

Paper for WINIR 2017:

Shareholder primacy and shareholder prominence: Swedish corporate law and the corporate purpose 1848-2005

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Abstract

Despite evidence of global legal convergence in corporate law, Swedish corporate law does not recognize the interest of the corporate entity. Rather, the corporate purpose is explicitly defined as profit generation on behalf of the shareholders. Although this is not fully comparable to the normative stance of shareholder primacy, it is a stance of shareholder prominence. In this paper we trace this position in Swedish legal thinking regarding the corporation, and throughout history, drawing on Sewells eventful temporality approach. We find strong indications of foreign influence on Swedish corporate law, from its introduction in 1848 until the last revision in 2005, although the shareholder prominence position is linked to internal developments in the 1930s: contemporary legal thinking, conservatism of the legal profession and the economic disasters following the Kreuger-crash. This path dependent development led to an inert institution of shareholder prominence, strongly rejecting legal change.

1. Introduction

A sizable legal literature dismisses shareholder primacy as a legal myth (e.g. Stout, 2012) persisting only because it is forcefully advocated by consultants (Froud et al, 2009), scholars and lawyers (Weinstein, 2012), and institutional investors (Lazonic & O’Sullivan, 2000). In influential legal settings for corporate law, such as the UK and Delaware, the purpose of the corporation should rather be understood as furthering the interests of the corporate entity itself, making corporate directors stewards of the corporation rather than of the shareholders. This position is generally associated with the idea of the corporation as an independent entity (Ireland, 1999; Veldman, 2011) and has vast implications for how we understand the corporation in relation to society. However, despite the converging power of globalization on corporate law (e.g. Hansmann and Kraakman, 2004), not all legal jurisdictions have converged on this understanding of corporate purpose. In 1944, when corporate law was amended for the third time in Sweden, the law explicitly prescribed the corporate purpose to be ‘profit generation on behalf of the shareholders’. Such a purpose, although not the equivalent to shareholder primacy, clearly gives preeminence to shareholders and is more in line with an understanding of the corporation as an instrument for furthering the interests of shareholders, a position associated with an understanding of the corporation as a partnership of shareholders (Ireland, 1999; Veldman, 2011). Hereafter, we refer to Swedish legal position as shareholder prominence.

In this paper we follow how the shareholder prominence purpose of the corporation has evolved in Swedish legal thinking throughout the history of Swedish corporate law. Institutions, such as how the corporation is understood, do not only vary among contexts, but also over time, in ways displaying significant path dependency. Such path dependent character of institutions surrounding corporate law has been acknowledged in much previous research (e.g. North, 1991; Bebchuck and Roe, 1999). Applying the lens of the eventful temporality approach proposed by Sewell (2005; 2008), to contextualise the described changes of corporate law in Sweden, we take the historical legal debates as our case, focusing on the Swedish legal thinking with regards to the corporation. This helps illuminate how corporate law is shaped by – and shapes – the institutional setting of corporate governance in a context in which the legal understanding of the corporation lies somewhere between the entity theory and popular corporate governance discourse of shareholder primacy. Thereby, this paper contributes to our understanding of global variation in corporate law, and how this is situated in the different institutional settings surrounding corporate law, and corporate governance more generally.

The remainder of the paper is structured as follows: first the theoretical distinction of the corporate entity and its relation to the shareholders are discussed; this is followed by a brief description of the eventful temporality approach; after a note on the empirical material employed, our case of the history of Swedish corporate law is presented; Finally, the findings of the case is discussed before our conclusions are put forward.

2. Literature review

This section is divided into two subsections: the first, 2.1, discussing the corporate entity and its relation to the proprietor; and the second, 2.2, presenting the eventful temporality approach.

2.1 The corporate entity and its purpose

The corporate form has a history that can be traced to the middle ages (Maitland, 2003), but the modern form of corporation used for business purposes, characterised by being a legal person with tradable shares and limited liability for shareholders created through registration, emerged in the UK during the 19th century (Ireland, 1999; Veldman, 2011). It can be seen as a fusion of two constructions, with two different rationales that are mutually exclusive, but yet both necessary for rationalising the modern corporate form (Veldman, 2011). On the one hand, the corporate form draws from the partnership form; the idea that the corporation is a distinctly *private*, contractual arrangement among individuals, i.e. that it can be seen as an aggregation of individuals/shareholders (Ireland, 1999). This model of the corporation can be seen as consistent with shareholder primacy as it sees the corporation as the shareholders' vehicle for acting as a collective. On the other hand, the corporate form draws from the idea of the corporation as an entity, independent from shareholders and other stakeholders and charged with agency (Ireland, 1999); a form previously only available through concession from the sovereign, originally for ventures that could further the interests of the state. This distinctly *public* model of the corporation can be seen as consistent with features such as limited liability and the formal separation between the corporation's assets and shareholders, and with the idea that the corporation should be run in the interests of the corporation itself.

The interpretation and rationalisation of the corporation has varied over time, in such way that either of the two models have been more emphasized than the other at different points in time, in debate and in policy development (Jansson and Veldman, 2012). The recent popularity in the Anglo-Saxon world of the idea of shareholder primacy at the expense of the idea of the corporation as a societal institution run in the interests of the corporation itself, can be seen as a shift towards an emphasis on the aggregation of individuals model (Ireland, 1999). In fact, this move is often described as being intellectually driven by the triumph of agency theory, a theory that explicitly describes the corporation as nothing beyond a nexus of contracting individuals, in corporate governance and legal thinking (Weinstein, 2012). This would suggest that reinterpretations of the corporate purpose is driven by the underlying, basic ideas about what the corporation is, i.e. that specific historical circumstances may create the conditions of possibility for a changed understanding of the corporate purpose. We use the eventful temporality approach proposed by Sewell (2005; 2008) to capture how the intellectual context shapes regulatory development.

2.2 The eventful temporality and path dependency

In 2004, Hansmann and Kraakman, famously proclaimed the *end of history for corporate law*, as we had - following the collapse of the Soviet Union - witnessed the convergence of corporate law based on the ‘shareholder-centered ideology’ (p. 33). As such, Hansmann and Kraakman, display an implicit linear understanding of the development going forward, and to the better. As history now had ended, the final objective of the trajectory was reached, and all previous steps of the development was simply small steps to get to where we are today. Such an understanding of history is called teleological, and identified by many as evident in much scholarship on law and economics (e.g. Coffee, 2001; Gilson, 2005; Nordberg, 2008).

The historian William Sewell (2005) describes a teleological explanation as *‘the attribution of the cause of a historical happening [...] to abstract transhistorical processes leading to some future historical state. Events in some historical present, in other words, are actually explained by events in the future.’* (Sewell, 2005, p. 84). Sewell refutes this thought-model as fallacious, and instead proposes that historical development should be understood as eventful and temporal. In Sewell’s theory, human history should be understood as a series of happenings. Generally these happenings tend to reproduce the current social and cultural structure, that is, in Sewell’s terminology ‘social action’, while a rare sub-group of happenings significantly transform social structures, and are referred to as ‘events’. Events changing social structure imply that time is heterogeneous (rather than uniform as would be assumed under the assumption of teleological explanation), thus, a multitude of outcomes are possible following a given event. This heterogeneity should also be understood as temporal, *‘as the consequences of a given act are not intrinsic to the act, but rather will depend on the nature of the social world within it takes place’* (Sewell, 2008, p. 518). Such an understanding of history has vast implications for understanding the development of corporate law, as an event - e.g. amending corporate law - must be understood from its own context, when it happened, rather than its overall fit with a teleological model.

In many ways Sewell’s terminology provides a coherent fundamental understanding of institutional development supporting path dependency, as it has been put forward in a corporate law context by e.g. North (1991) and Bebechuck and Roe (1999). The concept of path dependency, as introduced by David (1985), draws our attention to the fact that development is not linear, and the best solution does not always win the day. To add the eventful temporality approach by Sewell, is to point out that it is the situation when a certain path was chosen - over other possible paths - that needs to be empirically studied. In this paper we try to understand the development of Swedish corporate law from the time that it was developed, rather than from where it is today.

3. Methods and materials

Swedish regulatory processes offer ample opportunities for studying the debates, arguments and rationalisations that underlie regulatory development. The reason is the relatively transparent due process, in which a governmentally appointed commission or expert report of

their investigations underlying their suggestion for a new law, which stakeholders may publicly comment on before it is turned into a proposition of a law with adjoining motivation that (after being examined by legal experts and potentially revised) the parliament votes upon. The investigations and motivations in propositions are after a law has been ratified used by courts for establishing how the laws should be interpreted on basis of what is the intent and ‘spirit’ of the law.

We use the investigations and propositions leading up to the various versions of the Swedish companies acts (Sw. *Aktiebolagslagen*) in 1848, 1895, 1905, 1944, 1976 and 2004, respectively, as our main empirical material to capture the legal thinking about the corporation prevailing at the various points in time. Moreover, we use additional sources in the form of secondary literature and, notably, commentary of the laws and handbooks for interpreting the law typically written by legal professors, often the one that had led the governmentally commissioned investigation and thus in effect the one that wrote the law, and used in education of lawyers among others.

Our aim with our empirical investigation is to (i) identify concrete changes to the corporation as this is manifested in Swedish law that has bearing for the issue of the purpose of the corporation, and (ii) relate this to the legal thinking prevailing at the time of the change, which requires that we (iii) capture and describe the legal thinking pertaining to the corporation and its purpose in the Swedish context. Identifying concrete changes in regulation pertaining to corporations is fairly straightforward as regulation is manifest. To some extent, capturing legal thinking is also straightforward in our material since the laws are motivated and well reasoned in investigations and propositions. However, since investigators sometimes may take certain foundational issues for granted, it must also to some extent be inferred from manifest statements. Linking the two is done both by governmental investigators for motivating new regulation, but also by us through the lens of the eventful temporality approach. We now turn to describing our findings.

4. Swedish corporate law throughout history

In 2017, in Sweden largest newspaper, an independent director in one of the largest listed Swedish corporations wrote opinion piece claiming that Swedish corporate law was outdated as it explicitly hindered corporate sustainability developments with its §3:3 demanding shareholder prominence (Kvart, Dagens Nyheter, 20170507). In the article Kvart (2017) cited Swedish legal doctrine, clearly giving shareholders prominence as both *lege lata* and as *de lege ferenda* (Skog, 2015). Thus, Swedish corporate law as it reads today is clearly at odds with corporate law in other significant jurisdictions (e.g. Delaware, UK, see further e.g. Stout, 2012). In this paper we claim that this is a result of legal thinking in Sweden as it has developed throughout history as both corporate law and corporations has evolved. In the following sections we describe this process chronologically, as prescribed by Sewell (2005), to avoid being captured by an teleological understanding.

4.1 The first companies act: 1848

When the first Swedish corporate law was introduced in 1848, the corporate form as such was not unknown. Already ‘Stora Kopparbergs Bergslag’ (today known as the listed corporation StoraEnso), licenced by King Magnus in 1347 had corporate like properties (SOU 1971:15), although most sources place the development of the first corporations in Sweden to 17th century and the establishment of the first trade corporations modelled on the Dutch experience (SOU 1971:15; Smiciklas, 1989).

The first recognition of corporations in Swedish law is found in the ‘Trade law’ of 1815 (Sw: Handelsbalken), where shares could be emitted and sold to the public, with limited liability, provided that it was sanctioned by the King (Peterson, 2007). This was merely one paragraph in the ‘Trade law’, and according to Peterson (2007) based on historical legal thinking where society and state was one, personified by the King, as a master, providing for the best of all his loyal servants.

In the years following the introduction of the ‘Trade law’, liberal ideas of economic freedom, dispersing throughout Europe following the French revolution, also reached Sweden (Magnusson, 1997; Peterson, 2007). This affected the understanding of the corporation. Breaking with the previous hierarchical understanding of society, the corporation was understood as an arrangement between citizens, and the role played by the state was to protect citizens from the dangers latent to the corporate form (Peterson, 2007).

As often is, the trigger to further regulate corporations into corporate law followed by corporate failure. The bankruptcy of the ‘Nyköpings bruks och faktoriaaktiebolag’ in 1844, a non-commissioned corporation, where the (noble) shareholders still claimed limited liability in court paved the way (Peterson, 2007). The result was the 1848 Swedish corporate law based on the French Code de commerce (SOU 1971:15; Smiciklas, 1989; Peterson, 2007). The companies act contained merely 15 §. The French connection implied that the first Swedish corporate law still was based on a concession model, where the King gave the licence to operate. However, it should be noted that the act did not outright ban the formation of non-concessioned corporations. Therefore, corporate law could be understood as a standard contract between suppliers of equity and entrepreneurs, providing for limited liability, where the state (the King) protected suppliers of equity from unscrupulous entrepreneurs.

The legal understanding of the corporation at this time was based on the French, as expressed in Code de Commerce (Peterson, 2007). This implied that the basis for limited liability was that the corporation was understood as ‘non personal mass of capital’ (Peterson, 2007). As Peterson points out, this is closely related to an understanding of the corporation as a legal entity, but the corporation was not considered as such under Swedish law.

4.2 1895 and the Hammarskjöld's companies act

The legal underpinning of 1848 licensing system was not considered sufficient (Hammarskjöld, 1890; SOU 1971: 15). The new companies act of 1895 was an attempt to codify the established practice, and this is referred to as the normative model (SOU 1971: 15; Skog, 2015). The codification of licensing practice implied that the concession model could be dropt, and the corporate form was opened up to everyone.

Obviously this expanded the size of the companies act, from 15 to 71 paragraphs. The foreign influence was also strong on new the companies act, this time German rather than French (SOU 1971: 15, Smiciklas, 1989).

The 1895 companies act does not contain any reference to the corporate purpose or profit generation on behalf of the shareholders. However, the understanding of the corporation and its shareholders was similar to today. This is evident in the following quote from the motives:

*'Although a share should be awarded a certain amount, the nature of the share is not comparable to a claim. The share is only a proof that the holder owns a part of the corporation, as displayed by the relationship between the nominal worth of the share and the total share capital of the corporation. This share is under the corporation's existence locked up by obligations towards other shareholders and bondholders, and may not be separated and used by the shareholder until the corporation been liquidated and the bondholders claims are served'*¹ (p. 117)

The only time the 1895 companies act refers to the interest of the corporation is in §48 concerning bankruptcy, when the board of directors are mandated to act as debtors of the corporation itself.

4.3 1910 Companies act

The 1895 companies act was short lived, only a decade later the King installed a commission that should propose amendments. The commission reported in 1908 (company law commission) and the new law was set in place in 1910 (proposition: 54). The background for the commission was a number of appellations from elected officials to the Riksdag to amend corporate law to further strengthen the protection of the general public against unsound corporations, as well as strengthening the protection of minority shareholders against both the board of directors and controlling shareholders (SOU:1971:15).

¹ Sw: Ehuru aktie skall lyda å visst belopp, är dock ett aktiebref till sin natur ingalunda ett fordringsbevis utan allenast ett bevis att innehafvaren eger en så stor ideel qvotdel i bolaget, som förhållandet mellan aktiebrefvets nominela belopp och hela aktiekapitalet utvisar. Denna qvotdel är dock under bolagets bestånd bunden genom förpligtelserna emot öfrige bolagsmännen och bolagets borgenärer och får ej utbrytas eller eljest af egaren sjelfständigt disponeras förr än bolaget blifvit upplöst och alla dess borgenärer förnöjde

International influence referred to is mostly German (SOU 1971:15), as in 1895.

The size of the law continued to increase from 71 paragraphs to 141. The expansion rate of the number of rules seems to be almost a natural law for corporate law.

Still the Swedish companies act does not contain any paragraphs on the corporate purpose and the profit generation on behalf of the shareholders. What is there, however, is § 55: *‘The annual general meeting may not dispose corporate profit or assets for purposes that obviously deviate from the stated corporate purpose. The annual general meeting may, however, deviate from this, and use corporate assets for the public good, if the asset is of relatively small value’*²

This is a paragraph that relates to minority shareholder protection. If a controlling shareholder dominates the annual general meeting, the paragraph would be aimed at preventing decisions, in some way beneficial for the controlling shareholder but at the expense of the minority. As we shall see in the next section about 1944 companies act, the topic of minority shareholder protection and spending corporate resources outside the agreed purpose, is linked to shareholder prominence.

It should also be noted that the §55 of the actual company law does not have an equivalent paragraph in the proposed law (company law commission, 1908). Instead the commission had proposed a rather complicated solution where the minority shareholders (10%) would be able to force dividends, protecting the minority from a squeeze out. This solution was rejected by the King's ‘Law council’ (Sw: Lagrådet). Besides the risk of simple corporate matters increasing the workload of the country's courts, they claimed:

*‘It is not proper to include a rule that easily could prevent an honorable quest for the consolidation of the corporation. It is plausible to fear that the proposed rule, should it be included in the law, could lead to a situation where a small group of shareholders out of shortsightedness or plain need of cash, against the majority's will, could force dividends that would be against the true interest of the corporation’*³. (p. 86)

Instead the ‘Law council’ proposed §55, with this argument:

² ‘Bolagsstämman må ej förfoga öfver bolagets vinstmedel eller öfriga tillgångar för ändamål som uppenbarligen är för bolagets verksamhet främmande; stämman dock obetaget att till allmännyttigt eller därmed jämförligt ändamål använda tillgång, som i förhållande till bolagets ställing är af ringa betydighet’

³ ‘Kan det ej vara lämpligt att införa en bestämmelse som lätt kan leda därhän, att berömvärda sträfvanden för konsoliderande af ett bolags ställning motverkas. Det torde helt visst kunna befaras, att, i händelse förslaget i denna del blefve genomfördt, en kortsynt eller penningbehöfvande krets af aktieägare i mångt fall skulle vara redo att mot majoritetens önskan genomdrifva en utdelning, som vore stridande mot bolagets verkliga intresse’

‘Each shareholder has, in accordance with the nature of the corporation, a claim on the profits of the corporation, and he will obviously suffer if his claim is used for purposes that unquestionable lies outside the scope of the corporate charter or the agreed upon corporate purpose. What is here said does not only concern profits but also more generally the corporate assets’⁴. (p. 86)

For inspiration of the paragraph the ‘Law council’ referred to §12 of the Swedish Sea law.

Regarding the comments by the Kings ‘Law council’ we note, that on one hand, that the corporation has a ‘true interest’, which is consolidation, and on the other hand it is in ‘accordance with the nature of the corporation’ that the shareholders has rights to the profits. This duality seems to be beyond the impersonal mass of capital from 1848, but it is the difference in interest of shareholders of different size that is the focus rather than a distinct interest of the corporation. Finally, the thought-figure of the shortsighted minority shareholder dangerous to society in general, and the corporations in specific, that we see today (e.g. Jansson, 2013; Jonnergård & Larsson-Olaison, 2017), was present also in 1910.

4.4 1944 Companies act

In 1933, in the aftermath of the international financial crisis with its Swedish connection through Ivar Kreuger, the King initiated a commission from improving the companies act. One early ambition was Scandinavian harmonization, where a number of meetings with Danish, Norwegian and Finnish representatives took place during the 1930s (prop: 1944:5), but at the time of the commission's final report in 1941, the neighbouring countries was either under foreign occupation or had other pressing issues to deal with. When the new companies act was implemented in 1944 the Scandinavian harmonization ambition was toned down, and the project postponed until the next major revision in the 1970s (see below).

The companies act continued to expand, this time from 141 to 228 paragraphs. The foreign influence was strong, the commission's proposal (1941) heavily relying on German sources, but also English law was discussed, perhaps reflecting the uncertain times of the new companies act.

It is interesting to note that Kreuger never is mentioned in the discussions about the law. After all, the Kreuger crash was one of the triggers not only of the new Swedish companies act, but also the international financial crisis of the 1930s (SOU 1971:15). The Kreuger heritage is although clearly recognized in the new inventions of the law. For instance, the limitations on corporate debt (consolidation before dividends), the separation of the board

⁴ ‘Hvarje aktieägare har enligt bolagsförhållandets natur andel i vinstmedlen och lider tydligen förfång, om de utan hans begifvande tagas i anspråk för något syfte, som obestriddligen ligger utanför det vid bolagsordningens antagande eller sedermera öfverenskomna bolagsändamålet. Hvad sålunda anförts gäller för öfrigt icke allenast vinstmedel utan äger tydligen tillämpning å bolagets tillgångar öfver hufvud’

from the CEO, the strengthening of the audit function, and most importantly, new accounting regulation on corporate groups.

Of special interest for this paper is the § 9 which states: *'If the purpose of the corporation is not to provide profit for the shareholders, the corporate charter should state the purpose'*⁵, and § 76 corresponding to the § 55 in the old law: *'The annual general meeting may not decide on use of corporate profits or assets or debts that obviously is foreign to corporate operations or purpose [...] The annual general meeting may not decide on use of corporate assets, or other, in ways that obviously benefits some shareholder at the expense of the corporation or other shareholders, unless stated in this law or in the corporate charter'*⁶.

So §9 is new in relation to Swedish corporate law, while § 76 is very similar to the old law, with the inclusion of the last part of the rule, which still today applies as the "general clause" for minority shareholder protection.

The law was based on the work of the preparatory commission reporting in 1941. The proposed §9 is commented: *'By this, a legal distinction is made by corporations with the purpose of providing profit for the shareholders, and corporations with another. This does not imply that the former only should perform the mentioned purpose. To the extent that corporations should be required to perform positive obligations of social nature, such as worker protection, pensions and so on, these are topics the commission consider outside the scope of corporate law, as part of social law, in the same way as the corporation's economic obligations towards the common is decided by tax-law'*⁷. In many ways the argument put forward by Milton Friedman 26 years later (Friedman, 1970).

The link between §9 and §55 in the commission's proposal is established in the report: *'the corporate purpose, is as stated above to provide profits to the shareholder [...], should this be*

⁵ Sw: 'I den mån bolagets verksamhet ej åsyftas beredande av vinst åt aktieägarna, skall bolagsordningen ange verksamhetens syfte'

⁶ Sw: 'bolagsstämman må ej besluta om användning av bolagets vinstmedel eller övriga tillgångar eller om åtagande av förpliktelser för ändamål som uppenbarligen är främmande för föremålet för bolagets verksamhet eller för verksamhetens syfte[...] Bolagsstämman må ej heller, med mindre annat följer av vad i denna lag eller bolagsordning är stadgat, besluta om sådan användning av bolagets tillgångar eller eljest om sådan åtgärd, att uppenbarligen fördel beredes vissa aktieägare till nackdel för bolaget eller övriga aktieägare'

⁷ Att på detta sätt en rättslig gräns måste dragas mellan bolag, vilkas verksamhet åsyftar att bereda aktieägarna vinst, och bolag, som hava annat syfte, betyder naturligtvis icke att ett bolag av det förra slaget i sin verksamhet enbart och utan andra hänsyn bör fullfölja nämnda syfte. I vilken mån aktiebolagen i sin egenskap av näringsidkare skola åläggas positiva förpliktelser av social natur t. ex. beträffande arbetarskydd, pensionering m. m. äro frågor som enligt beredningens mening icke höra till aktiebolagslagstiftningen utan till den sociala lagstiftningen, liksom bolagens ekonomiska förpliktelser gentemot det allmänna väsentligen bestämmas av skattelagstiftningen.

*elevated into law, there should be no doubt that a decision by the annual general meeting in conflict with the corporate purpose, could be tested in court*⁸. Thus, the commission's idea to put forward profit generation on behalf of the shareholders as the corporate purpose is thought of as minority shareholder protection. Corporate charters should describe what line of business the corporation should be in, and the profits from that should be distributed, rather invested into any market integration. Therefore, it is not only controlling shareholders that are targeted but also managers and any empire-building ambitions on their behalf.

Further, in the discussion of the same problem, the commission refuse the interest of the corporation to be acknowledged: *'that if the decision of the annual general meeting might be considered, from the position of business administration, as harming the corporation, is not basis for reprehension. If the majority decides to distribute all possible profits, although diligent care of the corporation's future would require consolidation, this is not legally challengeable.[..] Although a decision is not illegal if it hurt the corporation, then what the law and the corporate charter specify as the corporate purpose must guide the annual general meeting. As this purpose, if not otherwise declared in the charter, is to provide profit for the shareholders, any decision in conflict with this is against the law'*⁹. From this follows that interest of the corporation is considered secondary.

From the proposition (1944 prop: 5), which include the comments from the 'Law council', from the different interest groups in the process of referrals, along with the final comments from the chief of the department of justice, not §9 nor §76 is commented. This implies that the inclusion of the paragraph of what today is understood as shareholder prominence, at this time was considered as unproblematic. One might speculate on why this was the case, but the most plausible explanation is that shareholder prominence was the established, or institutionalised, way of thinking of the corporation at this time. Interestingly though, in the proposition, the chief of the justice department, in his introduction wrote: 'I would here put forward that the commission, when formulating its proposal, has taken its starting point from the modern position that the corporation is not solely an instrument for the furthering of

⁸ Verksamhetens syfte, ändamål, är såsom ovan framhållits regelmässigt att bereda delägarna ekonomisk vinst. Vid sådant förhållande skulle, om förslaget upphöjes till lag, det även utan uttrycklig bestämmelse knappast kunna råda något tvivel om att ett bolagsstämmobeslut, som stode i strid med verksamhetens syfte därigenom att bolagets tillgångar undandrogas aktieägarna till förmån för annan, vore rättsstridigt och kunde klandras.

⁹ att den omständigheten, att ett bolagsstämmobeslut framstår såsom från företagsekonomisk synpunkt skadligt eller olämpligt för bolaget, icke i och för sig utgör grund för klander av beslutet. Om majoriteten fattar beslut om utdelning av hela den utdelningsbara vinsten, ehuru klok omtanke om bolagets ställning och framtida utveckling hade bort föranleda en avsevärd fondering, är beslutet dock rättsligen oangripligt. Ehuru sålunda ett beslut icke i och för sig är rättsstridigt därför att det medför ekonomisk skada eller uppoffring för bolaget, måste emellertid vad lagen eller bolagsordningen angiver såsom bolagets syfte tjäna till rättesnöre för bolagsstämman. Då syftet, om icke annat angives i bolagsordningen, är att bereda aktieägarna vinst, är ett beslut som står i strid med detta syfte rättsstridigt

private economic ventures, but also that the corporate form has a function to fill for the entire business society, as well as in the service of the people.’ (p. 208)¹⁰

4.5 1976 Companies act

In the 1960s the question about Scandinavian harmonization of corporate law was again brought forward (Smicklas, 1989). This, together with the technical development of computers, was the key mission of professor Nial when he was appointed to rewrite the 1944 companies act.

The changes in the law are very much technical. The law was now divided into chapters, 19 of them, and totally 206 paragraphs. In the 12 chapter, 1 §, the shareholder prominence is put forward: *If the operations of the company fully or partially shall have a different purpose than generating profits for distributing to shareholders, it has to be stated in the bylaws.*¹¹

In both the proposal (SOU 1971:15) and the final law (prop. 1975: 103) there are lengthy discussions about economic democracy. The understanding of the corporation is clearly stakeholder oriented (see further Jonnergård et al, 2017), as manifested in other law issued at this time, but this does not translate into a discussion of the corporate purpose and the relation to profit generation. However, in the proposed law (prop. 1975: 103) it is said: *‘The rule starts from fact that the purpose of the corporation, if nothing else says in the charter, is profit generation on behalf of the shareholder. That those, who by investment in shares, has made the corporation possible, and that thereby assumed large risk of losing all, or part, of their investment, should also be given the reward, if the corporation is successful, of part of the corporate profits. This is a necessary condition for the corporations to attract necessary funds. Then, when the law speaks of the purpose of the corporation to be profit generation on behalf of the shareholders, it is thus not in conflict with the initial statement that corporations today has important tasks in the interest of society in general’*¹² (SOU 1971:15, p. 310)

¹⁰ Jag vill härvid framhålla, att beredningen vid utformandet av sitt förslag utgått från den uppfattningen, att det nutida aktiebolaget icke bör vara endast ett instrument för drivande av privatekonomisk rörelse utan att aktiebolaget såsom företagsform har att fylla en funktion i hela näringslivets och folkförsörjningens tjänst.

¹¹ om bolagets verksamhet helt eller delvis skall ha annat syfte än att bereda vinst åt aktieägarna, skall bolagsordningen innehålla bestämmelse om användning av vinst och behållna tillgångar vid bolagets likvidation.

¹² Bestämmelsen utgår från den förutsättningen att syftet med ett aktiebolags verksamhet, om ej annat anges i bolagsordningen, är att bereda vinst åt aktieägarna. Att de som genom aktieinvestering möjliggör ett företags tillkomst och verksamhet och som därvid tar risken av att helt eller delvis förlora sin insats skall ha chansen att om företaget går bra få del av uppkommande vinst är en nödvändig förutsättning för att företagen skall kunna dra till sig erforderligt kapital. När lagen talar om att syftet med bolagets verksamhet är att bereda aktieägarna vinst strider det därför ej mot det i den allmänna inledningen påpekade förhållandet att företagen i nutiden har viktiga uppgifter i hela samhällets intresse

Nevertheless, in the process of referrals (cited in the prop. 1975:103) the white-collar union TCO, propose: *TCO emphasis that the proposal does not meet the workers wish for a more equal division between capital and labor with regards to the management of the corporation. The proposal is based on the traditional perception that decision-right are given to the shareholders. Instead of supporting an important development of society toward equal influence between capital and labor, the proposal will ossify a - from the workers perspective - unsatisfactory situation for a long time forward*'(p. 86)¹³

But when the final proposal is accepted as law it still says that the corporate purpose is profit generation on behalf of the shareholders, and the only comment: *'this represent the current legal order'*¹⁴ (prop. 1975: 103, p 476). At this time, a number of important changes was either enacted (such as law on codetermination and labor board representation) and yet other fiercely debated, such as the wage-earner funds with the ambition of creating social enterprises without owners (see further Lindbeck, 1998 ; Henreksen & Jacobsson, 2001; Jonnergård et al, 2017). Still corporate law did not change with regards to the purpose of the corporation.

4.6 2004 Companies act

It took until 2004 before Sweden got a new, fully revised companies act. However, a number of incremental changes to the 1976 act, that largely were brought into the new 2004 act, had previously occurred, especially driven by EU harmonization following Sweden's joining of the EU in 1995. The 2004 companies act, comprising originally 813 paragraphs divided into 31 chapters, was preceded by a governmental investigation by the so-called *Aktiebolagskommittén* ("the corporation committee") that issued a number of reports on different issues relating to company law.

The new act explicitly states the shareholder prominence position in its third paragraph of the third chapter in the same way as in the previous act: *'If the operations of the company fully or partially shall have a different purpose than generating profits for distributing to shareholders, it has be be stated in the bylaws. In that case it shall also be stated how the profit and retained assets shall be used at the liquidation of the company.'*¹⁵

¹³ Sw: TCO framhåller att utredningsförslaget inte tillgodoser arbetstagarnas strävan att få en jämnare fördelning mellan kapital och arbete vad beträffar bolagets ledning och skötsel. Förslaget bygger på den traditionella uppfattningen att förvaltning och beslutanderätt tillkommer aktieägarna. I stället för att främja en angelägen samhällsutveckling mot jämnare fördelning av inflytande mellan kapital och arbete, kommer utredningens förslag enligt TCO att bidra till att konservera ett från arbetstagarsynpunkt otillfredsställande förhållande för avsevärd tid framåt.

¹⁴ Sw: representerar i sak gällande rätt.

¹⁵ Sw. Om bolagets verksamhet helt eller delvis skall ha ett annat syfte än att ge vinst till fördelning mellan aktieägarna, skall detta anges i bolagsordningen. I så fall skall det också anges hur bolagets vinst och behållna tillgångar vid bolagets likvidation skall användas.

While the paragraph allows the possibility to, by bylaw, choose a different purpose than profit generation, the motivations and investigations preceding the law makes clear that such cases are assumed to be rare exceptions (SOU 2001:1; Prop. 2004/05:85). For example, the the *Aktiebolagskommittén* also investigated a new form of corporation - corporations with a special limitation on profit distribution (SOU 2003:98) - that later was added to the new companies act as the 32nd chapter. The committee argues that the new type of corporate form is suitable for non profit driven health care providers and municipal housing companies and the motivation behind introducing the form rather than simply encourage the opportunity to limit profit distribution in bylaws, is that it is considered “obvious” that the regular corporate form is designed for operations with purpose of generating profits for shareholders (Prop. 2004/05:178, p. 20).

There are, nevertheless, a number of mentions of a ‘corporate interest’ in the new law. These are there to make a distinction between, on the one hand, the individual self interest of shareholders, board members or the CEO and, on the other hand, the interest of the corporation (ch 7 §46; ch 8 §§23 and 34). Since the purpose of the corporation is assumed to be profit generation on behalf of shareholders, this distinction can be understood as regulating situations in which the individual self-interest of a (controlling) shareholder, the directors or CEO deviates from the profit-generating overall purpose of the corporation, i.e. in agency-theoretical terms, situations characterised by risk of extractions of private benefits at the expense of the shareholder collective.

The shareholder prominence position is motivated in two ways in particular (see Prop. 2004/05:85): Firstly, reference is being made to it being the established principle. Secondly, it is argued that such a legal principle, will serve to protect shareholders from management’s use of corporate resources in ways that are not beneficial to shareholders; a rationale seemingly based on the same assumptions as for example agency theory. Interestingly, the one stakeholder in the referral process that had significant objections to this position was the organisation *Företagarna* (association of SME owners), which argued that the profit motive rarely is decisive for starting a business. The issue of corporate social responsibility is also raised as a possible objection to this position on corporate purpose, but is considered to be a something to be handled outside company law; in fact, as in previous corporate acts, it remains forbidden to allocate corporate funds to social purposes that counteract the profit-making purpose of the corporation.

Hence, all in all, the 2004 act does not change the take on corporate purpose in Swedish corporate law. The principle of shareholder prominence is rationalised by arguments about shareholder protection to a large extent, and by tradition, suggesting that it remains steadily institutionalised in Swedish corporate law.

5. Discussion and conclusion

Otto von Bismarck is often ascribed with the famous quote: Laws are like sausages, it is better not to see them being made. Regardless if Bismarck ever said this or not, and regardless if this is true, to dig into historical law-making processes is not uncomplicated. In this paper we set out to trace the §3:3 of shareholder prominence in history of Swedish companies act. We found the first traces of this paragraph in 1910, and in relation to minority shareholder protection. The rule finally came into writing in 1944, passing almost without discussion, before miraculously surviving the onslaught of economic democracy in the 1976 companies act with the simple: ‘this is the law’. In the process leading to the 2004 law, it is no longer controversial and understood in terms of protecting the shareholders’ interests.

On a theoretical note, we started off from the discussion on convergence of corporate law (Hansmann & Kraakman, 2004) and its relation to how to understand the corporation: is it an entity of its own or is it a partnership among shareholders (Ireland, 1999; Veldman, 2011). From the legal literature, we acknowledge that the entity understanding prevails in legal settings said to dominate corporate law, e.g. Delaware and UK (e.g. Stout, 2012), thus it is interesting to empirically study why a different perception has remained in Sweden. To empirically study the changes in Swedish corporate law, we draw on Sewell’s (2005) eventful temporality approach.

Overall, we find a severely path-dependent trajectory of Swedish corporate law, which made it hold on to the unfashionable shareholder prominence position in the 1970s despite pressures for economic democracy, a position that after recent developments has made Swedish corporate law more aligned with shareholder value ideology than the American context in which this ideology emerged (cf. Lazonic & O’Sullivan, 2000). A number of historical events in the form of introduction of new corporate acts, shaped by both practical matters and the legal thinking prevailing at the time of their construction, established the principle. The principle was thereafter guarded by a seemingly conservative legal profession treating as an established and almost unchangeable principle that serves a meaningful purpose. Despite that it may look as if Swedish corporate law reached ‘the end of history’ in 1944, we can be pretty certain to see other events in the future that again change the trajectory of its development, be it to converge with or diverge from developments in more dominant legal settings.

6. References

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