THINKING AHEAD: "FLEXIBILITY AND ACCESSIBILITY"[1]

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The (poor) quality of company law has, perhaps, been one of the most consistent themes to unite both academic and practitioner. As far back as the 1890s, Manson published "Tinkering Company Law", arguing that[2]:

> "The English mind, by a curious paradox, is constitutionally distrustful of change while full of reforming energy. The result is a superabundance of legislation, but of a tentative and temporising kind, unscientific, crude, confused; the despair of judges and all who value law as a science ... [the Companies Act 1862] ... was intended to constitute a complete code of Company law. Since 1862 we have had no less than sixteen amending Acts ... culminating in the three Acts of the past Session. Add to these sixteen Acts, two sets of General Orders, a Table of Statutory Regulations, sections in other Acts ... and between 3,000 and 4,000 decisions, with selections from the general law of partnership and agency, and the state of mind of the ordinary business man who happens to be a director, or has dealings with a Company, and wants to know his legal position, can be better imagined than described. Ill-considered and empirical law-making is not altogether responsible ... The Legislature has had to keep up with the mischievous activity of the promoter.".

More recent demands for reform can be traced to the 1980s with Len Sealy's influential series of lectures published as "Company Law and Commercial Reality"[3]. The trend accelerated in the 1990s with dissatisfaction at the *Companies Act 1989* and culminated in the criticism put trenchantly by the Law Society Company Law Committee in its Memorandum on "The Reform of Company Law" (exceptionally, not in response to a specific proposal): "No Government can escape responsibility for the quality of its legislation"[4]. What became clear was that such criticisms were not only concerned with the substantive content of company law, where there can be legitimate scope for divergence, but on its legislative form. Such criticisms are particularly worrying when applied to a discipline such as company law which is

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[1] The views in this article represent the development of an unpublished joint paper "Participation or Poisoned Chalice: Proposals for a New Companies Code" with Peter Walsh, School of Conservation Sciences, Bournemouth University (1999). The author hopes to develop some of the ideas in this Opinion further in *The Institutional Architecture of Corporate Governance Reform* at the Corporate Governance of Financial Institutions conference being organised jointly by Oxford Brookes University and the Journal of International Banking Regulation at the Institute of Advanced Legal Studies, London, 2004. The position is as stated at 29th July 2004.

[2] Manson, E. "Tinkering Company Law" (1890) 24 Law Quarterly Review 428 at 428 – 429.

[3] Sealy, L.S. "Company Law and Commercial Reality" (London: Sweet & Maxwell, 1984), esp. Chapter IV "The Legislators: Do the Companies Acts Help or Hamper?" at p. 56.

[4] Law Society Company Law Committee Memorandum No. 255 (London: Law Society, 1991), p. 1.

dominated by its statutory framework and where the scope for judicial activism is accordingly somewhat restricted.

When government initiatives to reform company law commenced in earnest in the late 1990s, it is unsurprising then that they would be sensitive to such criticisms. The Law Commissions in 1998 included in the guiding principles for the reform of directors' duties a number which were essentially targeted at the quality of the legislation itself: the "useability principle", the "certainty principle" and the "enough but not excessive principle"[5]. So when, in March 1998, the DTI under Margaret Beckett published the Consultation Paper, "Modern Company Law, for a Competitive Economy", it is unsurprising that a major focus of criticism related to the quality of companies' legislation, in particular identifying difficulties of "over-formal language", "excessive detail", "over regulation" and "complex structure", as well as the need to deal with "obsolescent or ineffective provisions"[6]. The initial solution suggested in the Consultation Document "Modern Company Law, the Strategic Framework" was truly radical[7]. One proposal considered was to put substantially the whole of company law into secondary legislation, with an appropriate primary power conferred on the Secretary of State to enact it and amend it from time to time, subject to safeguards to meet the obvious concerns as to the acceptability of such a sweeping power to Parliament – and others. However, it is my view that it was also flawed: placing substantially the whole of company law in a statutory instrument would send the wrong signal as to its importance and would have been likely to have led to a further degradation of quality over time.

In May 2004, the Consultative Document "Flexibility and Accessibility"[8] was issued which finally sets out how the issue of the future updating of companies' legislation might be addressed in the new Companies Bill. The intention is that this should include powers to *restate* and *reform* the law. Restatement is defined as rewording and/ or rearranging the law in order to simplify it, and reform is defined as any kind of amendment to the existing law which changes its effect. The restatement power is intended to be used in the short term to address key areas such as reports, accounts, meetings and resolutions. The reform power is intended to be used for matters which cannot be implemented immediately in the Companies Bill, such as capital maintenance or jurisdictional migration, where changing developments in European law make it impossible to reach definitive long-term conclusions about what the law should be. The safeguards will require consultation with representative organisations (the nature of which may differ depending on whether the restatement or reform power is being used), relevant regulatory bodies and other persons considered appropriate; publication of an Explanatory Document, setting out the purpose and intended benefits of the proposals, to be laid with the proposed Order in Parliament; 60 days of Parliamentary scrutiny; and the laying of the final draft Order with a further report detailing representations made during the scrutiny period and

[5] Law Commission Report No. 261 "Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties" (London: TSO, 1999), p. 26.
[6] DTI, "Modern Company Law for a Competitive Economy" (London: DTI, 1998), Chapter 3.
[7] Company Law Steering Group "Modern Company Law for a Competitive Economy, The Strategic Framework" (London: DTI, 1999), Chapter 8.
[8] "Flexibility and Accessibility: A Consultative Document" (London: DTI, 2004), esp. pp. 9 – 10, 12 – 13 and Annexes A and B. Comments are invited by 24th September 2004 and the document can be obtained from http://www.dti.gov.uk/cld/condocs.htm.

consequential changes. The Order must then follow the affirmative procedures of debate and approval in Parliament. A marginally simpler procedure would govern the use of the reform power if it were being used to implement a Law Commission proposal encompassing the common law. However, the important difference from the initial approach of "The Strategic Framework" is that it is acknowledged that, on the whole, company law should remain in primary legislation.

There is a strong temptation for pragmatically orientated lawyers, whether academic or practitioner, to dismiss proposals such as "Flexibility and Accessibility" as relatively unimportant when compared to the substantive changes to company law which are currently being debated. Yet this would be unwise, and it is important that the questions which are being consulted upon are considered carefully. If the proposals are adopted, they may well establish the framework for company law reform for a generation. This Opinion will simply discuss the merits and demerits of what appear to be the two key questions: 2 and 3, as to whether powers to reform and restate the law through secondary legislation would be useful in ensuring future flexibility and accessibility, respectively. For the purpose of this discussion, it will be assumed that there is no practical difference between the two types of power since, as the Consultative Document itself recognises, the two powers would often need to be used at the same time because simplification of the law in any real sense would often require changes both to its effect and to the way in which the law is set out.

The basic premise of the Consultative Document, that company law provisions should on the whole remain in primary legislation, merits support. The extensive use of secondary legislation in areas related to company law, such as insolvency and financial services, has rendered them unnecessarily opaque. Yet beyond this the arguments become less clear and there are perhaps much more pressing reasons for rejecting the proposal.

In the first draft of this Opinion, I commenced by praising the measure for two key reasons, which on reflection I have abandoned. The first was that it was inescapable that it had traditionally been difficult to gain Parliamentary time for company law measures. However, this must be questioned. In the post-Enron environment it has proved possible for the *Companies (Audit, Investigations and Community Enterprise) Bill* to find Parliamentary time no doubt because our political masters thought it merited it. The second was that the need for flexibility could easily be demonstrated because it enabled a rapid response to exogenous changes which merited amendment of companies law. Yet even this seemingly innocuous proposition, on reflection, appeared to be flawed. There are some genuine examples of exogenous change which may require corresponding changes to company law – an interesting list of these was set out in "The Strategic Framework" and included matters such as information technologies and changing patterns of ownership[9]. But on closer inspection it can be seen that the law has been sufficiently flexible to accommodate certain of these already. For example, changes in information technology, by and large, have not awaited another Companies Act but were addressed (to some extent at least) in the *Companies Act (Electronic Communications) Order 2000*[10]. Other exogenous changes which might require flexibility are, perhaps, less attractive. I found it harder than I

[9] Ibid., pp. 11 – 14.
[10] SI 2000/3373.

expected to come up with a truly bad judicial decision in the area of company law – as opposed to one with which I merely disagreed – and examples of bad statutory drafting, such as the *Companies Act 1989* was criticised for, were hardly likely to be addressed by making change easier.

The critical problem with the proposed measure has already been alluded to – the greatest pressure to change company law invariably follows a major corporate scandal. Feelings run high. Perhaps there have been widespread losses by small investors. The attractiveness of the proposed reforms, if enacted, will become an unbearable burden for the DTI. The ability to move relatively quickly to change company law, even with the proposed safeguards, could lead to an even more fluid and reactive company law. The corresponding danger is that company law will grow even longer as more stable doors are locked after more horses have bolted. But there is a further danger – that company law will become the subject of protracted campaigns for change by lobby groups. More subtly the risk associated with a more fluid company law is that it will never become embedded in business norms of conduct. While in-depth research would be required to prove the point, there is at the least anecdotal evidence that the relative success of the *Companies Act 1948* (and perhaps its predecessors - regrettably the author is too young to have experienced them) was that its longevity and relative comprehensiveness led to a familiarity with it in the business community that the subsequent fragmented and fluid regimes of companies legislation, financial services and insolvency legislation have failed to achieve. In contrast, it appears likely that the more recently developed Combined Code on Corporate Governance, with its simple structure and plain language, has gained much familiarity in the business community.

"Flexibility and Accessibility" has, to be fair, recognised some of these problems. As a consequence, it states that the new powers should not be capable of being used in ways which conflict with the agreed principles on which a broad consensus was achieved in the Modern Company Law Review. Accordingly, the Consultative Document welcomes views on what criteria should govern the use of the powers, in particular suggesting that the reform power – the more far-reaching of the proposed powers – should be limited to proposals which will lead to a simpler or more flexible vehicle for conducting business in Great Britain or elsewhere; will increase the effectiveness of, or confidence in, the regulatory system; will contribute to prosperity; will not change the fundamental nature or purpose of the company; and will be in the interests of private companies, where affected. A further possibility might be to remove an anomaly in the existing law. The intention here is clear and laudable. The problem is that many of these criteria represent concepts which are very difficult to define or interpret with any precision. For example, the criterion of increasing confidence in the regulatory system could justify almost any additional regulatory burden that might be imposed through company law. The criterion as to the fundamental nature or purpose of the company is one which might provoke many an academic seminar – but little agreement.

The moral? Reform company law by producing a relatively brief piece of primary legislation of no more than, say, 500 sections. And then make it difficult – though, of course, not impossible - for politicians (whether in the United Kingdom or the EU) to change it.