Pre-Packs in Administration: Overview' (*Thomson Reuters Practical Law: Practice Note*) <https://tinyurl.com/3nvx8y9j>.

**Box 1: Insolvency law definitions**

**Insolvency:** A company is deemed to be insolvent if it has in sufficient assets to discharge its debts and liabilities. Under Section 123 of the Insolvency Act 1986 ('the Act') a company is deemed unable to pay its debts where 1) It has failed to comply with a creditor statutory demand 2) A creditor has attempted an enforcement process without success 3) It is proven to a court the company cannot pay its debts as they fall due (cash flow test) 4) It is proven to a court that the value of assets is less than liabilities (balance sheet test). Insolvency will lead to either a 'pre-pack' sale, administration or liquidation. ('Insolvency (corporate)', *Thompson Reuters Practical Law: Glossary*)

**Pre-pack:** A pre-pack sale is negotiated outside of a company's administration, and the business and/or assets sold immediately upon appointment of the administrator, sometimes to the original shareholders or directors of the insolvent company. The pre-pack may involve the sale of the business on a going concern basis, or may only entail some assets, the rest being sold-off separately or put into liquidation. The negotiation requires approval from secured creditors where they have security over the assets concerned, but not unsecured creditors who may face losses. Pre-packs are not provided for or defined in the Act. The legal basis is the established right of an administrator to exercise statutory powers to sell company property without court or creditor approval (Practical Law Restructuring and Insolvency, 'Pre-Packs in Administration: Overview' *Thomson Reuters Practical Law: Practice Note*.)

**Company Voluntary Arrangement (CVA):** A CVA enables the renegotiation of a company's debts via a 28 day moratorium on creditors enforcing claims. Company directors remain in post throughout the process. Sections 1 – 7B the Act.

**Administration:** A process under section 8 through which a company and its assets may be reorganised or realised under the control of an administrator. A company may be put into administration either by court order (court route), or by the company, its Directors, or the holder of a qualifying floating charge filing documents at court (out-of-court route).

**Liquidation:** The process of asset realisation and distribution to creditors by a liquidator, in the order given by the section 175-176a and the Insolvency Rules 2016. Liquidation may be voluntarily instigated by the members of the company, or compulsory following a court order.

**Security:** A security interest is understood to give the holder a proprietary claim over assets in order to secure repayment of a debt. Security may take the form of a pledge (creditor takes possession of goods or title to assets), contractual lien (grants creditor power by contract to detain assets), mortgage of chattels (transfers ownership until repayment is completed), equitable charge (gives creditor right to have an asset sold to discharge a debt, may be fixed or floating). (Vanessa Finch, 'Insolvency and Corporate Borrowing', Corporate Insolvency Law 2nd Edition, Cambridge University Press 2012 108-9)

**Fixed/floating charge:** A fixed charge gives the charge control over dealing or disposal of an asset by the chargor. A floating charge is taken over all the assets or a class of the assets of a company. Charged assets may be disposed over by the chargor without reference to the charge-holder. A floating charge crystallizes into a fixed charge upon default. (ibid. 92)

**Pari passu:** The *pari passu* principle is said to be a fundamental principle of insolvency law. Pari passu means that unsecured creditors will share 'rateably' in available (unsecured) assets on distribution, being paid pro rata to the amount of their pre-insolvency claims. Where unsecured creditors are placed into classes (such as preferred creditors) by insolvency law, *pari passu* means unsecured creditors will share rateably within the classes allocated (all ordinary unsecured creditors will be treated alike). (Vanessa Finch, 'The Pari Passu Principle', Corporate Insolvency Law 2nd Edition, Cambridge University Press 2012. 599-600)

**Prescribed part:** The 'prescribed part' is a ring-fenced carve out from assets available for floating charge holders to be made available for distribution to unsecured creditors, up to a cap of £600,000 when created before 6 April 2020, or £800,000 if created after. (Ibid, 607)

## 5.2 Insolvency law, priority rights, and the position of workers in insolvency

Whilst perspectives in corporate finance may focus on the contractual blending of investor claims, in insolvency these claims are realized against a very real set of statutory distinctions. The Insolvency Act 1986 and the Insolvency Rules 2016 together create a statutory scheme which places claimants in classes of creditors ranked in a hierarchy which determines how claims must be dealt with by an insolvency practitioner (acting either as an administrator or liquidator) when applying asset realizations to meet claims.

- Secured creditors: Fixed charge holders (where created as a fixed charge, see box 1) are entitled to full proceeds of realization of the asset, with no deductions other than from senior fixed charge claims
- Liquidators fees and expenses
- Preferred Creditors. 'Ordinary' preferential creditors include certain employee claims: contributions to occupational pension schemes, wages and holiday pay subject to statutory limits. 'Secondary' preferential creditors including certain HMRC debts
- Secured creditors: Floating charge holders. Floating charges crystallize on insolvency. Entitled to proceeds of realisation of assets, subject to claims of preferential creditors, and the 'prescribed part' (see box 1)
- Unsecured creditors: All employee non-preferential claims, trade creditors, consumer creditors and all other lenders with a 'provable debt' and without security
- Statutory interest incurred on all unsecured debts post-liquidation
- Shareholders[704]

The position of shareholders, who are last in the order for distributions is notable. This is consistent with the shift in control rights from shareholders to creditors in UK insolvency law upon default. The position in insolvency reflects the rationale of shareholders holding control rights on the basis that their (profits) claims are unfixed and contingent. This is understood as characteristic of the way a standard debt contract shares control rights on a sequential and contingent basis: whilst repayments are made, the debtor has control of the asset, upon default, control of the asset switches to the creditor.[705] Top priority goes to secured creditors. UK insolvency law provides a favourable protection for secured creditors, and as such a favourable environment for corporate finance.[706]

[704] All data in list from: Practical Law Restructuring and Insolvency, 'How Are Assets Distributed to Creditors in Corporate Insolvency Procedures?' (*Thomson Reuters Practical Law: Practice Note*) <https://tinyurl.com/4kpyzxsd>.
[705] Armour and Deakin (n 668) 448.
[706] La Porta and others (n 674).

### 5.2.1 Priority and workers monetary claims.

A proportion of workers' claims is ranked as preferential (or priority) debt. The status of 'preferential creditor' is understood as an intervention by insolvency law in the pre-insolvency contractual positions of parties, reflecting various public policy concerns such as economic efficiency or fairness of outcomes.[707] The background presumption of insolvency law is that unsecured creditors positions are ranked *pari passu* (see Box 1.). The question of employee priority in insolvency was addressed by the 1949 ILO Convention on protection of wages which states employees should be "treated as privileged creditors" for wages due to them prior to bankruptcy, although this requirement is subject to periods and amounts "as may be determined by national laws or regulations".[708] As Muciarelli shows, this emphasis by international institutions on worker priority rights has shifted markedly since 1949. By 2001 the World Bank *Principles and Guidelines for Effective Insolvency and Creditor Rights System* were advocating for the need to protect the system of secured lending. The *Principles* are remarkably hostile to employee priority, arguing that "Such priorities should be eliminated, reduced, and, where public policy concerns are compelling, addressed by other legal reforms that do not compromise the system for secured lending", such as social security and insurance schemes.[709] The EU Directive on the protection of employees in the event of the insolvency of their employer (2008/94/EC) exhibits a similar preference for social security mechanisms in the form of 'guarantee institutions' over worker priorities.[710] In the UK, the priority mechanism established under the IA 1986 (the preferred creditor status) has been allowed to drastically fall in real terms value since it was established.[711] The Act provides for certain wages, holiday pay and pension contributions to be treated as 'ordinary' preferential creditors.[712] Unfair dismissal compensation, redundancy pay and notice pay are not considered preferential debts.[713] The wage component for work done in the four months prior to the insolvency date was set at a maximum (total) of £800 per person at the time the Act was passed and remains the same 36 years later.[714] A real terms calculator based upon RPI inflation puts the real terms value of this in 2022 at £2585. This is a remarkable downgrading of the proportion of workers claims which are treated as preferential within the insolvency estate. Wage and holiday claims in excess of this limit are ranked as unsecured. In practice the majority of debts owed to employees in insolvency are unsecured and as such fall second to last in priority on

[707] Finch, 'The Pari Passu Principle' (n 662) 599.
[708] Article 11, Protection of Wages Convention, 1949 (No. 95) REF
[709] Federico M Mucciarelli, 'Employee Priorities in Insolvency Proceedings and Wage Guarantees: A Critical Assessment' [2016] SSRN Electronic Journal 6.
[710] Directive 2008/94/EC ibid 8.
[711] ibid 9.
[712] Insolvency Act 1986 schedule 6, category 5 (8-10).
[713] Nyombi, 'Employees' Rights during Insolvency' (n 668) 424.
[714] Insolvency Proceedings (Monetary limits) Order 1986 (SI 1886/1996) article 4

realization of assets.[715] Unsecured creditors are likely to get a few pence in the pound on debts owed.[716] However, where the employer is insolvent and the employment has been terminated employee claims may be met by the Redundancy Payments Office (RPO), which allocates payments from the National Insurance Fund (NIF), which then seeks to collect from the insolvency estate 'standing in the shoes' of the employee.[717] Directive 2008/94/EC required that member states must establish 'guarantee institutions' to guarantee employee pay.[718] The UK implemented the Directive through the National Insurance Fund.[719] The NIF guarantees basic minimum payment of specific debts. These claims however are also capped. Up to April 2022 arrears of pay are claimable up to eight weeks pay, capped at £544 per week, holiday pay owed up to 6 weeks, statutory notice pay for days worked but not paid during notice periods, and statutory redundancy payments, all subject to the same weekly caps. Where a protective award has been made this is also claimable from the NIF, however the protective award and unpaid wages are subject to a combined total of 8 weeks pay. Damages for wrongful dismissal do not count as 'wages and salaries' for the purposes of the Insolvency Act and so rank as unsecured.[720] For the year to end 31 March 2021 redundancy payments from the NIF totalled nearly £489m and redundancy losses to the NIF were over £447m.[721] These losses total the amounts paid out to employees of insolvent companies which ultimately prove irrecoverable, due to ranking as unsecured debt. On this basis 91% of redundancy claims were irrecoverable, perhaps indicating the fate of unsecured creditors, as well as the scale of transfer of risk and losses to the scheme.[722] As the TUC have pointed out, NIF limits have often lagged behind median weekly pay.[723] However, the 2021 caps are close to the median figure of £581.[724] The situation of agency workers, those on zero hours contracts and the self-employed is far worse as they have no recourse to the NIF and no preferential status.[725] Where companies go into insolvency

[715] Practical Law Employment, H Swindle and J Jootla, 'Overview of the Employment Aspects of Insolvency' (*Thompson Reuters Practical Law: Practice Note*) <https://tinyurl.com/5n6uyne4>.
[716] ibid.
[717] Finch, 'The Pari Passu Principle' (n 662) 612.
[718] Directive 2008/94 - Protection of employees in the event of the insolvency of their employer
[719] s 166 Employment Rights Act 1996
[720] *Leeds United Association Football Club Ltd (In administration) [2007] EWHC 1761 (Ch)*
[721] HMRC, 'Great Britain National Insurance Fund Account for the Year Ended 31 March 2021' (2021) <https://www.gov.uk/government/publications/national-insurance-fund-accounts/great-britain-national-insurance-fund-account-for-the-year-ended-31-march-2021--2#other-financial-information>.
[722] ibid
[723] TUC (n 483) 11.
[724] Office for National Statistics, 'Average Weekly Earnings in Great Britain: September 2022' (2022) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/averageweeklyearningsingreatbritain/latest>.
[725] The question of 'worker' claims for preferred status is unclear as the IA 1986 does not specify the meaning of 'employee', if the ERA 1996 is applicable then workers do no qualify but this is unclear. Self-employed workers cannot have preferred status.Practical Law Employment, 'Claiming against an Insolvent Employer' (*Thomson Reuters Practical Law*) <https://tinyurl.com/yc429b73> accessed 15 October 2022.

with underfunded pension schemes, schemes may fall into the Pension Protection Fund. Claims to the fund are also capped, currently £41,461 for the year 2021-22.[726] PPF claims are outside the insolvency estate, but the PPF do hold a vote at creditor meeting s during insolvency proceedings where pensions will fall into the fund. So whilst the amount workers can claim as preferential creditors has been allowed to dramatically depreciate, with the effect that the largest proportion of worker claims rank as unsecured, this has been counterbalanced (to a significant degree) by the social security mechanism of the NIF (with the exception of workers on precarious or self-employed contracts). As Muciarelli shows, this shift reflects a preference amongst major international institutions to protect the position of secured creditors in corporate finance. However, the question of priority rights in insolvency is not only one of pay-outs, but of voice and control within insolvency processes. This raises the question of how allocation of priority rights, and the function of the NIF confers bargaining power within these processes.

### 5.2.2 Priority rights and restructuring

Workers' rights in insolvency extend beyond the question of securing outstanding monetary claims, to the question of shaping the outcomes of the insolvency proceedings. Workers rights in the process are principally governed by the application of TUPE consultation rights, and rights to consultation in contemplation of collective redundancies.[727] Failure to consult also opens the possibility to bring a 'protective award' claim. Approaches in the labour law literature to this have focused on the enhancement of worker voice in insolvency restructuring as a result of the UK implementation of the Acquired Rights Directive and the Collective Redundancies Directive.[728] Yet these studies have not focused on the question of priority rights and the way in which they shape workers power within these proceedings.

Priority rights in restructuring go to the secured creditors holding a fixed or floating charge over the corporate assets. The power to replace management by appointing the administrator is a key basis for control in restructuring for holders of a floating charge over all or substantially all of the company assets.[729] In the UK the holder of a qualifying floating charge ( QFC) has the power to appoint an administrator under the charge, pursuant to the QFC holder out- of-court route to trigger insolvency.[730] The out-of-court route was introduced by the Enterprise Act 2002 which also

[726] Pension Protection Fund, 'Compensation Cap Factors 2021' (2021) <https://www.ppf.co.uk/sites/default/files/2021-03/Compensation_cap_factors_2021.pdf>.
[727] The latter as contained in s. 188 of Trade Union and Labour Relations (Consolidation) Act 1992
[728] Nyombi, 'Employees' Rights during Insolvency' (n 668); Armour and Deakin (n 668).
[729] La Porta and others (n 674) 1135.
[730] schedule B1 Insolvency Act 1986 (14-21) rules 3.16 - 3.22 Insolvency Rules 2016

restricted the ability of floating charge holders to appoint an administrative receiver to enforce their security, significantly reducing the ability of a secured creditor to unilaterally enforce their claims.[731] The principle aim of these reforms was to embed a 'rescue culture' maximising businesses 'going concern' value and seeking to avoid liquidation where possible. Once appointed the insolvency practitioner (IP) acts as an agent of the company and effectively becomes the employer. The right to appoint is therefore comparable to shareholders' right to appoint Directors, shifting to senior secured creditors in insolvency. The primary function of administration and liquidation procedures is to realise the assets of the insolvent company and to distribute cash realizations of this to the company's creditors.[732] The IP is however bound by specific goals regarding protecting the company as a going concern and the interests of the creditors 'as a whole'. The absolute priority of senior secured creditors in administration is tempered by the requirement that the process must meet one of three statutory objectives:

- The rescue of the company itself (distinct from the business of the company) as a going concern. (primary objective)
- The achievement of a better result for the company's creditors as a whole than would be likely if the company was placed directly into liquidation. (secondary objective)
- The realization of some or all of the company's property to distribute to secured or preferential creditors (the third objective)[733]

Administrators must pursue the primary objective of rescue of the business as a 'going concern', unless this is not 'reasonably practicable', or an alternative solution would better serve the interests of the company creditors 'as a whole' (objective 2). The third objective of realizing property for secured creditors may only be pursued if will 'not unnecessarily' harm creditors 'as a whole'.[734] However, despite the formal parity of the 'creditors as a whole' expressed here, IP's face a conflict of interest. IPs consider their primary responsibilities to be to the senior secured creditors who appoint them, and may face significant pressure from large creditors to quickly unwind the company and release the assets.[735] Worker voice within this process is provided by consultation rights governing collective redundancies and transfers.[736] Failure to consult opens the possibility for workers or unions to bring a 'protective award' claim. Yet the cost of the protective award claim are often

[731] s 250 Enterprise Act 2002 c. 40
[732] Practical Law Restructuring and Insolvency (n 704).
[733] Insolvency Act 1986 Schedule B1 (6)
[734] ibid
[735] TUC (n 483).
[736] Trade Union and Labour Relations (Consolidation) Act 1992 s 188, Transfer of Undertakings (Protection of Employment) Regulations 2006 (13)

considered to be less than those of continuing to run the business whilst the consultation process proceeds, leading to a cost benefit analysis in favour of ignoring employee voice rights.[737] In addition, it is frequently the case that the financial position of the firm is completely untenable by the time an IP is appointed leaving asset realization as the only goal. As Finch points out it is also the case that there has been a significant shift towards informal pre-insolvency restructuring in recent decades to the extent that most restructurings occur outside of formal proceedings.[738] This includes the emergence of the pre-pack sale (see Box 1) in which unsecured creditors and employees have no voting or consultation rights. These trends suggest that the formal enhancement of employee rights under the TUPE and collective redundancy provisions, and the nominal downgrading of the position of secured creditors under the EA 2002, may be less significant than they appear.

The downgrading of priority claims would appear to primarily serve the interests of secured creditors. The emergence of the NIF as a social security mechanism clearly will have benefits in terms of mitigating hardship for workers, at least for those with access to it. Yet the preference of policy elites for social security mechanisms over priority rights may come at a significant cost to workers power and voice in corporate restructuring. Moreover, the given structure of control and priority rights in corporate and insolvency law underpin practices of value extraction in the ordinary course of business. These practices are rooted in part in the priority and convertibility dimensions of creditor rights. It is necessary then to look beyond the statutory worker protective mechanisms at the point of insolvency, to the processes of credit creation and its economic dynamics and legal characteristics. The following sections set out empirical examples of how workers' interests are harmed by the coding of debt assets for convertibility and priority in the context of dynamics of credit markets and the market for corporate control.

## 5.3 Transformations in the legal coding of debt claims

Credit markets, and the debt instruments issued and traded on them have been radically reconfigured in the period since the early 1980s. These are transformations both of the legal characteristics of dominant credit instruments in corporate finance: bonds and loans, and of the roles and identities of the actors involved in issuing, originating, trading and enforcing these claims. Bonds and loans have traditionally been viewed as contrasting forms of debt. Bonds are seen as long term passive investments in large, rated, listed corporations, and as such requiring minimal oversight

[737] TUC (n 483) 8.
[738] Vanessa Finch, 'The Dynamics of Insolvency Law: Three Models of Reform' (2009) 3 Law and Financial Markets Review 438, 439.

and thusly being a highly tradeable, liquid asset.[739] Loans by contrast are seen as short term credit extensions typically to smaller more opaque companies requiring intensive monitoring. As such they are traditionally the preserve of large banks and are inherently illiquid.[740] Accordingly, loans are associated with seniority in capital structures - priority rights - and bonds are associated with low priority but high convertibility. What has happened since the early 1980s has been a shift towards bonds (in particular, speculative, high risk-high-yield bonds) gaining priority rights, and loans (in particular, leveraged loans) gaining convertibility. This process has been tied up with the rise of private equity firms and the LBO model, as well as the shift of banks from an originate and hold model to originating loans and trading on open financial markets. This shift on the part of the banking sector has been accompanied by a rise of non-bank credit holders such as hedge funds, frequently holding debt for the purposes of leveraging influence in corporate control transactions. These transformations have also been driven in response to financial crises and state responses to crises, in particular regulatory reforms of banks, low interest rates, and the associated search for yield by private actors seeking return's which in turn has driven credit instrument innovation and credit bubbles. These processes cannot be understood simply in terms of capital market dynamics. Rather, they reflect concerted strategies of concentrations of industrial and money capital in exerting control and extracting value from wage labour. Section 2.1 describes the dynamics of priority rights in the bonds market. 2.2 focuses on convertibility and leveraged loans. Both sections also consider the wider dynamics within which these transformations occurred. Sections 2.3 and 2.4 set out two case studies: Phones 4U and Debenhams. Section 3 then explores the impacts of these processes on workers and considers the ways in which these transformations are rooted in the labour relationship.

### 5.3.1 Seeking priority: transformations in the bonds market

The role of capital markets in UK corporate debt finance has expanded enormously in the past few decades. UK corporate borrowers have traditionally relied heavily upon bank finance, in contrast to the US reliance upon capital markets. US borrowing has traditionally split 70/30 in favour of raising debt on capital markets, with UK borrowing a reverse 30/70 split in favour of bank finance.[741] In the period since the 1980's the expansion of private equity funds has been closely related to a shift towards the raising of UK corporate debt through capital markets. The emergence of new forms of high yield debt finance have been integral to the expansion of the PE model. High-yield debt refers to 'non-investment grade' debt (where borrowers are rated less than B++ by ratings agencies or

[739] de Fontenay (n 677).
[740] ibid.
[741] Sarah Paterson, 'The Adaptive Capacity of Markets and Convergence in Law: UK High Yield Issuers, US Investors and Insolvency Law' (2015) 78 Modern Law Review 431, 432.

have no rating). Up to the 1980's this type of borrowing was most common in the form of markets for the 'junk bonds' issued by 'fallen angels': listed corporations which had lost investment grade status.[742] Investment banks launched the modern high yield market by selling new bonds from non-investment grade securities to finance takeovers and M&A, a key factor in the 1980's LBO boom.[743] Innovations in bond issuance were a key ingredient of the expansion of the LBO model across the UK care home sector. The first recorded 'whole business securitization' (WBS) was used to package up care home property assets to raise debt finance through bond sales in the early 1990's.[744] UK High Yield Bond (HYB) issuance (meaning sub investment grade) for listing on US secondary markets grew steadily through the 1990's.[745] The expansion of the UK high-yield bond market was however constrained by the dominant position of the banks as providers of senior secured loan finance. The strong position of the banks in insolvency was rooted in the uniquely creditor friendly (pre- EA 2002 reforms) power of senior secured creditors to dismember companies and withdraw assets without regard for unsecured creditors. This contrasted with the conditions in which the US high-yield bond market had evolved, in which capital market finance was more dominant, and the 'debtor-in possession' model of bankruptcy gave HYB holders a 'seat at the table', whilst (typically) remaining contractually subordinated to senior secured bank debt.[746]

[742] Brown (n 516) 4.
[743] ibid 5.
[744] 'Whole Business Securitisation' (*Vinod Kothari Consultants* , 30 January 2007) <http://vinodkothari.com/wholebusiness/> accessed 27 January 2021.
[745] Paterson (n 741) 439.
[746] John Ryan, 'Evolving Intercreditor Relationships among European High Yield Issuers' [2000] Banking Law Journal.

**Box 2: structural and contractual subordination**

Private law coding for priority rights can be understood as a spectrum from types of security claims through to mechanisms for subordination, which can be contractual or structural:

**Contractual subordination:** enables creditors to agree to rank below other contractual claims and has become a critical aspect of contemporary corporate finance. The courts do not allow unsecured parties to contractually enhance their *pari passu* position, but contracting to subordinate is allowed. This has enabled the emergence of subordinated high-risk debt, as contracting to subordinate bypasses other secured creditor restrictions on corporate borrowing.[1] This has allowed companies to draw in high risk/reward creditors and facilitated the expansion of corporate debt. (Vanessa Finch, 'The Pari Passu Principle', Corporate Insolvency Law (2nd Edition, Cambridge University Press 2012)

**Structural subordination:** entails granting security at a different level within the corporate structure. Holders of debt will have a claim at the holding company level. The holdco will typically have no assets other than its (substantial) equity claims upon the operational company below (which holds the majority of the assets and against which senior secured lenders will hold security). In insolvency these claims will likely be of no value, shareholders being last in the distribution. In the absence of any guarantees upon the opco lenders will end up enforcing against an empty holdco. (John Ryan, 'Evolving Intercreditor Relationships among European High Yield Issuers' [2000] Banking Law Journal)

### *Subordination, security, and the UK high-yield bond market*

During the early period of expansion of the UK HYB market the UK banks were insisting upon structural subordination of HYB's, a potential barrier to the expansion of the market for UK HYB's, as this contrasted with the contractual subordination offered by US issuers. At this time subordinated creditors were trading priority for returns. As Paterson shows this trade-off likely underpinned the early growth of the UK HYB market. It is likely that the early boom in HYB investment was calculated by reference to likelihood of default rather than likelihood of achieving a return once default occurred.[747] The UK and European HYB market was to change drastically, however. In 1998 Russia defaulted on its debt, with major implications for financial firms exposed to Russian debt, including the near collapse of the hedge fund Long Term Capital Management. This triggered Wall Street firms

[747] Paterson (n 741) 439.

to reduce their debt exposure, driving a liquidity crisis in the bonds markets.[748] The crisis led to a major influx of US HYD investment into European high yield markets, with at least ten European HYD funds opening in the second half of 1999 and an estimated $200m inflows per month during the period.[749] In 2002 the expanded role of US HYD investors would make an impact. Following significantly greater default losses in Europe than the US in 2002 a coalition of US HY investors organised a boycott of European HYB issues, on the basis of opposition to structural subordination.[750]The boycott demonstrated the power of the new US bondholders, and the UK banks shifted to accommodate them, increasingly allowing investors to take either subordinated guarantees or direct asset security from opco's.[751] Issuance of secured bonds has soared in recent years.[752] The 2021 ASDA buyout was financed by package including £2.25bn 5 year secured notes, the largest ever single-tranche issue in the European high-yield market.[753] HYB investors can now enjoy a high-return, highly liquid asset with senior secured rights.

### 5.3.2 Seeking convertibility: transformations in the loans market

If the search for priority rights has been the characteristic of transformations in the HYB market, conversely investors in the leveraged loans market have sought convertibility. The development of the syndicated 'leveraged loan' market in the late 1990's was the next significant development for financing takeovers. This transformation in the loans market occurred in a context in which the major banks (traditionally dominant in the loans market) were facing competition from insurance companies, investment banks and mutual funds, pushing them towards new lines of business. These pressures, combined with the Basel II (international banking) regulations (2004) which required banks to diversify their assets, were the trigger for the banks to radically transform their model by shifting to loan trading.[754] Loan syndication and trading would rapidly become the world's largest source of corporate finance.[755] Leveraged loans are non-investment grade rated loans, invested in by a group of lenders (a syndicate), made up of banks, finance companies, institutional investors, mutuals and others.[756] Leveraged loans are typically senior secured in the capital structure (first or second lien) and may or may not have covenant provisions.[757] Syndication involves the sale of the

[748] Glenn Yago and Susanne Trimbath, 'New High Yield Markets' [2003] Beyond Junk Bonds 82.
[749] ibid 90.
[750] Paterson (n 741) 443.
[751] ibid.
[752] de Fontenay (n 677).
[753] LCD News, 'Asda Allocates Loan, High-Yield Bonds for Buyout; Terms' (*S&P Global Market Intelligence*, 2021) <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/asda-allocates-loan-high-yield-bonds-for-buyout-terms-62597229> accessed 7 April 2022.
[754] de Fontenay (n 677).
[755] ibid.
[756] https://www.investopedia.com/terms/s/syndicatedloan.asp
[757] Brown (n 516) 5.

loan by the originator (typically an investment bank) to investors in leveraged loans, via the use of a structured vehicle such as a Collateralised Loan Obligation (CLO).[758] In the years preceding the GFC saw a shift from hold-to-maturity loans to active trading of loans. Covenants are typically amendable over the life of a loan, requiring negotiation which is difficult in an active secondary market. Convertibility was enabled by a reduction in loan covenants and the proliferation of 'covenant-lite' loans as the due diligence on loan covenants came to be seen as an obstacle to a rapidly trading marketplace.[759] Crucially, covenants preventing the borrower from exceeding a given leverage ratio were stripped out.[760] The use of Collateralised Loan Obligations to package up loans mitigated the risk of this by enabling diversification of risk for the lenders.[761] The simplified CLO package was easier to sell, facilitating the expansion of a liquid market. Whilst increasingly convertible, new leveraged loan products retained relative seniority in capital structures as exemplified by the emergence of 'mezzanine' or 'second-lien' finance: secured high yielding loans which are contractually subordinated to senior secured claims (as described above section 1.2).

Covenant-lite loans proliferated in US loan markets in the run-up to 2008. During this period private equity funds had been spending big, with a major round of leveraged buy-outs in 2006-07 leaving huge numbers of firms highly indebted exposed to the crisis, and raising concerns of a huge round of insolvencies amongst PE owned firms.[762] By 2007, the 10 largest private equity firms were already significantly larger by numbers of people employed within their portfolio companies than the 10 largest corporations in UNCTAD's top 100 TNC's list.[763] The expected reckoning never came. The new era of near zero interest rates spurred by the crisis allowed steady refinancing of the huge leverage carried by PE controlled companies.[764] Instead the combination of low interest rates and the promise of 'outsize returns' by PE firms pushed many pension funds (themselves facing huge liability gaps arising from the GFC) towards private equity and high yield lending, ensuring a ready influx of investment capital.[765] The financial crisis also intensified the shift of private equity companies towards capital market financing as the regulatory constraints and leverage restrictions placed upon

[758] ibid.
[759] Sarah Paterson, 'The Rise of Covenant-Lite Lending and Implications for the UK's Corporate Insolvency Law Toolbox' (2019) 39 Oxford Journal of Legal Studies 654, 662.
[760] de Fontenay (n 677).
[761] The loan originator negotiates the loan knowing that they will not be holding the debt, but selling it on via a CLO vehicle which enables buyers to purchase tranches of debt. the effect is to increase the distance between the holder of the debt and the originator. The CLO holds a large and diversified portfolio of loans nominally reducing the risk.
[762] Find the ref for this its in the
[763] Blum and Rossman (n 569) 160.
[764] H MacArthur, G Elton and B Rainey, 'The Impact of Covid-19 on Private Equity' (*Bain: Brief*, 2020) <https://www.bain.com/insights/the-impact-of-covid-19-on-private-equity/> accessed 12 August 2021.
[765] McKinsey and Company (n 15).

the banking sector pushing PE borrowers towards debt capital markets to access the required levels of leverage.[766] Central banks had effectively bailed out the private equity business model, private equity had "won the crisis".[767] The period since the 2008 crisis has seen the rise of private equity towards a dominant mode of ownership, with private markets accounting for 50% of new funds raised in 2019.[768] Private equity's net asset value has grown more than sevenfold since 2002, twice as fast as global public equities.[769] Leverage ratios had returned to their 2008 peak by 2018.[770] In 2019 the UK was the third largest target country for private equity deals by value ($68.44bn) (US 372bn, China 84bn, Germany next largest 36.9bn, Spain 24bn, France 22bn UK more than double Germany and 3x).[771] Issuance of leveraged loans was a major source of funding for this activity. By 2019 leveraged loans had reached a further all time high: globally $3.4 trn, or 11% of total advanced economy credit to NFC's.[772] The boom was accompanied by a rapid decline in underwriting standards. Less than 10% of global leveraged loans were 'cov-lite' in 2010, yet by 2018 this had reached 60%, and 80% in the UK. By comparison the pre-crisis 2008 peak in cov-lite issuance was 20%.[773] Rapid growth in leveraged lending driven by increased securitization activity through CLO's and demand from investment funds.[774] Once viewed as symptoms of pre-crisis excesses in the credit market, covenant-lite leveraged loans are now a major feature of the UK buyouts market.[775] The majority of funds generated through issuance of leveraged loans were used for the purposes of corporate control and maximising investor returns. In 2018 approximately 60% of leveraged lending was used to finance M&A including LBO's, 9% to finance buybacks or dividends, and 30% used for refinancing, 1% went to investment.[776] As the Bank of England *Financial Stability Report 2018* noted, "most of these proceeds have been used to engineer changes in the liability structure of the corporate sector to optimise returns, rather than to fund new investment'.[777] This dynamic indicates

[766] Paterson (n 741) 432.
[767] B Mclean, 'Too Big to Fail, COVID-19 Edition: How Private Equity Is Winning the Coronavirus Crisis' (*Vanity Fair*, 2020) <https://www.vanityfair.com/news/2020/04/how-private-equity-is-winning-the-coronavirus-crisis> accessed 12 August 2021.
[768] P Lee, 'Wework, Fake Wealth and the Stunning Fall of the Private Equity Capital Market' (*Euromoney*, 2019) <https://tinyurl.com/yc7vp84z>.
[769] McKinsey & Company, 'Private Markets Come of Age: Mckinsey Global Private Equity Markets Review' (2019) <https://tinyurl.com/msfrmbyz>.
[770] Brown (n 516) 19.
[771] 'Value of Private Equity Deals Worldwide from 2019 to 2021, by Target Country' (*Statista*, 2022) <https://tinyurl.com/yemxzds4> accessed 3 October 2022.
[772] Bank of England, 'Financial Stability Report December 2019' 12 <https://www.bankofengland.co.uk/-/media/boe/files/financial-stability-report/2019/december-2019.pdf>.
[773] Bank of England, 'Financial Stability Report November 2018' 43 <https://www.bankofengland.co.uk/-/media/boe/files/financial-stability-report/2018/november-2018.pdf>.
[774] ibid 42.
[775] Paterson (n 759) 659.
[776] Bank of England, 'Financial Stability Report November 2018' (n 773) 42.
[777] ibid.

a radical divergence from the ostensible purposes of corporate finance: meeting the investment needs of firms. Instead, changes in the liability structure of the corporation have been used to aggressively extract surplus value with direct implications for workers both in the ordinary course of business and in insolvency, as the following case examples demonstrate.

### 5.3.3 Case 1: Phones 4U

The effect of these transformation in the legal structuring of bonds can be seen in the case of Phones 4U. In 2011 mobile phone retailer Phones 4U was acquired by private equity firm BC Capital partners in a leveraged buyout. The acquisition was funded by £430m in high yield bonds (9.5% seven year Senior Secured Notes) issued on the Irish stock exchange.[778] In 2013 BC Capital Partners issued £200m in 'PIK' notes to fund a dividend. The PIK notes were structurally subordinated, secured only by a first ranking lien over the share capital of a holding company in the group: Phosphorus Holdco Plc. The company's sole assets were its significant equity holdings in Phones 4U group companies.[779] The dividend recapitalization was used to repay BC Capital Partners initial equity investment in full. The notes, listed on the Irish Stock Exchange carried a large burden of compound interest, and increased Phones 4U leverage to 7xEBITDA, with a leverage ratio of only 1.5 (EBITDA is only 1.5x interest on debts in a given period).[780] Financial commentators stated that both the original takeover, and the dividend recapitalization transaction reflected a desire to take advantage of the resurgence in markets for high yield bonds since the GFC.[781] Within a year of the transaction Phones 4U would collapse into insolvency liquidation. The collapse was precipitated by the withdrawal of many of the major phone networks who were key commercial partners. The networks claimed this occurred as Phones 4U had "little commercial flexibility" to negotiate terms of partnerships "due to their debt repayment options".[782] BC Capital Partners were able to make a 30% profit (£18m) on their investment thanks to the dividend. Meanwhile 6500 staff across 550 stores lost their jobs.

In administration, the Senior Secured noteholders who financed the original takeover had by January 2022 received £219m (with all assets liquidated), just over half the face value of the debt (it should be noted also that the interest on these notes over the 3 ½ years between issuance and

[778] Claer Barrat and Mary Watkins, 'BC Partners Snaps up Phones 4U' *Financial Times* (18 March 2011).
[779] PricewaterhouseCoopers LLP, 'Joint Administrators' First Progress Report Phosphorus Holdco Plc ( in Administration )' (2015).
[780] D Dunkley, 'BC Joins Dividend Recap Rush with Phones4U PIK Notes' *Financial News* (17 September 2013) <https://www.fnlondon.com/articles/bc-partners-dividend-recap-phones4u-deal-high-yield-bond-market-20130917>.
[781] Barrat and Watkins (n 778).
[782] D Thomas and A Chasseny, 'Accusations Fly after Phones 4U Collapse' *Financial Times* (15 September 2014) <https://www.ft.com/content/f53a3ea6-3cd2-11e4-871d-00144feabdc0>.

insolvency would be in the region of £73m).[783] It also should be noted that the recipients of the pay-outs likely paid far less than face value for the distressed debt, the original holders having traded out likely at a loss. By the time of the appointment the vast majority of the debt was held by hedge funds who had bought into the distressed debt as the company struggled. In fact, the majority of the noteholders upon insolvency wished to continue trading in the debt throughout the administration process. The administrators report describes the "unusual" aspect of the senior secured creditors being noteholders (bondholders).[784] The hedge funds refused to join the secured creditors committee (as the non-public information disclosed would prevent them from continuing to trade), later acceding to an informal committee and continuing to actively trade the debt beyond 2015.[785] The fragmentary nature of the creditor base was also an issue. Standard procedures for dealing with secured creditors did not function as a result. The report notes that administrators seeking consent for the release of security for asset sales usually deal with a "limited and static population".[786] The procedures set out in the Note agreements for this were not practically feasible, and ultimately administrators had to apply to court to obtain release of Noteholder security for completing transactions.[787] The subordinated PIK noteholders who had financed the dividend recapitalization had only an equity claim over the Phones 4U group companies which appeared valueless upon insolvency.[788] However, following claims against third parties Phosphorous was able to recoup £4.5m, leading to a distribution to noteholders to the value of 0.19p/£ in 2020.[789]

The Directors statement of affairs (form 2.16b[790]) November 2014 shows employees claims of £25.9m were outstanding. Of these £3.4m are listed as expected preferential claims (£2.4m wage arrears £1m holiday), leaving an outstanding amount of £22.5m employee claims as unsecured debt.[791] On this basis only 13% of employee claims could be claimed as priority.[792] In practice only £1.7m was paid out as preferential claims. The difference between the initial £3.4m figure was accounted for by certain wage arrears payments made early in the insolvency period, reducing the

[783] PWC, 'Joint Administrators' Sixteenth Progress Report for the Period from 21 January 2022 to 20 July 2022' <https://www.pwc.co.uk/business-recovery/administrations/assets/Phones4U/p4u_pr_aug22.pdf>.
[784] PricewaterhouseCoopers LLP, 'Joint Administrators Progress Report for the Period 15 September 2014 to 14 March 2015'.
[785] ibid.
[786] ibid.
[787] ibid.
[788] PricewaterhouseCoopers LLP, 'Joint Administrators' First Progress Report Phosphorus Holdco Plc ( in Administration )' (n 779).
[789] PricewaterhouseCoopers LLP, 'Joint Administrators' Ninth Progress Report Phosphorus Holdco Plc ( in Administration )'.
[790] Disclosure in accordance with Rule 2.29 IA 1986
[791] PricewaterhouseCoopers LLP, 'Notice of Statement of Affairs 2.16b' (2014).
[792] If real terms for preferential claims had been maintained since the IA 1986 these claims would have been around £10.8m (ratio of 3.2, 3.2x£3.4m = £10.8m)

amounts finally claimable against the company. As the administrators reports state these arrears were paid at the time "for a number of commercial reasons including the need to secure support from employees during the stock repatriation exercise and ongoing assistance of employees at head office".[793] The goodwill sought from employees during this time however appears not to have been reciprocated by the administrators. In early 2015 the administrators sought legal advice as to whether these amounts could be discounted from the outstanding preferential claims and, finding in the affirmative were able to reduce preferential payments to the £1.7m figure.[794] Whilst employees preferential claims could be met from the estate, unsecured creditors were estimated to recover only 0.27% of the £173m unsecured claims (arising only from the £600,000 set aside for the 'prescribed part').[795] On this (0.27%) basis only £60,000 of the total £22,500,000 unsecured employee claims would be met. The final outcome for unsecured creditors was expected to be 0.4p/£.[796]

Employees reported finding out about the redundancies via media reportage on Facebook.[797] Head office employees suggest this reflected a pattern, with employees repeatedly finding out news of the companies deterioration second hand and a sense that Directors were not sharing information, and that the original BC Capital Partners takeover was accompanied by little employee engagement and information.[798] This view would later be validated when 409 employees from Phones 4U head office sought protective award at the Employment Tribunal, which found that despite evidence that plans to make redundancies were being put in place by the beginning of August 2014, no attempt was made to initiate consultation procedures giving no opportunity to seek alternative solutions to mass redundancies. Administrators were appointed on 15th September and mass redundancies were made 4 days later.[799] The numbers with potential protective award claims was far higher, with 60% of claims struck out in preliminary hearing in April 2016, possibly on procedural grounds, with the remaining 409 proceeding.[800] The protective award claims were

[793] PricewaterhouseCoopers LLP, 'Joint Administrators Progress Report for the Period 15 September 2014 to 14 March 2015' (n 784).
[794] PricewaterhouseCoopers LLP, 'Administrator's Progress Report for the Period 21 July 2015 to 20 January 2016'.
[795] PWC, 'Joint Administrators' Fourteenth Progress Report for the Period from 21 January 2021 to 20 July 2021' <https://www.pwc.co.uk/business-recovery/administrations/assets/Phones4U/phones4u_report_18082021.pdf>.
[796] D Thomas, 'Phones4U Secured Creditors to Get up to 24p in the £1, Says PwC' *Financial Times* (14 April 2015) <https://www.ft.com/content/575bbeee-e2b3-11e4-aa1d-00144feab7de>.
[797] A Partington, 'Ex-Phones 4U Employee: How the Retailer Fell down around Our Ears, and BC Partners Forgot to Say Goodbye' *Evening Standard* (10 October 2014).
[798] ibid.
[799] 'Employment Tribunal Rules in Favour of Sacked Phones4U Workers' *Morrish Solicitors LLP* (2017) <https://www.morrishsolicitors.com/employment-tribunal-rules-favour-sacked-phones4u-workers/>.
[800] PWC (n 783).

awarded for the full 90 day period, but were claimable only from the NIF, meaning in practice they were reduced to a maximum of 8 weeks pay, minus any unpaid wages already claimed from the RPO.[801] None of the controlling shareholders BC Capital Partners who profited handsomely despite the companies collapse, the Senior Secured creditor group who financed the transaction, nor the subordinated noteholders who financed the dividend recapitalization would bear any of the cost of these lost claims, or the other employee losses in liquidation.

### 5.3.4 Case 2: Debenhams

In 2003 Debenhams was acquired by a private equity consortium (CVC, Texas Pacific, Merrill Lynch) in an LBO valued at £1.8bn with £600m equity. The group engaged in the sale and leaseback of Debenhams property assets to the value of £1,2bn.[802] The group engaged in extensive cost cutting, shedding 12% of head office staff, and reducing overall headcount by nearly 100 despite opening 17 new stores.[803] In 2005 the group refinanced Debenhams debt issuing a £1.9bn in Senior term loans on the syndicated loan market. The refinancing struggled due to the aggressive leverage and the property asset spin-offs (now held in SPV's outside the insolvency estate). Ratings agency Fitch cited the pressure the large proportion of senior debt would have on cash flows, alongside the leaseback costs.[804] The structure was viewed as leaving lenders with the brand name as the main asset.[805] The refinancing was used to transfer £900m to shareholders less than 18 months after their initial £600m outlay to acquire the firm. The group then rapidly moved to exit and refloated the company in 2006. The market response to the float was relatively unfavorable with the initial offer taken up at the bottom end of the expected range. Within 3 weeks the share price had fallen from the initial 195p to 120p.[806] Nevertheless the refloat valued the (now asset stripped and highly indebted) company at £1.7bn, nearly the original purchase price, whilst retaining significant equity stakes.[807] Most of the £700m new equity was used to part pay down the senior credit facility.[808] The group thereby collected £1.2bn on a £600m investment in less than 3 years. The "over-enthusiastic cash extraction"

[801] Where employees have made unpaid wage claims to the NIF, the combined total of wage and protective award claims cannot exceed 8 weeks (see above Section 1.3)
[802] B Elder, 'Online Retailers Are Playing a Risky Game with the UK High Street' *Financial Times* (26 January 2021) <https://www.ft.com/content/7194a1de-da9e-46b7-af06-a80d0a2cb9a1>.
[803] E Rigby, 'Inside the Debenhams Deal' *Financial Times* (5 August 2007).
[804] I Simenson, 'Fitch Warns of Buyout Trouble' *Financial Times* (8 June 2005).
[805] ibid.
[806] Rigby (n 803).
[807] J Finch, 'Cool Reception for Debenhams Float' *The Guardian* (5 May 2006) <https://www.theguardian.com/business/2006/may/05/privateequity.retail>.
[808] 'Debenhams Annual Report and Accounts 2006' (2007).

would come to be blamed for the retailers downfall as it struggled under the new debt burden, which forced dramatic cost savings whilst preventing adequate investment.[809]

In October 2018 a number of hedge funds began buying into Debenhams debt, acquiring significant holdings in its revolving credit facility (RCF) and bonds (the Notes) at a discount from banks and other lenders as the company's financial condition worsened.[810] Alcentra, Silver Point and Angelo Gordon purchased slices of Debenhams debt cheaply, positioning them to take control of the company and its assets should it breach loan covenants.[811] The large banks had been exiting their exposure to Debenhams debt over the year, including RBS who sold off £66m at a loss of £15m.[812] The share price had fallen ¾ over the year on a series of profit warnings.[813] At the same time a restructuring plan for 50 store closures with 4000 potential job losses was announced, alongside a 50% reduction in capital expenditure. These events were triggered by the announcement of a £509m loss for the year (in the UK business). The 2018 UK losses were however attributable to non-trading and non-cash transactions. The loss reflected huge asset value write downs, in particular of 'goodwill' assets of £302m driven by the failure to meet earnings projections. The goodwill asset values underlying this were generated in 2006 when the group was re-floated, reflecting apparently unlikely valuations of the real value of Debenhams goodwill.[814] Absent these write downs the company would have made a full year pre-tax profit of £33m, down from £95m the previous year.[815] In February 2019 Debenhams entered into a £40m bridge loan facility with some of the hedge funds, granting qualifying floating charges over the undertaking and its principle subsidiaries enabling Glas Trust Corporation Ltd (the security trustee) to appoint administrators upon default. It was a term of the loan that Debenhams could not borrow from any other lenders without consent.[816] On 29th March the company entered into a £200m New Money Facilities (NMF) agreement with the lenders secured through a fixed and floating charge over substantially all of the group assets. As a condition of the security agreement the company's liabilities to the two Debenhams' pension funds were subordinated to the NMF.[817] On 9th April Debenhams PLC was placed into administration and

[809] Elder (n 802).
[810] J Eley, 'Hedge Funds Secure Bulk of £300m Recovered from Debenhams' *Financial Times* (17 November 2021) <https://www.ft.com/content/3c02899f-1d86-481f-9a31-63d10c4c71bc>.
[811] S Chambers, 'Hedge Funds Ready to Pounce after Buying Debenhams Debt' *The Sunday Times* (21 October 2018).
[812] ibid.
[813] N Rovnick, 'Debenhams Store Closures Put 4,000 Jobs at Risk' *Financial Times* (25 October 2018) <https://www.ft.com/content/568b49de-d81f-11e8-ab8e-6be0dcf18713>.
[814] Stewart Smyth, 'KPMG : 2 + 2 = The End ( Or , " Capitalism , States and Ac - Counting ", Revisited )' (2021).
[815] Rovnick (n 813).
[816] *Frasers Group Plc v Debenhams Plc [2020] EWHC 1755 (Ch)*2 c.
[817] FRP, 'Debenhams Retail Ltd AM03 Notice of Administrators Proposals' (2020) <https://tinyurl.com/jmv2n2my>.

administrators FTI Consulting Limited were appointed. FTI had been engaged by the lenders since December 2019 to advise on proposed restructuring of the company and to support lenders in negotiations.[818] On the same day (9th April), via a pre-pack sale, FTI immediately transferred the Debenhams PLC shares in it subsidiary opco's to Celine Newco I Ltd, an entity owned by lead hedge fund creditors.[819] The consideration for the sale was the discharge of £101m due under the loan agreement.[820] Debenhams PLC shareholders were effectively wiped out by the asset transfer. Mike Ashley's Fraser Group Plc (formerly Sports Direct), a 30% shareholder, would later (unsuccessfully) seek scrutiny of the bridge loan (via a court application to appoint provisional liquidators for Debenhams PLC in 2020) claiming it was designed to engineer a situation where the company would be forced into administration, in a 'loan to own' strategy enabling the lenders to take control for a cost of only £101m.[821] At the same time the liability for the RCF and the Notes (which the new owners had bought into in October 2018) transferred to the Newco as secured debt (subordinated to the NMF).[822] The pre-pack sale was a condition for the NMF to become available. On the 26th of April the (DRL) boards proposed CVA passed a creditor vote. The CVA passed was virtually identical to the restructuring plan proposed the previous October with large numbers of store closures. The NMF terms were severe, with 12% interest (compared to circa 3% for comparable credit facilities), with financial commentators suggesting most of the £80m cost savings from the CVA were likely to be absorbed by the combined fees and interest of the new financing package.[823] In March 2020, the government announced the closure of non-essential stores as part of its Covid-19 pandemic response. This announcement, combined with existing financial pressures and potential further action from creditors lead the Debenhams board to file at court to put the company into administration on 6th April 2020.[824]

Debenhams had £720m secured debt upon insolvency. By May 2022 the administrators reported total distributions to secured creditors (the hedge funds holding the NMF, RCF and Notes) of £314m. This included all £241m liabilities (including interest) under the first lien NMF, with the remainder going to the second lien facilities.[825] A significant chunk of the asset realization came from the sale of the Debenhams brand (and in-house fashion brands) as goodwill assets to fashion retailor

[818] *Frasers Group Plc v Debenhams Plc [2020] EWHC 1755 (Ch)* (n 816)2 e.
[819] AM03 Notice of administrators proposals 02 July 2020
[820] *Frasers Group Plc v Debenhams Plc [2020] EWHC 1755 (Ch)* (n 816) 2 d .
[821] ibid 2.
[822] FRP (n 817) 6.
[823] J Eley, 'Debenhams Refinancing Costs Threaten to Offset Any Savings' *The Financial Times* (2 April 2019).
[824] FRP (n 817).
[825] FRP, 'Debenhams Retail Limited Notice of Administrators Progress Report 9th May 2022'.

BooHoo for £55m.[826] Debenhams retail limited had approximately 12,675 employees at date of administration, as well as 6,825 employees of concessions within stores across 19 contractors. The administrators do not provide figures for the employee preferential creditors but state it is anticipated that the preferential element would be paid in full. None of the £348m unsecured creditor claims are expected to be met beyond the £600,000 prescribed part.[827] The top of the creditor list is populated with large debts to garment manufacturing companies mostly based in India and Bangladesh,[828] raising concerns about knock on effects in terms of lost wages to garment workers. As both the Debenhams pension funds were subordinated to the NMF, and had funding shortfalls, they fell into the Pension Protection Fund, with members facing 10% cuts on their pension payouts.[829] The fund was understood to be £32m in deficit, reportedly less than one of the PE executives made in a year during the original takeover.[830] Large numbers of Debenhams staff have since sought protective awards for failure to consult. Law firm Simpson Millar is representing at least 700 staff.[831] A further 100 plus successfully sought 90 day protective awards in April 2022.[832]

## 5.4 Impacts on workers

The transformations described in Section 2, and the accompanying case studies have major implications for workers. The recoding of corporate debt instruments has been integral to processes of value extraction, has increased exposure to risk and endless rounds of restructuring, and has eroded workers ability to leverage their claims to affect the outcomes of insolvency processes.

### 5.4.1 Surplus value extraction

In both the Debenhams and Phones 4U cases listed above, as with many of the examples discussed in Chapter 4, the extraction of value by private equity investors had serious impacts upon workers. What is clear from the perspective taken here however is the centrality of structures of creditor rights to processes of value extraction. The convergence of seniority and convertibility (liquidity) in rights instruments described above indicates a legal dimension to the credit bubbles which enable private equity firms to secure large volumes of debt finance for the purposes of gaining control over companies – and over large numbers of workers – and extracting surplus value. In the case of

[826] ibid.
[827] ibid.
[828] FRP (n 817).
[829] R Marsden, 'Debenhams Pension Scandal: MPs Demand Answers from Private Equity "asset Strippers" as Retirees Face 10% Cuts' (*This is Money*, 2021) <https://www.thisismoney.co.uk/money/markets/article-9807321/amp/Debenhams-pension-scandal-MPs-demand-answers-retirees-face-10-cut.html>.
[830] ibid.
[831] M Cox, 'Ex-Romford Debenhams Staff Join Legal Action over Redundancy Process' *Romford Recorder* (25 May 2021) <https://tinyurl.com/5bkw33pa>.
[832] G Blackstock, 'Sacked Debenhams Workers Win £350,000 Legal Battle as Lawyers Warn P&O Next' *Daily Record* (10 April 2022) <https://tinyurl.com/4n43r35h>.

Phones 4U the original acquisition was enabled by developments in the high yield bond market and the emergence of secured HYB's, granting security to a range of actors actively trading on secondary markets. In addition the P4U dividend recapitalization was only possible due to the practice of structural subordination which enabled a major increase in borrowing without impinging on the position of the secured noteholders. Debenhams workers had been subject to years of cost cutting pressures, job losses and ultimately rolling store closures as a result of the asset stripping value extraction by CVC, Texas Pacific and Merrill Lynch. The buoyancy of the syndicated loans market was crucial to this, in particular with reference to the 2005 refinancing. The subsequent refloat also appears to have to obscured the extent of the hollowing out of the business, presenting inflated goodwill values which would later unravel. In both cases the value extraction by equity holders was only possible due to the ways in which changes in the rights structure of credit instruments (as forms of intangible property) facilitated the ability of equity holders to 'mint capital' by attaching large volumes of rentier capital to the firm. The expansion in corporate debt under this model also serves to dilute workers claims in insolvency. The return of ultra-high leverage ratios in response to low interest rates and the effect of large volumes of capital seeking enhanced returns, alongside appetite on the part of PE firms to leverage credit market bubbles to gain control of large firms, appears to leave unsecured creditors claims effectively worthless.

### 5.4.2 Increased insolvency and liquidation risk

The shift towards convertibility in loan markets, as well as the increased role of HYB's has transformed the rights structure underpinning highly leveraged models. One dimension of this is that it has enhanced the ability of equity holders to increase borrowing and hold-off creditors in ways which increase the transfer of risk to workers and other creditors. Covenant-lite loans lack the financial distress triggers of maintenance covenants, enabling higher borrowing, and reducing ability of creditors to initiate insolvency proceedings.[833] Private equity sponsors pay a premium for covenant-lite loans, likely because they retain increased control and flexibility during periods of financial distress and avoid the need to enter into debt restructurings that may target the equity investment, or the imposition by lenders of other costly controls.[834] In enabling PE owners to hold off insolvency the risk of ultimate liquidation is increased.[835] The higher default risk is passed onto employees and small trade creditors. In the case of Phones 4U much of the increase in debt was subordinated. Nonetheless the levels of borrowing and interest imposed financial constraints which ultimately led to insolvency liquidation. Whilst the structurally subordinated noteholders had no

[833] Paterson (n 759) 665.
[834] ibid 661.
[835] ibid 665.

claim on the insolvency estate, this was likely scant satisfaction for workers with unsecured claims beyond the RPO limits, who could expect 0.4p/£ on these claims. The question of outcomes in insolvency also misses the deeper impacts of job and financial loss which can have major ongoing impacts on workers livelihoods and wellbeing.

The use of debt in the PE model reflects a wider trend towards high indebtedness across both listed and privately held corporations both in the UK and globally. The debt of global NFC's amounted to $81 trillion in 2020 and exceeded the value of global GDP for the first time.[836] UK corporate net debt rose 8 years in a row from 2011 (after hitting a post GFC low that year) to reach £443bn in March 2020.[837] Prior to the pandemic corporate debt had been growing steadily. The share of 500 largest UK listed companies classed as 'highly indebted' as measured by net debt/earnings rose from 30% to 45% over the period 2006-2020.[838] Debt as a proportion of surplus value has increased markedly since the mid 1990s. The Debt to Gross Operating Surplus ratio for all UK NFC's rose from 3.8 in 1996 to 5.3 in 2019 (lower than the 2008 peak of 6.8).[839] Corporate debt to earnings rose from 279% in 2015 to 322% in 2019, increases partly driven by leveraged loan issuance.[840] These wider trends indicate both a greater role for creditors' claims in the overall liability structure of companies, as well as significantly inflated claims in insolvency, with highly speculative 'equity like' debt claims diluting workers' and others' unsecured claims. Whilst at the level of corporate finance this trend represents investor willingness to swap priority rights and contractual protection measures for high returns and accessible liquid markets, at the level of the firm it represents a massive expansion of risk for workers – whose interests remain mostly subordinated to the growing volume of claims upon the firm.

### 5.4.3 Amplified cyclicality and endemic precarity

This transfer of risk from credit markets to workers must be understood as it operates not only at the point of insolvency but in terms of the way the LBO model amplifies (via creditor and shareholder rights) workers exposures to cyclicality and crisis in the form of endemic restructuring and precarity. Evidence from the 2008 financial crisis shows that workers in highly leveraged firms are far more exposed to job losses during downturns and crises. Firm level data shows highly

[836] 'Global Corporate Debt - Statistics & Facts' (*Statista*) <https://www.statista.com/topics/5724/global-corporate-debt/#topicHeader__wrapper> accessed 16 October 2021.
[837] C Conway, 'Corporate Debt Crisis: The Stocks You Shouldn't Own' (*Shares Magazine*, 2020) <https://www.sharesmagazine.co.uk/article/corporate-debt-crisis-the-stocks-you-shouldnt-own> accessed 16 October 2021.
[838] Bank of England, 'Financial Stability In Focus: The Corporate Sector and UK Financial Stability' (2021) 10–11 <https://www.bankofengland.co.uk/financial-policy-summary-and-record/2021/october-2021/financial-stability-in-focus>.
[839] https://www-statista-com.liverpool.idm.oclc.org/statistics/1205749/corporate-debt-rating-type-uk/
[840] Bank of England, 'Financial Stability In Focus: The Corporate Sector and UK Financial Stability' (n 838) 10.

indebted companies cut investment and employment more than unleveraged companies in the GFC: unleveraged companies increased employment by 8% increase (and cut investment by only 10%) over the period of the GFC (2007-09), highly leveraged companies (those with greater than 4x debt/EBITDA ratios) cut employment 10% and investment by 33%.[841] This shows that where equity holders are able to extract dividends by attaching debt the costs are directly transferred onto workers when wider macro-economic conditions worsen. This is intensified by the LBO model. LBO's amplify restructuring at the firm level. Reallocation of jobs across companies and establishments is significantly higher post buyout, much of which includes additional merger and acquisition activity.[842] GDP growth gains or losses lead to amplified employment impacts at PE owned firms. Targets saw faster employment growth where GDP growth is high post buyout compared to controls, whilst downturns see intensified job losses.[843] When debt is cheap PE firms use financial engineering such as debt financed dividends to provide returns to investors, when debt tightens gains are sought through operational changes.[844] This indicates that acquisition choices are often based upon one or other strategy. Where credit conditions deteriorate post-buyout firms are less able to make returns from productivity gains (especially where targets were selected for financial engineering) and generate higher job losses.[845] All of this suggests that private equity buy-outs are both highly cyclical and that they amplify the impacts of economic downturns and crises upon workers.

There is extensive evidence which suggests the impacts of the LBO model is to intensify cyclical trends. Buy-outs increase when GDP growth is high and credit spreads narrow.[846] Debt markets drive leverage ratios; when debt is cheap LBO's have higher leverage.[847] High levels of buyout activity tends to precede worsening economic conditions.[848] In contrast to the rational capital markets hypothesis - which postulates that capital markets effectively price firm risk - leveraged capital structures are arising independently of the specific characteristics of the target. Competition between PE firms for targets drives up price and leverage and weakens quality.[849] Cheap credit does not improve the performance of LBO's as price-to-earnings ratios paid by buyers

[841] Bank of England, 'Financial Stability Report November 2018' (n 773) 44.
[842] Davis and others (n 501) 5.
[843] ibid 6.
[844] ibid.
[845] ibid 33.
[846] ibid 6. 'Credit spread' in this instance refers to the difference on yields between government and corporate bonds. Wider spreads indicate poor confidence in corporate bonds and a wider or expected downturn and are associated with tighter credit conditions. Narrow spreads indicate economic growth and cheap credit.
[847] Brown (n 516) 14.
[848] Davis and others (n 501) 2.
[849] Paterson (n 759) 660.

increase as does leverage.[850] Easy credit conditions during periods of high growth lead to higher leverage, higher valuations and ultimately greater financial distress and higher failure rates in target firms.[851] Kaplan and Stein show that whilst 25 out of 66 deals executed during the peak easy credit period 1986-88 ended with debt default or restructuring, only one out of 41 deals executed during the tighter credit period 1980-1984 ended the same way.[852]

However, the evidence since 2008 suggests that credit conditions are the most important factor driving LBO's, not economic growth prospects. The global boom in leveraged loans issuance since the GFC emerged against a stagnating economic outlook, with global growth declining steadily from its post crisis bounce back peak in 2010, reaching its lowest levels since 2009 in 2019.[853] PE deals returned to their 2007 peak in 2020 despite the global recession triggered by coronavirus. The basis for the boom was stimulus: the FED cut rates to zero and moved to buy up junk debt, ensuring continued access to cheap credit. In the UK low interest rates generated demand for high yielding debt, enabling PE groups to load their companies with fresh loans and use the money to pay themselves dividends.[854] Despite the dire economic context valuation multiples reached record highs. In 2020 multiples (purchase price as a multiple of EBITDA) expanded to 12.8 times. This means investors in 2020 paid 30-40% more for companies than they would have a decade before.[855] Leverage ratios rose above 7x debt/EBITDA.[856] Record premiums were paid by PE companies in 2021.[857] This represents a huge expansion of the financial claims upon the future earnings of the firm, driven not by a logic of rational allocation of capital to meet the investment needs of firms but by competition for corporate control amongst actors able to 'mint capital' through the sale of new credit instruments backed by creditor rights.

### 5.4.4 Property and priority

Why do priority rights matter? Section 1 described how the formal improvement in workers' position insolvency through the (preferred creditor) provisions of the IA 1986, the RPO route for

[850] Brown (n 516) 14.
[851] Davis and others (n 501) 2.
[852] Steven Kaplan and Jeremy Stein, 'The Evolution of Buyout Pricing and Financial Structure in the 1980s.' [1993] Quarterly Journal of Economics 313.
[853] Bank of England, 'Financial Stability Report December 2019' (n 772) 27.
[854] Wiggins, Kaye. "Stimulus helps private equity dealmaking hit fresh highs; Value at $559bn largest since 2007 Sector rebounds after early turmoil." Financial Times, 24 Dec. 2020, p. 5. Gale Academic OneFile, link.gale.com/apps/doc/A646430042/AONE?u=livuni&sid=AONE&xid=7947ff2d. Accessed 1 Apr. 2021.
[855] McKinsey & Company, 'A Year of Disruption in the Private Markets: McKinsey Global Private Markets Review 2021' (2021) 26 <https://www.mckinsey.com/~/media/mckinsey/industries/private equity and principal investors/our insights/mckinseys private markets annual review/2021/mckinsey-global-private-markets-review-2021-v3.pdf>.
[856] ibid.
[857] Private equity pays record premiums for public companies | Financial Times (ft.com)

claims, and the UK implementation of the ARD and CRD, had also been accompanied by a downgrading of the proportion of workers' claims with priority in the insolvency estate, and that this downgrading reflected a wider pattern at the level of international and supranational institutions aimed at securing the system of secured lending globally.[858] The cases above suggest priority matters *because property matters* in corporate and insolvency law.

The analysis put forward by Deakin and Armour (and reflected in Nyombi's argument) is that the combined effect of the Acquired Rights Directive and the Collective Redundancies Directive has been to collectivize workers' claims at critical junctures, both during takeovers (Chapter 4) and at the point of insolvency. The authors argue that rights under TUPE (consultation rights, transfer of contractual and outstanding statutory claims) function in a way which is analogous to shareholder or creditor property claims upon insolvency. The argument is built upon the leverage the collectivisation of claims give to workers. As in the case of Rover (discussed in Chapter 4), workers are seen as being able to leverage these claims to shape outcomes, in particular where the possibility of waiving claims enables them to be used as a bargaining chip. Yet there is limited scope for counterbalancing secured creditors' claims in insolvency through this mechanism. In insolvency liquidation, workers' redundancy claims, as well as outstanding wages and salaries and any statutory claims such as protective awards will rank as unsecured debt (save for the small proportion which ranks as preferential), and as such will be of no concern to secured creditors. In practice they will be picked up by the NIF, and the RPO will seek to recoup them (standing in the workers' shoes as unsecured creditors).[859] The recouping of protective award (and other) claims from the NIF then breaks any kind of property nexus with regards to secured creditors claims. In practice the costs of the protective award claim are often considered to be less than those of continuing to run the business whilst the consultation process proceeds, leading to a cost benefit analysis in favour of ignoring employee voice rights.[860] As the authors acknowledge, the analogy to creditors' property claims breaks down as a matter of positive law as workers have consultation not control rights, and failure to consult is governed by a liability rule not property rule. The analogy functions at the level of leverage: creditors' control rights are understood to be principally about a credible *ex ante* threat to take control from shareholders if their interests are not met.[861] From this perspective however, the downgrading of workers' priority claims in real terms, and the shifting of claims into the NIF has weakened workers bargaining power vis secured creditors. Due to the shift from priority rights to

[858] It should be noted that UK insolvency law is particularly important in this regard as companies operating in many jurisdictions choose to contract debt under English law
[859] Finch, 'The Pari Passu Principle' (n 662) 612.
[860] TUC (n 483) 8.
[861] Armour and Deakin (n 668) 450.

social security, the bargaining power workers have in relation to senior creditors effectively evaporates upon insolvency via the threat of liquidation. In addition, it would appear the collectivisation of workers' claims, and the triggering of consultation rights simply happens far too late to be effective. In the two cases given above, the effective trigger point would surely have been the original LBO transaction, and during the subsequent rounds of asset stripping. In the case of Debenhams, the company's poor financial health then became the opportunity for a second round of extraction by the hedge funds, buying up distressed debt then locking the company into further lending on extremely poor terms. Then extensive closures and cuts in the CVA proposals mooted at the time the hedge funds were buying in in late 2018 were surely a foregone conclusion by the time of the 2019 CVA, not least due to the huge fees and interest attaching to the NMF. As in the later administration, consultation proceedings would appear to be an irrelevant formality.

The argument regarding 'property' claims however is particularly interesting with regards to insolvency law. As described above (Box 1), a security interest is understood as a proprietary claim over an asset to secure repayment of a debt. As Finch notes, the distinction between a property right and a personal (contractual) right is crucial in insolvency law: the holder of a property right can enforce it ahead of the general body of creditors, whereas the holder of a contractual right can only seek a dividend in competition with other contractual (unsecured ) creditors.[862] Where creditors take security over loans they take property rights for themselves as the property subject to the (fixed or floating charge) does not enter the insolvency estate.[863] The ability to make assets available to the company without them entering the insolvency estate leads to the deterioration of unsecured creditors claims: "Every new property right, every added security interest, every proprietary restitutionary remedy, every equity has eroded his or her stake in the insolvency process".[864] This is particularly acute given the nature of the floating charge: once granted, as the assets accumulated by the company build up over time, the security base for the charge holder is enhanced – with a property claim backed by ever more assets, with no additional funds being injected. These third-party effects are legitimised through claims that the lending generates 'new value' over which security is claimed, and therefore security is fair as it does not dilute the interests of others.[865] Such claims are of course particularly problematic vis workers, reflecting an appropriation of value. Moreover, as is frequently the case in corporate finance, there is a very important distinction between realized and unrealized speculative asset value, as evidenced by the rapid evaporation of

[862] Vanessa Finch, 'Bypassing Pari Passu', *Corporate Insolvency Law* (2nd Editio, Cambridge University Press 2012) 630.
[863] ibid 631.
[864] ibid.
[865] ibid 638.

Debenham's 'goodwill' assets. This raises the question of why all creditors don't seek security for their claims. As Finch describes the contractarian account for this states simply that creditors are free to bargain and adjust their claims: where a debtor company grants a security interest over its assets, others may seek better interest rates or negotiate new triggers for intervention.[866] In the reality of a corporate economy characterised by corporate actors of vastly varying size and market power such bargains will be shaped by the power of the parties. In the case of Debenhams, the hedge funds were able to leverage their secured lending position to tip the company into insolvency and acquire the share capital via a pre-pack and refinancing on extremely poor terms. In the same move they were able to subordinate the Debenhams pension funds to their claims. This reflects a wider trend. As Franzen has argued, pension funds frequently lack priority and are vulnerable to other creditors contracting to enhance priority prior to insolvency.[867]This is particularly problematic given the evidence that highly leveraged firms appear to systematically underfund pensions.[868] In the case of Debenhams, the subordination was agreed by the trustees who were signatory to the NMF creditor agreement.[869] The most charitable interpretation here points towards the pressure generated upon pension trustees by high leverage and insolvency risk. It appears that the power of particular actors on capital markets is the real factor determining who has 'property' in the corporation. The example of the US bondholders boycott of subordination in UK issued HYB's points to a similar conclusion. As Ireland notes with regards to securities in general, such intangible financial assets are not regulated property, but are "regulation all the way down".[870] In the insolvency space it becomes clear how regulation intersects with the power of financial actors to determine who has a property claim and who does not.

## Conclusion

Workers' claims can be seen as subject to a 3-way structuring by insolvency law: some claims are preferential, some are claimable from the RPO, and some are completely unsecured. The significant regulatory shift has been away from enhancing priority of claims towards shifting claims into social security mechanisms, reflecting a wider trend internationally, understood by major financial institutions as being necessary to protect the system of secured lending. Yet at the same time this

[866] ibid 631–3.
[867] Dorothee Franzen, 'OECD Working Papers on Insurance and Private Pensions No . 38 Managing Investment Risk in Defined Benefit Pension Funds' [2010] Pensions 4, 10.
[868] Anzela Volkova, 'Defined-Benefit Pension Schemes in the United Kingdom : Study of the Deficit Funding Approaches Alternative Formats If You Require This Document in an Alternative Format , Please Contact : Defined-Benefit Pension Schemes in the United Kingdom : Study of T'.
[869] FRP (n 817).
[870] Paddy Ireland, 'Property and Contract in Contemporary Corporate Theory' (2003) 23 Legal Studies 453, 496.

system has been radically reconfigured by changes in the legal structuring of credit instruments. The aim of protecting the system of secured lending has entailed something very different: the protection of high-risk high-return forms of speculative capital. The transformations in credit markets show that secured creditors are now highly diversified (and frequently hedged) against exposures to firm level risk and losses. This structuring of liabilities and risk exposure can be starkly contrasted to the position of workers who carry significant risk for frequently low reward. It is far from clear whether the material contribution to the company's success by the Debenhams noteholders was greater than, for instance, that of the garment supply chain workers who went unpaid as a result of the company's collapse, or the proportion of value of Debenhams' workers which ranked unsecured. Nevertheless, these noteholders were positioned to cash in on the sale of the 'goodwill' associated with the garments these workers had made and sold. The dynamics of 'taking security' reveal new dimensions of the class relation at the heart of capital in its intangible forms.

The blurring of the equity/debt distinction demonstrates that the processes of transformation generated by the emergent doctrine of corporate legal personality in the late 19th century continue to this day. The depersonalization implied by the nature of liquid assets is at odds with the interpersonal nature of senior secured rights in insolvency, pointing to the paradoxes of the 'janus faced' share being extended to the space of debenture holders. Ireland describes the depersonalization of the share as a public process, controversial and overtly political: promoting certain interests through derogations from traditional notions of contractual obligation and individual responsibility.[871] The processes of transformation of credit instruments has been no less political, enabling further derogations from contractual responsibility *and* enhanced authority for investors enabled by the contradictory logic of intangible financial property. The extent to which it has been public and controversial, in the sense of generating contestation (notwithstanding the early controversies of covenant -lite loans precipitated by the GFC and soon forgotten) is less clear. The contradictions of a highly speculative and risky financial model appear to have been partially diffused by the socialization of corporate risks in the contemporary insolvency regime. In contrast to the situation in the UK, the collapse of Debenhams in the Republic of Ireland with no funds available to pay staff redundancies was met with 271 days of picketing stores and the administrators' (KPMG) offices. Workers from the Mandate union sought to slow down the liquidation process, leveraging the value of the in-store stock to demand a '2+2' redundancy package (2 weeks per year worked statutory plus 2 years per year worked from the company). The action led to an initial offer of 1

[871] Ireland, 'Property and Contract in Contemporary Corporate Theory' (n 873).

million euros (short of the 13m package total) from KPMG, later withdrawn following the granting of an injunction against pickets stopping stock removal.[872] The situation of the Debenhams UK workers able to claim from the NIF is clearly preferable to that faced in the RoI, yet the contrast between the cases is indicative of how the UK insolvency regime partially depoliticizes the tensions of the corporate model and pacifies workers, socializing the costs in the process. The phenomenal form taken by new credit instruments is traceable to this depoliticization of distributional conflict at the level of corporate insolvency regulation. In removing claims from the space of contestation the effectiveness of worker voice rights in insolvency is undermined, as workers lack leverage to shape negotiations. Simultaneously, the shift away from contestation reinforces the distinction between the 'economic' sphere of decision making and the 'social' sphere of rights, with clear implications for ideas of economic democracy.

[872] Smyth (n 814).

# Chapter 6: Coding the corporate structure

## Introduction

> *"Within the capitalist system all methods for raising the social productivity of labour are put into effect at the cost of the individual worker; that all means for the development of production undergo a dialectical inversion so that they become means of domination and exploitation of the producers; they distort the worker into a fragment of a man, they degrade him to the appendage of a machine, they destroy the actual content of his labour by turning it into a torment; they alienate…from him the intellectual potentialities of the labour process…; they deform the conditions under which he works, subject him during the labour process to a despotism the more hateful for its meanness…"* Karl Marx, Capital, Volume 1 [873]

There are sectors of the global and local economy which are particularly well characterised by Marx's well-known description of the immiseration and alienation of the worker through the capitalist labour process. For example, the garment sector is notorious. Despite decades of campaigning and concerted action by unions, NGOs and international organizations, workers in fashion supply chains still face appalling conditions and the denial of basic labour rights whilst lead companies return billions in profit to executives and shareholders.[874] We need not look overseas however to find such abuses. The (short-lived) scandal in 2020 over conditions in the Leicester garment manufacturing sector, predominantly supplying online fashion retailer Boohoo, revealed that the new UK garment sector was being built on the same corporate production model that generates exploitation in the global south.[875] The logistics and delivery sector has become synonymous with below minimum wage pay, employment status misclassification and working time and health and safety violations. Concerns around these issues have proliferated since the advent of Amazon and the boom in online retail. These problems persist despite a vigorous fight back by new unions such as the IWGB and developing case law supportive of employment status in the 'gig' economy. In the catering sector, fast food 'business format franchising' has, since its inception, been a consistent site of union suppression strategies, low pay and insecure work.[876] Supermarket supply chains, in particular meat processing, see persistent pay violations, exploitation of precariously

[873] Marx, K. Capital: A Critique of Political Economy, Volume 1 cited in Harvey (n 282).
[874] 'Fixing Fashion: Clothing Consumption and Sustainability' (*House of Commons Select Committee: Environmental Audit*, 2019) <https://tinyurl.com/5b5xuk6t> accessed 18 February 2022.
[875] Crawford, 'Boohoo: Profiting from Poverty?' (n 6).
[876] Tony Royle, '"Low-Road Americanization" and the Global "McJob": A Longitudinal Analysis of Work, Pay and Unionization in the International Fast-Food Industry' (2010) 51 Labor History 249.

employed workers, migrant worker exploitation and forced labour.[877] The extent of these problems has been well recognised since at least the mid-2000s, becoming a focus of the newly formed GLA, yet the problems appear to remain entrenched in 2021.[878] How are we to understand the entrenched nature of labour rights abuses in these sectors? The common dynamic across these examples is of powerful lead firms able to transform, externalise and direct production through fragmented networks of suppliers and various forms of outsourcing, subcontracting, franchising, or use of subsidiary organisations within a corporate group. Moreover, in many of these examples the alienated nature of the labour process; the subordination of the workers body and mind to a standardised, repetitive, and machine-driven process of production (or distribution), is often firmly embedded in the physical and intangible capital of the lead firms; the franchise system, the delivery routing technology, the fast fashion brand.

One clear characteristic here is that these impacts upon workers appear to be at least in part an outcome not of the labour relationship within the firm, but of relationships between firms which are generally understood to be driven by market competition. Marx showed that the spread of abusive labour practices could not be understood as the outcomes of the good or ill will of the individual capitalist, but arose from the internal laws of motion of capitalism; the drive for surplus value.[879] This drive is realized through the 'coercive laws of competition' which compel individual capitalists to compete for market advantage through enhanced productivity.[880] The drive for surplus value pushes the 'methods for raising the social productivity of labour' referred to above, which immiserate the worker. Paradoxically, these forces of competition between capitals also generate the concentration and centralization of capital. The progress of increasing productivity depends upon processes of concentration and centralization of capital. Wealth concentrates both as a dynamic of growth, as each round of accumulation increases the wealth of the individual capitalist, and as a dynamic of centralization as capitals seek market advantage through economies of scale. This proceeds through mergers, takeovers and the destruction of competitors, which Marx saw as a tendency – if not a law – of Capital towards centralization.[881] In contrast to neoclassical economics idea of perfect markets, the market economy of small competitive businesses is inevitably transformed by centralization into a state of monopoly and oligopoly: competition ultimately results

[877] S Scott and others, 'Gangmasters Licensing Authority Annual Review: Executive Summary' (2007).
[878] Ella McSweeney and H Young, 'Revealed: Exploitation of Meat Plant Workers Rife across UK and Europe' *The Guardian* (28 September 2021) <https://www.theguardian.com/environment/2021/sep/28/revealed-exploitation-of-meat-plant-workers-rife-across-uk-and-europe>.
[879] Harvey (n 282) 377.
[880] ibid.
[881] ibid 273.

in monopoly.[882] As described in chapter 2 the problems posed by non-vertically integrated firm structures such as franchising, supply chains and other forms of subcontracting has been recognized in a the labour law literature concerned with the 'fragmentation' of the employer. Yet one paradoxical characteristic of the era of apparent 'fragmentation' has been the enormous concentration and consolidation of corporate power in and through fragmented organizational forms. These dynamics are also recognized in labour process analysis. Firms relate through competition which drives endless search for efficiency improvements, the effect of which is to maximize the speed and intensity of the labour process.[883] Political economy perspectives have focused on the entrenchment of relations of inequality through Global Value Chains (GVC's) and Global Production Networks (GPNs).[884] Yet these approaches tend not to focus on the role of law in securing these arrangements.[885] This chapter seeks to understand the problems faced by workers through analysis of the ways in which law shapes the structuring of the labour relationship across 'fragmented' organizational forms. I explore the role of corporate and competition law in facilitating the distribution of the labour relationship across the 'corporate veil' of formally independent entities in ways which intensify workers' exposures to the 'coercive laws of competition' whilst insulating big capitals, simultaneously undercutting the effectiveness of rights. The effects of this legal structuring are considered in relation to the distribution of value and bargaining power between workers and capital owners, the degree of autonomy workers have over the labour process, and their ability to meaningfully influence terms and conditions of employment. I draw predominantly from the case example of franchising and include some examples and comparisons with the case of integrated supply chains.

The chapter contributes to the development of the thesis in the following ways. The shift from relations of direct equity ownership to indirect models of control in these examples points towards the legal coding of new forms of intangible capital. The development of business format franchising has been built upon the emergence of a new set of property rights arising through the franchise system as intellectual property which directly commodify the labour process and enable indirect control over workers. The example of franchising points towards the central role of complex contracts in the legal structuring of the corporate-labour relationship. As I shall show these

[882] ibid 274.
[883] Selwyn (n 286).
[884] For a good overview of these studies see Nicola Phillips, 'Power and Inequality in the Global Political Economy' (2017) 93 International Affairs 429; Ashok Kumar, 'Oligopolistic Suppliers, Symbiotic Value Chains and Workers' Bargaining Power: Labour Contestation in South China at an Ascendant Global Footwear Firm' (2019) 19 Global Networks 394.
[885] Grietje Baars and others, 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4 London Review of International Law 57.

restrictive contracts are ultimately reliant upon a loose and expansive logic of property which simultaneously secures the value of the franchise form and the externalization of labour. The example of supply chains and intangible 'brand' assets is less reliant upon direct legal structuring. Law is considered to contribute to these dynamics by *securing* forms of capital across formally independent entities, and *channeling* logics of competition in ways which harm workers. These models are only possible due to judicial respect for the formal separateness of entities, even under conditions of extensive hierarchical control. Adopting a competition law lens reveals the role of coordinating and controlling *practices* over workers 'beyond the firm' which are 'non-legal', 'quasi-legal' or 'quasi- regulated'. The legal treatment of these practices reveal the contours of the regulatory regime in relation to corporate power over workers. Building on the work of Sanjukta Paul I show how the legal framework confers 'coordination rights' which underpin fragmented relations of exploitation.[886] UK competition law is shown to permit enormous concentrations of corporate power and vertical coordination (control) down the supply chain. By combining Paul's critique with Pistor's coding approach, I show why these concentrations of corporate power do not reflect the institutional logic of the entity theory but show instead the ways in which the legal framework confers coordination rights which drive exploitation across formally depersonalized and fragmented institutional structures. This also points to the mutually reinforcing relationships between private ordering, private law, and regulatory regimes. The analysis has implications for the ways in which Marxist perspectives conceptualise the production-circulation binary, and the need for analysis at the level of *coordination* as identified by Lokjine.[887] In building on Paul's analysis of the regulation of vertical domination and restrictive contracts to the UK context the chapter represents an original contribution to the growing literature on the interface of competition and labour law. My analyses goes beyond that of Paul in considering competition laws from the perspective of class relations. The analysis provides limited grounds for optimism regarding the potential for a more worker friendly competition law. However, a shift towards recognising the class dimensions of competition law through engaging with its implications for workers is a step towards challenging competition law in its current formulation and the types of corporate structuring it permits.

Section 1 explores the ways in which the corporate law, labour law and competition law literatures construct normative models of the boundaries of 'the firm' in relation to the labour relationship, with reference to Paul's notion of 'coordination rights'. Section 2 explores the case of

[886] Sanjukta Paul, 'Antitrust As Allocator of Coordination Rights' (2020) 67 UCLA Law Review 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337861>.
[887] U Lojkine, 'CRITICAL POLITICAL ECONOMY BEYOND THE PRODUCTION/CIRCULATION DICHOTOMY' (*LPE Project*, 2021) <https://lpeproject.org/blog/critical-political-economy-beyond-the-production-circulation-dichotomy/> accessed 28 January 2022.

franchising, focusing on how the franchise model shapes the labour process and distributes the labour relationship across formally independent legal entities. Section 3 explores the way in which vertical domination in supply chains underpins the value of lead firm 'brand' assets and shareholder returns. Section 4 looks at how the relations of vertical domination in supply chain and franchising models are regulated in commercial and competition law. Throughout I draw on examples from the literature on US anti-trust, as well as UK franchising, supermarket supply chains and competition law and regulation. I also include examples of the impacts of franchise models in France and Germany, and cases from the European Court of Justice. The example of US anti-trust is justified as it provides a useful lens for examining the regulation of vertical domination and vertical restraints. The inclusion of examples of the impact of franchising is useful as it is indicative of the way in which it conflicts with regulatory regimes which provide stronger statutory representation rights than the UK. EU competition law is also important as UK competition regulation is directly aligned with it.

## 6.1 Coordination rights and the boundaries of the firm

This section analyses the ways in which the question of control and coordination rights over workers are approached in the labour law and competition law literatures, in relation to normative models of the firm and its boundaries. The corporate law literature is explicitly concerned with coordination rights as has been discussed in chapter 1. As described, the contractarian account of the corporation is based upon a claim of the superiority of the corporate 'nexus of contracts' in terms of allocative efficiency: coordinating resources (including capital and labour) in efficient ways. Since Coase the size and boundaries of the firm have been understood to emerge based on the relative (transaction) costs of vertical coordination inside the firm versus horizontal coordination in the marketplace. The contractarian perspective goes one step further and asserts the firm is nothing more than coordination in the marketplace. From this perspective, the labour relationship is pure horizontal contracting to the purposes of optimizing individual advantage, and there is no exploitation either within or between firms.

### 6.1.1 Labour law

As was recognised by Coase, the contractarian account lacks understanding of the role of law in the firm, particularly the hierarchical dimensions of labour law.[888] Labour law is concerned with the legal basis for authority, hierarchical control and coordination rights over workers. For Deakin the central

[888] Coase (n 197).

problematic for labour law is that the legal designation of 'the employer' has no direct correlation to the concept of 'the firm'. Deakin highlights this absence by reminding us what the legal definition of 'the employer' is not: "the legal meaning of the employer is not synonymous with the sociological or economic idea of the 'enterprise' or 'organization', nor with the workplace, that is, the physical site on which work is carried out".[889] There are however three latent conceptions of the employer which are traceable to ideas of the economic function of the employment relationship and the firm: coordination (centralised managerial control), risk (which treats the employer as a juridical form for spreading social and economic risk) and equity (the employment unit as a space within which the equal treatment principle is observed).[890] The question of coordination (or control) over labour is a key dimension of the employment relationship, which contributes to the linkage between the economic concept of the firm, and the legal concept of the employer. Coordination rights are important as a facet of the nexus of control and security, wherein the employer assumes certain risks in return for the right to control the worker.[891] The central problematic of 'fragmentation' is understood to be the splitting of the 'coordination' function from the risk sharing and equity functions. Deakin shows that the legal basis for the authority relationship – the right to control test and implied terms of obedience – (managerial rights to coordination of activities), *has* occasionally been utilized to extend obligations beyond the bilateral contractual nexus, in the form of associated employers and group level liabilities. Yet this is rare in the extreme. The contemporary employment landscape is replete with examples of extended hierarchy beyond the (single entity) firm which dispense with the 'risk-sharing' and 'equity' functions. This significantly problematises contractarian understandings of the labour relationship.

These patterns are problematic not only because they degrade the social security and equity function of the employer identified by Deakin. As Shamir has shown they undermine core assumptions underpinning collective bargaining and freedom of association rights. Firstly, the fundamental assumption of collective action is that workers' power poses a threat to the entity which benefits from their labour - traditionally understood to be the employer. This assumes that the direct contracting parties – the employer and the employee – are the only relevant parties to setting labour standards and management in the workplace.[892] Yet in cases of franchising and subcontracting most terms and conditions are determined by a third party which also exerts managerial control over the workplace. The immediate employer lacks the competencies to implement significant changes and so leverage is curtailed as due to confinement of voice to de-

[889] S Deakin, 'The Changing Concept of the "Employer" in Labour Law' (2001) 30 Industrial Law Journal 72, 73.
[890] ibid 83.
[891] ibid.
[892] Shamir (n 406) 237.

centralised units against centralised decision making.[893] Secondly, subcontracting undermines the stability of the negotiating parties, as the (third party) lead firm can terminate the agreement with a unionized contractor. This negates the premiss that parties to the agreement are repeat players to negotiation with a mutual interest and dependency in the continuity of the enterprise. The strength of the collective agreement becomes dependent upon the third - non-signatory - party who may terminate the contract at a stroke.[894] Thirdly, patterns of subcontracting interrupt labour laws assumption that there is a clearly and easily discernible bargaining unit, and that this unit is typically defined as workers working for the same employer. Outsourcing excludes workers from the bargaining unit or altogether prevents the formation of an effective unit, reducing or eliminating workers' power against the lead firm.[895] This dimension of fragmentation undermines freedom of association rights and particularly the right to strike. Shamir's account then points not only to the direct labour relationship but to the inter-firm hierarchies through which it is mediated and the power of nominal 'third parties'. Understanding contemporary labour conditions requires then an understanding of how these hierarchies are *legally* secured through coordination and control rights, and *practically* secured through domination of workers across multiple legal entities. This requires analysis of the hierarchies of relationships *between* formal commercial parties. This raises the question of the ways in which corporate power permeates commercial relations, which point to the role of competition law.

### 6.1.2 Competition law

Recent work by Sanjukta Paul (and other US based scholars in the field of LPE) has demonstrated the importance of competition law in underpinning contemporary concentrations of corporate power. Paul has shown that, contrary to the dominant contemporary perspective of anti-trust law that sees it as regulating markets 'at the margins' to prevent the emergence of monopolies, antitrust should be viewed as a 'generalist law of market construction'.[896] In contrast to the neoclassical paradigm of the market, and the claim that the aggregate of individual market transactions will result in optimal allocation of resources, Paul emphasises (in common with the LPE approach) that the market has no existence independent or prior to legal allocations of coordination rights, which are granted through property, corporate, contract, labour and anti-trust law.[897] The granting of coordination rights to some and denial to others makes private decisions to engage in economic coordination subject to

[893] ibid 238–9.
[894] ibid 240.
[895] ibid 242.
[896] Sanjukta Paul, 'Designing the Market, Workers, Concentration, and Big Tech', *Democratizing Work Panel* (Global Forum for Democratizing Work 2021) <https://democratizingwork.org/recordings-gfdw-1>.
[897] Paul, 'Antitrust As Allocator of Coordination Rights' (n 889) 4–5.

public approval.[898] Paul's second contribution is to 'flip' analysis away from the dominant focus on the prohibition of *horizontal* forms of coordination: anti-competitive agreements such as cartels and the policing of market power amongst dominant firms, to the question of antitrust laws increasingly permissive stance towards structures of *vertical* coordination.[899] She argues the law and economics movement radically altered the function of US antitrust law since the early 1970s along lines which are extremely permissive of concentrations of corporate power and control beyond the firm. Economic efficiency analysis of antitrust in the US was heavily shaped by the law and economics movement. Coase's argument that hierarchical coordination in the firm occurred because it was *efficient* became a 'counterweight' to the mid-century normative goals recognized by the US courts such as vertical 'non-domination', and a commitment to significant horizontal competition.[900] Efficiency became the central criteria in a radical redrawing of anti-trust in ways which permitted huge concentrations of corporate power and hierarchical (vertical) control beyond the firm. As Steinbaum has argued mid-century anti-trust established a sharp line between labour law and anti-trust law based upon control and the boundaries of the firm: control over 'independent business men' with regard to how they conducted their business was illegal, there were no rights of coercion or control over non-employees.[901] Callaci shows that the transformation of US anti-trust law from the 1970's onwards was part of the project of 'redrawing' of the boundaries of the firm driven by the corporate lobby power of the emergent franchise businesses, which left workers on the outside.[902] Paul shows this has been critical to the emergence of the fissured workplace and its impacts upon workers.[903] Direct shareholder ownership structures were exempted from this via the 'firm exemption', which permitted large vertical coordination through *direct* property holdings.[904] New forms of corporate oligopoly and domination of labour were facilitated through antitrust legal and regulatory reform.[905] Vaheesan has argued that US antitrust, in tolerating patterns of consolidation benefits the shareholders of large corporations.[906] Through the framing of economic coordination rights Paul's approach brings competition, corporate and labour law into the same space: the

[898] ibid 7.
[899] Paul, 'Antitrust As Allocator of Coordination Rights' (n 889).
[900] Paul, 'Designing the Market, Workers, Concentration, and Big Tech' (n 899).
[901] Steinbaum (n 87) 49.
[902] Brian Callaci, 'Control without Responsibility: The Legal Creation of Franchising, 1960-1980' (2021) 22 Enterprise and Society 156.
[903] Sanjukta Paul, 'Fissuring and the Firm Exemption' (2019) 82 Law and Contemporary Problems 65.
[904] Sandeep Vaheesan, 'Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law' (2020) 1 Journal of Law and Political Economy.
[905] Steinbaum (n 87).
[906] Vaheesan, S. 'Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law' (2020) Journal of Law and Political Economy, 1, 1

constitutive role of law in designing markets, and the prohibition and permission of particular concentrations of power, and the mechanisms of hierarchy, control and liability therein.

UK competition law has historically been far more accommodating to corporate monopoly. Scott argues the Victorian commitment to *laissez faire* had worked hand in glove with the toleration of monopoly during a period of international dominance of British firms in the early days of empire, challengers to which had only increased appreciation of the value of monopoly, conglomeration and cartelization.[907] The UK only developed a statutory competition law regime after the second world war. Andrew Scott highlights that the statutory competition law regime which emerged post-war was pre-disposed towards tolerating concentrations of corporate power as it was drafted in the shadow of the "proven benefits of monopoly and cartelisation during times of crisis".[908] McGaughey however has pointed to the shared common law roots of US antitrust and UK competition law which "developed to break the private monopoly power of unaccountable corporations".[909] For McGaughey this points towards the role of competition law in underpinning a more democratic, pluralistic economy.[910] As I shall show, this framing is problematised by the extent to which modern UK competition law is based upon a statutory regulatory framework which embeds the 'law and economics' perspective. Furthermore, the historical development of the common law doctrine of 'restraint of trade' also points towards judicial priorities of securing property rights over and above preventing the exercise of highly restrictive practices and constraining corporate monopoly.

Studies on the interface between UK/EU labour and competition law point towards the question of the 'boundaries of the firm' but have only approached this in terms of the self-employed/worker distinction and the potential implications of competition law for unionization of self-employed workers if they were to be treated as a cartel.[911] These papers focus on the exemptions from competition law for workers' organizations. Ofer analyses the extent to which non-efficiency objectives have been part of competition law, with a focus on employment considerations. However, the framing is concerned only with the horizontal dimensions of competition law (mergers) upon employment levels, reflecting the dominant economic perspective of policing markets at the margins.[912] These effects are however significant. A recent OECD paper revealed

[907] Andrew Scott, 'The Evolution of Competition Law and Policy in the United Kingdom' [2011] SSRN Electronic Journal 3.
[908] ibid 2.
[909] Ewan McGaughey, 'Competition and Labour Law in the United Kingdom' [2022] The Cambridge Handbook of Labor in Competition Law 208.
[910] ibid.
[911] ibid; I Lianos, N Countouris and V De Stefano, 'Re-Thinking the Competition Law/Labour Law Interaction: Promoting a Fairer Labour Market' (2019) 10 European Labour Law Journal 291.
[912] Ofer Green, 'Injection of Non-Efficiency Considerations in Competition Law – Employment Considerations as a Test Case' (University of Haifa 2019).

widespread patterns of monopsony power on the demand side of labour markets which enable some large firms to determine wages and worsen employment terms and conditions by reducing employment.[913] Firms may also artificially produce conditions analogous to monopsony by anti-competitive means such as entering into anticompetitive agreements reducing wages or workers' mobility, such as wage fixing or anti-poaching agreements.[914] De-unionization also has the effect of increasing the market power of employers as the countervailing power of workers is reduced. A study of the UK private sector between 1998 and 2017 shows significant monopsony power. The study found that concentration has a larger impact where wages are not covered by collective agreements.[915]Notably, the effects of monopsony power on the demand side of labour markets is not considered to be outside the scope of competition law, but the OECD report that competition enforcement in labour markets is "rare, if not unheard of" in most jurisdictions.[916] The question of the way that UK competition law regulates vertical coordination and hierarchy and its implications for workers has not however been considered. The permissive dimensions of UK competition law as it stands in relation to concentrations of corporate power, the 'nexus of contracts' imaginary underpinning it, and the domination of workers across 'fragmented' organizational forms is absent from analysis. Whilst the historically *laissez faire* dimensions of UK competition law has meant that there has been relatively limited intervention on these issues,[917] the mechanisms of 'vertical restraint' identified are useful in analysing how corporate power is constituted down supply chains or across fragmented organizational forms. As such they function as a heuristic tool in what follows, revealing the contours of law and permissive regulatory regimes in relation to corporate power.

### 6.1.3 Political economy

From a Marxist perspective, dynamics of competition, concentration and centralization are critical for understanding the ways in which capitalism exploits the worker. Marx recognised that the conditions of labour were deeply tied into the wider conditions of competition and the processes of concentration and centralization that simultaneously disciplined small capitals. Critical political economy perspectives have emphasized the oligopolistic nature of contemporary capitalism and the distribution of value, in particular with regards to the structure of GVC's. Such analysis typically refers to the outcomes of the corporate strategies of lead firms in a globalizing, increasingly

[913] Directorate for financial and enterprise affairs competition committee (n 422).
[914] ibid 5.
[915] W Abel, S Tenreyo and G Thwaites, 'Monopsony in the UK' 13265 <https://cepr.org/voxeu/columns/monopsony-uk>.
[916] Directorate for financial and enterprise affairs competition committee (n 422) 6.
[917] Scott (n 909).

financialised and unequal world economy.[918] More sociological approaches such as Labour Process Theory (LPT) have charted the squeeze on labour arising in relation to these processes,[919] and as a result of lead firms ability to secure strategic assets such as "technology, human resources, forms of production organization, intellectual property, and marketing and design",[920] and the associated ability to capture fees for services or intangibles such as management, branding and marketing.[921] These characteristics of contemporary production are central to the analysis here, but are analysed in terms of their legal foundations. As Baars et. al argue, analysis of GVC's tends to take firms and their capacities as a given, not as a product of legal arrangements which could be organized differently.[922] The governance, geography and distribution of value and bargaining power along GVC's are highly contingent upon law.[923] At the same time, analysis of fragmented forms such as GVC's can assist legal scholars in formulating alternatives to traditional disciplinary boundaries "between local and global, law and non-law, public regulation and private ordering, form and substance, rules and norms, firm and contract and firm and state".[924] This also suggests a challenge to the ways in which Marxists conceptualise the boundaries of the firm. As Lojkine argues, contemporary corporate forms problematise the classic Marxian understanding of the labour relationship, and the analytical distinction between the spheres of production and circulation.[925] Lojkine shows how Marx's framing of the sphere of production as being defined by the wage relation and surplus value appropriation, in contrast to the sphere of circulation defined by commercial relations of commodity exchange understood as exchange *of equal values*, becomes problematic under contemporary conditions. The problem, simply put, is this: in a supply chain which is the 'real' wage relation: between the small firm owner and the worker (implying an exchange of equal values between supplier and lead firm), or between the lead firm and the worker (implying the small firm owner is not accumulating capital)? If exploitation and the creation of surplus value occurs in both spheres, then the distinction itself is flawed. For Lojkine, both historically and contemporarily capitalism has entailed the transfer of surplus value as much through credit and commercial relations as through the wage relation, entailing exploitation in both production and circulation. He

[918] W Milburg, 'Shifting Sources and Uses of Profits: Sustaining US Financialisation with Global Value Chains.' (2008) 37 Economy and Society 420.
[919] Jean Cushen and Paul Thompson, 'Financialization and Value: Why Labour and the Labour Process Still Matter' (2016) 30 Work, Employment and Society 352.
[920] P Parker, R. Cox, S. Thompson, 'Financialisation and Value-Based Control: Lessons from the Australian Mining Supply Chain.' (2018) 94 Economic Geography.
[921] Julie Froud and others, 'Apple Business Model Financialization across the Pacific' [2012] CRESC Working Paper Series.
[922] Baars and others (n 888) 61.
[923] Baars and others (n 888).
[924] Ibid.
[925] Lojkine (n 890).

suggests that preserving the central insight developed by Marx: that under capitalism exploitation pervades formally equal relations of exchange, requires a shift in focus from the primacy of production in capitalist exploitation to the concept of coordination. Multi-tiered exploitation in the labour relationship may best explored through analysis of *coordination* and *coordination rights* (with reference to Sanjukta Paul), a concept hitherto dominated by liberal economic thought.[926] This reflects calls for alignment of labour process theory with forms of value production in the 'new economy'.[927] Lojkine's critique fits well with the analysis of multi-tiered exploitation developed here.

## 6.2 The case of franchising

This section explores franchising as a model of the fragmentation-consolidation dynamic, which deploys a complex legal architecture of intangible property rights and highly restrictive contracts to 'code' the firm in ways which contribute to capital consolidation whilst indirectly controlling workers. I explore the multiple levels at which the system is secured, the legal coding of the 'franchise capital', and the directly disciplinary practices over workers which underpins it.

### 6.2.1 Franchising and the labour process

The history of franchising in the UK dates back to the 'tied house' system of brewery distribution in the 1700's, under which landlord leases were tied to the sale of the property owning brewery's ale.[928]However the contemporary form of 'business format franchising' is essentially a post-war phenomenon, developing rapidly in the US from the 1950s, and expanding in the UK and continental Europe in the 1970s.[929] Franchising is characterised by an extensive legal architecture. The franchising model uses highly restrictive contracts rather than formal property ownership and employment relations to "bind subordinate units into coherant, centrally controlled business organizations".[930] This is achieved through the 'business format franchise' package; a set of intellectual property rights relating to trade-marks and business systems, and a body of non-patented practical information to be used by the franchisor for the resale of goods or services to customers.[931] The franchisee agrees to comply with the detailed specifications of the 'franchise system' via the franchise agreement contract. Franchisors effectively control working conditions through contractual requirements on franchisees to implement the franchise 'system' in its entirety. Such systems are made up of huge volumes of procedures laid out in handbooks, training manuals and the franchise contract, as well as through systems such as automatic rota and payment systems which match staffing levels to demand. The

[926] ibid.
[927] Böhm and Land (n 427).
[928] Philip Mark Abell, 'The Regulation of Franchising in the European Union' (University of London 2011) <http://www.elsevier.com/locate/scp>.
[929] ibid 38.
[930] Callaci (n 905) 157.
[931] Abell (n 929) 28.

franchisor can directly or indirectly regulate working conditions through control - via the franchise agreement, operations manuals and employee handbooks - of matters such as working hours, training, and recruitment policies.[932] Whilst franchisees are formally in control of HR management, the control enjoyed by franchisors over almost every other variable in the business enables them to indirectly influence working conditions. This arises through control over pricing policy, sourcing and pricing of inputs, as well as rents. This makes labour costs one of the very few areas where franchisees have some discretion, and may be able to increase profit margins.[933] The model adopted in large parts of the new logistics sector closely reflect the franchising model. Amazon's 'service delivery partner' model provide a template business model, including a range of linked lease deals on equipment (vans, insurance, mobile devices), as well as access to various support services, and a comprehensive operation manual. Amazon control the scale of the operation, limiting route numbers, and the price paid to providers leaving labour costs as the only variable. This arrangement has given rise to numerous claims of labour rights abuses, including excessive hours driving without breaks, wage theft and hourly rates as low as £3.45. In the UK, a pattern of wage theft, unauthorised deductions from wages, and extremely onerous terms in identical 'self-employment' contracts across multiple private couriers engaging drivers for Amazon has emerged, suggesting a high degree of informal control of pay and conditions. Drivers frequently face enormous deductions for van hire, poor quality insurance (with enormous excess payments £1500), and excessive deductions for damage or cleaning costs.[934] These issues in the logistics sector have been approached principally through the frame of 'platform work' in the gig economy. Yet the elements of vertical domination between formally independent businesses, highly restrictive contracts, and the central role of business and technological systems in dictating both the labour process and the distribution of value are characteristic of franchise models. In isolating labour costs and conditions as one of the very few variables open to franchisees, these extensive controls can be seen to focus and intensify the effects of the franchisee's competition in the marketplace upon workers. Supply chains have similar features. Whilst suppliers define labour costs in principle, in practice these are highly contingent on the price structure offered by the lead firms.

Franchise structures are problematic for effectiveness of freedom of association, rights to collectively bargain and the right to strike. Koukiadaki and Katsaroumpas find that fragmented structures such as franchising operate as "restraining or even disabling" factors of workers

[932] Aristea Koukiadaki and Ioannis Katsaroumpas, 'Temporary Contracts, Precarious Employment, Employees' Fundamental Rights and EU Employment Law' (2017) 85 <http://www.europarl.europa.eu/supporting-analyses>.
[933] ibid.
[934] Ben Crawford, 'None of the Freedom, All of the Risk: Delivery Drivers and Bogus Self Employment in Bristol' (2016) <https://www.bristolcab.org.uk/wp-content/uploads/2018/03/None-of-the-freedom-report-A4-8-web.pdf>.

representation, by either excluding workers from representational structures or confining their voice to ineffective smaller sites. This reflects a contradictory dialectic of 'business fragmentation-integration' which retains power and control for the lead firm, in contradiction with its formal independence.[935] High integration is needed to ensure the uniformity that is characteristic of the business model: the consumer experience at all outlets of a given brand is the same. Because of this the basic structure of the organization is a barrier to effective worker representation as the decisions which shape the labour process are predominantly made at the network level. As such collective representation at the level of the employer is mislocated, the employer lacking the basic competencies to negotiate or effect changes, one of the central features of the fragmented organizational forms.[936] Negotiations will be destabilized by the silent 'third party', and unions organizing at the workplace level will almost certainly lack leverage against the controlling entity.[937] As Royle shows the franchise structure may be actively manipulated by lead firms switching branches between franchise/directly owned status to interrupt labour organizing or to avoid compliance with statutory regulation such as European Works Councils.[938]

### 6.2.2 Securing franchise capital I: labour law and the corporate veil

The franchise system enables franchisors to effectively determine the substantive terms and conditions of workers within formally independent firms with no employer's liability. Challenges to this model have principally been focused on extending employer liabilities to lead firms through the concept of joint employers. These attempts have seen limited success in the UK. Examples from the parcel delivery sector and fast-food franchising suggests that containing liabilities at the lowest level of the structure is crucial for securing emergent models which transform the labour relationship.

Reflecting the labour law critique of fragmentation, the problem of the unitary model of the employer and the need for 'joint employers' has been a central response. Trade union and regulatory responses to franchising in the US have played out around the scope and application of the concept of the definition of 'joint employers' in the National Labour Relations Act 1935. This battle has played out significantly on political grounds, with appointees to the NLRB periodically tightening and widening the degree of 'direct and immediate control' required for joint liability from the Reagan administration onwards.[939] Common law constraints have also applied. In 2017 New York

[935] Koukiadaki and Katsaroumpas (n 933) 18.
[936] Shamir (n 406).
[937] ibid.
[938] T Royle, 'Where's the Beef? Mcdonald's and Its European Works Council' (1999) 5 European Journal of Industrial Relations 327.
[939] D Moburg, 'NLRB Decision Could Mean Excellent News for Fast Food and Other Low-Wage Workers' (*In these times*, 2015) <https://inthesetimes.com/article/nlrb-decision-could-mean-excellent-news-for-fast-food-and-other-low-wage-work>.

Attorney General Eric T. Schneiderman launched litigation against Domino's Pizza Inc., its franchising subsidiaries, and three Domino's franchisees for purportedly underpaying workers at least $565,000 at 10 stores in New York. The state alleged that Domino's were liable as joint employers under the Fair Labour Standards Act for underpayments which were facilitated by Dominos 'PULSE' payroll system. The common law unitary model won out however, with the District Court finding that Dominos could not be 'joint employers' if they did not meet the standard 'employer' test in full.[940] In the UK the question of joint employers was brought before the CAC by the IWGB. The IWGB were seeking recognition for a bargaining unit of workers who worked for both the outsourcing company Cordant, and the University of London, on the basis that whilst Cordant was the legal employer, the University effectively determined their terms and conditions for the purposes of schedule 1 of the Trade Union and Labour Relations (Consolidation) Act 1992.[941] The CAC found that even were it to be the case in fact that the University "substantially determined" terms and conditions, the Act could not be construed to find the University as an employer in the absence of an employment contract.[942] It would be a matter for parliament to expand the definition of worker within the Act (s296 (1)) to someone who works "for a person who in practice substantially determines the terms of his contract with a different employer". The CAC also argued such an extension would go against "fair and efficient practices" in particular by enabling workers to have one union facing the de facto employer and one facing the de jure employer, a situation that it described as "a recipe for chaotic workplace relationships".[943] It is of course notable that this is the position enjoyed by employers who benefit from the split between an entity which employs and an entity which sets terms and conditions and enjoys effective labour control, and that this arrangement is an intentional outcome in cases of outsourcing and franchising. The move beyond the unitary model is likely to be an uphill struggle in common law jurisdictions. As Njoya has shown judicial respect for the separate legal personality of incorporated entities in common law jurisdictions, upheld as 'freedom of contract', has tightly constrained the applicability of joint liability statutes such as 'associated employers'.[944] In particular she argues that the restrictive scope of 'associated employer' and 'related employer' statutes in the UK and Canada (respectively) arises because of the "unified commitment to freedom of contract" exemplified by judicial respect for the separate legal entity status of corporations contracting labour through intermediaries. Because of this commitment, the statutory provisions are not sufficient to defeat the principle of contractual privity, and the corporate entity is shielded from liability from

[940] *In re Dominos Pizza Inc* [2018] S.D.N.Y 16-CV-2492 (AJN)(KNF)
[941] Independent Workers' Union of Great Britain and University of London (2018) CAC, TUR1/1027(2017)
[942] Ibid p.9
[943] Ibid p.9
[944] Njoya (n 224) 130.

those with whom it has no contract.[945] Despite these doctrinal challenges, as the example of the US shows, these are significantly political legislative questions. In turn it is questionable whether an emergent joint employer's doctrine would survive a hostile legislature. Questions of pay setting across independent entities has however been challenged through statutory means in the area of equal pay. The Equal Pay Act 1970 expressly provides for employers associated by either direct or third party control within a corporate group will be captured for the purposes of equal pay.[946] The extension of this to indirect forms such as franchising has not been tested but would not likely fall within the definition of 'control' required for associated employers.[947]

The question of liability for breaches of labour standards is particularly important where emergent business models are transformative or destructive of sectoral labour norms and practices. The tech companies driving transformations in the logistics and delivery sector are often hailed as engaged in 'creative destruction', yet much of the groundwork of this appears to take place at the lowest level of outsourced production. The pattern of wage theft, exploitative terms of engagement and misclassification which has appeared at the provider level in tandem with the expansion of the Amazon model. This basic pattern is reflected in claims brought with regard to employment status, wage theft and other labour rights breaches in the logistics sector. The law firm Leigh Day are bringing employment status claims against multiple Amazon Service Delivery Partners, but notably not against Amazon for basic reasons of employment law discussed above.[948] Given the scale of the potential penalties (Leigh Day estimate drivers may be entitled to £10,500 per year of service) many small providers would likely fold if the action is successful, leaving the drivers with no compensation, but having effectively shielded Amazon from the costs of its business model. As Tony Royle has extensively documented, during the expansion of the fast-food franchising model lead firms consistently resorted to quasi-legal and illegal practices, skirting the line of liability and criminality in order to secure the business model. Royle describes how where McDonalds franchisees are deemed to have diverged from implementation of the franchise system in any way, regional management swiftly intervene to ensure that standard practices and targets are met. McDonalds has historically responded aggressively to works council organizing in European countries. In particular in Germany where statutory works councils have extensive information, consultation and co-determination rights McDonald's deploys head office 'flying squads' of managers to intervene at store level. Managers are trained in a range of responses to works council organizing via a guide called *Practical Help in Dealing with Works Councils*. Practices include refusing to recognize nominees, disallowing

[945] Ibid
[946] The Equal Pay Act 1970 s.1(6)(c)
[947] s 231 Employment Rights Act 1996
[948] 'Amazon Drivers Claim' (*Leigh Day*) <https://tinyurl.com/yc6vh3ue> accessed 1 February 2023.

meetings on work premisses, temporarily closing stores, buying out employee contracts, altering opening hours to 'hive off' undesirable employees, and flipping from direct ownership into franchise ownership to undercut representation rights.[949] In France, in 1994, 12 McDonalds managers were imprisoned for interfering with works council and trade union rights.[950] Such practices reveal an interesting dimension to the 'depersonalization' of the labour relationship implied in the abstract property forms of the franchise system: the formal legal distance enabled by the structure quickly collapses in empirical reality. When labour organizing threatens to disrupt the uniformity of the labour process lead firms must risk a directly disciplinary interventions which skirt the line of involvement in 'employment' practice and thus liability. The 'arm's length' production of uniformity may only be secured through the multiplicity of micro level rights violations.

### 6.2.3 Securing franchise capital II: franchising as intangible financial capital

The principle characteristic of the franchising model from the perspective of the labour process is the necessity of the production of uniformity across extended and fragmented networks. This characteristic is also reflected in the ways in which the franchise system has been coded into financial capital. The emergence of 'Whole Business Securitization' (WBS) practices as a method for tying finance capital to franchise models is indicative of these characteristics. WBS entails isolating revenue streams from an originator firm and enabling them to be used as collateral for borrowing, with provision for creditors to take control of assets if in breach.[951] What makes WBS different to other forms of securitization is that it functions to identify a particular source of value within a business (an asset) and enables the asset to be securitized whilst remaining under the control of the originator. In standard securitizations the originator becomes a 'servicer' post securitization, in WBS there is no 'originator independence' as cashflows are strongly originator performance dependent.[952] WBS extends the types of assets that can be securitised. Whilst it has been applied to many business types (the first WBS was applied to a care home in the early 90's see Chapter 5), the underlying cash flows to WBS are most frequently royalties generated by contract's such as franchising, which offer a stable and secure set of receivables from multiple franchise outlets.[953] Companies who hold large numbers of franchise agreements use WBS to access financing to expand, pooling the assets in an SPV and issuing debt from the vehicle. The revenue from contract royalties, property leases and fees then pays

[949] In Germany works council representation as the company (Gesamtbetriebsrat) level only applies to directly owned entities not franchises. Royle, '"Low-Road Americanization" and the Global "McJob": A Longitudinal Analysis of Work, Pay and Unionization in the International Fast-Food Industry' (n 879) 262.
[950] Tony Royle, 'Just Vote No! Union–Busting in the European Fast–Food Industry: The Case of McDonald's' (2002) 33 Industrial Relations Journal 262, 262.
[951] 'Whole Business Securitisation' (n 744).
[952] ibid.
[953] D DeMatos, 'What Is a Whole Business Securitization?' (*Percent*, 2019) <https://percent.com/blog/what-is-a-whole-business-securitization/> accessed 2 July 2020.

the interest and principal on debt issued. The critical characteristic of this is that the securitization remains strongly dependant on stability of revenue streams and originator performance.[954]

The transformation of firms into 'asset only' enterprises in this way; promising a steady stream of income without the complications of employing large numbers of people, is attractive to finance capital. This trend is observable in the hotel sector, which has seen a marked shift from direct corporate ownership to the fragmentation of the model across property asset only investment models (such as REITs), private equity investment, and a shift to a 'brand only' hotel franchising model which has seen significant employment volatility.[955] Frequent ownership changes and fragmented structures in this sector have also driven the now familiar problem of the absent 'employer' where unions have sought recognition.[956] The 'capital minting' qualities of franchise assets was exemplified by 3G Capital's takeover of Burger King. 3G took Burger King private with $1.6bn equity in a $5.6bn LBO in 2010 and immediately transformed the chain from majority lead firm managed to majority franchised, with the directly employed head count falling from 39,000 to 2,400. The reduced payroll exposure and capital investment costs enabled 3G to refloat 30% of the shares for $1.5bn, leaving the company 70% owners with all capital outlay recouped.[957] At the same time 3G boosted stock options to middle management making many of them millionaires, and boosted store openings.[958] The outcome was the world's third largest restaurant chain with 18,000 units in 100 countries.

### 6.2.4 Summary

The case of franchising demonstrates the ease with which the basic norms of company and labour law open up a gulf in labour rights and representation. Arguably the most critical aspect of the labour relationship: the rights of control of one party over another (or the coordination function of the firm in Deakins terminology), does not itself come with rights or protections attached. In the absence of statutory intervention, attempts to pursue 'joint employer' status for workers faces an uphill battle against freedom of contract and judicial respect for the corporate legal person. These norms constitute the background conditions under which corporate models which break down the employment relationship emerge. The franchise system codes the labour process through highly

[954] 'Whole Business Securitisation' (n 744).
[955] 'Volatility Alert for Hospitality Employees: Private Equity Pushes REITs aside as Top Hotel Owner' (*IUF private equity buyout watch*) <http://www.iufdocuments.org/buyoutwatch/2013/10/volatility_alert_for_hospitali.html> accessed 5 May 2020.
[956] Jeremy Blasi and Samir Sonti, 'Private Equity, Human Rights Due Diligence, and Global Labour Rights: The Case of "Hotel California"' (2017) 1 44.
[957] 'Burger King's Debt Whopper Is a Public Subsidy to Fast Food Poverty' (*IUF private equity buyout watch*, 2014) <http://www.iufdocuments.org/buyoutwatch/2014/09/burger_kings_debt_whopper_is_a.html#more> accessed 5 May 2020.
[958] C Sorvino, 'Whopper Of A Turnaround: At Burger King, The 3G Capital Model Actually Worked' (*Forbes*, 2019) <https://tinyurl.com/2v28fd3w>.

restrictive contracts. The uniformity of production and revenue streams the system generates underpins new financial forms and patterns of capital concentration. These interlinked forms of intangible property can be understood as 'franchise capital'. Yet legal coding is not sufficient to uphold the franchise capital. The basis of the revenue streams for WBS in franchise contracts implies tight control over the labour process at the workplace level. The global reach of these systems implies a remarkable degree of uniformity is upheld in diverse national contexts. Disabling workplace and network level worker representation structures appears to be integral to preserving the uniformity of the model. Corporate driven, sector wide transformations of employment norms such as fast-food franchising or the 'Amazon effect' in the logistics sector have frequently been accompanied by fragmented structures which hold liability at the lowest level. This suggests that securing control over the labour process opens new spaces for the coding of capital. The following section considers the ways in which these dynamics play out in the case of supply chains, which pose a more problematic context for the role of legal coding.

## 6.3 Supply chains, brand value and the labour process

Analysis of the source of the 'brand value' of lead firms in supply chains points directly to the brutal exploitation of contract labour through domination of supplier firms. In contrast to the case of franchising however, supply chain dominance is exerted less through restrictive contracts than deployment of particular buying practices.

### 6.3.1 Sources of brand value

The prospectus advertising Boohoo stock to a select group of investors prior to its 2014 float on the London Stock Market is instructive as to the source of value of the stock. Boohoo produce large quantities of very cheap fashion items, mostly un-logoed: the value of the 'brand' is deeply tied up with these products. Whilst the prospectus is selling on the value of the 'Boohoo brand' each aspect of the product: mass production, low cost, quick turnaround – is directly traceable back to the labour process and the conditions of exploitation in garment production. At the point of the IPO, Boohoo raised £300m on £8.3m net assets.[959] The asset base was negligible for the valuation, as the prospectus makes clear shares were selling on profitability, growth prospects and the 'fast fashion' business model. Boohoo's price point - an average of £17 per item across the range with £3 vest tops and £12 dresses cited as examples - "is considered a key factor in the popularity of the brand".[960] Growth

[959] £239.9m of which went to the existing shareholders, with £50.1 million investment to the company. PricewaterhouseCoopers LLP, 'Boohoo.Com Plc: Admission to AIM' (2014) <http://www.boohooplc.com/~/media/Files/B/Boohoo/documents/prospectus/boohoocom-plc-final-admission-document-5-march-2014.pdf>.

[960] ibid 18.

prospects were underpinned by boohoo's "highly efficient product sourcing model", as the prospectus boasts:

"The majority of products (some 71%) are sourced in the UK…Boohoo does not have any significant reliance on any single supplier, or any small group of suppliers, with no supplier accounting for over 10% of sold products. The performance of suppliers is continually monitored by the buying team in terms of pricing, level of returns, responsiveness, on-time delivery, quality and product sales. boohoo are able to switch suppliers quickly in the event of underperformance, with minimal disruption to the business."[961]

The company also offloaded a number of directly owned subsidiaries in the process of preparing to float, shifting to a fully externalised supply model.[962] The prospectus clearly articulates the market power disparities underlying this, the disciplinary power this enables and the control and pricing benefits accrued. These selling points for the company stock are directly rooted in the labour process. The effects of cheap garments, tight cost control, quick turnaround, no dependence upon suppliers, and quick switch in suppliers, are directly translated into conditions of extreme exploitation in the Leicester garment sector and elsewhere around the world. Boohoo Group Ltd accounts for almost 75–80% production in the Leicester garment sector, and sources around 60–70% of its production from Leicester.[963] Producers in Leicester and the UK sector generally are typically small, and produce high volumes of basic garments at low margins.[964] Reflecting the experience of the meat processing sector, the costs of compliance with auditing and industry codes of conduct has been a driver of consolidated supply bases, with lead firms using fewer, larger suppliers over longer periods of time.[965] Consolidated and integrated supplier bases however have generated 'captive relationships', which increase planning ability but also increase dependencies.[966] Boohoo has been accused of driving prices down through induced competition between small suppliers, which is explicitly linked to low wages, forced overtime and irregular working hours.[967] At the same time supplier dependence upon lead firms is high with many producers reporting working exclusively, whether for BooHoo or for other brands.[968] Industry sources state that it is impossible to

[961] PricewaterhouseCoopers LLP, 'Boohoo.Com Plc: Admission to AIM' (n 960).
[962] ibid 20.
[963] Labour Behind the Label, 'Boohoo & COVID-19' <https://labourbehindthelabel.net/wp-content/uploads/2020/06/LBL-Boohoo-WEB.pdf>.
[964] Nikolaus Hammer and Reka Plugor, 'New Industry on a Skewed Playing Field: Supply Chain Relations and Working Conditions in UK Garment Manufacturing' (2015) 22 <https://www2.le.ac.uk/offices/press/for-journalists/media-resources/Leicester Report - Final -to publish.pdf/>.
[965] ibid 24.
[966] ibid.
[967] Labour Behind the Label (n 964) 9.
[968] ibid 4.

produce the units/garments requested by Boohoo for the product price and pay workers the national minimum wage. A 2015 study by the Ethical Trading Initiative found the real local average wage to be close to £3 per hour: less than half the NMW at the time. Workers with marginal immigration status were found to be working for as low as £1 an hour.[969] In addition to illegally low wages, working time violations and forced overtime, the ETI found high levels of informal employment, injuries and health issues arising from intensive repetitive production, widespread health and safety violations, and abuse threats and bullying used as a management tool to meet quotas and deadlines.[970]

### 6.3.2 Sources of shareholder value

Since the IPO BooHoo's revenues, profit margins and share capital have since rocketed, with a market capitalization of £1.25bn in February 2022 (a 4X increase on the float price).[971] This rise was briefly interrupted in late 2020 when the intensive exploitation of workers in BooHoo's Leicester manufacturing base was 'revealed' in an expose by the *Guardian* newspaper and campaign group *Labour Behind the Label*. BooHoo's share price dropped by £2bn on the Monday following reportage about labour abuses in Leicester. Yet within three days major institutional investors were weighing in with supportive notes, characterising the price hit caused by the "supply chain/low pay controversy" as an "isolated incident" and a "buying opportunity". Hedge funds ended their short positions, and retail investors bought in rapidly at the new lower price. BooHoo's largest stockholder - Merian Global Investors - increased its holding to 10%.[972] BooHoo shares rebounded 30%, and have since reached its previous highs. This took only three days, and a token promise to invest in improving factory conditions in Leicester, suggesting investors rapidly 'priced in' the (very limited) damage of bad publicity on future profits. Given the selling points in the company prospectus and the fact that working conditions in the Leicester garment sector had been an 'open secret' for years, it is clear that these had in fact been 'priced in' from the outset. Given the endemic nature of exploitative practices in fashion supply chains, the characterisation of this as an "isolated incident" is absurd. Reflecting the patterns described above, liability for breaches of labour rights has been held at the lowest level. The Levitt report concludes that from (at the very latest) December 2019, senior Boohoo Directors "knew for a fact that there were very serious issues in its Leicester garment suppliers". BooHoo reportedly account for 75-80% of manufacturing in the notorious Leicester

[969] Hammer and Plugor (n 965).
[970] ibid.
[971] 'Boohoo Group Plc (BOO.L)' (*Yahoo Finance*, 2022) <https://tinyurl.com/yc37mssd> accessed 3 February 2022.
[972] S Butler, 'Boohoo Shares Bounce Back after Pledge to Improve Factory Conditions' *The Guardian* (9 July 2020) <https://www.theguardian.com/fashion/2020/jul/09/boohoo-shares-bounce-back-after-pledge-to-improve-factory-conditions>.

garment sector, which in turn accounts for up to 80% of BooHoo's total production.[973] Yet Mr Kamani and the other members of the BooHoo board have faced no criminal or civil penalties for the gross labour rights abuses from which they have profited.[974] Despite lining themselves up for a £350m pay-day wage claims remain unaddressed.[975] Companies house lists more than 50 Directors of Leicester garment factories who have been banned from running companies, many of whom continue to own and control garment companies as shareholders instead.[976] These bans exemplify both the problems of the multi-layered corporate veil and the ineffectiveness of tackling abuses at the lowest level of the firm authority structure. On this basis the Directors of BooHoo have been able to take control of even bigger supply chains, further consolidating their power to control conditions and pay. Since the scandal BooHoo has acquired the high street giant Debenhams - overnight transforming a major British multinational into a website – as well as Burton, Burton, Dorothy Perkins and Wallis from the liquidation of the Arcadia group.[977] In every acquisition BooHoo gains control over the conditions of ever more supply chain workers.

## 6.4: Vertical domination and the labour process

The relationship between formally independent firms is a critical point of transmission for corporate power. This section explores the legal dimensions of hierarchy in commercial relations from the perspective of contract, property and competition law, and seeks to trace the linkages between practices of vertical domination and the labour process. The central focus is on the case of franchising, but I also draw on examples from vertical domination in supply chains.

The relationship between the franchisor and franchisee appears as a critical contact point for the law, as the point at which the franchisors rights over the conduct of the 'system' will be upheld. Whilst the relationship is rooted in contract, a significant characteristic is the asymmetry of power between the parties, which is rooted in the system of franchise property. Writing in 1973 legal scholars Harold Brown and Jerry Cohen recognized the franchise system as a 'class of industrial property', entailing not only the various forms of intellectual property such as patents, licenses and

[973] Labour Behind the Label (n 964).
[974] J Powell, 'Boohoo's Levitt Report: The Highlights' *Financial Times* (20 October 2020) <https://www.ft.com/content/a450acb0-7c8b-4b98-b77e-a1df4d52574b>.
[975] M Sweney, 'Boohoo Bosses in Line for £150m Bonus as Part of Incentive Plan' *The Guardian* (26 June 2020) <https://www.theguardian.com/business/2020/jun/26/boohoo-bosses-in-line-for-150m-bonus-as-part-of-incentive-plan>.
[976] A Bland, 'Leicester Garment Factory Bosses Banned from Running Businesses for More than 400 Years' *The Guardian* (3 September 2020) <https://www.theguardian.com/uk-news/2020/sep/03/dozens-of-disqualified-directors-linked-to-leicester-textiles-trade>.
[977] J Eley, 'Boohoo in Talks over Remaining Arcadia Brands' <https://www.ft.com/content/a6d01da4-0375-46bb-9b73-37945c53c5b4>.

trademarks but "something more - a feudal enfeoffment of the franchisee", a status relationship masked by the contract of adhesion drawn up by the franchisor.[978] The disparity is rooted in the property rights of the franchisor, and the dependency of the franchisee business upon continued permission to use this property. The power to sanction the franchisee by terminating the agreement is a powerful disciplinary power over management at the franchise level.

### 6.4.1 Lawful act economic duress

The high tolerance of commercial law for relationships of vertical domination is expressed in the application of the doctrine of lawful act economic duress. Where the judicial treatment of employment contracts takes consideration for the absence of genuine contractual freedom between parties, commercial contracts are treated differently, with strong presumption of freely contracting parties. Yet the example of franchise or similar 'asymmetric' contracts demonstrates how assumptions of contractual freedom obscure economic power relations which have significant social effects. The common law concept of 'economic duress' is one point of divergence here which does directly address bargaining power in commercial contracts. In *Burger King Corp v King Franchises Ltd* alleged 'economic duress' in signing of settlement agreement was found to have no real prospect of success in summary judgement. The franchisees alleged a settlement agreement signed following threats from Burger King to terminate the franchise agreements (in accordance with its contractual rights under the agreements) had only been signed subject to duress. The summary judgement found that whilst lawful act economic duress could occur in rare occasions in a commercial context, actions taken within established contractual rights will not normally amount to duress in the absence of "unconscionable or immoral pressure".[979] The question of lawful act economic duress was considered by the Supreme Court in 2021, in a ruling which showed the high degree of legitimate power disparity in commercial transactions. In *Pakistan International Airline Corp v Times Travel (UK) Ltd* the court emphasised that there was no doctrine of unequal bargaining power and no general principle of good faith in contract law, and that a powerful commercial party could impose onerous terms, unless "illegitimate threats or pressure" were deployed.[980] The exercise of monopoly power could not by itself amount to illegitimate pressure.[981]

### 6.4.2 UK franchising regulation

The presumption of formal equality of parties is also reflected in UK franchising regulation. Regulation of franchising in the UK has taken the route of voluntary industry self-regulation. There is no sector

[978] Harold Brown and Jerry Cohen, 'Franchise Misuse' (1973) 48 Notre Dame Lawyer 1145, 1146.

[979] *Burger King v King Franchisees* [2013] EWHC 1761 (Comm) (24)
[980] *Pakistan International Airline Corp v Times Travel (UK) Ltd*, 2021 WL 03634097 (19-57)
[981] Ibid (58-61)

specific statutory regulation, as business format franchising expanded from the 1970's onwards "successive governments have made clear they are not contemplating franchise regulation".[982]

British franchising is subject to voluntary regulation by British Franchising Association (BVA), a standards-based membership organization which requires members to comply with the BVA Code of Ethics. The code is heavily disclosure based, focusing on the quality of information disclosed by franchisors prior to the signing of the franchise agreement. To the extent to which these individuals have more in common with employees than business owners, the regulatory response has been more suited to arm's length relationships between autonomous economic actors. As Joellen Riley has emphasised in the Australian franchising context, removing informational asymmetries through disclosure requirements under a franchising 'code of conduct' reflects a market efficiencies based response which assumes that a free and efficient market will protect participants, and that franchisees are robust and autonomous entrepreneurs able to make rational business decisions and contract freely.[983] The adoption of a code of conduct focused on informational disclosures is likely to work in favour of established franchisors. Misrepresentation by the franchisor is a common area of litigation in the UK, following where expectations of business outcomes have not been met. The ability to indicate compliance with an industry standard for information may likely strengthen the position of franchisors in litigation. This reflects wider problems with 'soft law' modes of regulation in fragmented structures. There is an extensive literature concerning the rise of mechanisms of supply chain 'governance' to improve such practices, such as ethical audits, codes of conduct, and statutory backed reporting regimes such as that established by the Modern Slavery Act. As Lebaron et. al. show audit regimes often fail to detect or correct abuses and instead "respond to and protect industry commercial interests" reflecting an "industry led privatization of global governance".[984] In supermarket supply chains the buying practices of lead firms has been found to operate in direct contradiction to ethical codes of conduct regarding labour standards in suppliers. At the same time, in both agri-food and fast fashion supply chains the costs of ethical compliance has been found to drive vertical consolidation and the emergence of 'captive relationships' which enhance supplier dependency and thus lead firms

[982] John Pratt, 'Franchising in the United Kingdom' (2012) 32 Franchise Law Journal 95.
[983] Joellen Riley, 'A Blurred Boundary between Entrepreneurship and Servitude: Regulating Business Format Franchising in Australia' in Judy Fudge, Shae McCrystal and Kamala Sankaren (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing 2012).
[984] Genevieve LeBaron, Jane Lister and Peter Dauvergne, 'Governing Global Supply Chain Sustainability through the Ethical Audit Regime' (2017) 14 Globalizations 958 <https://doi.org/10.1080/14747731.2017.1304008>.

power.[985] As such, whilst such mechanisms may have some impact on curtailing abuses, they risk entrenching (not challenging) the economic power and private legal authority of lead firms.

### 6.4.3 US franchising and anti-trust

Callaci has shown how many of the practices integral to the business format franchising model were prohibited under US anti-trust bans on 'vertical restraints'. US anti-trust had traditionally allowed for centralized control and coordination *within* firms, but prohibited coordination *between* firms, including vertical forms of coordination. Because the business format franchising model entailed tight management and control of formally independent chains of stores the post-war US franchising boom quickly attracted legal scrutiny. As Callaci argues, business format franchising "as we know it in 2019 was not legal in the 1960's".[986] As Steinbaum shows via the 1951 case of *United States v. Richfield Oil Co*, control over 'independent businessmen' with regard to how they conducted their business (choices over sourcing of parts, products carried etc) was illegal. This drew a sharp line between labour law and antitrust law: there was no rights of coercion or control of non-employees.[987] The tight control exercised through business format franchising clashed with prohibitions on vertical restraints, in particular minimum and maximum price controls, territorial restrictions, and practices of 'tying' franchisees to particular suppliers.

**Territorial restrictions**

Territorial restrictions enable franchisors to shape the degree of monopoly or competition between like outlets in a given geographic area, and enable the granting of exclusive distribution rights in a given area. The control over exclusive distribution rights confers wider powers on producer firms who may then specify wider conditions of sale, display, staff uniforms and suchlike. The US Supreme Court found territorial constraints to be *per se* illegal (meaning such terms were always illegal and would not be considered on a case by case basis) under Section 1 of the Sherman Act in *United States v. Arnold, Schwinn, &Co* in 1967, sending shockwaves through the emergent franchising industry.[988]

[985] Hammer and Plugor (n 965); Safak Tartanoglu Bennet, Nikolaus Hammer and Jean Jenkins, 'Rights without Remedy: The Disconnection of Labour across Multiple Scales and Domains' (2021) 1 Work in the global economy.
[986] Callaci (n 905) 161.
[987] Steinbaum (n 87) 49.
[988] Callaci (n 905) 164. It should be noted the application of *Schwinn* to business format franchising was not direct as the prohibition arose where a distributor took title to the goods (and could therefore not be told where to sell them), unlike businesses which provided services under a registered trademark. Nonetheless it put the business model on uncertain terrain from the perspective of antitrust law. Ibid 164-166

**Price and cost structure**

As described above, from a workers perspective the fact that the franchisor effectively controls almost the entire price and cost structure of the business is hugely significant as it enables them to indirectly set pay, terms and conditions. The ability to set prices can also be seen as a basic marker of independence. As Callaci notes, there is no more fundamental business decision than what price to charge.[989] Franchisor control over the price and cost structure of the business falls into two areas of anti-trust regulation: price restraints and 'tying' practices. Tying refers to contractual requirements for franchisees to use suppliers, usually those owned or approved by the franchisor. As such lead firms are able to both profit from sales to franchise outlets, control product quality and uniformity, and influence franchisee margins. The practice of requiring franchisees to purchase supplies or equipment from a specified supplier as a condition of using a registered trademark was held to be per se illegal under Section 1 of the Sherman Act in 1970, and franchisors were under sustained regulatory and legal pressure around these practices throughout the 1970's.[990] The recognition that a trademark license was a separate product to other inputs also enabled franchisees to challenge requirements to lease real estate or buy other unwanted products.[991] Both minimum and maximum price constraints were also prohibited in US antitrust. Franchisors however were creative in sidestepping the legal constraints. Franchisors shifted to adopting lists of 'approved suppliers' and quality standards instead of requiring mandatory purchases and shifted to charging royalties rather than seeking to profit through direct sales. Brands advertised products nationally at a certain price point making it almost impossible for franchise stores not to adopt the quoted price, or adopted 'suggested prices' backed by the threat of termination or non-renewal of the contract.[992] The legal restrictions would be gradually unravelled over the period from 1970 onwards, in response both to the jurisprudential influence of the law and economics movement in relation to anti-trust, and an extensive lobbying effort on the part of the franchise corporations and industry bodies. Callaci shows a twin track lobbying strategy. On the one hand the franchisors sought to argue against the prohibitions on vertical constraints, enabling them tighter hierarchical control. At the same time they argued vociferously against being treated as singular, integrated organizations for the purposes of tax and labour law. [993] Success in this strategy provided an 'alternative route' to large scale centralized control: through "contract not ownership", redefining the legal boundaries of the firm and leaving workers firmly outside.[994] The erosion of the 'sharp line' between anti-trust and labour

[989] ibid 169.
[990] Siegel v. Chicken Delight, Inc., 311 F. Supp. 847 (N.D. Cal. 1970) cited in ibid p.166
[991] Callaci (n 905) 167.
[992] ibid 165–67.
[993] ibid 158.
[994] ibid 164.

law identified by Steinbaum legalised vertical domination beyond the firm with major implications for workers.[995]

### 6.4.4 UK competition law: the 'restraint of trade' doctrine

In contrast to the 'Richfield standard' described by Steinbaum, UK competition law has historically granted wide facility to the exercise of hierarchical control beyond the firm. There has been relatively little UK litigation of franchising, with the most prominent areas being non-competition post termination clauses, breach of contract, and misrepresentation by the franchisor. However, the case law on non-competition clauses is indicative of the courts' view of a number of critical features of the franchise model, in particular questions of the status and independence of the franchisee, and the nature and protection of the franchise 'property'. The courts' treatment of franchising in competition law cases is indicative of the process of emergence of franchise property as a form of directly commodified labour.

The non-compete end clause case law principally concerns the enforceability of contractual clauses which may constitute 'restraint of trade'. At common law the restraint of trade doctrine is the principal mechanism through which contractual terms may be voided. Non-compete clauses as restrictive covenants in restraint of trade are *prima facie* unenforceable but may be enforced if such covenants can be shown to be 'reasonably necessary' to protect legitimate business interests.[996] As Andrew Scott has described, the doctrine represents the courts attempts to reconcile freedom of contract with freedom to trade.[997] The doctrine is rendered open to public policy concerns via the concept of 'reasonableness' which is judged in reference both to the interests of the counterparties and the wider public interest. Whilst the doctrine has shaped UK competition policy its effectiveness has been limited due to the "persistent commitment to the ideology of laissez-faire economics and the primacy of freedom of contract" on the part of the judiciary, eroding the practical importance of the doctrine.[998]

The courts are far more willing to uphold such a covenant in the case of the sale of a business than in a contract of employment.[999] The question of the autonomy or independence of parties is critical to the dividing line between competition law and labour law. For example the exemption of labour organizing from competition law is based upon the fact that an employee cannot be an 'undertaking' for the purposes of competition law as an employee does not exercise an 'autonomous

[995] Steinbaum (n 87) 49.
[996] Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company [1894] AC 535 [565] [707]
[997] Scott (n 909).
[998] ibid.
[999] Carewatch Care Services Ltd v Focus Caring Services Ltd, 2014 WL 3002765 [127]

economic activity'.[1000] As such the enforceability of covenants in restraint of trade raises questions of status. During the formative period of UK franchising in the 1960's some authorities viewed franchise contracts as master/servant covenants.[1001] More recently it has consistently been held that a franchise agreement is closer to a vendor and purchaser agreement than a contract of employment.[1002] However, in *Dwyer v Fredbar* the Court of Appeal upheld the Chancery court decision that a (relatively standard) non-compete clause was unenforceable on the basis that the franchise agreement was more akin to an employment contract. Inequality of bargaining power was a significant factor in determining the 'reasonableness' of covenants. In this case the franchisee was a particularly weak party with no experience in the industry, and the alignment of interest and exposure to risk were relevant factors in determining bargaining power.[1003]

In considering non-compete clauses, the courts have paid significant attention to the objective of securing the 'goodwill' property of the franchisor. Non-compete clauses in business sales are defensible in terms of protecting the integrity of the business property: to secure the business property as the "accumulated results" of "commercial energy and activity".[1004] Public interest cannot be invoked to render such restraints void as to do so would be "to use public interest for the destruction of property". The property at issue was framed by Cooke J as "a form of lease of goodwill for a term of years, with an obligation on the tenant, as it were, to retransfer the subject matter of the lease at the end".[1005] Goodwill is understood as legal property in a business, a proprietary personal right which can be assigned or licensed but must be attached to a business or trade. It is understood in law as the accumulation of good name and reputation, the attractive force of a business which brings in custom, and may subsist in the features of goods themselves. To exist as property goodwill must be tied into registered trademarks.[1006] As such goodwill is a broad and malleable concept suited well to securing franchise property.

Goodwill property is linked to the question of territorial designations and restrictions. In *Chipsaway International Ltd v Kerr* the Court of Appeal underlined that the principle purpose of non-compete clauses was the protection of franchise property, rather than questions of direct competition.[1007] The franchisee had continued to provide services repairing car paintwork chips having

[1000] Lianos, Countouris and De Stefano (n 913) 8.
[1001] *Kall Kwik Printing (UK) Ltd v Rush*, [1996] F.S.R. 114 [118]
[1002] *Carewatch Care Services Ltd v Focus Caring Services Ltd*, 2014 WL 3002765 [127]
[1003] *Dwyer (UK Franchising) Ltd v Fredbar Ltd,* 2022 WL 02346028 [73] [80] [81]
[1004] *Herbert Morris Ltd v. Saxelby* [1916] 1 A.C. 688 [713]
[1005] *Kall Kwik* (n.55) [119]
[1006] 11:23, 16 December 2022
Passing off: goodwill
[1007] *ChipsAway International Ltd v Kerr*, 2009 WL 592615

terminated the franchise agreement with Chipsaway International Ltd. The lower court had refused the injunction sought by the franchisor to enforce post-term restrictive covenants on the grounds that the claimant had no business in the designated territory in which the former franchisee was operating, was not engaged in recruiting any new franchisees in the territory, and as such the ex-franchisee was not engaged in any business "which competes with" Chipsaway as prohibited in the franchise agreement.[1008] The appeal court held that this failed to achieve the commercial purpose of the clause: enabling the franchisor to exploit the goodwill built up in the geographic area.[1009] The injunction preventing the ex-franchisee's garage from fixing car paint chips for a year was upheld.

The very nature of accumulated labour as property is evident in the treatment of franchise property. Lord Parker contrasted the use of non-compete clauses for the protection of the business property to their use in an employment relationship in which "no actual thing is handed over by a present to a future possessor".[1010] At the same time the registered owner has the right to capture the goodwill built up by the labour of others. In both *Chipsaway* and *Carewatch* the transfer of the goodwill built up under the period of the franchise agreement to the franchisor was central. Goodwill accrues to the trademarks of the lead firm not the activity or service as provided. The work of the franchisee in the development of the goodwill is not recognised, and continuation in participating in the generalised activity (providing care services, mending chipped paint etc) is prohibited in order to protect the property interest. In *Dwyer* the extent of the franchise property at stake appears to have been a core consideration: that the franchisee had not built-up significant goodwill in the territory, which the covenants are designed to protect was a significant factor in finding an employment relationship.[1011] The cases here are indicative of the way in which designations of intangible property underpin the accumulation of particular forms of commercial capital which directly commodify the labour process. These designations are built at the boundaries of labour and non-labour/commercial relationships. The application of the restraint of trade doctrine and its exemptions secures freedom of contract and franchise property at same time, falling in favour of significant restrictions of freedom of trade in the process. In practice this has supported the emergence of a set of 'goodwill' property rights – the franchise system - often exercised by large multinational corporations, which embeds vertical dominance of formally independent businesses and workers, and directly commodifies the labour process.

[1008] *ChipsAway International Ltd v Kerr*, 2009 WL 592615 [13]
[1009] Ibid [22]
[1010] Ibid
[1011] V Hobbs, 'Dwyer (UK Franchising) v Fredbar Court of Appeal Decision – The "End of Franchising" in the UK?' (*Bird & Bird*, 2022) <https://www.twobirds.com/en/disputes-plus/shared/insights/2022/uk/the-end-of-franchising-in-the-uk> accessed 11 December 2022.

### 6.4.5 UK competition law: Regulation of market dominance and vertical agreements

The UK's contemporary competition law regime is strongly based in statute, being significantly established by the Competition Act 1998 which regulated anti-competitive agreements and positions of market dominance, and the Enterprise Act 2002 which regulated mergers.[1012] The Competition Act 1998 sought to closely align UK domestic law with the EU competition law. Chapters I and II CA 1998 directly reflect the prohibitions under articles 101 and 102 on the Treaty on the Functioning of the European Union respectively. Chapter I concerns coordination through 'anti-competitive agreements'. Prohibitions cover price fixing (and non-price trading conditions such as discounts), the limiting or control of production or markets, agreements which share markets or sources of supply, or which apply dissimilar conditions to similar transactions disadvantaging third parties.[1013] Chapter II prohibits abuse of a dominant market position through the imposition of unfair trading terms (such as exclusivity), excessive, predatory or discriminatory pricing, refusal of access to essential facilities, or 'tying' - the practice of requiring a buyer of one product to commit to the purchase of additional products from the same supplier.[1014] Infringements bring substantial penalties. The state has the power to block or reverse mergers, void agreements or fine companies up to 10% of global annual turnover. Directors' can be disqualified for up to 15 years, and those engaging in 'hardcore cartel' activities can be imprisoned for up to 5 years.[1015] Yet the scope of these prohibitions is heavily circumscribed by the range of exemptions which are based upon an economic efficiency framing which in practice is highly permissive of hierarchies of concentrated corporate power which extend 'beyond the firm'.

#### *Consumer welfare as 'nexus of contracts'*

The US law and economics reframing of antitrust through the rationale of economic efficiency has had a significant influence on the emergence of EU competition law. This can be seen in the way in which 'market power' has been defined. The Chicago school advocated a 'market power' policing role for antitrust, derived from an economic efficiency analysis based upon maximising consumer welfare: meaning low consumer prices. In this approach 'economic efficiency' is measured by concept of economic 'welfare': the sum of welfare of different groups in the economy: producers and consumers. Consumer welfare is calculated as the differential between the amount the purchaser is

[1012] Infringements bring substantial penalties. The state has the power to block or reverse mergers, void agreements or fine companies up to 10% of global annual turnover. Directors' can be disqualified for up to 15 years, and those engaging in 'hardcore cartel' activities can be imprisoned for up to 5 years.
[1013] s 2 (2) b - c Competition Act 1998 c.41.
[1014] s 18 (2) ibid.
[1015] Competition and Markets Authority, 'Guidance: How to Comply with Competition Law' (2015) <https://www.gov.uk/government/publications/competing-fairly-in-business-at-a-glance-guide-to-competition-law/competing-fairly-in-business> accessed 18 February 2022.

willing to pay and the amount paid, the differential being the 'consumer surplus'. The 'producer surplus' is equal to the profits of all producers for a given good. Ideally competition law seeks an equilibrium point between consumers low prices and producer returns on investment.[1016] However, as profits from price increases which reduce consumer surplus do not compensate for loss of consumer surplus, competition law must control market power and prevent firms raising prices above a competitive level (through either monopoly or agreement).[1017] Under the consumer welfare standard then, market power is only defined as harmful (to economic efficiency) at the point at which a producer is able to raise prices above the competitive level. Through this lens the corporate nature of actors interacting in the economy disappears and impacts are measured at the level of the market impact overall. This reproduces the nexus of contracts imaginary of the corporation.

UK competition law is explicitly consumer focused. The CMA is "responsible for ensuring that competition and markets work well for consumers. The CMA's primary duty is to seek to promote competition, both within and outside the UK, for the benefit of consumers."[1018] Harms which do not have the effect of raising prices above the competitive level will not be investigated or sanctioned.[1019] The Chapter 1 prohibitions allow an efficiencies defense, which exempts anti-competitive agreements where they contribute to improving production or distribution, or promoting technical or economic progress whilst allowing consumers a fair share of the resulting benefit.[1020] Under the mergers regime, a 'substantial lessening of competition' may be tolerated if it generates customer benefits. [1021] The investigative activity of the CMA predominantly concerns horizontal mergers (between head to head competitors) which form 80% of investigations.[1022] Where vertical mergers (between firms at different levels in the same industry) are investigated the primary concern is the possible effect of foreclosure of current rivals, i.e the concern is with the horizontal effect (reduced price competition between rivals).[1023] The dominance over acquired companies and their workforces is excluded by the 'firm exemption'. The Chapter II prohibition does not apply in any of the cases in which it is excluded by or

[1016] Sandra Marco Colino, 'The Enduring Debate on the Nature of Vertical Agreements', *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Hart Publishing 2010) 29.
[1017] ibid 30.
[1018] Competition and Markets Authority, 'Mergers : Guidance on the CMA ' s Jurisdiction and Procedure' (2020) 6 <https://tinyurl.com/3t4v8c3s>.
[1019] Competition and Markets Authority, 'Mergers : Guidance on the CMA ' s Jurisdiction and Procedure' (n 1019).
[1020] Competition and Markets Authority, 'The Retained Vertical Agreements Block Exemption Regulation: Annexes to the CMA ' s Recommendation' (2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1030920/VABER_Final_Recommendation_Oct_2021_Annexes_PVedit_REDACTED.pdf>.
[1021] Enterprise Act 2002 s 22 (2) 33 (2).
[1022] Competition and Markets Authority, 'Merger Assessment Guidelines', vol CMA129 (2021) 4.
[1023] ibid 53.

as a result of mergers and concentrations, or general exclusions.[1024] The definition of dominance in the Chapter II provisions sets the tolerated level of concentration extremely high. Whilst numerous factors are considered, the presumption of a dominant position is taken as a rule where a business has 50% market share, though dominance has been found at 40%.[1025]

*Example: Buyer power and supermarket supply chains*

The UK supermarket retail sector is extremely concentrated, with the 'big four' (ASDA, Tesco, Sainsbury's, Morrisons) having 68% market share in 2022.[1026] The present state of concentration has direct implications for supply chain workers and is closely related to the permissive approach taken in UK competition law. The dominance of the big retailers is traceable to changes in UK competition law in the early post-war years. Until it was prohibited in 1964, resale price maintenance enabled large producers to control prices charged for their products by retailers. The prohibition liberated the bulk buy power of large retailers who previously could not pass on any discounts so obtained.[1027] At the same time the shift towards more capital-intensive retail outlets with lower costs enabled a pattern of concentration: large retailers could bulk buy and pass on discounts, drawing in consumers and expanding enabling the further extraction of discounts.[1028] A period of rapid concentration of capital followed with the formation of a small oligopolistic group of retailers by the early 1980's.[1029] By comparison, patterns of concentration in the US supermarket sector were heavily constrained until the late 1980's by anti-trust prohibitions on price discrimination, having a similar effect in constraining the bulk-buy powers of the major retailers.[1030] Price discrimination in contemporary UK competition law is regulated under Chapter II Section 18 (2)(c) where an undertaking applies 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage', yet this is only applied in the context of a 'dominant position' (40-50% market share), and so fails to capture even the enormously concentrated supermarket sector.

From the early 1980's onwards the Office for Fair Trading (OFT) had been warning of deep imbalances between the retail and manufacturing sectors. A 1985 report described the latter as "fragmented, inefficient and unable to cope with the power of the major food retailers" but argued

[1024] s. 19 Competition Act 1998 c. 41 The Chapter II prohibition in s.18 is identical to Article 102 TFEU, minus the requirement for their to be an effect upon trade between member states.
[1025] Competition and Markets Authority, 'Merger Assessment Guidelines' (n 1023).
[1026] Statista, 'Market Share of Grocery Stores in Great Britain from January 2017 to January 2022' (2022) <https://www.statista.com/statistics/280208/grocery-market-share-in-the-united-kingdom-uk/> accessed 16 February 2022.
[1027] N Wrigley, 'Antitrust Regulation and the Restructuring of Grocery Retailing in Britain and the USA' (1992) 24 Environment & Planning A 727, 736.
[1028] ibid 742.
[1029] ibid 729.
[1030] The 1936 Robinson-Patman Act prohibited discrimination between buyers of "commodities of like grade and quantity" ibid 734.

that the manufacturers loss was consumers gain.[1031] In 2006 the OFT referred the UK groceries retail sector to the Competition Commission for investigation citing reasonable grounds for suspecting that competition was distorted in the sector. The investigation looked at the question of 'adverse effects on competition' in the sector including 'buyer power'. The report found that the four largest retailers accounted for a significant proportion of total retail sales in the UK and were likely to have buyer power in most product categories, with most suppliers having relatively small sales.[1032] Suppliers reported the lowest margins from the 'big 4' supermarkets, and supplier data showed the lowest bargaining power for small suppliers, suppliers of fresh produce, and suppliers of own-label products.[1033] The Gangmasters Licensing Authority raised issues relating to working conditions among workers in the agri-food supply chain. The Commission however excluded these concerns as its remit constrains investigation to question of effectiveness of competition between grocery retailers as it effects consumer pricing.[1034]

Asymmetries in market power between firms have clear implications for the conditions of workers. A report by the (then newly formed) GLA in 2007 made explicit links between supermarket buying power and labour rights abuses in the farming, food packing and processing sectors. Some supply chain firms reported being "very much hostages to their customers", with the need to reduce costs to maintain profitability driving up the use of temporary, migrant based labour and the permanent use of 'temporary' minimum wage labour.[1035] Inter-firm bargaining power was closely related to worker conditions; suppliers with greater power were able to secure sufficient margins to pay above minimum wage rates, and benefit from lower staff turnover and greater loyalty.[1036] The CMA's investigation of the proposed merger between ASDA and Sainsbury's in 2019 demonstrates how UK competition law excludes the vertical effects of corporate power upon workers from regulatory consideration. CMA investigations identify a number of 'theories of harm' as working hypotheses to test the against the expected impacts of a merger.[1037] In the ASDA/Sainsbury's

[1031] ibid 743. Price discrimination in contemporary UK competition law arises principally in the context of the Chapter II prohibition on abuse of a dominant position. Under Chapter II Section 18 (2)(c) an abuse may be committed where an undertaking applies 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. The critical distinction between UK law and the Robinson-Patman prohibitions is that the Chapter II prohibition only applies in the context of a 'dominant position' (40-50% market share). The US provisions prohibit unilateral price discrimination regardless of a monopoly position. In addition it is not an abuse unless it leads to excessive prices or significantly reduces competition. Peter Whelan and Philip Marsden, 'The Concept of Price Discrimination under EC and UK Law' (2006) 10.

[1032] Competition Commission, 'The Supply of Groceries in the UK Market Investigation' (2008) 159.

[1033] ibid 159–160.

[1034] ibid 23.

[1035] Scott and others (n 880) 8.

[1036] ibid.

[1037] Competition and Markets Authority, 'Merger Assessment Guidelines' (n 1023) 8.

investigation the potential increase in 'buyer power' was one such theory. The risk of increased buyer power being exerted on suppliers is recognised in the report with reference to some £500m in 'efficiencies' identified in the merger proposal as arising from 'improved buying terms with suppliers'.[1038] However, the framing of the investigation as a strictly 'competitive assessment' ensured that this was a concern "only to the extent that it may distort competition in the relation to the supply of groceries and result in adverse effects on end-consumers. In and of itself, a reduction in the profitability of suppliers does not give rise to an SLC ".[1039] A submission from the National Farmers Union argued that the merger would increase price pressure in already 'very competitive' supply chain. 74% of NFU members stated investment in their business would be reduced by average 30% due to the merger.[1040] Despite framing their response within the narrow constraints of the CMA's remit (impacts upon investment), these concerns were waived as they did not indicate that they would pass on the effects in the form of price rises to other buyers, thus effecting consumer prices.[1041] Whilst the merger was ultimately blocked, this was on grounds that it would likely lead to price rises in supermarkets and petrol station forecourts across the country.

### *The Vertical Agreement Block Exemption Regulation (VABER)*

Vertical agreements are exempted from competition law through the application of the retained EU VABER.[1042] The VABER sets out a list of provisions that cannot be contained in a vertical agreement in order for that agreement to be exempted. In practice the vast majority of franchise businesses are exempted from competition law since the European Commission published the 'Notice on Agreements of Minor Importance' and 'Recommendation in relation to Small and Medium Sized Businesses' the effect of which is to remove franchise agreements entered into by SME's from the scope of Article 101. The block exemption regulation will be applied only if the franchisor and franchisee have a market share above 30% in the whole or substantial part of the EU. Pratt notes however that in practice most comply with the block exemption regulations for legal certainty. The scope of Chapters I and II CA 1998 and the VABER captures a number of practices which are integral to the franchise business model and the dominant position of the franchisor. These directly reflect

[1038] Competition & Markets Authority, 'Anticipated Merger between J Sainsbury PLC and Asda Group Ltd Summary of Final Report' 1, 417.
[1039] SLC refers to the 'substantial lessening of competition' test which triggers regulatory intervention. Competition and Markets Authority, *Anticipated Merger between J Sainsbury PLC and ASDA Group Ltd: Final Report*, 2019, p. 99 <www.nationalarchives.gov.uk/doc/open-government->.
[1040] ibid 413.
[1041] Competition and Markets Authority, 'Anticipated Merger between J Sainsbury PLC and ASDA Group Ltd: Final Report' (n 1040).
[1042] As of May 2022 the retained VABER has expired and been replaced by the UK Vertical Agreements Block Exemption Order (VABEO), which is for the purposes of the discussion here, although not fully, identical to the retained VABER. The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022

the areas identified by Steinbaum and Callaci which were per se illegal under the early post-war US antitrust regime.

**Territorial restrictions**

Chapter I covers agreements which limit or control production, markets, technical development or investment,[1043] and agreements which share markets or sources of supply.[1044] The block exemption gives wide facility to franchisors to control territorial exclusivity, including prohibiting franchisees from 'active selling' outside a given territory, including exclusive territory or customer groups reserved for other designated franchisees or the franchisors own territory.[1045]

**Price and cost structure**

The Act prohibits agreements, decisions or practices which directly or indirectly fix purchase or selling prices or any other trading conditions.[1046] Purchase or sale price fixing restraints under C1 can be exempted via the VABER 'block' exemption, subject to certain specific prohibitions. Under the VABER minimum resale price fixing is strictly prohibited, maximum and 'recommended' price restraints are permitted so long as they do not constitute disguised minimum price fixing, meaning they must constitute genuine 'recommendations' and may not be backed by preferential treatment of compliant franchisees.[1047] The guidelines to the block exemption also state that resale price maintenance is permissible in the short term or for introductory offers (typically 2-6 weeks). The strict prohibition on price floors but not price ceilings is consistent with the consumer pricing framework of contemporary competition law.

**Tying clauses and non-compete covenants**

Tying practices are dealt with under the non-compete covenants under the VABER. The franchisor may prohibit franchisee's from engaging in competing business during period of contract. They may also impose extensive exclusive purchase obligations on franchisees, up to 80% of total purchase goods or services can be tied to the franchisor or a nominated supplier. The 80% cap can be exceeded for up to 5 years, and the 5 year limit does not apply if the supplier of the goods (franchisor) owns the real estate property from which they are resold.[1048] So whilst the VABER imposes a restriction upon the tying of products, the proportion allowed is extremely high, and in practice – particularly in the context

[1043] Competition Act 1998 c.41 s 2 (2) b.
[1044] ibid s 2 (2) c.
[1045] Pratt (n 983) 98.
[1046] Competition Act 1998 c.41 s 2 (2) a.
[1047] Pratt (n 983) 98.
[1048] Commission Notice: Guidelines on Vertical Restraints (67).

of fast food restaurant chains – will often not apply at all. Subcontracting where the contractor provides technology or equipment to a subcontractor to produce certain products exclusively for the contractor generally fall outside Article 101. However other restrictions imposed such as not to produce in general for third parties may be caught by Article 101.[1049]

The content of the VABER points to a set of agreements and practices through which vertical coordination and domination occurs. In application the regulation in these areas is highly permissive, firstly by deregulating all business sizes short of major multinationals with very high market shares, and secondly through a highly flexible regime which grants wide facility for highly restrictive practices. This is reflected in the jurisprudence of the European Court which has recognised the legitimacy of vertical restraints within the franchising business model. In Pronuptia de Paris GmbH Schillgallis the European Court recognised that restrictive contract clauses were a strictly necessary feature of the franchising business model, which was a legitimate activity distinct from exclusive distribution systems.[1050] The principles of Pronuptia have come to be relied upon by franchisors as a 'safe harbour' from EU competition law with regards to restrictive covenants and were upheld in the UK courts in *Carewatch.*

### 6.4.6 Competition law and the corporate veil

One particularly interesting dimension of competition law from the perspective of 'fragmented' organizational forms is that it is applicable at the level of the 'undertaking', which is understood as an economic rather than a legal unit.[1051] The CJEU has stressed that the term refers to an economic rather than legal unit and has taken a 'functional' or 'economic reality' approach to the definition emphasising content over form.[1052] This is based upon a "unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement".[1053] Further to this, in the context of anti-competitive practices and a parent-subsidiary relationship, the CJEU has held that the parent and subsidiary relationship can be treated as a 'single economic unit' if the subsidiary 'enjoys no economic independence'[1054] or has 'no real freedom to determine its course of action on the market'.[1055] Where a corporate group is found to be a single economy unit then the parent and

[1049] ibid (22).
[1050] Pratt (n 983) 97.
[1051] Andriani Kalintiri, 'Revisiting Parental Liability in EU Competition Law' 1, 1.
[1052] ibid.
[1053] Shell v Commission (T-11/89) ECLI:EU:T:1992:33, at [311] Cited in Kalintiri (n 1052). 22
[1054] Béguelin Import Co. v S.A.G.L. Import Export, 61971CJ0022 [1]
[1055] Centrafarm BV v Sterling Drug Inc (C-15/74), [1975] F.S.R. 161 [41]

subsidiary can be held jointly and severally liable for the competition law breaches of the subsidiary. As such the concept of an undertaking has functioned to 'pierce the veil' in enforcement of competition law violations.

This has been identified as a potential mechanism for extending the reach of labour rights across franchise networks. Koukiadaki and Katsaroumpas discuss the scope for the definition of an 'undertaking' from competition law to be used for the purposes of recognising a franchise network as an undertaking for the purposes of thresholds on information and consultation rights. Recognition of the franchise network as an undertaking would support extension of ICE rights to capture the franchisor as party to the requirements. The authors cautiously suggest that (with the heavy caveat of area of application) the lack of economic independence exhibited by franchisee's could be the basis for the network to be considered an undertaking.[1056] However, the context of application may be a significant barrier to this extended usage. As stated above, the UK and EU competition law regimes are significantly characterised by a permissive approach to vertical coordination, through a range of exemptions including the 'firm exemption' for corporate groups, and the 'franchise exemption'. The caselaw for the definition of an undertaking has developed significantly as a process of granting exemptions and permitting forms of coordination. In *Centrafarm* the 'no real freedom' criteria was applied for the purposes of exempting agreements or coordinated practices from the scope of Article 85 EEC.[1057] In *Import* the 'no economic independence' criteria was similarly applied to the purposes of generally exempting parent subsidiary relationship from prohibitions on exclusive dealing.[1058] As such the development of the definition has occurred in the context of the *permission* of vertical coordination and the elaboration of the 'firm exemption'. In view of the arguments above regarding the permissive regime as it stands in relation to corporate hierarchical organization, and in view of the ECJ position in *Akavan* discussed in Chapter 4 (stating the purpose of ICE was not "to restrict the freedom of such a group to organise their activities in the way which they think best suits their needs"[1059]), we may be skeptical as to the likelihood of the extension of the 'single economic unit' doctrine to the purposes of constraining the freedom of franchisors to structure as they see fit. Callaci's discussion of the double strategy of the franchise lobby in the US is apposite here: redrawing the boundaries of the firm to permit vertical coordination whilst leaving labour on the outside. Of course, this project may of course still be subject to contestation along these lines.

[1056] Koukiadaki and Katsaroumpas (n 933) 94.
[1057] Centrafarm BV v Sterling Drug Inc (C-15/74), [1975] F.S.R. 161 [41]
[1058] Béguelin Import Co. v S.A.G.L. Import Export, 61971CJ0022 [1]
[1059] Akavan Erityisalojen Keskusliitto AEK ry v Fujitsu Siemens Computers Oy (2009) C-44/08, [2009] IRLR 944 [58]

## Conclusion

The shift away from control through equity ownership to indirect control over workers has been enabled by the development of new forms of property which directly commodify the labour process, described here as 'franchise capital'. The franchise system, encompassing a vast array of restrictive contracts which significantly direct the labour process, may appear as a pure example of the corporation as merely a 'nexus' of contracts. Yet these contracts are marked not only by what they include (tight specification over uniforms, rota systems etc), but by what they exclude: the worker and the labour contract. The franchise system can be understood as a partial bundle of contracts which acts to exclude liability for control over workers. In Deakins account of the economic and legal functions of the firm and the employer, the two overlap through the intersecting functions of labour coordination, risk sharing, and the equity principle. The franchise contract effectively isolates labour control from the latter two functions. The power to do this cannot be understood in terms of pure free contracting but follows a logic of property. As argued in chapter 2, control over labour should be understood as a right ultimately derived from property ownership and the 'right to exclude', not a contractual agreement around risk sharing and equal treatment. Franchise capital may be coded in the highly restrictive contracts of the franchise system, and in particular types of intangible financial assets, but this is ultimately upheld as *property* by the loose and expansive notion of goodwill as legal property, and the power of the franchisor to police and withdraw the franchise property. In garment supply chains, the source of shareholder returns in the brutalization of supply chain workers is obscured by the 'brand' asset as property form.

This legally secured private ordering is complemented by a competition law regulatory regime which exhibits great tolerance towards corporate power. Indeed, analysis of the competition law regime as it stands in relation to the practices of vertical domination and control in franchise networks and supply chains reveal it is highly tolerant of forms of corporate structuring which intensify the effects of competition upon workers. The dominance of BooHoo in the otherwise fragmented Leicester garment sector demonstrates this well. This dominance has not been challenged by the CMA and would not fall within the definition of a 'substantial lessening' of competition, perversely because it generates such cheap consumer prices; the very core of the fast fashion business model. Both UK commercial law and the UK regulatory approach to franchising are based upon the formal equality of commercial actors. Such formalism in practice dispenses with questions of corporate power and embeds the nexus of contracts view of the corporation and the market. Reflecting Paul's analysis of US antitrust, the European and UK competition regimes appear to favour certain forms of economic coordination between independent corporate entities, where coordination occurs through *hierarchical* corporate structures and *vertical* agreements, granting

coordination rights by way of exemptions. The consumer welfare standard frames corporate power only at the level of market wide (price) impacts. In doing so the very real effects of the concentration of property rights in large corporate entities disappears. The regime recognizes many of the practices of dominance opts to exempt them on an economic efficiency analysis. Meanwhile the application of labour law has remained trapped within the confines of 'the employer'. The boundaries of the firm are blurred through a regime that is permissive of vertical control over workers, who are caught between regulatory regimes which do not protect them from excesses of corporate and market power as workers but only as consumers. More importantly, as the case of BooHoo indicates, these models are upheld by the corporate veil at the level of supplier companies, where profit cannot be realized within the cost structure provided without violating labour rights. The development of fragmentary and extended models of corporate hierarchy has developed in tandem with a paradoxical process that has seen workers' rights tied ever closer to the single entity employer (see Chapter 2). Competition law offers an 'economic reality' account of the firm which diverges from this legal formalism regarding corporate structures. The application of this to the purposes of enhancing workers rights within fragmented structures will likely require a major shift in the normative framing of competition law and regulation. McGaughey, echoing Paul's claims regarding the normative content of competition law, states that the "intent and context" of modern competition law is clearly constraining big business and corporate power.[1060] The broader political economy of competition law regimes may indicate that we should be more circumspect of its uses in challenging corporate power. The history of UK competition law is one of tolerance for monopoly and vertical constraints, tied to the state and corporate colonialist project. Indeed 'tolerance' may be the wrong word, given the centrality of trade monopolies to the function of the colonial corporations which built the British empire. The pattern from the 1980's onwards is essentially one of convergence around the neoliberal law and economics version. Whilst in the US the trajectory was one of retrenchment, reconceptualization and the liberalization of constraints on corporate power, the UK trajectory was a shifting from a relatively ad hoc and political regime concerned built around a 'public interest' concept, to a fully-fledged independent regulatory regime built around a tightly drawn concept of 'competition'. However, a shift towards recognising the class dimensions of competition law: its major implications for workers, is a step towards challenging competition law in its current formulation and the types of corporate structuring it permits.

[1060] McGaughey (n 911).

# Chapter 7: Conclusion



## Introduction

The aim of the thesis has been to unpack the ways in which law upholds the corporate status of the employer, and the ways in which this legal structuring is harmful for workers, limiting the realization of labour rights. My analysis has sought to integrate the fields of corporate law and labour law through drawing out the relational dimensions of 'core features' of corporate law regarding the labour relationship and the effectiveness of rights. In doing so I have explored the relationship between the legal forms and processes which secure capital accumulation through the corporate employer and dynamics of class conflict within the labour relationship. This concluding section connects the main arguments of the thesis and identifies the implications of these findings for workers struggles. I revisit the main arguments across the chapters and draw out the findings with reference to the ways in which the 5 'core features' of corporate law identified by Hansmann and Kraakman affect the realization of rights. These are: corporate legal personality, delegated management, limited liability, freely transferable shares, shareholder ownership.[1061] In sharp distinction to the contractarian perspective underlying them, I draw out both the powerful social ordering effects of private law, and the ways in which these features are upheld through statutory regulation across a range of areas of law; contract, property, corporate, competition, labour and insolvency law. Most importantly, I review the extent to which workers have been able to contest these processes of legal structuring through invoking collective and individual labour rights. The overarching themes concerning the relationship between law and political economy, the extent to which private legal coding can be considered 'autonomous' of class relations, and the scope and limits to law in facilitating workers responses to the coding of capital are further explored to identify the broader implications of the thesis for workers struggles. The final section draws out a set of tentative recommendations for trade unions based on the findings.

[1061] Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 Georgetown Law Journal 439.

## 7.1 Chapters and findings

Understanding contemporary rights struggles requires analysis at the level of the corporate structuring of the labour relationship. The introduction argued that, despite the dramatic intensification of the power of corporate elites, and a backdrop of rolling precarity for workers related to this, trade unions have not sufficiently engaged with corporate law and the corporate status of the employer. Debates have been principally concerned with the desirability of forms of representation within company structures (such as workers on boards), as alternatives to the traditional 'single channel' representation through collective bargaining. These debates have failed to get to the heart of the problem of corporate structuring from the perspective of workers.
This study has gone deeper than these debates over representation by focusing on the role of law in ongoing processes of change in the way that the labour relationship is legally structured through the corporate form. As Chapter 1 demonstrated, the dominant theories of the corporation and corporate law have served to obscure more than illuminate the property relations of the corporation. Indeed, the original contribution of the chapter was to show that, from the perspective of labour, the differences between these dominant theories - the entity theory, the contractarian theory, and stakeholder perspectives – has been greatly overstated. The managerialism at the heart of the entity theory was shown to reflect a normative preference for the status quo of a property based corporate hierarchy, based upon the claim that class conflict has been transcended through the corporate property form. Similarly, the contractarian rewriting of hierarchy in terms of relations of pure contractual voluntarism has served principally to *legitimize* existing hierarchies of corporate power. The outcome of this theoretical deference to elites can be seen in the gross contradiction between the contractarian 'epistemic order' of neoliberalism and the social order of concentrated corporate power.[1062] Breaking with the dominant theoretical approaches to corporate law requires an alternative framework for understanding how private law is shaped by class relations and state regulation. The original theoretical perspective developed here brings together Katherina Pistor's legal coding analysis with Ireland's Marxist perspective on class conflict in the property relations of the corporation. Pistor's coding methodology is effective in exposing how private law is imbricated with power, yet she neglects class dynamics and the labour relationship. In doing so her LPE analysis gives too much autonomy to law, and not enough prominence to political economy. Ireland's understanding of the corporate entity and share as objectified expressions of class conflict was taken as an alternative point of departure for legal coding analysis, centring the perspective of workers.

[1062] Kean Birch, 'Market vs . Contract ? The Implications of Contractual Theories of Corporate Governance to the Analysis of Neoliberalism' (2016) 16 107.

This is an original and innovative use of the 'coding' approach which has opened analysis of legal developments at the level of corporate property and organizational structures from the perspective of workers. Applying Pistor's insights on the role of private law in structuring 'capital' reveals the ways in which the legal structuring of capital through the corporation underpins contemporary problems faced by workers.

Chapter 2 set out how labour law positions workers in relation to the corporate employer, and the ways in which labour laws normative aims are problematised by corporate law. These aims were framed as a partial rebalancing of the power asymmetries of the labour relationship in relation to struggles over value, job security, and voice and autonomy at work. The chapter concluded that labour law reifies the employer and fails to deal with the corporation. How can this be the case? Firstly, labour law upholds the corporate employer through the bilateral ontology of contract. Functionally, as identified by Prassl, this entails a misfit between the assumed competencies of the unitary 'employer' and the real distribution of competencies in circumstances of 'multi-party' relations.[1063] However, the chapter moved beyond Prassl's functionalist analysis to identify the role of class-based norms and assumptions in labour law and industrial relations theory and practice. Labour law scholarship has failed to sufficiently theorize the role of private law in shaping the labour relationship. This is linked to the legacies of voluntarism, industrial relations pluralism, and the limits of the 'partial rejection' of the contract/property distinction which concedes authority regarding 'economic' decision making to the owners of capital. This is further entrenched through labour law's 'job based' perspective which embeds assumptions of labour subordination and privileges the contract of employment over other types of contract and legal forms. Workers' rights remain tied to a set of 'social' concerns regarding pay and conditions, in abstraction from the 'economic' sphere of decisional authority over production. Therefore, legal and institutional developments above the level of the workplace are out of scope. On this basis the wider legal forms and practices adopted by firms are naturalised as given features of capitalist enterprises, going largely unchallenged by workers and trade unions. As such, longstanding dynamics in capitalist property relations can be identified which underpin the normative divergence between the real context of employment relations and labour laws legal imaginary. At a deeper level, the question of how law positions workers in relation to capital through the corporation concerns the *form* of rights. The chapter adopted analysis from Christoph Menke and Jean Philippe Robe concerning the relationship between property rights, private law and public regulation. The central argument was that

[1063] Jeremias Francis Benedict Baruch Prassl, 'The Notion of the Employer in Multilateral Organisational Settings' (University of Oxford 2012).

'stakeholder' perspectives such as that of Deakin, which claim that workers have 'property-like' rights through labour statutes are flawed. This is so because liberal law secures property not as a 'bundle of rights' but rather as a fundamental right of autonomy regarding an object of property subject only to statutory 'bundles of limits'.[1064] Conversely, workers statutory rights are not open ended but rather constrained by the 'general goal of regulation', which represents the 'mere reflex' of the prevailing politico-legal order.[1065] This distinction of form matters for workers struggles as they are not conducted in the voluntarist legal imaginary of 'collective laissez faire' but in the real context of restrictive labour laws which dictate both the lawful *content* of disputes, and the *identities* which can be party to such disputes. The outcomes of the end of the period of 'collective laissez faire' are revealing of the fundamental legal positioning of labour and capital embedded in the form of rights in liberal law. Legal regulation has increasingly tied employment rights and lawful industrial action to the single entity employer. Unions have shifted from representing the broad interest of the working class towards a narrow, member serving function. Simultaneously, complex multi-entity corporate structures and network models have proliferated. The political and regulatory constraints faced by workers and unions stand in stark contrast to the autonomy conferred upon capital through corporate legal status. In conferring subjective rights to corporate individuals, corporate law intensifies the effects of the form of rights in liberal law. The ability to both concentrate property rights *and* fragment property across multiple legal entities not only contradicts the liberal rationale for strong property rights – the decentralization of authority – but gives a diffuse and liquid quality to corporate-law mediated property. The ability to structure capital across multiple entities is a power which workers organizations struggle to match. Corporate-law mediated property depersonalizes and destabilizes the labour relationship; breaking the legal relationship between workers and controlling parties and eroding the relational labour contract through opaque or informal hierarchies and constant changes of ownership. This argument provides an original perspective upon the contemporary dynamics of 'fragmentation' and 'financialization' which have been the subject of significant attention within the labour law literature in recent years. Both concern changes in the labour market institutional context characterized by an increase in the power of non-contractual parties acting upon workers through changing firm structures. The labour law literature positions these dynamics as the background economic conditions to which labour law must respond. The approach taken here reframes this by placing corporate law, and the corporate employer at the centre of analysis. In doing so the links between these phenomena are made explicit at the level of rights. This analysis reveals the deep flaws of 'stakeholder' models of the corporation

[1064] Jean-Philippe Robe, *Property, Power and Politics: Why We Need to Rethink the World Power System* (Bristol University Press 2020).
[1065] Christoph Menke, *Critique of Rights* (Polity Press 2020).

which seek to position the role of law as a social mediating force which can balance the interests of the parties to production. Instead, the inherently 'financialized' nature of corporate law is made explicit, and the disparities of legal power between capital owners and workers which are generated by the form of rights – which positions capital owners as active economic agents and workers as passive respondents – are made clear. These dynamics of 'fragmentation' and 'financialization' raise the question of the degree of 'autonomy' of actors deploying private legal coding against the interests of workers and trade unions. Two arguments were made here regarding class, regulation and the state. Firstly, as identified by the regulationist school of Marxism, the legal positioning of capital and labour at any given time is at least in part the result of attempts to stabilize and contain class conflicts and the contradictions of capital accumulation. Actors may attempt to escape regulatory constraints on profitability, ultimately eroding the institutional ensemble upon which they have depended, but this will imperil the conditions of stable accumulation as workers seek to protect their interests, and the state seeks shore up continued production. The shift from the collective to the individual mode of regulation accompanying the neoliberal accumulation regime is a good example of this, indicating the critical state role in stabilizing class relations through regulation and heavily qualifying the 'autonomous' function of private law. Secondly, from this perspective, the primacy of property in liberal constitutions afforded by Robe and Menke should be qualified. Corporate structures and property forms are contingent, state backed legal abstractions which must not be reified or naturalised but challenged. The abstract property forms of the corporate employer are upheld not only by private law but by the class preferences expressed through state regulation.

The approach to the empirical chapters – as described in chapter 3 – has been to unpack the ways in which these abstract legal property forms of contemporary business firms affect workers. The methodology adopted proposed analysis of the relational dimensions of the legal coding of corporate assets, including analysis of the role of state regulation in upholding these forms, and the extent of contestation of these processes by workers and unions. The subsequent empirical chapters of the thesis (4-6) took up this analysis across three different case examples of corporate property structures: the share in the takeovers market through the example of the LBO (Chapter 4), debt instruments in the context of corporate insolvency (Chapter 5), and franchise and supply chain organizational structures.

Chapter 4, 'Coding the leveraged buyout' focused on the relationship between the share and the corporate entity, with emphasis on the ways in which free transferability of shares and limited liability affect workers share of value and ability to bargain collectively. These questions were approached through a case study analysis of the Leveraged Buyout (LBO). The chapter represents an

original contribution to the literature on Private Equity and the LBO model, which has focused on the model as an example of 'financialization' characterized by financial and managerial practices which drive wealth transfers to owners of financial assets. The principal original contribution was to demonstrate the extent to which these practices rest upon the ways in which corporate law structures the labour relationship. With regards to the corporate legal person, the chapter revealed the role of the 'entity shielding' function of corporate law in underpinning asset stripping takeovers. Through careful legal coding, the accumulated wealth of the company – the productive assets – can be hived off from workers' claims to generate shareholder returns and drive disciplinary cost pressures at the operational level through rising rent bills and debt servicing obligations. The LBO model was also shown to neatly subvert the assumptions underpinning collective bargaining, removing value from the bargaining table through asset stripping and debt loading for shareholder wealth transfers. UK company law has progressively liberalized the use of the corporate entity to these ends. Most notably through the ending of financial assistance prohibitions and the decline of the ultra vires doctrine, eroding the practical effect of the legal distinction established in *Bligh v Brent* which separated the shareholder interest in profits from the corporation and its assets.[1066] The significance of these doctrines was that they constrained the property rights of the corporation: its assets could not be used for shareholder self-dealing such as financing buyouts or share buybacks. At a deeper level the private equity model reveals the flaws in the normative model of the firm - conceptualized as a shared space for negotiation over value - which underpins labour law and collective bargaining rights.

The exposure of workers facing the share market to expropriation of value is also closely linked to the principle of free transferability (or in Pistor's terminology convertibility) of shares. For the contractarian theorists, transferability of shares is what distinguishes the corporate form. Transferability is the flipside of the principles of shareholder lock-in and corporate personality: the 'bundle of contracts' will be kept together despite changing share ownership. Critically, these features allow transfer of ownership without the need for reassignment of the corporation's contracts from outgoing to incoming shareholders.[1067] As discussed in chapter 1, Ireland shows how the emergence of the modern doctrine of corporate legal personality was closely tied to the development of the share into a fully alienable property form, from its original legal basis as a type of credit contract (choses in action). The implications of this were enormous, enabling the competitive valuation of different firm equities and productive activities across the economy based upon profitability. As Bryan and Rafferty argue, this competitive valuation of the constant capital of

[1066] *Bligh v Brent 1837 (2 Y & C Ex 268)*.
[1067] John Armour and others, 'Ch1 - What Is Corporate Law?', *The Anatomy of Corporate Law* (2017) 10.

different firms had implications for workers; labour as variable capital became subject to competitive forms of valuation in the share market.[1068] One of the principal contributions developed here has been to show how the labour relationship has continued to be subject to new methods of legal coding which shape transfers of labour value. This includes methods which enhance the transferability of intangible asset forms. Chapter 5 'Coding the corporate debt' explored this process in relation to the legal structuring of debt instruments and the impacts of this on workers exposure to risk and losses in insolvency and liquidation. The chapter showed how legal coding has transformed the rights structures of credit instruments. This represents an original contribution to the literature on workers' rights in insolvency, which has focused on the development of statutory protections in labour law but neglected dynamics in the coding of capital. The chapter explored this through the case example of the transformation of two types of debt asset. High Yield Bonds (HYB's) have been transformed from a high risk/return, low seniority liquid asset into a highly liquid senior secured asset. The stripping out of loan covenants to meet the demands of a rapidly trading market have seen leveraged loans transformed from an illiquid asset with senior rights and close oversight to a liquid asset. These processes of coding have been driven by rolling conditions of financial crisis and the interests of large financial actors. These forms have facilitated 'capital minting' by private equity firms, primarily to finance corporate control transactions (LBOs) rather than to meet the investment needs of firms. For workers the effect has been to amplify the effects of cyclicality and drive endemic precarity, exposing workers to higher risk of job loss during downturns, increased restructuring, and higher risk of insolvency and liquidation. This has demonstrated that from the perspective of the labour relationship, the implications for workers of the coding of capital for convertibility which began with the emergence of the modern form of the shareholder corporation *are still unfolding* and continue to manifest in new ways as the coding assets for convertibility on financial markets develop.

Chapters 4 and 5 also showed how workers are positioned as 'outsiders' by the legal and regulatory frameworks governing takeovers and insolvencies. Having apparently opted for the outsider, 'market' protections of liquid asset forms, shareholder and creditor claims are nonetheless upheld over those of workers in a statutory hierarchy. The property form of the share in the takeovers market is upheld by a regulatory framework which locates decisional authority *solely* with shareholders regarding a bid. At the point of a takeover, workers have no bargaining rights with any of the parties with decisional authority over the transaction which may, nevertheless, have significant implications for pay, terms and conditions and job security. The right to alienate the share is protected by the non-application of TUPE to share capital transfers. This has been upheld through

[1068] Dick Bryan, Randy Martin and Mike Rafferty, 'Financialization and Marx: Giving Labor and Capital a Financial Makeover' (2009) 41 Review of Radical Political Economics 458.

regulatory debates which reify the corporate employer through emphasis on the *continuity* of workers' contractual rights. However, such debates appear to have been driven more by a political preference to protect the share market, than by the empirical realities of the rights of workers facing the takeovers market. At the point of insolvency, despite the development of TUPE and collective redundancy consultation measures, workers are significantly positioned as 'outsiders' by the legal framework. Arguably, it is exactly this that the social security-based regime has accomplished. Workers lack voting rights as creditors despite their significant exposures. Consultation obligations are frequently disregarded in a cost-benefit analysis which sees the costs of compliance as worse than the penalty. In part this is possible because the largest proportion of workers' claims are positioned outside the insolvency estate (as unsecured), having the effect that workers cannot leverage claims to shape decision making of secured creditors. Workers have no 'property nexus' with secured creditors, and as such, bargaining power evaporates on insolvency via threat of liquidation (wherein workers claims fall into the National Insurance Fund). Again, the property form is upheld by the (insolvency law) regulatory framework, this time through the mechanism of 'taking security' which transforms a debt into a property right based solely on the economic power of the lender to demand so, diluting, and displacing others' claims in the process. In contrast to the claims of the economic theory, from horizontal market exchange arises a property-based hierarchy. This 'outsider' positioning of workers must also be understood as an outcome of the peculiarities of the corporate form. For example, the erosion of the equity/debt distinction is a result of the way in which the corporate entity erodes insider/outsider distinctions concerning questions of control and liability. A crucial effect of the limited liability corporation was to supplant the partnership form with its strict distinction between (outsider) creditors and (insider) members (the latter having joint and several liability). This lack of strict distinctions is a key benefit of the corporate form for investors, enabling a tailored range of risk exposures, controls, and preferences without risk of liability, greatly facilitating the capital minting function. These transformations reflect an ongoing process of depersonalization. The depersonalized nature of the property forms of equity and debt is at odds with the interpersonal nature of senior secured rights in insolvency and the insider rights attaching to the share, pointing to the paradoxes of the 'janus faced' share being extended to the space of debenture holders. This has generated paradoxical effects, such as the 'fragmentation' of senior creditors, as exemplified in the case of Phones 4U where the hedge fund secured creditors opted to keep trading the debt throughout the insolvency proceedings. This is an exact expression of the problematic way in which the corporate form erodes meaningful inside/outside distinctions, facilitating the convertibility of capital and simultaneously undermining and destabilizing the relational dimensions of the labour relationship.

The analysis developed across chapters 4 and 5 also suggests limited liability has implications for workers which go beyond what is usually recognized in debates which largely focus on enterprise liability and corporate veil piercing jurisprudence. Legal debates, and legal developments, have been centrally concerned with the problem of creditors facing undercapitalized or insolvent corporate entities, and the problems this poses in access to a remedy. This indicates the problematic logic of shareholder limited liability: money is always safer behind the corporate veil: in the shareholder's bank account, or at the corporate level furthest removed from possible claims. The economic theory holds that in reducing the need for shareholder oversight limited liability enables the separation of shareholder and management functions and thus enhances shareholders ability to diversify. This – alongside the capping of downside losses to contributed share capital only - reduces the risk premium demanded by shareholders and thusly the cost of capital.[1069] Debates within the law and economics tradition recognize that the general principle of limited liability creates the risk that shareholders (whether corporate or individual) may seek to externalize costs. These debates play out around two principal axis: closely held vs publicly held corporations, and voluntary (contractual) vs involuntary (tort) creditors. Many law and economics scholars accept that the economic arguments for limited liability do not hold in corporate group settings as the benefits of diversification, reduced monitoring and liquidity materialize at the level of the capital market.[1070] It is generally held however that limited liability is less problematic for voluntary contractual creditors who are able to protect themselves through ex ante 'due diligence' and negotiated protections.[1071] Legal developments have remained limited to a narrow range of issues. As described in chapter 1, since *Adams v Cape*, the development of corporate veil piercing jurisprudence has been limited to a narrow range of issues (where the company is used as a façade to avoid a contractual obligation or acts as the agent of the parent) since.[1072] Progress on attaching liability in group settings has been largely through the direct liability in tort (including the common law duty of care in the contract of employment) route based upon a company's non-delegable duty of care, as in *Chandler v Cape.* Whilst clearly very important, for the questions of workers share of value, of job security and of voice identified here this route is not significantly promising, remaining constrained to liability for harms to workers or third parties arising from health and safety failures. The cases explored in chapters 4 and 5 have shown that the principle of limited liability has far wider effects for the structuring of the labour relationship, and the expansion of harmful corporate models which limit the effectiveness of rights and erode workers'

[1069] Armour and others (n 7) 9.
[1070] Stephen M Bainbridge, 'Abolishing Llc Veil Piercing' [2004] Ssrn.
[1071] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 780 <https://doi.org/10.1007/s40804-018-0121-7>.
[1072] Adams v Cape Industries plc (n 148)

power. This represents a significant original contribution to the labour law literature, and the literature on the corporate veil, which have failed to consider the effect on workers' power. The 'capital minting' function of corporate law is underpinned by limited liability. Liabilities over bundles of corporate assets must be limited to secured creditor claims for shareholders to reap the benefits of securitization. In the LBO model private equity firms can build up huge chains of controlled entities with very limited exposures. This promotes high risk high return approach to business restructuring, high use of leverage, and maximum value extraction in minimal time before exit. The model erodes workers associational power through endless rounds of restructuring, and the leverage ratio and liability structure was shown to have implications for workers position in industrial disputes via disciplinary effects of the risk of insolvency. This structuring has been significantly reflected in publicly held firms. In the case of Carillion, the huge debt pile which precipitated its collapse into liquidation had been accumulated through an aggressive approach to expansion, entailing inflated booking of goodwill assets to secure lending for further expansion and debt financed dividends; closely resembling the dynamics of the private equity model.[1073] Control over an ever-growing balance sheet enabled profit extraction from debt in an inter-temporal gamble which shifted distributional conflict into the future.[1074] This model can only be understood with reference to the protection from exposure to liability of shareholders and Directors. Carillion was in no way an outlier, within months of its collapse fellow outsourcer Interserve was teetering on the brink having followed a remarkably similar model of growth.[1075] Asset partitioning through entity shielding and limited liability are critical elements of the code of capital: allocating claims over unrealized value in order to secure revenues to expand control over more assets. The scaling effects of corporate law are closely linked to these principles and the ability to externalize social harms and risk. The concentration and consolidation effects of these principles are indicated by the fact that private equity chains have recently emerged as a concern for US anti-trust regulators.[1076] Limited liability can be seen to scale a particular *type* of social relations. The asset partitioning function of corporate law codes capital as a relation of exclusion, securing value by putting it beyond the reach of workers claims.

Chapter 6 'Coding the corporate structure' further developed this analysis regarding the separation of control from liability through the example of indirect models of ownership and control

[1073] Ben Crawford and David Whyte, 'Workers Rights versus Shareholder Value in the Outsourcing Sector' [2019] Futures of Work <https://futuresofwork.co.uk/2019/01/25/workers-rights-versus-shareholder-value-in-the-outsourcing-sector/>.
[1074] Adam Leaver, 'Adam Leaver – Out of Time: The Fragile Temporality of Carillion's Accumulation Model' (*Brave New Europe*, 2018) <https://braveneweurope.com/adam-leaver-out-of-time-the-fragile-temporality-of-carillions-accumulation-model> accessed 5 March 2019.
[1075] Crawford and Whyte (n 14).
[1076] 'New Antitrust Priorities under the Biden Administration Has Private Equity in the Cross-Hairs' (*Linklaters*, 2022) <https://tinyurl.com/deubmf2v> accessed 10 December 2022.

in supply chains and franchise networks. The chapter argued that the shift from relations of direct equity ownership to indirect models of control in these examples is legally facilitated through new forms of intangible capital which commodify the labour process and enable indirect control over workers. Principally, the chapter demonstrated that the value of the franchise capital or 'brand value' intangible assets of lead firms in supply chains is rooted in the labour process *and the ways in which it is legally secured* through corporate, labour, competition, and commercial law. Adopting a competition law lens revealed the role of coordinating and controlling *practices* over workers 'beyond the firm' which are 'non-legal', 'quasi-legal' or 'quasi- regulated'. These reveal the contours of the regulatory regime in relation to corporate power over workers. In contrast to the nascent literature looking at labour rights and UK competition law which emphasizes how competition law limits corporate power,[1077] competition law was shown to permit enormous concentrations of corporate power, and vertical coordination and domination down the supply chain. The approach was original, applying Sanjukta Pauls analysis of US antitrust to the context of the UK. However, the analysis goes beyond that of Pauls by adopting Marx's insights on the concentration and centralization of capital and the disciplinary function of the forces of competition upon the worker. The legal coding of corporate structures was shown to *channel* the forces of competition in ways which are especially harmful for workers as part of processes of consolidation of capital. In this way law contributes to the disciplinary effects of competition on workers in ways which harm union organizing and effective responses through collective bargaining. The chapter also contributes to labour law debates on dynamics of 'fragmentation' by placing analysis of the ways in which fragmented forms relate to the *consolidation* of corporate power through these forms and the legal dimensions of mechanisms of vertical domination and control.

In doing so, chapter 6 further develops another core theme of the thesis; that of a disjuncture between the formal and the actual constitution of authority over workers within corporate organizational structures. Stakeholder orientated perspectives such as Deakin's argue that the delegated management principle ensures shareholders rights to manage firm assets are 'nearly zero'.[1078] The degree of separation in reality is far less clear. Multiple overlapping layers of control over workers has been demonstrated in three different contexts: the rights of equity holders, of creditors, and of 'third party' lead firms. Whilst this is recognized within the labour law literature on fragmentation, conceptualized as a defect of the employment contract, the wider role of private law and public regulation in upholding this structure has not been subject to analysis. Moreover, it is not

[1077] Ewan McGaughey, 'Competition and Labour Law in the United Kingdom' [2022] The Cambridge Handbook of Labor in Competition Law 208.
[1078] Simon Deakin, 'The Corporation as Commons : Rethinking Property Rights , Governance and Sustainability in the Business Enterprise' 339, 359.

recognized as a *general characteristic* of the way in which corporate law structures capitalist property relations within the firm. In practice, the powers of decisional authority are often only *formally* located at the level of the employing entities management. What is perhaps most striking is that judicial opinion appears to concur that for the purposes of employment and company law statutes, decisional authority *need only be formally constituted at the level of the corporate entity*. Rights of control are not structured in a way that protects workers, as exemplified by the non-application of TUPE rights. The 'mere fact of control' is not sufficient for a TUPE transfer,[1079] and liability for a transfer can be avoided by formal ratification of decisions at board level.[1080] The management competency to effect collective redundancies is not required for liability for consultation rights to be held at the subsidiary level, and binding parental decisions regarding redundancies will not give rise to employers liability.[1081] Perhaps most starkly, the default position of labour law as expressed by the CAC that quite simply, employees have no bargaining rights (or other employment rights) with the party that 'substantially determines' their terms and conditions.[1082] Controlling shareholders (or creditors) will not be shadow directors where their decisions are ratified formally at board level.[1083] Company law, despite the formal principle of board independence, does not consider that this principle may be affected by board members being major shareholders and reaping huge sums during takeovers. This absence of meaningful independence can also be seen in the assumptions of equality in commercial law, in particular the absence of a doctrine of unequal bargaining power.[1084] The absence of direct regulation of franchise relationships, or of the private equity industry, is testament to a market equality assumption. In both cases voluntary disclosure-based codes reproduce the legal imaginary of equal market participants. The legal and regulatory framework appears to uphold a principle of formal not substantive independence of entities: decisional authority need not be located at the level of the employer. To modify Berle and Means famous thesis, corporate law enables *the separation of control from liability.* This separation in practice means that workers ability to meaningfully anticipate the absent content of their employment contracts, to meaningfully negotiate around pay and conditions of work (whether individually or collectively), and to influence decisions by industrial means are heavily circumscribed.

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[1079] *ICAP Management Services Ltd v Berry, 2017 WL 02391613* [13].
[1080] Jackson REF
[1081] *Rockfon A/S v Specialarbejderforbundet i Danmark (C-449/93), [1996] ICR 673*; *Akavan Erityisalojen Keskusliitto AEK ry v Fujitsu Siemens Computers Oy (2009) C-44/08, [2009] IRLR 944 [58]*.
[1082] 'CENTRAL ARBITRATION COMMITTEE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992 SCHEDULE A1 - COLLECTIVE BARGAINING: RECOGNITION DECISION ON WHETHER TO ACCEPT THE APPLICATION', vol 63 (2018)62.
[1083] REF
[1084] *Pakistan International Airline Corp v Times Travel (UK) Ltd, 2021 WL 03634097*.

We may consider that these abstractions – the formal equality of contract, the formal constitution of power at the single entity level - are *necessary abstractions* for capital accumulation to proceed smoothly in the contemporary corporate economy. The example of competition law exemplifies this point. Competition law is interesting because it is directly concerned with questions of the economic independence of market actors, and with questions of corporate power. As such, it is characterized by striking digressions from the formalism of corporate and commercial law. For example: competition law does not apply to employees as they do not exercise 'autonomous economic activity';[1085] inequality of bargaining power matters for the 'reasonableness' of restrictive covenants; and parent-subsidiary relations may constitute a 'single economic unit' if the subsidiary has 'no economic independence' or 'no real freedom'.[1086] Regarding the latter, given the decline of the 'single economic unit' theory of Denning in the area of veil piercing jurisprudence, it is significant that this theory has emerged from the European court in an area of law in which the UK statutory framework is almost identical. The theory is in principle applicable beyond the context of parent subsidiary relationships to other fragmented forms such as vertical dominance in supply chains. These digressions reflect the fact that competition law regulation, being concerned with market power, would be useless were it to take a formalistic approach to the corporate entity. Competition law plays a crucial role in maintaining a class society because - as Marx argued – through the coercive laws of competition the market economy of small competitive businesses is inevitably transformed by centralization into a state of monopoly and oligopoly: competition ultimately results in monopoly.[1087] In contrast to neoclassical economics epistemology of 'perfect competition' and 'equilibrium', capitalist economies are characterized by the drive to escape competition through extraction, exploitation and monopoly. So, competition law must intervene to uphold the viability of a class society. Moreover, it must do so in a way which does not reify abstract entities. Yet transparently, it does so in a way which reflects the interests of capital. In its current 'consumer welfare' formulation, competition regulation sidesteps meaningful engagement in questions of how corporate power shapes conditions of production. The 'Richfield standard' of "no domination of non-employees"[1088] is starkly absent from UK inter-company relations, providing for extended hierarchies

[1085] I Lianos, N Countouris and V De Stefano, 'Re-Thinking the Competition Law/Labour Law Interaction: Promoting a Fairer Labour Market' (2019) 10 European Labour Law Journal 291, 8.
[1086] *Béguelin Import Co v SAGL Import Export, 61971CJ0022 [1]*; *Centrafarm BV v Sterling Drug Inc (C-15/74), [1975] FSR 161 [41]*.
[1087] D Harvey, *A Companion to Marx's Capital* (Verso 2018) 274. These dynamics come to the fore in specifically in the context where increasing productivity becomes "the most powerful lever of accumulation" as a result of technological and organizational changes. The process of increasing productivity depends upon processes of concentration and centralization of capital in order to enable the full realization of economies of scale.
[1088] Marshall Steinbaum, 'Antitrust, the Gig Economy, and Labor Market Power' (2019) 82 Law and Contemporary Problems 45.

of dominance beyond the firm. UK competition law has embedded the 'nexus of contracts' imaginary of the contractarian theory through the consumer welfare standard which measures corporate power not at the level of the corporate entity but at the level of the market. Corporate power is only problematic if it leads to an overall effect on prices. Competition law opts to protect individuals as consumers but not as producers. Yet consumers are atomized individuals, workers often likewise. Shareholders are the only actors in the chain of production whose interests are collectively secured. Reflecting patterns in the US,[1089] the UK regulatory regime upholds the interests of the shareholders of large corporations. Recent dynamics in corporate profitability bear this point out. Large firms with significant market power have been able to defend and increase profit margins against high inflation by passing price rises onto consumers whilst workers have faced below inflation pay rises.[1090] From the perspective of workers, US, UK and European competition law have significantly converged with regards to permitting vertical domination of workers by large multinational corporations. The practical application of competition law upholds the formalism of equal parties, cedes power to concentrations of capital, and reifies the corporate employer. In adopting the contractarian 'epistemic order' of neoliberalism it upholds the social order of concentrated corporate power.

The empirical chapters have demonstrated the ways in which the legal structuring of the labour relationship through processes of legal coding are deeply problematic for the realization of worker's rights. The corporate entity and the forms of intangible capital it secures obscure the social relations of workers and capital owners. The forms of corporate-law mediated property destabilize, depersonalize, and enclose the labour relationship, subjecting workers to arms-length control, value extraction, and intensified exposure to risk and losses emanating from capital markets. Under such conditions, the very ability of workers to retain or build the capacity for collective self-regulation of the employment relationship is undermined. This basic tension – between effective labour rights and the corporate form – is not recognized in the labour law literature. This is because the literature which approaches these issues does so through a lens which seeks to understand the compatibility, and complementarity of these areas of law. The original contribution of this thesis has been to show the fundamental, ongoing, conflict between the normative aims of labour law and the realization of rights in the corporation.

[1089] Vaheesan, S. 'Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law' (2020) Journal of Law and Political Economy 1, 1, 34.
[1090] Costas Lapavitsas, James Meadway and Doug Nicholls, 'The True Causes of Inflation: Weak Production and High Profits' (2022).

## 7.2 Law, class, and political economy: implications for workers facing the corporate employer

This section further draws out some of the core themes which have emerged through the development of the thesis, concerning the relationship between law and political economy, the extent to which private legal coding can be considered 'autonomous' of class relations, and the related question of the scope and limits to law in facilitating workers responses to legal coding processes.

In Pistor's LPE analysis (and that of many other LPE scholars), law is constitutive of capitalist social relations. In contrast to this, the analysis developed here has suggested that there is a gap between the formalism of law and the real property relations of the labour relationship, which is filled by the pure economic power to dominate workers which is legally *secured* not legally *constituted*. The reified property forms of the share, debt instruments, and other intangibles are upheld through the formalism of contract and the corporate legal person which reproduce the liberal ontology of equal parties in economic exchange. As such, whilst the role of law is indispensable to structuring capital, analysis should seek to open up the ways in which law serves to mask, conceal or abstract from real social relations and economic power imbalances in ways which undermine effective rights and erode mechanisms of economic democracy. Perhaps the most pervasive example of this masking effect is to be found in the longstanding and tired debate regarding shareholder 'ownership'. Whilst contractarian theorists argue for shareholder ownership conceptualized in functional economic rather than legal terms, legal scholars normatively orientated towards less shareholder centric models strongly emphasize the legal reality of corporate ownership of assets.[1091] Notably, most branches of economic theory fail to properly conceptualize the legal dimensions of property rights at all. As Robe notes the four major economic schools of thought (classical, neoclassical, Keynesian and New Institutionalist Economics) confuse property with possession. But this is a reductive notion of property which fails to capture its relational dimensions: property rights are not 'things', nor rights over things, but rights against *others* regarding a thing. The possessive view assumes that only one person can possess an object of property, but property rights as 'having the right to' is far more complex and enables the complex structuring of property as intangibles and securities, which grant rights regarding an object of property *under certain conditions*.[1092] As demonstrated across chapters 4, 5 and 6, from the point of view of capital accumulation as a process,

[1091] Lynn A Stout and others, 'The Modern Corporation Statement on Company Law' [2018] SSRN Electronic Journal 1.
[1092] Jean Philippe Robé, 'The Legal Structure of the Firm' (2011) 1 Accounting, Economics and Law 47–48.

the crystallization of rights under certain conditions is what matters most. The splitting of property and possession is exemplified in the range of corporate securities and intangible asset forms; of equity and debt instruments, and 'goodwill' assets such as the franchise system. Shareholders may only fully 'own' their shares (De Vroey's 'legal ownership'), but under certain conditions they have the right to radically restructure, fragment and dismember, or even wind up, the entire enterprise. This is the complex structuring of property as rights of exclusion: having 'the right to' replace the board, to spin off the property assets, to trigger insolvency proceedings, to withdraw the franchise contract. Having 'the right to' is the legal basis for capitalization. It enables the transformation of a thing into an asset, into something which can be traded, or credit can be secured against. At the same time, these conditions are a matter of degree of concentration, not of the type of rights (De Vroey's 'economic ownership'). Under such circumstances, the pervasive public and policy discourse which positions shareholders as company 'owners' is hardly surprising, if infuriating from the point of view of legal scholars. As described above, under these circumstances, corporate laws 'masking' function kicks in through the circular claim that despite these complex rights structures, the corporate employer provides contractual continuity for workers. As demonstrated in Chapter 4, the contradictory nature of such claims ultimately reflect ideological support for the primacy of the share market and the property form of the share. In contrast to the owners of intangible capital, workers cannot separate themselves from their labour to sell it on capital markets. The very nature of labour commodification is the granting of the 'right to' one's labour to another. There is no limited liability for workers facing the labour market: if you lose your job you may shortly lose everything else.[1093] The code of capital opens a basic asymmetry with workers, enabling the separation of 'owners' and their property: which workers cannot reproduce.

This does not mean however, that coding processes go uncontested. The relational view of capital suggests that processes of coding are not autonomous but tied up with class relations. In contrast to the autonomy of private law, developments at the level of the labour relationship also shape finance. As described in chapter 6, the particular forms of securitization which have developed around the franchise form are tied into characteristics of the labour process. The revenue streams underpinning franchise capital are closely tied to the need for uniformity at the level of production – even across decentered networks - generating disciplinary interventions and labour contestation. In the case of garment supply chains the value of the equity capital of investors in fast fashion is demonstrably tied into conditions of abuse shaped through vertical domination of supply chains. Whilst the short-term market valuation may reflect stock market dynamics emerging from trader responses to issues of corporate reputation, the long run value of the stock is to be found directly in

[1093] Bryan, Martin and Rafferty (n 9).

conditions of extreme exploitation. In the care sector Horton shows that the persistent undervaluing of care work, its construction as women's work or as 'dirty jobs' for migrants contributed to and influenced financialization.[1094] The relative powerlessness of the workforce to respond to the impacts of privatization effectively enabled the sectors transformation according to the interests of private equity and REIT investors. This has been linked to the low level of political opposition to dynamics of privatization in the social care sector due to the predominance of unqualified, poorly paid and relatively transient staff, in comparison to other professionalized health services.[1095] Regarding the emergence of new forms of credit instruments behind the LBO model, the contradictions of a highly speculative and risky financial model appear to have been partially diffused by the socialization of corporate risks in the contemporary insolvency regime. The shift of workers insolvency claims into social security mechanisms can be seen as depoliticizing the effects of dynamics on capital markets, through shifting claims out of the space of distributional conflict. The contrast between the response to the collapse of Debenhams in the UK and the Republic of Ireland is indicative of how the UK insolvency regime partially depoliticizes the tensions of the corporate model and pacifies workers, socializing the costs in the process. The phenomenal form taken by new credit instruments is traceable to this depoliticization of distributional conflict at the level of corporate insolvency regulation. These methods of legally removing corporate assets from the space of distributional conflict by workers is reflected across the case examples developed here. It carries across from the LBO to the franchise and the supply chain, securing processes of capitalization through law. These processes also reflect the narrowing of trade unions function.  Robert Knox has argued that the shift into the neoliberal era entailed a  transformation – driven by labour law regulation - of the political subjectivity of labour as expressed through trade unions, from the model of 'collective laissez faire' which enabled unions to act in the broadly drawn interests of the working class, to a neoliberal model of unions narrowly representing their members interests and engaging in 'interest group' political lobbying.[1096] The collective political subjectivity of organized labour was transformed into an individualized mode more compatible with neoliberalism.[1097] More broadly, the decline of trade union coverage and the transformation of union models can also be mapped against developments in corporate property forms. As described in chapter 2, the principal characteristic of the end of the SER was the reification of the single entity employer as horizontal modes of regulation were narrowed to individualized contracting. Worker's action was confined to the 'own employer' at

[1094] Amy Eleanor Horton, 'Financialisation of Care: Investment and Organising in the UK and US' 1, 12.
[1095] ibid 104–6.
[1096] Robert Knox, 'Law, Neoliberalism and the Constitution of Political Subjectivity: The Case of Organised Labour' [2016] Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project 95, 115.
[1097] ibid 94.

precisely the time that the vertically integrated firm was falling apart. Unions facing private equity extraction have failed to significantly challenge the model. In the care sector, unions adopted partnership models, and engaged in joint advocacy for better funding for care, despite the likelihood that better funding would be funneled out straight to investors, feeding the further expansion of private equity control. Struggles against the impact of private equity have developed at the level of political campaigning and policy advocacy but do not appear to have translated into an industrial challenge to the model.

Despite the limited extent to which unions have challenged coding practices, it is clear that, contra Pistor, law cannot generate 'capital' without labour. Yet it is the legal relational dimensions of the coding of capital, so central to Pistor's analysis, which I have argued go to the heart of the contemporary problems faced by workers. Pistor's account of the law has analytical utility in trying to understand the contemporary dynamics of the labour relationship. The insight that there is *agency* in legal coding processes must be retained in order for them to be challenged. From the perspective of labour law, which seeks to a modicum of balancing of capitalist property relations, mitigating the private legal authority of the employer, the disparities of legal power implied by processes of legal coding take on alarming proportions in the contemporary corporate economy. From the perspective of class relations, and the capacity to *at least balance* these dynamics, this points to the both the temporality of struggles, and the institutional spaces in which they play out. *Temporality* points to the problems of regulation after the fact, when rights are established already. It points to the steady erosion of workers power as whole sectors are asset stripped and restructured. It points to commodification as a one-way street. The *Institutional spaces* of legal coding points to the need for interventions in areas which are usually considered outside the sphere of workers' rights and labour regulation. The principle contribution of the application of ideas of legal coding developed here has been to show how the appearance of a financialized 'asset economy' is traceable to the conditions of wage labour and the structure of rights. Moreover, the role of law has been shown to be crucial for mediating these social relations in ways which scale, secure, and abstract the labour relationship. In doing so the analysis has consistently traversed the Marxist analytical binary of the spheres of production and circulation. Indeed, the distinction has frequently been a barrier to understanding the nature of the labour relationship in contemporary complex forms of corporate structuring. As Lojkine has argued, seeking to identify the 'real' labour relationship under these circumstances' risks obscuring the ways in which relations of exploitation are structured across the economy.[1098] Lojkine

[1098] U Lojkine, 'CRITICAL POLITICAL ECONOMY BEYOND THE PRODUCTION/CIRCULATION DICHOTOMY' (*LPE Project*, 2021) <https://lpeproject.org/blog/critical-political-economy-beyond-the-production-circulation-dichotomy/> accessed 28 January 2022.

(drawing on the work of Paul) argues that exploitation can be better understood through analysis of capitalism as a mode of coordination underpinned by 'coordination rights' which facilitate the exploitation of workers.[1099] As demonstrated here, the rules of corporate, labour, insolvency and competition law clearly shape the ways in which the labour process is coordinated in relation to the legal structuring of capital. This legal structuring has been shown to channel dynamics of competition: the 'coercive laws' of market competition, in ways which intensify workers exposures and insulate concentrations of capital. This perspective challenges the primacy of production as the site of intervention for labour law regulation.

## Recommendations

What do these findings mean for how trade unions and workers respond to the problems posed by the corporate status of the employer?

The disparity of power in the way that corporate law positions workers in relation to the owners of capital, and the way in which corporate law masks the relations of production points to the need for trade union strategies which challenge laws abstractions. At the same time, responding to processes of capitalization requires attention both to the temporality of legal coding processes and interventions at the institutional spaces in which they play out. As described above, the class norms of UK labour law consistently uphold a distinction between the sphere economic of decision making restricted to corporate elites, and the social sphere of worker's rights. In accepting this distinction, in accordance with industrial relations pluralism, labour law puts developments at the level of corporate property consistently out of scope. These findings suggest that the trade union movement must pay attention to the kinds of legal coding processes described here and seek to challenge the ways in which the law positions unions and workers in relation to the corporate employer. Such strategies could include the following:

1) Trade union campaigns with regards to the law must be expanded beyond the traditional focus on trade union rights and the right to strike. Campaigns should target the contradictory effects of corporate law. Political opposition to the effects of the corporate legal person and limited liability are as old as the shareholder corporation itself. Contemporarily, such opposition has been manifest in the wake of economic shocks such as the 2008 financial crisis, and the effects of the covid pandemic, both of which saw large numbers of business failures linked to extractive corporate models. This

[1099] ibid.

opposition however has been short lived, and has not translated into sustained calls for transforming corporate ownership models. The initiatives developed under the 'Alternative Models of Ownership' report commissioned by Jeremy Corbyn and John McDonnell was a notable exception to this, leading to the 'Inclusive Ownership Funds' proposals in the Labour party's 2017 and 2019 manifestos. These proposals are highly significant and deserve ongoing engagement by the trade union movement.

2) Campaigns must challenge existing regulatory regimes regarding takeovers and insolvency restructuring, which position workers as 'outsiders' with no voice, and confer decisional authority onto holders of highly convertible intangible capital. The rise of the private equity model also points to the way in which areas of law such as capital maintenance rules, financial assistance, company objects and ultra vires shape the economic context in which unions operate. Deregulation in these areas has facilitated asset stripping hugely to the detriment of many workers, and should be monitored and contested as a labour rights issue.

3) The importance of workers priority rights in insolvency has also been neglected. The long run downgrading in real terms of the preferential proportion of claims does not appear to have been challenged by the TUC, whose interventions have focused on the gaps in the RPO provisions.
This is indicative of a direction of travel away from asserting collective claims against company assets – as a mechanism for worker voice in insolvency proceedings - towards a focus on individualised claims. The role of creditors needs to be subject to far more critical scrutiny at the point of corporate insolvency. Prevailing narratives position creditors alongside workers as the wronged parties. In many cases these creditors have contributed nothing to the direct finance of the company, instead participating in and supporting pure value extraction.

4) Unions should seek an expansion of rights to information and consultation to include changes to company's capital structures. Clearly, debt loading of companies has employment effects and should trigger information and consultation proceedings. Such a mechanism could serve as an early warning system for possible future redundancies. Whilst such rights would not confer decisional authority on workers, statutory obligations on employers at this point would serve to drive engagement and awareness of workers around these practices, supporting trade union organizing and the development of strategies to challenge value extraction. At the same time such a mechanism promotes the idea that workers must have a say over the corporate assets and their uses, and can help build the capacities and capabilities of workers and unions needed for the shift to more democratic models of ownership.

5) The high barriers to regulatory change point to the need for unions to challenge harmful practices directly. This should include monitoring and challenging developments at the level of the capital structures, and shifting responses to LBO's from purely campaigning to industrial means. Whilst legally, direct industrial responses to buyouts is difficult without clear evidence of direct and immediate impacts upon jobs, at the minimum unions can link existing actions to these processes. For example, it is striking that the question of asset stripping of ASDA's distribution centers was not linked to GMB's 2021 industrial action by distribution workers. One strategic problem faced by unions regarding takeovers and insolvency restructuring is that these processes often occur at a point of crisis where workers and unions are particularly vulnerable. The subordination of the Debenhams pension schemes is a good example of this. Yet, these models generate a 'rolling crisis' of endemic restructuring as a method of value capture. This requires that moves which weaken balance sheets or switch out debt for equity, or subordinate workers claims must be monitored and challenged on a constant basis. Interventions at this level reflect a shift towards workers making a claim on assets – as claiming an interest in assets – and claiming the right to directly intervene in the coding of corporate property.

6) Campaigns should also focus on the liability structure of corporate models, most obviously regarding the private equity model. A model for this emerged in the US shortly after the 2008 crisis in the form of the 'Stop Wall Street Looting Act', which contained provisions to increase financial and legal liability of private equity funds, give employee compensation higher priority in bankruptcies, and prohibit dividend payments in the early years post-acquisition. Whilst such campaigns clearly face enormous obstacles, it is important that the role of limited liability in driving harmful models be directly addressed.

7) Union campaigns must focus on competition law and the impacts of concentration and vertical domination on workers. Even within the existing 'consumer welfare' framing there are opportunities to push for enforcement where patterns of concentration negatively affect wages. Patterns of concentration across private equity ownership can also be challenged. Steps towards a more rigorous approach to anti-trust enforcement in the US aiming to reduce the "trend of corporate consolidation",[1100] particularly with regards to private equity may be taken as indicative of the possibility for a shift in policy in the UK. Extreme examples of vertical domination such as seen in the Leicester garment sector can also be used to build the argument for a shift in the objectives of regulation, given the clear relationship between concentration and labour abuses. UK competition

[1100] 'New Antitrust Priorities under the Biden Administration Has Private Equity in the Cross-Hairs' (n 17).

regulation is potentially shifting to support sustainability objectives, including enabling enhanced cooperation in certain areas.[1101] Unions should campaign to ensure workers interests are reflected in such measures. Unions must also focus on mergers and the mergers regime, which is potentially a powerful point of intervention at the corporate level. Steps towards blocking patterns of concentration in the interests of workers would be a meaningful shift in the regulatory regime. There is existing conflict between regulatory agencies in this area, as evidenced by the GLA submission to the CMA investigation during the ASDA/Sainsbury's merger which was out of scope for the CMA. There is no reason to expect a more 'worker friendly' competition regime will translate into better outcomes for workers directly. Nonetheless current patterns of concentration-fragmentation directly undermine workers power and union organizing and should be challenged as such.

8) Union organizing strategies must shift beyond the immediate employer. Identifying exploitation across the supply chain, network or corporate group, and across entire sectors and the economy as a whole are key elements for rebuilding a class-based unionism, and shifting away from the narrow, member serving function carved out for unions by the neoliberal logic of law. Recent research by Unite has indicated the potential for a supply chain focused strategy, generated by supply chain mapping and building links between reps across workplaces, sectors and at different stages of the supply chain.[1102] Such approaches cannot be seen as an 'add on' to traditional organizing and bargaining but as a fundamental feature of effective organizing in the contemporary economy.

The analysis here has identified the critical role of law in shaping corporate power. Shifting from a reactive union model towards a model that intervenes at the level of corporate property structures faces significant barriers. However, the evidence presented here shows that left unchallenged, processes of legal coding underpin value extraction, transfer risk and losses to workers, and intensify the commodification of labour. Too often these processes have gone unchallenged, yet they consistently erode the capacity for workers self-regulation which sits at the heart of ideas of collective labour rights and economic democracy. Shifting the focus of rights struggles to the corporate employer is a crucial first step in challenging the diffuse and unaccountable nature of corporate power, and in building the capabilities and capacities workers need to supplant it.

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