

THE ETHICS OF CORPORATE LOBBYING

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Abstract

This research sought to defend the proposition that not only do corporations have a moral right to lobby, corporations also have a moral duty to influence public policy through lobbying. The research has considered the ethics of corporate lobbying within the context of the extent literature in Business Ethics and from a South African perspective. An argument for corporate moral personhood has been advanced as the basis for a corporation's moral right to lobby. The rights and duties of corporations as citizens have also been considered, and a case has been made for a normative theory of corporations as political actors with an associated moral obligation to seek to influence public policy to promote public interests. A set of ethical principles to guide responsible lobbying has been articulated as a morally justified basis for restricting a corporation's moral right to lobby which arises from its status as a type of moral person to ensure that the power of corporations is harnessed in service of society.

Declaration

I declare that this research report is my own unaided work. It is submitted for the degree of Masters of Arts, Applied Ethics for Professionals, in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

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____ day of _____, 2016

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CHAPTER 1

INTRODUCTION AND OVERVIEW

Public trust in business has been undermined by repeated scandals, frauds, egregious mismanagement, and unlawful conduct. Recent examples include the collapse of Enron and Lehman Brothers, the interest-rate fixing scandal at Barclays, the Volkswagen emissions-rigging fraud, and in South Africa, collusion amongst food companies to fix the price of bread and between construction companies in their bids to build 2010 World Cup stadia, and the 2014 collapse of African Bank in part due to risky lending practices. These incidents, and others, have placed the ethics of business in the spotlight unlike ever before.

Business has a pervasive influence: the conduct of corporations affects billions of people every day. This research report examines one type of corporate conduct that is widely-regarded as especially pernicious and unethical: *corporate lobbying to influence public policy and regulation*. In this research I'll be investigating the ethics of corporate lobbying and answering the question as to whether a corporation has a moral duty to influence public policy. In addition to this, the importance of the research question will be considered.

Lobbying is a set of activities undertaken with the aim of changing public policy and legislation. There does not appear to be a consensus in the literature as to whether corporate lobbying is a morally legitimate activity or not. The purpose of this research undertaking is to attempt to answer the following research question: Do corporations have a moral right and duty to influence public policy through lobbying? In seeking an answer to this question the following sub questions will also be considered:

a) Can corporations be regarded as moral persons capable of moral agency?

- b) Are attempts by business to influence public policy morally suspicious and illegitimate? Why, or why not?
- c) What justifies the moral right and duty of business to influence public policy?
- d) What moral principles should guide lobbying by business?

This examination will be done in the context of the extant literature on ethics and lobbying, in particular and business ethics, in general. It will include consideration of the issue from a South African perspective, and identify issues of relevance for emerging and new democracies.

Importance of the Research Question

The ethical conduct of businesses, and the role of businesses in society, is the subject of considerable attention by many different actors in society: politicians; special interest groups; academics; and the business community itself. A related question concerns what the appropriate role of business in political processes, particularly policy-making. Public policy plays an increasingly significant role in the market, in addressing market failures, and introducing new legal requirements for firms in line with evolving moral norms about the ethical role of businesses (Néron, 2010: 344). Firms are “taking an increasingly active and visible role in public policy development and practice” and policy and regulation is increasingly aimed at “shaping more responsible markets ... lobbying is hugely influential in this space” (AccountAbility, 2005: 11). Regulation is a very strong shaper of corporate conduct, and as Néron (2010: 344) notes: this implies that a primary focus of business ethics should be a determination of the appropriate political role of the corporation.

It is perhaps therefore surprising that “the business and corporate social responsibility literature contains little discussion of the ethics of business efforts to influence public policy decisions” (Weber, 1997: 73). Néron (2010: 344) asserts that “normative theories of corporate rights, obligations ... have failed to take seriously ... that ‘the most critical dimension of corporate

responsibility may well be a company's impact on public policy'." In this light, Alzola (2013: 391) claims there is "an urgent need for the study of the ethics of engaging in corporate political activity."

Much of the academic work on corporate social responsibility (CSR) has also tended to neglect lobbying and political activities of corporations (Bauer, 2014: 64, and Scherer, Palazzo and Matten, 2014: 148) despite the moral questions raised about the real and potential contradictions between a corporation's CSR activities and its lobbying activities. Much of the theoretical analysis of corporate political activity and lobbying has ignored the ethical implications of such activities (Dahan, Hadani, and Schuler, 2013: 367), despite persistent public concern about the moral legitimacy of this sort of corporate conduct. The literature that does exist on this subject is predominantly concerned with the actions of corporations in the US (and to a lesser extent other Western countries). There is very little discussion of the topic in the context of new and emerging democracies, such as South Africa, where different political systems and moral norms may apply (South Africa, for example, is characterized by a strong commitment to social dialogue in policy-making). Examination of the ethics and morality of lobbying is equally important in these contexts. The *Mail & Guardian* has opined (November 28 to December 4, 2014: 30): "Democracy's next challenge: ... a debate on ethical lobbying is more urgent than we imagined ... How do we ensure that there is honest lobbying and that public debate is not corrupted by corporate interests?"

The need to examine the ethics of lobbying and how to prevent the hijacking of public debate and policy making by corporate interests is particularly important in young democracies like South Africa. And so too is the need to properly set the perimeter for what is fair, honest, just, and moral lobbying and to demarcate this from what is unfair, dishonest, unjust, and immoral lobbying.

Thesis Statement

The following thesis statement will be defended in answer to the research question above:

“Not only is business lobbying morally permissible, it is a moral duty of business to lobby to influence public policy”. The claims for the arguments that will be presented for the thesis are summarized as follows:

- a) A corporation is a type of moral person with similar moral rights and duties as natural persons.
- b) A corporation has a moral right to engage in activities that influence public policy.
- c) This right does not erode the principle of political equality and justice.
- d) A corporation has a moral duty to influence public policy in the interests of its shareholders and stakeholders, and in its role as corporate citizen in a pluralist, democratic system.
- e) A corporation has a moral duty to influence public policy through responsible lobbying practices.

There are two legs to my argument for the above thesis and these will proceed along the following lines:

1. Corporations are moral persons, which enjoy moral rights and responsibilities that are similar in nature, although not always identical to, those accorded to natural persons. These include the right to freedom of speech, and the right of political participation. As such, a case will be made that corporations have a moral right to lobby to influence public policy.
2. The duties of corporations include corporate citizenship and responsible participation in public policy processes. This leg of the argument looks to the Constitution of the Republic of South Africa and the proposition that it serves as a normative framework that rests, in part, on a social contract between moral entities, and on recognition that stakeholders should not be treated as mere means to an end. This particular South African version of the social contract provides a normative basis for stakeholder theory and corporate citizenship, and is also evident in other South African legislation such as the National Economic Development and Labour Council Act, 1994. A case will be presented that corporations have a moral duty

to participate in the policy and legislative process as morally responsible corporate citizens, and this duty is heightened for businesses which are operating in countries with similar constitutions to those of South Africa, as well as countries with a similar tradition of social dialogue and social partnership.

These two sub-arguments seek to provide a moral justification for corporate lobbying that will be founded on an exploration of the concept of corporate citizenship, and a normative theory of the firm as a political actor. In this way, this research report attempts to bring together some of the recent thinking about the moral rights and responsibilities of corporations in the literature on corporate citizenship, corporate social responsibility, business and society, and business ethics, and apply these directly to the research question: do corporations have a moral right and duty to influence public policy through lobbying?

In Chapter Two, I seek to define lobbying and to present a case as to why it is an activity that is worth enquiring into, morally speaking. I consider in Chapter Three the proposition that corporations should be regarded as a type of moral person with moral rights and responsibilities equivalent to those of individual, natural persons, including civic or political rights: the right to free speech, the right to freedom of association, the right to petition government, and the right to due process. It is these rights that are being exercised when corporations lobby. In Chapter Four I will argue that a corporation's political rights as a type of moral person and corporate citizen underpin its right to influence public policy through lobbying. It assesses the implications for individual political rights, specifically the right to political equality. Individual rights are compared with collectivist or communitarian approaches to political rights, policy-making, and democracy.

Chapter Five focuses on the moral responsibilities of corporations and the ethics of corporate lobbying from the perspective of the Shareholder and the Stakeholder Theories of the Firm. The

limitations of these normative frameworks are taken into account in constructing a case for a normative Theory of the Firm as a Political Actor, with an associated moral obligation to seek to influence public policy. Chapter Six proposes a set of ethical principles to guide morally responsible lobbying. I conclude with an argument for the importance of ethical corporate lobbying to ensure that the resources and influence of powerful corporations are harnessed in service of the greater good, and the strengthening of democracy, and include pragmatic implications for policy governing corporate lobbying in countries like South Africa.

CHAPTER 2

WHAT IS LOBBYING AND WHY IS IT OF MORAL CONCERN?

Introduction

This chapter briefly considers the nature of lobbying, where it originated, and how it has come to be described and defined. Lobbying is an activity which has an inherently political complexion. It often evokes imagery of shady deals being done in smoke-filled rooms by dishonest businessman and corrupt politicians. This widespread perception of lobbying underpins public sentiment that corporate lobbying is not quite legitimate, and this moral skepticism about corporate lobbying is examined in the second part of the chapter. An alternative perspective on the morality of lobbying by corporations is also briefly discussed.

What is Lobbying?

Since this research is about the ethics of corporate lobbying it will be important to offer some definitions and descriptions of lobbying. Lobbying is a set of activities that are undertaken with the aim of changing public policy and legislation. Lobbying is one type of corporate political activity, which can also include campaign financing, hiring former public officials and regulators, litigation, and political advertising. This essay will confine itself to the ethics of lobbying by corporations and will not examine other forms of corporate political action.

There are a number of different definitions and descriptions of lobbying used in the literature however for the purposes of this essay I will confine myself to the definition and description provided by Anastasiadis¹ (2006: 14):

Lobbying seeks to affect public policy by providing key stakeholders – notably policy makers
– with specific information about preferences for policy or policy positions. It may involve

¹ As a lobbyist by profession, I find the definition and description by Anastasiadis to capture the true essence and description of the practice of lobbying and advocacy.

providing information on the costs and benefits of different issue outcomes, or more broadly, attempting to set the terms of the debate and thus channel policy discussions in a favourable manner. Lobbying can challenge outcomes of decisions already made, through seeking to redefine the terms of the debate and thereby re-problematising undesirable outcomes, causing them to be revisited. The good provided is information. The ultimate target of lobbying input is the legislator or political decision maker. Lobbying involves a range of tactics, such as 'direct' or issue-specific lobbying; reporting research and survey results; commissioning research/think-tank research projects; testifying as expert witnesses and in hearings or before other government bodies; and supplying decision makers with position papers or technical reports. In addition to seeking desired policy outcomes, one goal of lobbying is to develop a strong reputation, so that decision-makers are inclined to trust the information provided and turn to the lobbying organization for information when developing or discussing policy or policy positions.

Lobbying activities include monitoring, assessing, and commenting on proposed legislation, proposing legislative drafting, testifying at public hearings, and meeting public officials (Keffer and Hill, 1997: 1373); writing letters, memoranda, and submissions; serving on government advisory groups and regulatory drafting technical teams; presenting positions and arguments at conferences; commissioning regulatory impact assessments; public relations; sponsoring research and sharing such with policy-makers; and participating in industry associations (AccountAbility, 2005: 39). Lobbying reflects an intention on the part of a corporation to "enter the political arena to influence the shaping and reshaping of their regulatory environment" (Néron, 2010: 343), including influencing how regulators interpret, apply and enforce existing laws (SustainAbility, 2005: 5). The essence of lobbying is to change the law (Ostas, 2007: 33); to alter the regulatory framework and legal environment within which corporations exist. As the regulatory framework has expanded and become increasingly complex, impacting on more and more aspects of a corporation's decisions and

activities, regulation and public policy has become a matter of material strategic concern for most corporations. The growing recognition of government's powers vis-à-vis corporations has provided the impetus for increased corporate political action and lobbying as corporations try to reduce the costs that governments can impose on them (Anastasiadis, 2006: 2, and Ostas, 2007: 34). This implies that corporations undertake lobbying to defend and promote their own interests, which may or may not be the case. There may be additional or alternative reasons for corporations to seek to influence public policy, and these will be considered in this essay in addition to lobbying that is only aimed at lowering compliance costs.

Throughout this essay, regulation will be used as a broad term that incorporates public policy, legislation, and regulation (often referred to as subordinate legislation). Regulation is defined as legally-binding constraints that are imposed by the state on private activity in order to promote and protect the public good (Hogan, Murphy, and Chari, 2008: 131).

"Some form of lobbying is as old as politics itself" - the right to petition government has a long history in Western legal tradition, appearing in the Magna Carta in 1215 (Woodstock Theological Centre, 2002: 25). US President Ulysses Grant famously coined the term 'lobbyist' after petitioners who would accost him in the lobby of the Willard Hotel close to the White House (Anastasiadis, 2006: 8). Lobbying has been described as the world's second-oldest profession.

Why is Corporate Lobbying a Subject for Moral Enquiry?

There does not appear to be a consensus in the extant literature as to whether corporate lobbying is a morally legitimate activity or not. Prevailing sentiment still seems to generally regard corporate lobbying as morally questionable, even "morally reprehensible" (Barker, 2008: 25). In some contexts, lobbying is treated with suspicion and maligned as unethical, immoral, and responsible for increasing cynicism about democracy (Ostas, 1997: 34). There is a commonly-held belief that efforts by

business to influence public policy are morally suspicious and illegitimate, and the discourse on lobbying typically uses negative language and imagery. According to Keffer and Hill, "... the word 'lobbying' ... evokes images of furtive influence peddlers lurking in the lobbies outside government offices ... ready ... to sacrifice the public welfare ..." (1997: 161).

Lobbying generally has an undesirable reputation because of concerns about privileged access to policy processes, and the abuse of corporate power at society's expense (Bauer, 2014: 62). The history of corporate lobbying is tainted with corporations largely perceived to have engaged in lobbying to "defend the status quo ... to the detriment of wider society" (AccountAbility, 2005: 17). Weber (1997: 73) argues that lobbying by businesses is tantamount to "special interests" exercising an undue influence in policy processes, while the interests of ordinary citizens do not receive the same attention from policy-makers. The "widespread and deep-seated" moral unease with corporate lobbying is that it seemingly allows the wealthy to shape the law to serve their (illegitimate) private interests rather than the public good (Ostas, 2007: 34-35).

Alzola, in his 2013 paper titled "Corporate Dystopia: The Ethics of Corporate Political Spending", paints a bleak picture of the ethics of corporate lobbying. Alzola's argument contains an analysis of consequentialist and rights-based arguments both for and against lobbying: in brief, lobbying, on consequentialist grounds, is unethical because it is linked to deleterious outcomes such as corruption, regulatory capture, and corporatism; and lobbying is also unethical because it jeopardizes individual rights to equality and the practice of democracy (2013: 414). Corporate lobbying arguably undermines political equality and the concept of "one person, one vote" (Alzola, 2013: 406); and it allows "wealthy firms without any democratic mandate [to] attempt to directly influence democratically-elected policy-makers," (Bauer, 2014: 65).

Yet, despite these misgivings there are few countries that explicitly regulate lobbying (Hogan, Murphy, and Chari, 2008: 129). In South Africa, policy-makers and legislators are regulated through rules requiring that they publicly disclose their business interests and register all gifts that they receive. Lobbying itself is not regulated in South Africa, although corporations (and other organisations) are subject to the laws outlawing bribery and corruption, as well as those regulating potential conflicts of interest in respect of corporate entertainment and hospitality. Much of the regulation of lobbying that does exist, such as that in the European Union, focuses on transparency and public disclosure in respect of who is lobbying who and on what particular policy issues. It is left to the many of codes of conduct on lobbying that have emerged, some imposed by governments and some emerging as a form of self-regulation, to attempt to codify ethical lobbying conduct (see for example the Office of the Commissioner of Lobbying of Canada's "Lobbyists' Code of Conduct" (2015), the Department of the Prime Minister and Cabinet of Australia's "Lobbying Code of Conduct" (2013), and the US Association of Government Relations Professionals' 2010 Code of Ethics).

One can say that lobbying is not "inherently evil", rather as Hamilton and Hoch argue, lobbying "is a socially responsible activity ... which needs to be restrained by ethical standards." (1997: 120). Furthermore, Hamilton and Hoch have suggested that not only is corporate lobbying morally permissible, it is a moral requirement of ethically responsible corporations. They note: "In order to fulfill their social responsibilities (as well as promote their self-interest), corporates *ought*² to lobby" (1997: 118).

What are the primary ethical questions raised by corporate lobbying? The Woodstock Theological Centre's 2002 study of ethics in lobbying in the United States started by asking which moral principles govern the practice of lobbying? In my research report, the ethics of corporate lobbying will be considered from the perspective of the moral rights and moral responsibilities of

² Emphasis mine.

corporations, and intersection of these rights and responsibilities with those of other moral entities. This approach is based more in the tradition of Kantian ethics and non-consequentialist perspectives, although where especially pertinent some of the consequentialist arguments around the ethics of corporate conduct will be referenced.

As stated in the introduction, the purpose of this research undertaking is to attempt to answer the following research question: Do corporations have a moral right and duty to influence public policy through lobbying?

CHAPTER 3

ARE CORPORATIONS A TYPE OF MORAL PERSON?

Introduction

Are corporations moral persons? If they are, what moral rights do they have? In this chapter I will examine these questions. The claim that will be defended is that corporations are a type of moral person with similar moral rights and responsibilities as those of human beings.

Corporations, companies, and business firms are collectives of individuals who have joined together for a common enterprise, typically a commercial or profit-making enterprise. They are formal entities granted legal recognition by the law and a licence to operate by society. Once established, corporations can exist in perpetuity, while individual members come and go over time. Corporations are regarded as single entities and as persons under the law. The moral status of corporations is a central question in Business Ethics, which is not surprising given that corporations, and other similar forms of organisations, play a profound and prominent role in modern life. Corporations are the basic unit of modern economies (Solomon, 1991 in Marcoux, 2009: 4): every day across the globe millions of people interact with and are affected by corporations on a daily basis: as employees working in them, as consumers purchasing from them. While corporations are a valid and relevant unit of analysis for moral philosophy, the moral status of corporations is not yet settled.

The debate within business ethics as to whether or not corporations are moral persons with similar moral rights and duties accorded to natural persons is ongoing: can corporations actually be considered to have moral agency as collective yet singular entities separate from the individuals in the corporation? Marcoux (2009: 4) proclaims this debate to be the “main conversation” in Business Ethics, and Moore (1999: 229) states that this a fundamental question within the subject which is yet to be definitively answered given its inherent complexity. Philosophers differ in their analysis of the moral status of corporations. There are those who argue that corporations are a form of moral

person, which enjoy moral rights and duties similar to those possessed by natural persons. Others argue that corporations are not moral entities in any sense, and cannot be held morally responsible for anything that they do.

Corporations and Moral Agency

Much of the debate about the moral agency of corporations centres on the metaphysics of the corporation, and just what sort of entity a corporation is: is it a single moral entity or is it an aggregation of many separate individuals? The ontology of corporations seems to be central to arguments about whether or not corporations are moral agents. From an ontological perspective, the moral status of the corporation turns on the extent to which the corporation possesses the intrinsic qualities that are required for moral agency. Therefore, it is necessary to answer the following question: What intrinsic properties are required of an entity for it to be a moral agent? This is a fundamental question in moral philosophy and since only a limited response is possible a comprehensive answer is beyond the scope of this essay.

Meyers (1993: 253) argues that there are four essential elements of moral agency: the ability to form a rational intent; the ability to originate action in pursuit of that intent; the ability to engage in moral relationships within a moral community; and the singular nature of the entity such that responsibility can be ascribed to that specific entity. Rational intent is fundamental to moral agency. A moral agent must have the capability of forming a rational intention and acting purposively on that intention: to be capable of both rational thought and deed. Intentionality can be understood as “a deliberate disposition to do something in a certain manner or to realise a state of affairs. An intentional act involves both beliefs and desires and a self-conscious tendency to act in a certain way to realize an outcome based on these beliefs and desires,” (Werhane, 1985: 36). Rationality can be understood as “the pursuit of purposes with careful attention to ends and means, alternatives and consequences, risks and opportunities,” (Goodpaster, 1983: 7), and it is a prerequisite for

intentionality according to Velasquez (1983: 2). In order for an entity to be a moral agent, that entity's actions must not only cause a particular outcome – Outcome X – that entity must also have intended to cause Outcome X through its actions. It is on this basis that moral responsibility can be ascribed to that entity (Surber, 1983: 68). Thus, causality is a necessary but not a sufficient element of moral responsibility: a lightning strike may cause a fatal injury to a person but it makes no sense to think about lightning as having moral responsibility for the fatality. Rational intent must be added to causality to give rise to moral responsibility for the results of an action (Velasquez, 1983: 2-3).

Do corporations possess these qualities of moral agency? Those authors who assert the moral agency and moral responsibility of corporations argue that corporations do indeed possess these qualities (see for example Peter French (1979), Patricia Werhane (1985), and Pettit (2007)). What is the basis of their arguments?

There is a strong case that the internal decision-making structures and procedures of corporations transform the intentions and actions of multiple individuals into collective, corporate intention and action. This is the argument that is advanced by French (1979) in "The Corporation as a Moral Person", as well as by Werhane (1985) in "Persons, Rights, and Corporations". The essence of a corporation is such that the individual members thereof act within defined roles and according to prescribed rules to produce an "intricate web" of collective, corporate behaviour (Werhane, 1985: 39). Corporations are fundamentally defined by their organisational structure and allocation of functions to specific jobs which have specific decision-making rights and duties attached thereto and it is these job specifications which define what counts as "action on behalf of the corporation" (Werhane, 1985: 33). Peter French (1979: 212) calls this set of roles, rules, and procedures the "Corporate Internal Decision-Making Structure" and it is this structure that gives a corporation its capability to form rational intentions and to act on these, in other words its moral agency.

The corporation and its Corporate Internal Decision-making (CID) structure persist over time as individuals come and go, and it is this structure that makes the corporation more than just an aggregation of individual intentions and actions. The argument put forward by French resonates with the experience of those who work in organisations (whether corporations or other sorts of collectives): there is a real sense in which a myriad of individual values, beliefs, and goals become synthesised and subordinated into collective decisions and actions (French, 1979: 212). Garrett (1989: 536) argues that the “reciprocal adjustment of individual intentions and plans that take place in such organizations yields a corporate intentionality that is more like human intentionality than it is like the efficient causality that might be attributed to blindly operating social wholes such as markets.”

Organisational decision-making processes, organisational roles, corporate governance documents, founding memoranda of incorporation or constitutions, make manifest the organisation’s values and goals, and these tend to persist regardless of the “transient self-interest of individual owners, directors, and managers” (French, 1979: 214).

Generally, most of us tend to perceive and regard corporations as single entities. Our discourse on corporate conduct refers to ‘Apple’, ‘Google’, ‘BP’, or ‘MTN’ as cohesive single units which are more than the sum of their individual parts. Few of us know the names of the chief executive officers or the board of directors of these corporations. There is something intrinsically different about a collection of individuals who are members of a corporation (or a trade union, university, or charity for that matter) and a collection of individuals who have come together accidentally in a queue, for example, or even football fans who have come together for a short period to watch their team play a match (Goodpaster, 1983: 10). The intrinsic difference between these sorts of collectives lies in the existence and functioning of the CID Structure (Goodpaster, 1983: 10), for the individuals who constitute the corporation act within their roles in the corporation, as members of the corporation,

in accordance with the CID Mechanism, and not as separate individuals (Werhane, 1985: 61). Corporate decisions are taken in a “formal or anonymous” manner in line with the internal rules of the corporation (Werhane, 1985: 33) and the acts performed by individual human beings who are constituent members of the corporation are rendered as corporate acts (French, 1979: 214) performed for and in the name of the corporation (Goodpaster, 1983: 3), rather than individual acts.

Understanding corporations in this way - as formal collective entities capable of rational action – provides the grounds for arguing that corporations are moral agents which have the right sorts of capabilities to be appropriately regarded as a type of moral person (French, 1979: 215). Werhane (1985, 35) criticizes those who have challenged this proposition on the basis that corporations clearly cannot suffer physical harm or sickness, get married or divorced, on the grounds that this is a straw man fallacy. Werhane’s rebuttal is that French and others do not argue that corporations are the same as biological persons, but rather that it is useful and not unreasonable to regard corporations as a type of person, and that as such the analogy is appropriate and intelligible.

Yet there is a formidable and appealing counter-argument to the corporation as moral person position that has been put forward by a number of authors including Manuel Velasquez (1983). The essence of the case argued by Velasquez is that corporations have no intrinsic ability to form intentions or act thereon independently from the individual natural persons who constitute the corporation; its directors, managers, and employees. Only natural persons can form intent and can act, and corporations have no autonomous, independent capability to do so (Moore, 1999: 335). A corporation cannot act without a natural person acting on its behalf (Ewin, 1991: 749). A corporation is nothing more than an aggregation of the values, beliefs, intentions, and actions of these individuals. Beyond this, a corporation is only a legal creation with legal rights and duties. Velasquez (1983: 6) argues that corporations cannot think and act autonomously as corporations do not

possess a mind or body *qua* corporations: any and all intention and action originates in the minds and bodies of the individual people constituting the corporation.

Velasquez does not accept the argument that the CID Structure transforms individual intentions and actions into collective, corporate intentions and actions. Ranken (1987) provides a justification for this position: Ranken argues that while the CID structure does exist, it is itself the product of the decisions and actions of the corporation's individual members who over a period of time have institutionalised their values and beliefs into those of the corporation. The CID structure was the result of a process driven by natural persons within the corporation; it did not occur autonomously (Ranken, 1987: 634, 636). Therefore, the corporation does not have any independent moral status distinct from the individual human persons that constitute the corporation (Ranken, 1987: 633).

Another reason for Velasquez's rejection of corporate moral agency is based on his conception of moral responsibility. Velasquez (1983: 2) equates moral responsibility with the attribution of blame or praise for conduct that has taken place; he draws a link between moral responsibility and just liability to blame and punishment (1983: 4). Moral responsibility is attributed to an agent only for those actions that originate in the agent insofar as the action derived from the agent's intentions and from the same agent's physical movements; and because corporations cannot act autonomously, corporate acts do not originate in the corporation but in its members, and as such one of the necessary elements of responsibility cannot be satisfied (Velasquez, 1983: 4,6). If the corporation itself did not act, then moral responsibility cannot be attributed to the corporation. Only the individual member of the corporation acted, and only the individual member can be held responsible and be fairly blamed and punished (1983: 7). Blame and punishment cannot be fairly attributed to a collective, as a collective "has no soul or body" it cannot be punished (Moore, 1999: 336-337). For Velasquez this implies that corporations are not moral agents to whom moral

responsibility may be intelligibly attached, and it makes no sense to consider corporations *qua* corporations to be a sort of moral person.

Is Velasquez right in his complete rejection of the notion that corporations are intrinsically nothing more than the sum of the natural persons who constitute it, that corporations cannot be regarded as moral persons? Some writers who, like Velasquez, argue against corporations as moral agents express concern that French's conception of corporations absolves individual persons from any moral responsibility for their wrongful acts conducted in the name of the corporation. But this is a false dilemma: as a number of writers have argued that collective and individual responsibility do not need to be mutually exclusive (see for example Meyers (1993: 257-258), and Gibson (1985)). Corporations can be regarded as having moral responsibility for corporate actions and the individual constituent members of the corporation can also be held morally responsible for their conduct too. Indeed, many commercial laws and regulations recognise this duality of responsibility for wrong doing³.

The opposing views about the moral personhood of corporations represented respectively by French and Velasquez rest on the metaphysical nature of what sort of entity a corporation is. It is commonly-accepted that corporations are juristic persons, but the ontology of corporations is not yet settled (Marcoux, 2009: 5), and both sides of the debate have compelling arguments for their positions (Dubbink and Smith, 2011: 224). As a result, it may be necessary to build a case for the moral personhood of corporations on a different foundation, on a conception of moral responsibility that does not rest on moral agency.

³ For example, *inter alia* the Competition Act, Act No. 89 of 1998, the Financial Intelligence Centre Act, Act 38 of 2001, and the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, Act 33 of 2004.

Corporate Moral Responsibility

Werhane (1985: 47) poses an important and pragmatic question: is it necessary that the ontology of corporations is settled to discuss corporations in moral terms? Surber (1983), Gibson (1985), and Dubbink and Smith (2011), offer a convincing understanding of corporate moral responsibility that sidesteps the ontological status of corporations. Goodpaster (1982: 103) suggests that debates about the ontology of corporations are likely to be lost on the average person. He argues that the “fertility” of the moral person analogy lies in legitimating the use of ethical categories for guiding corporate actions.

Velasquez focuses on responsibility for the purposes of fairly allocating blame, and as such, his conception of responsibility tends to be retrospective, focused on past acts. Surber (1983: 68) explains that an ‘agent-intentionality’ model of moral responsibility defines and determines moral responsibility by linking an agent’s rational intentions and actions to the outcomes thereof. Gibson (1995: 761) compares this approach to that of criminal law which similarly hinges on the intention of the person committing the unlawful act. Yet, this approach fails to take into consideration the harm that corporations may unintentionally cause and the benefit of holding the corporation both morally and legally culpable for such unintended harm (Gibson, 1995: 762, Surber, 1983, 78). There are many examples of unintended deleterious outcomes of corporate action or inaction (Gibson, 1995: 763): such as the environmental damage caused by the Deepwater Horizon spill in 2010 or the deaths of two people when the Murray & Roberts pedestrian bridge over the Johannesburg M1 freeway collapsed in 2015. In both examples these corporations may be regarded as blameworthy on the basis of their negligence, which is a standard typically applied in tort law⁴ rather than criminal law (Gibson, 1995: 763). Gibson (1995: 763) and Surber (1983: 78) both use this argument to conclude that it is possible to establish moral liability in the absence of intent; to free the notion of moral responsibility from its dependence on the rational, intentional agent.

⁴ In South Africa, tort law is known as the law of delict; it covers *inter alia* issues related to negligence.

Thus, moral responsibility can also be understood as an obligation to avoid or minimise harm, to exercise a duty of care towards other moral entities which may be potentially harmed by a corporation's behaviour. This more forward-looking conception of moral responsibility implies that one entity has an obligation to another entity because of a relationship between the two entities (French, 1979: 210) which arises because of the first entity's ability to have profound moral effects on other entities which extend beyond contractual and legal obligations (Meyers, 1993: 252, 256).

French (1979: 211) argues that reducing corporations to only juristic persons fails to provide an adequate account of the nature of the moral obligations that a corporation has towards these other entities. This dimension of responsibility, respect for the impact of one's conduct on others and the adjustment of one's plans accordingly, is not completely captured by the law; yet it is society's expectation that corporations will engage in this kind of ethical self-restraint as moral persons not as merely legal persons. Especially as corporations, through their CID structures, do possess the ability to consider and adjust their planned actions if these carry the risk of harm to others (Moore, 1999: 333).

Corporations as Members of a Moral Community

Velasquez's thesis that "corporations are not responsible for anything they do" appears to be at odds with widespread moral intuitions about corporations (Werhane, 1985: 41). Velasquez (1985: 12) tends to dismiss these intuitions as nothing more than a convenient shorthand that people use in lieu of knowing the names of the responsible individuals. But, can such pervasive and persistent moral sentiments about the nature of corporations really be so readily dismissed?

My contention is that there is a sound philosophical basis for the enduring and widespread moral belief that a corporation is a sort of moral person. This foundation is provided by social contract theory and the answer to the question of why societies continue to grant corporations legal status as

juristic persons, which entitles corporations to receive many benefits. Democratic societies have not chosen to repeal the legislation that allows for the creation and continuation of corporations; indeed, corporate law reform has continued to codify the responsibilities of corporations in relation to society. Werhane (1985: 60) argues convincingly that the legal status granted to incorporation is predicated on a moral foundation as legal rights can only be justified if they have a moral basis. Arguably then the continued legislative backing for corporations reflects a moral norm about the nature of corporations, which is that corporations are more than merely legal persons, they are also moral persons. Moore (1999: 339) makes an interesting point about the evolving jurisprudence in respect of corporations: he proposes that developments in corporate case law reflect “a philosophical basis which accepts all the requirements of the corporation as being morally responsible.” Moore (1999: 339) concludes that the law has accepted that corporations are responsible in a causal sense and a moral sense; and that this is a more accurate reflection of how most people interpret the world around them.

Furthermore, to argue that corporations are only legal and social constructs is to ignore that legal and social constructs are themselves based on prevailing normative beliefs and frameworks. The act of incorporation is more than just a legal action, it is a process whereby individuals come together to pursue joint goals and by which individual values, desires and beliefs become intertwined, altered, and formalised in service of these joint goals. Incorporation makes manifest corporate moral responsibility: through a corporation’s organisational structure, its control systems, business practices, brand, corporate culture, and its legal personality (Goodpaster, 1983: 10, 14). Incorporation is the process whereby an aggregate becomes a collective; it is the act whereby society alters the very nature of the collective. Indeed, in creating corporations, society has created a new “locus of moral responsibility” (Garrett, 1989: 541).

My proposition is that, in democratic societies, legislation tends to reflect the implicit social contract between the members of those societies. This includes legislation that gives corporations' legal status as persons through the act of incorporation. The social contract sets out the rules by which members of society agree to operate and as such it provides the foundation of moral obligations for moral agents in that society (Scherer and Palazzo, 2004: 15). Social contract theory implies that because a corporation is licenced by society to operate it has implicit commitments to that society (Werhane, 1985: 46), and that the corporation exists in a moral community with moral responsibilities towards other entities within the same community (Meyers, 1993: 254, 255). In market-based economies, corporations are granted the right to determine how to make use of their property, where to invest it, what goods and services to produce and market, how much labour versus machinery to use, and how much surplus to reinvest or distribute to shareholders (Dubbink and Smith, 2011: 226). These decisions have profound implications for the society in which the corporation operates and can have significant positive and negative consequences for society. Just some factors that might be impacted include income levels, inequality, skills, pollution, congestion, technology and innovation, inflation, government revenue, foreign trade, and economic growth. There are approximately fifty transnational corporations whose annual revenues exceed those of the economies of nation states: for example, if Wal-Mart were a country it would be the world's 25th largest economy; and Apple would be the world's 19th largest economy, larger than the economy of Switzerland. It is inconceivable that such powerful entities are to be treated as amoral institutions, mere legal creatures that cannot be held morally accountable for the impact of their conduct. Dubbink and Smith (2011: 224) make a compelling case for the political necessity of corporate moral responsibility as corporations "have become the dominant social actors of our time".

The widespread acceptance of the role of corporations, and the legal privileges granted to them in market-based economic systems, rests on an expectation that corporations will respect certain moral principles and will act as moral agents (Dubbink and Smith, 2011: 227). Wesley Cragg (2002:

132) articulates the connection between corporate moral personhood and legal personhood through the social contract theory. Cragg (2002: 132) states that corporations are legal creations which would cease to exist without the active agreement of governments, and the publics for which they legislate. Therefore, the existence of corporations involves a contract between governments and corporations; and given that legislation is an intentional action, this contract is not accidental. The legal framework that allows corporations to exist and operate is reviewed, reinterpreted and evaluated on an ongoing basis in legislatures and in courts; thus, corporations do not exist outside of society (Cragg, 2002: 132). A moral community would not easily agree to create a legal framework for corporations only for the generation of private benefit without proper regard for the public benefits or harms resulting from corporate actions (Cragg, 2002: 132-133).

What this strongly indicates is corporations are not just a legal construct, corporations are also a societal construct, a product of an implicit contract concluded by members of a moral community, and thus have moral status in relation to fulfilling their obligations under that social contract. It does not seem reasonable that society would support the creation of powerful entities whose conduct can directly and indirectly impact on the wellbeing of billions of human beings without imposing some minimum requirements that such conduct needs to be in line with moral precepts and norms.

The perils of adopting the view that corporations “are not responsible for anything they do” are too great. To regard a corporation as an instrument that can be used by a group of individuals to generate private gain for themselves is to ignore the moral implications of the immense public costs that corporations can impose on society in pursuit of private gain. Patricia Werhane (1985: 43-44) rejects the “Corporation as Machine” metaphor on the grounds that it fails to provide an adequate account of the nature of the modern corporation which often engages in non-mechanistic, and non-economic actions, and it would also imply ending all philosophical enquiry about the status and purpose of corporations. There is also a case to be made that tools are designed and created by

human beings who can imbue them with specific values, and these values become embedded in the tools. Thus, it can be argued that because the concept of a corporation was conceived and created by human beings, corporations reflect certain embedded values and moral characteristics significantly similar to those of their human creators. Corporations cannot be dispensed with as mere legal fictions without moral rights and responsibilities. Consider the scenario where a corporation's legal registration or charter is withdrawn, perhaps temporarily⁵, and the corporation continues to operate: during this time period it can be argued that the corporation no longer exists as a legal entity, yet we would continue to hold it morally responsible for its actions during this time. The argument proposed by Ewin (1991: 749) that a corporation's moral personality is exhausted by its legal personality, that corporations are simply legal tools created to achieve economic goals, and that morality subsists in the people who use the tool and not in the tool itself, is subject to challenge.

Corporations as Moral Persons

I have argued that corporations have an inherent capability to form intentions and act thereon, and to apply moral principles in their decision-making. I have also argued that the legal personality granted to corporations is based on society's moral norms and is sanctioned through an implicit social contract. This social contract imposes moral duties on corporations which are not restricted to legal requirements, and as such they have also been granted certain moral rights. Notwithstanding this, one might still raise the worry as to whether corporations are moral persons given that they are different from human beings. In other words, the analogy between corporations and persons under the law has raised the question of whether corporations "are sufficiently like individual human beings that they can be considered to be moral as well as legal persons and thus have moral rights", (Werhane, 1985: 34).

⁵ The regulatory authority for registering corporations in South Africa is the Company and Intellectual Property Commission (CIPC). It regularly suspends the registration of those corporations who fail to submit their regulatory returns.

Arnold (2006: 280) writes that “(d)espite its many critics, French’s theory of corporate persons remains the single most influential account of the metaphysical status of corporations.” French’s seminal paper on corporate moral persons takes the view that the concept of personhood is rooted in the law, and cites Roman law in terms of which natural persons themselves are legal creations without existence outside of the law (1979: 208). French’s review of the jurisprudence of juristic persons leads him to conclude that “biological existence is not essentially associated with the concept of a person” (1979: 210).

Corporations are not biological persons, and I am sympathetic to the worry that acknowledging corporations as moral persons may lead some to argue that the rights of corporations can trump the rights of natural persons. Yet, I am of the view that regarding corporations as a type of moral person is not simply some shorthand that we employ to discuss corporate conduct, and that there are compelling ethical reasons to treat corporations as more than the sum of their parts, to regard corporations having a moral personality. Corporations have produced immense harm, and immense good; they have become the pre-eminent institution in modern society economically, politically, and culturally. If we want to hold corporations morally accountable for their conduct, and the consequences of their conduct, then we need to deem them moral persons with moral obligations to others, and moral rights in return.

CHAPTER 4

DO CORPORATE CORPORATIONS HAVE A MORAL RIGHT TO LOBBY?

Introduction

As moral persons, corporations “have whatever privileges, rights and duties as are, in the normal course of affairs, accorded to normal persons” (French 1979: 207). If it accepted that corporations are a particular kind of moral person, what moral rights can they claim? The moral claims that others may make on corporations dominates the extant literature; but there appears to be very little discussion about the specific sorts of moral rights that are afforded to corporations.

In this chapter, I will argue that a corporation may claim political rights as a type of moral person and as a corporate citizen, and that it is these political rights that underpin a corporation’s right to influence public policy through lobbying.

Corporate Political Rights

Rights can be understood as moral claims against other moral agents (Werhane, 1985: 15) and while the rights of corporations are set out in law, these laws are justified on the basis that they are grounded in general moral principles. May (2015) explains that moral rights are those that affect moral duties, freedoms, privileges, and immunities. Corporations have various rights by virtue of their status as a type of moral person. These include economic rights such as property ownership, procedural rights such as the right to administrative justice, and political rights such as freedom of speech and freedom of association (Werhane, 1985: 22, and May, 2015). Society has granted corporations extensive economic rights about how to deploy capital, what to investment in, and what to produce. Dubbink and Smith (2011) make a convincing case that these corporate decisions are of an inherently political nature; they are also inherently moral in nature since these corporate decisions have enormous implications for millions, if not billions, of people who may be far removed from the corporate decision-making process and not protected by law if their rights are infringed as

a consequence. An interest-based theory of rights proposes that an entity will have rights whenever its interests are sufficiently significant to create duties for others (Jones, 2014: 11). Corporations clearly have significant interests in their property: the property rights granted to corporations are both legal and moral rights, for property rights restrict the moral options available to other moral agents in respect of their behaviour towards the corporation (May, 2015). There is a case to be made, beyond the ambit of this essay, that property rights are inherently political in nature, and are not just economic or commercial rights.

Political rights are those rights that govern decision-making in the public sphere about the public interest and good (Werhane, 1985: 22) as well as directing the decisions about the rules by which these decisions will be made. Political rights protect the right to participate in political processes and circumscribe the authority of the state vis-à-vis citizens and other persons, and typically include the freedom of speech, freedom of assembly, freedom of association, the right to petition the government, the right to administrative justice, due process, and a fair trial. This group of rights is fundamental in a democratic dispensation and is often enshrined in constitutional frameworks and jurisprudence.

What will the political rights of corporations look like in the context of say, the legal framework of a country? Let us examine this question using the Constitution of the Republic of South Africa. The Constitution of the Republic of South Africa expressly incorporates corporations – as juristic persons - into the ambit of the Bill of Rights in sub-sections 8(2) and 8(4). These are legal rights; however, the Bill of Rights is as much a normative document as it is a legal one, and it is universal moral principles that inform the categorical and fundamental character of the rights contained therein. Moral rights are categorical principles that serve as benchmarks for evaluating legal rights (Werhane, 1985: 8). Political rights are a sub-set of moral rights pertaining to the public or civic domain and include freedom of speech, freedom of assembly, the right to privacy, and the right to due process

(Werhane, 1985: 22). The South African Constitution grants corporations rights to freedom of expression; freedom of association; just administrative action; access to courts; as well as property rights. There is a strong case to be argued that the South African Constitution represents an explicit social contract because of the extensive consultation and public participation that shaped its drafting. Thus, South Africa's social contract grants corporations, together with other types of juristic persons, certain fundamental rights which are both legal and normative in character. This position has been upheld by judgments of the superior courts which affirm that corporations can indeed claim the protection of these rights (*Contract Employment Contractors (Pty) Ltd v Motor Industry Bargaining Council and Others*, 2012:8).

Since the transition to a democratic political dispensation in South Africa in the beginning of the 1990s, stakeholder and public participation has been a characteristic feature of policy and legislative processes. A widespread and universal norm of participative policymaking has prevailed, and been codified into legislation. Arguably this moral standard about democratic governance reflects a considered and deliberate move away from the exclusionary character of Apartheid and an embrace of the inclusionary character of the mass democratic movement against the Apartheid regime. This moral norm recognizes both individual and collective participants in consultative mechanisms and processes: for example, public hearings in Parliament on proposed legislation typically include representations from both individuals and organisations, including corporations. South African moral norms recognize the right of groups, collectives, and juristic persons, to political participation.

Corporations are the subject of moral claims by society, governments, and various stakeholder groups. In some instances, legislation and regulation have codified these moral claims; but not always, and not always comprehensively. These moral claims can be aggregated together under the heading of corporate social responsibility or corporate citizenship; and extend beyond compliance with regulatory requirements to include moral responsibilities to consider and manage the impact of

corporate actions on society and the environment. These moral claims drive public policy and legislative agendas, at both international and national levels. Arguably, corporations have the right to participate in the political processes translating these moral claims into regulatory standards: regulatory standards that limit their legal rights and duties and directly influence their ability to exercise their property rights and operate autonomously without undue interference from the state. The right is fair administrative action and is enshrined in the South African Constitution, for example, and further codified in the Promotion of Administrative Justice Act. From the foregoing then one could say that *prima facie* corporations have the right to lobby government regarding public policy, legislation, and regulation, where such lobbying involves the exercising of political rights: freedom of speech, right to petition government, and the right to administrative justice. But can this view and position be sustained?

Does a Corporate Right to Lobby Compromise Individual Rights?

A rights-based argument for corporate lobbying pays no heed to the consequences of corporate lobbying, whatever these may be, whether positive or negative. A rights-based argument in support of a corporation's lobbying is open to attack on the basis that in exercising this right, corporations are infringing on the rights of individuals to political equality. This is the line taken by Alzola (2013) in his challenge to the moral legitimacy of corporate political spending. I will review Alzola's main arguments to identify the rights-based challenges to my proposition that corporations do enjoy the right to engage in lobbying.

Alzola's (2013) consideration of the ethics of corporate lobbying contains an analysis of consequentialist and rights-based arguments both for and against lobbying. Alzola's argument is that the moral wrongness of corporate lobbying is not because of its potentially harmful consequences, but rather that it infringes the rights of individuals (2013: 414). On consequentialist ground lobbying is considered unethical because it produces deleterious outcomes including corruption, regulatory

capture, and corporatism. These are claims that can be tested through empirical analysis. At the outset, Alzola acknowledges that his criticism of corporate political activity is based on the legal framework for this activity in the United States, and that he purposefully excludes corporate political activity related to the promotion of human rights in other jurisdictions, as well as political activity by other types of organized collectives. The reason for a detailed look at Alzola's thinking is that his argument against corporate political activity is grounded on non-consequentialist foundations, and is a more appropriate counterpoint to the rights-based argument in favour of corporate lobbying that I am seeking to present in this essay.

One of Alzola's (2013: 406) central claims is that corporate lobbying erodes the essential meaning of political equality. Political equality requires that individuals should have an equal opportunity to influence the formation of laws (Alzola, 2013: 407). The essence of "one person, one vote" is that votes carry equal weight in the electoral process irrespective of the resources an individual has at his or her disposal (Alzola, 2013: 407). Corporate political activity gives corporations, by virtue of their disproportionate resources, the ability to exercise disproportionate influence in the political process: in his view "democracy and equality should not be subordinated to property," (Alzola, 2013: 407). Furthermore, Alzola (2013: 407) contends that the use of corporate resources in the political system is also perhaps unfair because it amounts to an inappropriate blurring of private and public spheres. The moral principles for adjudicating fairness in "the market" are not the same as in "the political system"; and lobbying is an unfair extension of private interests into the public sphere. To express this point about the distinction between the private and public spheres in terms of the law and market we would say that the law has the backing of state force whereas the market operates on voluntary exchange (Ostas, 2007: 47).

It is important to note that Alzola highlights a tension that exists between two fundamental moral rights, the right to equality and the right to liberty (exemplified by the right to free speech). Political

equality requires that there are equal opportunities to influence political processes, which is why the cornerstone of liberal democracy is one person, one vote (Alzola, 2013: 407). Alzola (2013: 408-409) proposes that the right to free speech is not unfettered and it can be legitimately restricted for the sake of equality; as a corporation's right to free speech gives it an unfair advantage in the political arena it needs to be limited to ensure that citizens have equal opportunities for political influence.

Alzola's second line of attack on corporate political rights comes from his rejection of the proposition that corporations are single moral agents with a separate identity to their constituent members. By Alzola's account it follows that there are no corporate moral rights at all, and corporations cannot claim a moral right to freedom of speech. So when corporations engage in lobbying, it is the political views of individual corporate members that are being represented. According to him (2013: 410), this violates the individual rights of other members of the corporation, shareholders and employees, unless they have consented to the lobbying. Failure to obtain their consent implies that that members of the corporation have been unjustly compelled to support a particular political stance with which they may disagree (Alzola, 2013: 412).

There are a number of possible challenges to Alzola's argument against corporate political rights. His arguments are rooted in the particularities of the US political system (which he himself acknowledges), where liberal democracy is well entrenched and where a specific discourse about "free enterprise" is prevalent. His argument may not hold as firmly in other political systems, where democracy is still emerging, and in societies that hold different norms about the role of corporations and the role of the state, and a different political economy prevails. I will elaborate further on this point below.

Alzola (413) makes the untenable claim that "the economic man and the citizen are for all intents and purposes two different individuals", as if the economic sphere can be separated from the

political sphere and the market from the law. Such a separation is an entirely artificial one, and is not reflective of reasonable understandings of society and political economy; it is also not helpful in assessing the morality of corporate political conduct. To imply such a separation of spheres implies that corporations are apolitical, a claim that does not hold in modern economies. Alzola (412) himself states that corporations operate for the purpose of creating value for all their stakeholders; a process that requires a consideration of public and social goods and is an inherently political exercise. Néron (2009: 335) argues that the “theoretical understandings of corporate roles and responsibilities have been obfuscated by a historically developed de-politicization of the corporation in which there is a clear separation between the economic sphere and the political sphere” each with their own different sources of legitimacy, and that “such a separation is normatively and empirically untenable”. It is precisely this apolitical paradigm that allows Alzola to wrongly assert that economic man and political man are separate entities.

Is the threat to the principle of consent valid? If the proposition that corporations are single entities separate from their members is accepted, which I do accept, the question does not arise. As Pettit (2007: 184) credibly argues in his essay on “Responsibility Incorporated”, corporate decisions are not a simple “majoritarian or non-majoritarian function of the corresponding attitudes among individuals” and such decisions are “functionally independent of the corresponding” decision of individual, constituent members. The corporation lobbies in its own interests, and it is not unreasonable to believe that there is a coincidence of interests between the corporation *qua* corporation, its shareholders, and its employees. Alzola’s concern is that a corporation’s political preferences may be at odds with those of its individual members, and that these individuals are placed in a position where they must choose to compromise either their political interests or economic interests. My own view is that there will often be an alignment of these interests, that political and economic interests are typically one and the same. However, I accept that in the United States, where Alzola admittedly restricts his criticism, much political debate centres on the so-called

'culture wars' where economic interests are not as prominent. Nevertheless, many investors specifically use their shareholdings of corporations to express political preferences. For example, investors concerned about climate change have publicly divested their shareholding of oil companies. And many employees join trade unions in order to support political positions in relation to labour rights and pro-labour economic policy choices. Werhane (1985: 62) argues that corporate moral rights cannot trump or exceed individual rights, and that includes in respect of political rights too. As such, she argues (1985: 109) that corporations must respect that their individual employees have political rights and should not be denied the opportunity to exercise them.

Interestingly, Alzola seems to condone the political activities of other non-commercial groups, such as the Sierra Club⁶, on the basis that these activities do not violate the principle of internal democracy and the need for members' consent: that their members know that they are consenting to political action in support of specific values and beliefs when they join the organisation. Yet, the political action of these groups does violate the principle of political equality. Many of these groups, for example the National Rifle Association or Greenpeace have significant resources to spend on lobbying. If corporate lobbying is morally suspect, then similar political activity by all other well-resourced collective entities is also morally suspect. The actual basis of Alzola's moral unease is not clear: is it the unequal resources to expend on lobbying, or the nature of the group itself? Does a well-resourced special-interest group, formed with the sole purpose of influencing public policy, not represent a similar threat to political equality as a corporation? And is it not the case that such groups have the ability to exert undue influence in political processes, which is a charge regularly levelled at the National Rifle Association's influence on the gun control debate in the United States, for example, or the influence of Congress of South African Trade Unions on labour market policy in South Africa? For that matter, wealthy individuals, who are able to invest considerable resources into lobbying in support of their own individual interests, can also have undue influence over policy.

⁶ A pro-conservation group in the United States.

This too jeopardizes political equality. Does this imply that there is a need to curtail and restrict the political rights of wealthy individuals to protect political equality? These are important and topical questions, without simple answers. There are ongoing debates in a number of countries about the role of money of politics, including trade union's financial support of political parties in the United Kingdom, the limits on individual and corporate donations to political candidates in the US, and the lack of transparency about political party funding in South Africa.

Social Dialogue, Corporatism, and the Political Rights of Corporations

Alzola's rights-based critique of corporate political activity reflects a traditional, liberal view of democracy within a particular market-led political economy. His argument may not hold in other democratic systems and political economies, which place more emphasis on a communitarian approach; governance systems that value co-determination between important constituencies in society; pluralism and more participatory forms of democracy than periodic voting for political representatives. Social partnership, 'policy concertation', social compacts, and co-determination, are some of the names given to these participative forms of governance. Countries that have adopted these norms in their policy-making processes, particularly in respect of economic policy, include Ireland, the Netherlands, Germany, Japan, Australia, and South Africa. These societies often regard these arrangements as expansions of conventional democracy; and not as threats to political equality amongst individuals.

The International Labour Organisation defines concertation as a process of moving towards consensus on economic and social policy matters through dialogue among social partners, namely government, employer organisations, and representatives of workers (Trebilock, 1994: 3-4). Also known as 'tripartism', 'corporatism', or 'social partnership', it is a form of representative democracy that arguably augments parliamentary democracy (Trebilock, 1994: 7) with the purpose of promoting social solidarity and cohesion (Kim and Van der Westerhuizen, 2015: 88). This model of

democracy recognises the political rights of collectives to defend their interests. Government cedes some of its monopoly on making the rules in exchange for 'social peace' (Trebilock, 1994: 7). This model is regarded as having contributed to social harmony and economic prosperity in many Western European countries in the latter-half of the twentieth century (Kim and Van der Westerhuizen, 2015: 97).

One of the reasons for choosing to write on this particular topic is the paucity of literature on the ethics of corporate lobbying in South Africa, and similar developing democracies. Prevailing moral norms about the role of corporations in society in general, and in public policy making specifically, may differ in such democracies from long-established liberal democratic regimes, and such differences may or may not have implications for the moral permissibility of corporate political activity. South Africa's history of a negotiated transition from an oppressive, racist regime to a constitutional democracy is characterised by the great value placed on participatory governance and the involvement of extra-parliamentary, organised, and representative groups in policy-making processes⁷. As the multi-party negotiations proceeded in the 1990s, the Apartheid state had no legitimacy to make policy decisions that would commit a future newly-elected democratic government. The establishment of numerous multi-stakeholder forums during this time brought greater legitimacy to policy-formulation, such as the National Manpower Commission, the National Economic Forum, the National Peace Committee, and the National Education Crisis Committee⁸.

Corporations participated actively in these forums through organised business formations such as the South African Consultative Committee on Labour Affairs and the Consultative Business

⁷ Between 1995 and 2005, I had the opportunity to personally participate in several of these policy processes through my employment at the National Economic Development and Labour Council (Nedlac) and the Department of Trade and Industry (DTI).

⁸ A more detailed description of the emergence and evolution of social partnership in South Africa can be found in Webster and Jaynt (2014), Parsons (2007), and National Planning Commission (2015).

Movement; together with trade union federations like the Congress of South African Trade Unions and community-based organisations like the South African National Civics Organisation. The multi-party negotiations leading to a democratic election in 1994 and the convening of a Constitutional Assembly thereafter, together with the rise of consultative forums, combined to entrench social dialogue and participatory governance in South Africa. Democracy was viewed as requiring more than periodic elections for elected representatives of political parties; it required participation by the public and by a multiplicity of civil society organisations, including corporations, in policy-making. To some extent this was codified in statute: The National Economic Development and Labour Council Act was passed by Parliament in 1994, one of the first pieces of legislation enacted by the democratic Parliament. This statute granted organised business, organised labour, and community organisations a legal right to participate in government's economic policy-making processes and decisions. The post-democratic legislative framework codified participatory governance to a large degree, particularly in labour legislation; reflecting the value that society placed on participation and deliberative democracy. Organised business and organised labour secured the right to participate in the governance of various labour market institutions such as Sector Education and Training Authorities; the Commission for Conciliation, Mediation, and Arbitration; and the boards of Unemployment Insurance Fund and the Compensation Fund.

My argument is that South Africa's post-1994 'social contract' is founded on a moral norm of participation in public policy and governance by an assortment of organisations, including corporations and organised business formations and industry and trade associations. In South Africa, corporations are thus regarded as a type of citizen enjoying certain political rights, including the right to influence public policy and legislation.

The social partnership model of public governance has been criticised as a system that advances the interests of certain groups in society at the expense of others, particularly small enterprises and

consumers. In South Africa, concerns have been expressed about the absence of the unemployed, rural women, and other social movements like *Abahlali base Mjondolo*⁹ from formal social dialogue (Webster and Jaynt, 2014: 2). Attempts were made to remedy this common flaw in tripartism by providing for the participation in Nedlac of community-based organisations representing particular 'outsider' groups, including women, youth, and people with disabilities (Parsons, 2007: 10,11). Nevertheless, some regard this corporatist system as categorically undemocratic, unfair, and at odds with the principle of political equality. Indeed, in South Africa, the government itself has at times pulled back from its commitment to social dialogue because it believes it is a democratically elected government with a legitimate mandate to govern without the consent of business or labour, and the importance of Nedlac as a site for purposive deliberation about policy has declined accordingly since its heydays in the mid-1990s (Kim and Van der Westhuizen, 2015: 95, and National Planning Commission, 2015: 13). New and more informal forums for social dialogue were initiated by government including bilateral engagements with different constituencies such as 'big business', farmers, trade unions, and 'black business', however, even these informal arrangements have flagged recently.

This brief discussion of social partnership attempts to present an alternative model of democracy to that on which Alzola directs his argument against corporate political rights. In the next section, I will argue that the social partnership model has direct implications for the moral rights of corporations in respect of their role in society.

Corporate Citizenship

Dubbink and Smith (2011) put forward an interesting argument for corporate moral responsibility that recognizes the inherently political role performed by corporations in democratic, market-based

⁹ *Abahlali base Mjondolo* is a social movement based in South Africa's informal settlements which fights for the rights of 'shack-dwellers' to land, housing, water and sanitation. It emerged outside of formal political parties or civic structures following a blockade to protest evictions in KwaZulu-Natal Province.

political economies. In such systems, corporations have a right to decide how to allocate capital, which has profound moral consequences and implications. In return, society expects that corporations consider moral principles in their decision-making processes. In terms of this implicit social contract, corporations are viewed as the most effective and efficient agents for these decisions, leading to greater social good than if such decisions were made by the state. Corporations are given this right in return for morally responsible conduct. Corporations are intrinsically political entities and they straddle two spheres: the market and the polity. On this account, corporations are not contained within a “market” which is separate to the political arena. An account of moral responsibility, rights and duties is needed which recognizes this and provides a guide as to what constitutes moral conduct where these two spheres collide and intersect.

Globalisation has also threatened the traditional theory of the corporation as a private actor with limited liability and a focus on shareholder value (Palazzo and Scherer, 2008: 14). Globalisation can be understood as a collective term for a set of economic, political, and social forces and dynamics, that are changing the balance of forces between nation states, corporations, and civil society, threatening the effective functioning of traditional institutional arrangements, and pushing the rise of politically influential non-state and non-political actors like international non-governmental organisations and transnational corporations (Scherer and Palazzo, 2004: 28). Globalisation is also marked by the diminishing policy-making and regulatory powers of nation states because of the rise of powerful transnational corporations; the increase in supra-regional and international regulatory and standards-setting bodies like the International Labour Organisation (ILO) and the Basel Committee on Banking Supervision (BCBS); as well as the cross-border nature of pressing social problems and global public goods issues such as climate change, immigration, organized crime, and human-trafficking (Scherer, Baumann-Pauly, and Schneider, 2012: 474). Policy-making and regulation are no longer the sole domain of state actors, but are increasingly the outcome of multi-stakeholder dialogues between corporations, civil society organisations, and international agencies

which come together to share knowledge and resources in a bid to resolve global public policy issues (Scherer, et al, 2012: 478). Against this backdrop, corporations are confronting changing societal norms and expectations about their role and responsibilities and the social contract that binds corporations and society is evolving. A social contract is not necessarily ahistorical (Scherer and Palazzo, 2004: 18), and it seems reasonable that the morally appropriate relationship between business and government varies from society to society, depending on the social and political norms that prevail over time (DeGeorge, 2008: 47). Different societies have codified in their corporate governance and political systems different political roles for corporations (for example co-determination in Germany and social partnership in Ireland), which makes corporations citizens in a more substantial way than is the case in the US (DeGeorge, 2008:47). Outlined above is a strong argument that South Africa's particular history and the resulting institutions reflect a particular social contract that emphasises social dialogue, consultation and engagement between different groups in society, and especially between these groups and government, including the business community.

This particular conception of the social contract deems corporations to be a type of citizen. The term 'corporate citizenship' is the subject of considerable debate in the extant literature as academics seek to understand its meaning and the implications of regarding corporation as citizens. Some authors see potential in the term for understanding the corporation as a political actor and regard the concept of citizenship as providing a normative framework for morally assessing the political activities and conduct of a corporation. Others argue that the term has little value as corporations are clearly not citizens in any meaningful sense, and to regard them as such is to give rights to them that they cannot morally claim to have, as they are not full and equal members of the political community. Furthermore, granting corporations such rights may be a threat to a just society (Néron and Norman, 2008: 18), as Alzola argues.

There does not appear to be a commonly accepted definition of corporate citizenship (Matten and Crane, 2005: 2). Matten and Crane (2005: 3-5) outline two common conceptions of corporate citizenship: one is what they term the “limited view” describing a corporation’s philanthropy in the local communities in which it operates its business, while the second is equivalent to prevailing definitions of corporate social responsibility. Yet, they argue that both conceptions are problematic in that they do not actually relate to the substantive notion of citizenship which has an inherent political dimension.

Valor (2005: 193, 195) suggests that the term ‘corporate citizenship’ was introduced to link corporate activities to “broader social accountability” and that the concept is useful because of “the meaning conveyed in citizenship.” I agree that a revised conceptualisation of corporate citizenship can provide a new perspective on the political nature of the corporation’s role in society, and on corporations as political actors. Matten and Crane (2005: 7) describe the evolving work on understanding citizenship and define citizenship as a set of civil, social, and political rights. They point out that in the liberal tradition, these are seen as individual rights and subsequently corporations do not easily fit into the “liberal minimalist” approach of citizenship, however more participatory models of democracy might accommodate them more readily (Moon, Crane and Matten, 2005: 429), such as the corporatist models of Germany and Ireland. Theories of citizenship allow for an exploration of corporate activities within an extant literature about political relations of authority, power and responsibility (Crane and Matten, 2008: 30) and the concept can serve as a useful metaphor for understanding and assessing business-society relations as the substance of corporate political activities is in some meaningful way similar to that of citizenship (Moon, *et al*, 2005: 432). Going further, Moon, *et al*, (2005: 438-448) argue that corporate citizenship is a meaningful concept in relation to “pressure group activity”, “developmental democracy”, and “deliberative democracy”, all of which are contrasted with a minimalist, liberal approach which seems to dominate Alzola’s critique of lobbying. Corporate citizenship implies “accountability,

legitimacy and participation” (Moon, *et al*, 2005: 435) and as such the concept allows for the “application of key moral features of citizenship to discover analogous features of corporations” (Jeurissen, 2004: 87). Néron and Norman (2008: 15) argue that the benefit of the corporate citizenship metaphor is when it is used to understand “how a firm involves itself in the political process; and in particular how it participates in the process of developing government regulations”.

If a corporation is a type of moral person, as I have argued for in a previous chapter, then it seems reasonable to also regard a corporation as a type of citizen, and to see citizenship as an element of corporate moral personhood. Critics dismiss corporate citizenship as a “fictional concept” (Valor, 2005: 195): they argue that neither is a corporation voted for in an election (Néron and Norman, 2008:15), nor is it able to stand for public office or to represent others in the political sphere (Matten and Crane, 2005: 16). Wood and Logsdon (2008: 53) propose that at the most corporations should only be seen as “*secondary* citizens” whose rights, including political rights, are “subordinate” to those of human persons. Van Oosterhout (2008: 36) refers to the idea of corporate citizenship as a ‘misguided metaphor’, although he acknowledges that it may have some conceptual merit in respect of the “connotations of political citizenship” and the political activities of firms. However, he argues that the concept’s value is limited because the problem of corporate political activity arises “precisely because corporations are *not* citizens” and that it is not rational to connect such activity to “the idea of citizenship without simultaneously undermining the full and equal membership connotation that political citizenship has in modern democratic market societies,” (Van Oosterhout, 2008: 38). Nevertheless, despite the shortcomings of the metaphor, regarding a corporation as a type of citizen can provide a normative framework to determine the reasonable limitations on the exercising of corporate political rights, including lobbying.

Conclusion

It is not unreasonable to regard corporations as a type of moral person that are accorded certain moral rights such as the right of political participation and freedom of speech. It is also reasonable, especially in societies that place a high value on participatory governance, to regard corporations as citizens with certain political rights and subject to the moral norms associated with citizenship. If we accept this line of reasoning, then the conclusion to be drawn is that corporations do have a moral right to seek to influence public policy, laws, and regulations by lobbying government. If corporations have moral rights, do they also have corresponding moral duties? In the next chapter, I seek to expand on the content of the moral duties that corporations have in the context of lobbying.

CHAPTER 5

DO CORPORATIONS HAVE A MORAL DUTY TO LOBBY?

Introduction

If, as has been argued above corporations are a type of moral person with moral rights, and given the view that corresponding duties accompany rights, then some questions arise in connection with the moral duties of corporations. What is the nature of the moral duties of corporations and to who and whom are they liable to perform them?

Much of business ethics is centered on the question of the extent of the corporation's duties to its shareholders, its stakeholders, and to society. These duties arise from the reciprocal relationships that corporations have with other moral agents and entities (Werhane, 1985: 65) such as employees, managers, suppliers, investors, and customers. "A normative theory of the firm provides an account of the fundamental nature and purpose of the corporation, and of the moral claims to which it is subject," (Langtry, 1994: 431). It attempts to explain the function of a corporation on the basis of underlying moral principles (Donaldson and Preston, 1995: 72), and to answer the following questions: Who owns the corporation? For whose benefit should the corporation be operated? And what are the moral reasons for the legal recognition of corporations? (Moore, 1999: 122) Several theories of the firm will be looked at to provide an answer to the nature of a corporation's moral obligations: shareholder theory; stakeholder theory; and a theory of the firm as a political actor or corporate citizen. It will be argued that each of these normative theories of the firm includes a moral obligation on a corporation to participate in political processes through lobbying in order to influence public policy, legislation, and regulation.

The Shareholder Theory of the Firm

The Shareholder Theory of the Firm proposes that the foremost duty of a corporation is towards its owners - its shareholders - to safeguard their investment in the corporation and to ensure a return

on that investment, a profit. The normative basis of Shareholder Theory is threefold, according to Moore (1999a: 119). Firstly, the property rights of shareholders; it is the property of the shareholders that is placed at risk if the corporation fails. Shareholders are the providers of financial capital to the corporation, and are legally required to settle the corporation's debts in the event it becomes bankrupt "to the extent of the value of their shareholding," (Langtry, 1994: 486). Secondly, the principal-agent relationship between the corporation's managers and its shareholders is founded on a fiduciary duty to protect the owner's property. The fiduciary role generates special and particular duties to shareholders (Gibson, 2000: 247) and involves serving as a responsible custodian of the corporation's property (Goodpaster and Holloran, 1994: 427). Thirdly, there is a utilitarian argument that regards privately-owned corporations as being in society's best interest. Boatright (1994: 402) argues that the value of corporations, of the institution of privately-owned firms primarily accountable to their owners, is that it is this arrangement that generates the most benefits for society, and that all stakeholders are better off if corporations are run for the benefit of shareholders. This view is perhaps most famously expounded by Milton Friedman (1970) in his article "The Social Responsibility of Business is to Increase Its Profits".

Profit maximization has been characterized as amoral: there is no place for morality in the pursuit of profits and corporations must adopt the rules of the marketplace in order to compete and survive. But Primeaux and Stieber (1994: 289) argue that ethical norms are inherent within the concept of profit maximisation, if profit maximisation is understood as the process whereby society most efficiently allocates scarce resources according to society's preferences, including their moral preferences. According to this understanding, profit maximisation is "the act of producing the right kind and the right amount of goods and services the consumer wants at the lowest possible cost" (Primeaux and Stieber, 1994: 290). As such, profit-maximising corporations are fulfilling their side of the social contract. Arguably then, the fiduciary duty to maximize profits morally compels "rent-seeking behaviour" (Boatright, 2009: 542). Rent-seeking is an economics term that describes

economic advantages, known as ‘rents’, obtained without concomitant economic value being produced.

The response from government to the exploitation of market failures by corporations to maximize their profits is regulation to address market failures and resolve public policy challenges. The evolving social contract now incorporates regulation that aims to protect shareholders, employees, customers, the environment, and other stakeholders too. Almost every aspect of a corporation’s operations is subject to regulation: the employment of workers and what they are paid, the procurement of supplies, the servicing of customers, communication with competitors, reporting to shareholders, how products are designed and priced, and how waste is managed. Narrow compliance with the letter of law has failed to compensate for market failure which in turn has failed to address societal problems, all of which have led to a spiral of regulatory reform. Consequently, policymakers are increasingly moving away from rules-based regulation and introducing more principles-based approaches that require corporations to show evidence that they are institutionalizing an ethical approach to decision-making in their corporate cultures¹⁰.

Regulation significantly and directly affects a corporation’s operating environment and constrains its ability to maximize profits. As regulation is costly, the Shareholder Theory of the Firm suggests that a corporation has a moral duty to its shareholders to oppose such regulation through lobbying. The vast number of regulations emanating from national governments in many industrialised countries substantially increases costs and erodes profits (Hillman and Hitt, 1999: 826). This is not only the case in developed economies. In the South African financial services sector, government published, on average, more than one new regulation every two weeks in 2013 (Standard Bank, 2015: 39). A consequence of what some have called a ‘tsunami of regulation’ is that profit-maximising corporations are increasingly engaging in political action to ensure their competitiveness (Hillman

¹⁰ An example is the principles-based Treating Customers Fairly regulation introduced by regulators in the United Kingdom and South Africa to strengthen consumer protection in the financial services sector.

and Hitt, 1999: 826; Ostas, 2007, 34). The purpose of lobbying in this context is to protect profits, in line with the purpose of the corporation, according to Shareholder Theory; which is a strategy aimed at using “the power of government to advance private ends” (Hillman and Hitt, 1999: 826). Oberman (2004: 246) explains this duty of lobbying as follows: corporations have a direct fiduciary duty to protect and advance the interests of their shareholders when these interests can be affected by government action, or inaction; they have a duty to represent the functional requirements of economic productivity in the process of creating balanced public policy (Oberman, 2004: 246).

The Stakeholder Theory of the Firm

I would like to begin this section with a quote from EM Dodd, Jr (in Donaldson and Preston, 1995: 65) which captures the essence of the Stakeholder Theory of the Firm.

If the unity of the corporate body is real, then there is reality and not simply legal fiction in the proposition that the managers of the unit are fiduciaries for it and not merely for its individual members, that they are ... trustees for an institution [with multiple constituents] rather than attorneys for the stockholders.

Social norms about the purpose of a corporation have shifted away from pure shareholder theory. An alternate narrative about the purpose of corporations has emerged that extends beyond shareholders as the only moral agents to which a corporation has moral responsibilities. It has become clear that many different groups can impact, positively or negatively, a corporation’s pursuit of profit and that corporate conduct has the potential to affect a broad range of people across the globe (Parmar, et al, 2010: 404). The term “stakeholder” was adopted to challenge the claim that shareholders are the only group to whom the corporation is responsive (Parmar, et al, 2010: 205), and a stake can be understood as a moral claim or interest in a corporation (Donaldson and Preston, 1995: 85). Subsequently the idea that corporations have stakeholders has become commonplace and unremarkable (Donaldson and Preston, 1995: 65). Increasingly, the public no longer supports a

legal framework for corporations that allow them to generate private benefit without proper regard for the public benefits or harms resulting from their behaviour (Cragg, 2002: 132-133). And Stakeholder Theory has become embodied in widely-accepted norms for business conduct, such as the United Nations Global Compact, as well as in legislation, such as the South African Companies Act.

As the nature of share ownership has changed and become more diffuse, it has emerged that there are other groups that generally are far more at risk from the failure of a corporation than many of its shareholders (Boatright, 1994: 396). While shareholders in publicly-listed corporations can dispose of their stakes in a corporation through securities exchanges with little effort or cost, other stakeholders such as employees, suppliers, or local communities, may not be able to so easily divest of their stakes (Boatright, 1994: 396). The Stakeholder Theory of the Firm proposes that a corporation has duties towards those groups who are affected by the actions of the firm, including its employees, customers, suppliers, the communities where it operates, as well as its shareholders (Gibson, 2000: 245). Stakeholder Theory holds that the corporation has a moral duty to all of its legitimate stakeholders, and that shareholders are just one constituency amongst several that the corporation has obligations to. Kantian ethics provides a normative basis for Stakeholder Theory. As such, Stakeholder Theory is categorical: stakeholders ought to be given consideration for their own sakes (Moore, 1999a: 118) and their interests have intrinsic value (Donaldson and Preston, 1995: 66). Corporations are morally obligated to respect stakeholders as more than mere tools in the pursuit of profit and shareholder value (Gibson, 2000: 248). Stakeholder Theory is based on the belief that corporations have a duty to consider stakeholder interests irrespective of their instrumentality in respect of corporate profit objectives. There are also social justice and public policy grounds to operate corporations for the benefit of all their stakeholders: to promote distributive justice and wealth creation as a normal business practice, as opposed to the Shareholder Theory approach where the corporation creates wealth, which 'trickles down' through government's

redistributive policies or through the invisible hand of the market (Moore, 1999: 124). This approach stands in contrast to Shareholder Theory which is predicated on a moral division of labour whereby corporations are responsible for creating wealth, and government is responsible for distributing that wealth; a division that has become blurred in a rapidly globalising international economy (Cragg, 2002: 135-136). Under Stakeholder Theory, a corporation's duty is therefore to seek to balance the interests of these stakeholders: to balance profit-seeking with fair wages and fair prices; to comply with regulations; and to avoid harming the environment. Understanding and seeking to balance stakeholder interests is a "moral endeavour" as it centres on "values, choices, potential harms and benefits" for a large group of stakeholders (Parmar et al, 2010: 405), and not just the providers of financial capital.

There are volumes of articles that have been published on Stakeholder Theory: debates on the definition of a stakeholder; the nature of a corporation's duties towards stakeholders; the extent of these duties to different stakeholders; and whether or not stakeholder theory is descriptive, instrumental, or normative. In respect of the latter point, some authors writing in this field argue that corporations should take the interests of stakeholders into consideration because stakeholders are instrumental to the achievement of business objectives – the emphasis is on outcomes and the reason for engagement is strategic rather than normative (Goodpaster, 1991: 58). This argument is really a supplement to Shareholder Theory, but one that explicitly acknowledges the role that other stakeholders play in the pursuit of profits.

The Stakeholder Theory of the Firm has been challenged for undermining the property rights of the shareholders in corporations because it effectively limits shareholders' right to choose how their property will be used (Moore, 1999: 119). This challenge has been rebutted by, *inter alia*, Donaldson and Preston (1995: 83) on the basis of a reconceptualization of property rights and the extent to which property rights are not wholly unfettered and are subject to certain limitations. The

corporation is an agent for its stakeholders (Langtry, 1994: 440) and as such it has multi-fiduciary duties to operate the corporation in the interests of its stakeholders, of which shareholders are just one group among several (Moore, 1999: 121).

Goodpaster is among those who have rejected the multi-fiduciary approach as essentially rendering the notion of private corporations meaningless, as corporations will become *de facto* public institutions. This is the same argument that was propounded by Milton Friedman. Moore (1999: 121) suggests that this debate reveals that property rights do not provide a sufficiently solid justification for either the shareholder theory or the stakeholder theory of the firm. Moore (1999: 121) puts an alternative argument forward: corporations have duties towards stakeholders but these are not fiduciary duties based on property rights and agency theory, but rather that these are Kantian duties to not violate the rights of others which is a negative duty rather than a positive duty to promote the wellbeing of stakeholders, a duty of non-maleficence rather than a duty of beneficence. Moore terms his approach “tinged shareholder theory” as it recognises that corporations do have moral duties to stakeholders and that these need to be given proper consideration, however the corporation retains fiduciary duties and accountability to shareholders alone (1999: 125). Cragg explains this approach by arguing that corporations are private organisations with public responsibilities, that their accountability is multifaceted, but that this does not diminish accountability to its shareholders, rather it broadens it (2002: 137.)

A Changing Social Contract

A Social Contract Theory of the Firm views corporations as members of a moral community which are provided with a licence to operate by society, and in order to enjoy certain rights and benefits as corporations they are expected to contribute to the common good (Hasnas, 1998: 29). Langtry (1994: 440) asks what rational persons, concluding a social contract, would want by agreeing to the existence of corporations, and suggests that “they would seek the enhanced welfare of everyone in

society through the creation and distribution of goods and services, opportunities for meaningful work". Corporations are morally required to enhance the welfare of society on the basis of an "agreement between society" and the corporation, in terms of which the corporation's existence is recognised "on the condition that it serves the interests of society in certain specified ways," (Hasnas, 1998: 29). Society grants corporations the right to exist as single legal entities, as legal persons with specific rights, and an unlimited life, and in return society expects corporations to enhance the welfare of society" (Hasnas, 1998: 29-30). Corporations do not exist separate to society as distinct, self-justifying institutions, they are embedded in society, and because of this the purpose of corporations cannot be defined independently from society (Cragg, 2002: 132). The implicit social contract becomes a "benchmark" for evaluating corporate conduct and the performance of corporate duties (Gibson, 2000: 249).

Corporations were first recognised as important societal actors in the early nineteenth century after being absent from philosophers' early formulations of social contract theory (South African National Planning Commission, 2015: 7). Since then, society has substantially expanded its expectations of corporations beyond the efficient production of goods and delivery of services within the ambit of the law. Society has become quick to identify and condemn those corporations which are perceived to be reneging on their social contract because of aggressive tax avoidance, unfair labour practices, contributing to environmental degradation, or operating in countries with poor human rights track records. Society has recognised that corporations are powerful moral agents that can be harnessed to enhance the common good, or at the very least be restricted from causing serious moral harm. As society's expectations of corporations have changed and expanded, these expectations have become prevailing norms for corporate conduct and, in many countries, have increasingly found their way into regulation, becoming part of the legal framework within which corporations must comply. Yet, the list of moral demands on corporations continues apace, such that corporations are expected to contribute to solving societal problems like inequality and climate change. As discussed

in the previous chapter, corporations are increasingly assuming roles traditionally associated with state, including a role in rule-making and governance (Pies, Hielscher, and Beckmann, 2010: 2, 15).

The Theory of the Firm as Political Actor and Corporate Citizen

Conventional theories of the firm regard a corporation as a private actor in the economic sphere of society, 'the marketplace', and this sphere is separate and distinct from the political and civic spheres (Scherer, Palazzo and Matten, 2014: 143; and Palazzo and Scherer, 2008: 14). In the marketplace, individual citizens and corporations legitimately pursue their private interests without regard for the public good (Scherer, *et al*, 2014: 144). When a corporation does enter the political sphere it is to pursue its private interests as a tactic in its profit-maximisation strategy (Scherer, *et al*, 2014: 147; and Palazzo and Scherer, 2008: 7).

The previous chapter discussed the blurring of spheres in recent decades and subsequent calls for a new theory of the firm "as an economic and political actor in market societies, and as an actor that contributes to both private and public interests" (Scherer, *et al*, 2014: 148). A theory of the firm as a political actor, based on a reconceptualization of the meaning of corporate citizenship, suggests that a corporation's responsibilities extend beyond serving only private interests – whether those of its shareholders, or those of its stakeholders. A corporation has public responsibilities, responsibilities to enrich the public good. The social contract has progressed and society now demands more from corporations than profit maximisation. The failure of market economies to tackle persistent inequality, and the contribution of business to various societal and environmental problems, the rise of corporate lobbying, repeated corporate scandals and fraudulent conduct, greater exposure and condemnation of unethical conduct have altered the terms of the contract. Society expects more: it expects corporations to play a constructive role in the resolution of societal problems and to contribute to improving the public good. These are the actions of citizens (Jeurissen, 2004: 89) and corporate citizenship therefore provides a new normative theory of the firm and a new basis for

determining the moral legitimacy of corporate conduct. The signifying essential feature of citizenship *qua* citizenship is participation in political and civic processes (Crane, *et al*, 2004: 109); as well as the privileging of public interest over private interest (Weber, 1997: 73). Therefore, a corporation, as a corporate citizen, has a moral duty to participate in the civic and political spheres of society.

Corporations increasingly ‘participate’ in the regulation of the economic sphere – from voluntary, self-regulation through industry codes of conduct to an enormous mandatory rule-book enacted in legislation (Matten and Crane, 2005: 12). Néron and Norman (2008: 15) believe that it is in this respect corporate citizenship is a useful concept: in assessing how a corporation participates in the process of drafting regulation, both voluntary and statutory. A “regulatory state” requires specialised knowledge and expertise (Ostas, 1997: 34). Lobbying can serve an important role in a representative democracy by supplying policy-makers with relevant information (Woodstock Theological Centre, 2002: 57). Corporations possess a wealth of knowledge relevant to public policy and regulation (Van Oosterhout, 2008: 37) and are duty bound to share this with policy-makers in a bid for more effective policy solutions and regulation. This is reflective of a capability-based perspective of moral responsibility whereby if a moral agent possesses capabilities and capacities that can contribute to resolving societal problems then it has a moral responsibility to deploy these (Palazzo and Scherer, 2008: 5), even if this crosses the so-called private-public line. Hamilton and Hoch (1997: 118-199) argue that if corporations have local knowledge of a policy problem and have some degree of causal responsibility or involvement in that problem, then they are required to contribute to developing policy solutions.

A politically-oriented approach to corporate citizenship provides for lobbying by firms as a civic duty, and it includes “an affirmative moral duty to seek reasonably balanced and just laws,” (Ostas, 1997: 33). Social contract theory also generates a duty to respect and comply with just laws and just institutions. Ostas (2007: 48) argues that this duty incorporates an obligation to create just laws.

There are numerous examples of where a corporation's capabilities have been harnessed to address policy problems for the common good. One example is the role that privately-owned banks are expected to play in combating money laundering by monitoring transactions and reporting suspicious transactions to the authorities. A related example is the requirement that banks block the depositing of monies won through illegal internet gambling. Another example is that banks across the globe are required to check whether their clients have met their US tax obligations before transacting with them as an attempt to address tax evasion by US citizens.

The previous chapter considered an objection raised by Alzola to corporate political action based on a democratic deficit. Alzola's objection relates to a potential violation of the political rights of individual shareholders and employees who may hold different political beliefs and have different political positions to those being advocated by the corporation. But beyond the individual issue there is also a broader democratic deficit which raises a number of questions: To whom are corporations accountable? And how do corporations account for their political and policy-related activities? What institutions exist to enforce this accountability? What consequences do corporations face should they fail to account? And how is public accountability reconciled with private ownership? Existing governance frameworks have yet to resolve this accountability problem (Matten and Crane, 2004: 16; Palazzo and Scherer, 2008: 9). Valor (2005: 196) proposes that a more politically-oriented definition of corporate citizenship can fill this deficit by providing a mechanism for society to sanction ethical failures by corporations, as opposed to the pure shareholder theory of the firm where the corporation is accountable only to its investors.

A criticism of a more political approach to corporate citizenship is that it appears to legitimize the extension of the private sphere into the public sphere, and the blurring of economics and politics (Crane and Matten, 2008: 32). The crossing of the public-private boundary may represent a threat to "the democratic ideal of civic sovereignty and representativity," (Néron and Norman, 2008: 10). In

the context of marketplace competition, the pursuit of private interests is paramount. Some argue that this is desirable as a matter of public policy and the common good, as capitalism and free markets produce the greatest good for the greatest number. However, in the public sphere, where laws are made, private interest and competition is an inappropriate foundation for law-making. Laws should reflect the moral norms and societal aspirations of a democratic society; and because law is by definition backed by force it needs to be predicated on public interests. This is the essence of social contract theory whereby individuals give up some of their individual rights to liberty and freedom in the greater good of society.

Public Choice Theory from Public Sector Economics proposes that the rules of the marketplace will result in a set of laws that systematically favours the politically well-organised with narrow interests at the cost of the public good (Ostas, 2007: 50). Corporate lobbying allegedly captures the policy process and uses it to secure private, economic gains. A consequence of this rent-seeking is that the resultant regulatory framework lacks a moral underpinning and does not serve the public interest (Ostas, 2007: 51).

Prevailing sentiment is that politically-active corporations are a threat to democracy (Oberman, 2004: 246) and an unease about corporate citizenship reveals “a structural tension between the economic values of free-market capitalism and the political values of a democratic republic,” (Woodstock Theological Centre, 2002: 33). The concentration of resources in corporations has yet to be reconciled with predominant democratic ideals and theory (Oberman, 2004: 245) and granting corporations the rights of citizenship represents a further substantive threat to a just society (Néron and Norman, 2008: 18). The idea that political equality means ‘one person, one vote’, that each citizen has an equal vote, is core to the moral foundation of democracy (Woodstock Theological Society, 2002: 64). The proposition that a corporation is a citizen with similar political rights to individuals seems to challenge this notion of political equality as it accords a corporation rights as

“fully entitled members of a political community” which can lead democracy to “degenerate into plutocracy or cronyism”(Van Oosterhout, 2008: 38).

Orthodox economic theory proposes that market behaviour is self-regulated through competitive forces; pluralist political thinking proposes that political behaviour is also regulated through competitive forces, in this case the competing interests of various stakeholders (Oberman, 2004; 248). However, pluralist democratic processes require the participation of all stakeholders to be procedurally fair and to produce an outcome that is in the common good (Ostas, 2007: 53). Given that valid concerns about fair political contestation exist even in well-established democracies such as the United States, it may well be that particular caution should be applied to the political conception of corporate citizenship in new and emerging democracies, such as South Africa. Fair political competition requires a strong commitment to stakeholder dialogue and participatory governance by the state (Ostas, 2007: 53). It is not sufficient for policy processes to merely be made open to all stakeholders, as many constituencies may lack the capacity and capability to exercise their rights to participate meaningfully. In South Africa for example, an interest group that was based in Limpopo Province would need the financial resources to be able to participate in public hearings on proposed legislation in the National Assembly located in Cape Town. Another example of an obstacle to fair representation is language - as most public hearings are conducted in English in the National Assembly, which may not be mother tongue of the affected parties.

Interestingly, some of the primary concerns about corporate lobbying, that it distorts the policy agenda and entrenches political inequalities, echo concerns about weaknesses in democratic systems generally: rights versus utility; equality among individuals; and equality among institutions and organisations (Dahl, 1982 in Anastasiadis, 2006: 25). According to Anastasiadis (2006: 25), “This is significant because it implies that at least some of the criticisms of lobbying are inherent to the pluralist system in which lobbying takes place.” Those leading the charge for a theory of the firm as a

political actor acknowledge this concern is valid if a traditional limited mode of citizenship is accepted; but more participatory models of democracy, whether corporatist or pluralist, can more readily accommodate corporations as citizens (Moon, *et al*, 2005: 429). Furthermore, deliberative democracy requires a degree of tolerance for the overlap of public and private interests (Moon, *et al*, 2005: 445). These authors also make the point that bringing private interests into public policy deliberations is not unique to corporations or collectives – individual citizens also bring their private concerns, needs, and preferences into political, public deliberations (Moon, *et al*, 2005: 445). Ultimately, I concur with Néron (2009: 344) that it is exactly because there is a threat to political equality from corporate political action that a normative framework for guiding ethical participation in public policy processes by corporations is needed.

Corporations Have a Duty to Lobby

Each of the normative theories of the purpose of a corporation that have been briefly considered above provides a basis for the argument that corporations have a moral duty to participate in public policy processes through lobbying, albeit for different reasons. Shareholder Theory requires that a corporation engages in lobbying in order to maximise profits for shareholders, whereas Stakeholder Theory requires that a corporation engages in lobbying on behalf of its stakeholders in order to promote their interests. In contrast, the Corporate Citizenship approach requires that a corporation engages in lobbying to promote the public good.

Nevertheless, the critics of corporate lobbying do raise valid concerns that cannot be dismissed readily. In the next chapter I will argue that the corporation's duty to lobby is a duty to lobby *responsibly*. General moral principles will provide the basis for considering what responsible lobbying entails.

CHAPTER 6

ETHICAL LOBBYING

Introduction

I have argued that corporations have a right to seek to influence public policy through lobbying. I have also argued that corporations have a duty to exercise this right as part of their moral responsibilities towards society, stakeholders, and shareholders. I will now argue that a corporation's right to lobby is not unfettered and must be exercised responsibly, and that the duty to lobby is a duty to lobby in a *responsible* manner. I take *responsible lobbying* to be simply ethical lobbying. I will also explore the moral principles on which responsible lobbying should be based and how these principles can provide a guide to right action for those engaging in and those affected by corporate lobbying.

Ethics and Responsible Lobbying

The previous chapters presented a normative justification for a corporation's right to lobby predicated on an argument that a corporation is a type of moral person, enjoying similar rights, including political rights, to those enjoyed by a natural person. A question arises as to whether or not the rights of a corporation may be limited, and if so, what is the moral justification for doing so.

It is the role of ethics to provide corporations with a guide to right action and to assist responsible corporate citizens to think through how to exercise their right to lobby in a responsible manner (Ostas, 2007: 55, and Bauer, 2014: 65). A reliance only on lobbying regulation is insufficient to promote responsible lobbying given that many countries lack any form of lobbying regulation (Hogan, Murphy, and Chari, 2008: 129, and Pross, 2007: 8). Furthermore, there are aspects of lobbying which are difficult to codify into law.

We can state the fundamental requirements of ethical lobbying as follows and as having these features. Responsible lobbying must:

- (1) contribute to the public good (Woodstock Theological Centre, 2002: 84);
- (2) contribute to the resolution of public policy problems (Woodstock Theological Centre, 2002: 84);
- (3) be “in congruence with the corporate responsibilities towards society,” (Bauer, 2014: 61);
- (4) take into account the common good (Woodstock Theological Centre, 2002: 84; Keffer and Hill: 1997: 1378); and
- (5) Not be “merely a particular set of narrow interests,” (Woodstock Theological Centre, 2002: 84; Keffer and Hill: 1997: 1378).

I believe that in teasing out the obligations of corporations in respect of responsible lobbying we can look towards consequentialism and Kantian ethics. I begin with consequentialist reasoning and lobbying.

Consequentialism and Responsible Lobbying

Consequentialist normative theories determine the rightness or wrongness of conduct on the sole basis of the consequences of that conduct (Driver, 2005: 34). Utilitarianism is a species of consequentialism. As a consequentialist theory, it holds that the morality of actions is determined by their contribution to overall utility or welfare (Rachels, 2012: 111). Thus on consequentialist grounds the moral permissibility of corporate lobbying is determined by the outcomes of that lobbying, or in the case of utilitarianism, whether or not corporate lobbying maximises general welfare in society.

Restrictions on a corporation's right to lobby can only be justified if these produce "bad outcomes" (Alzola, 2013: 396), result in lower levels of utility, or cause harm to others (Rachels, 2012: 101).

According to the Shareholder Theory of the Firm, a corporation is required to maximise profits and is constrained in doing so only by the law. As a guide to right action by the corporation, Shareholder Theory posits that if lobbying results in greater profits, then lobbying is morally required, on the basis that lobbying maximises positive outcomes for the corporation. Yet, such lobbying may have negative consequences for others, and result in lower utility overall. Barker (2008) provides an example of the deleterious consequences of corporate lobbying in his study of an association representing estate agents¹¹ in the United States. The National Association of Realtors successfully lobbied for the introduction of licenses for new estate agents. These requirements were found to have cost consumers \$5.4bn per annum without any discernible improvement in the quality of services provided. Barker (2008: 32) argues that while the association had a legal right to lobby on this matter, such lobbying was not ethically responsible for it failed to take into account the costs and benefits for customers and the broader economy. Barker (2008: 32) calls this type of lobbying "morally reprehensible" because it benefits firms at the expense of the welfare of others.

There seems to be an argument to be made from the Stakeholder Theory of the Firm that corporations are required to engage in responsible lobbying insofar as such action produces good consequences for the corporation's stakeholders. The Stakeholder Theory of the Firm, according to which the corporation is run to benefit a wider set of stakeholders, will permit and require lobbying on behalf of its stakeholders. Arguably, this may be legitimate and ethically responsible, especially where there is a coincidence of corporate and stakeholder interests (Hamilton and Hoch, 1997: 119). However, a deeper examination may reveal that aligned corporate and stakeholder interests are no guarantee that the overall welfare will be well served. For example, as the criticisms of corporatism

¹¹ Real estate brokers in American parlance.

in previous chapters indicate, tripartite agreements between trade unions, corporations and government to set prices and wages can greatly disadvantage the unemployed, consumers, and small enterprises.

A theory of the firm as a political actor, as a corporate citizen, where the corporation is a legitimate political actor in society, generates a duty to lobby to promote valued public outcomes. Responsible lobbying requires a corporation to “acknowledge that there is a public good that they are responsible for promoting, a public good that is not equated with their private interests and that, at least at times, supersedes their private interests” (Weber 1996: 258). Responsible lobbying does not attempt to benefit a particular corporation, an industry, or even a set of stakeholders, at the expense of society (Dahan, Hadani and Schuler, 2013: 377; and Barker, 2008: 25). Peterson and Pfitzer (2009) use the term “lobbying for good” to describe corporate lobbying that promotes the common good by advancing causes that are critical to society, raise industry standards or improve the provision of public goods, while not necessarily or directly consequential to the corporation. An example is Mary Kay, a US cosmetics company, that lobbied in support of the Violence Against Women Act in the United States Congress (Peterson and Pfitzer, 2009: 48), or the UK’s Corporate Leaders Group on Climate Change (SustainAbility, 2005:20). In such cases, the consequences of lobbying are beneficial for society.

My argument is that lobbying for the interests of a single corporation, industry, or stakeholder group, without due regard for the costs and benefits, and rights of others is not morally legitimate. Lobbying for self-interest and private gain alone may fairly be described as rent-seeking, contributing little if anything to the common good. The extent to which such conduct risks deleterious consequences for the public such as the erosion of social justice (Woodstock Theological Centre, 2002: 61), promoting an inequitable “distribution of benefits and burdens” (Hamilton and Hoch, 1997: 124), reducing prosperity and hindering sustainable development (Oberman, 2004: 69)

provides a justifiable reason to limit the political rights of corporations. Alzola (2013: 396-397) outlines a number of other negative outcomes of corporate lobbying, including corruption, regulatory capture by corporate interests, an erosion of democracy, and diminished trust in the state and the political system.

Kantian Ethics and Lobbying

Kantian ethics, particularly the formulations of the Categorical Imperative, provides corporations and legislators with a robust basis for evaluating whether or not lobbying activities are morally responsible. Kant's Categorical Imperative (CI) functions as a benchmark for testing moral norms and ethical rules. Kant formulated the CI in the following three ways (Bowie, 2002: 4):

- 1 Act only on maxims which you can will be universal laws of nature.
- 2 Always treat the humanity in a person as an end, and never as a means merely.
- 3 So act as if you were a member of an ideal kingdom of ends in which were both subject and sovereign at the same time.

The extant literature reveals an implicit and explicit application of Kantian ethics to descriptions of morally acceptable lobbying (See for example Barker, 2008; Bauer, 2014; Grimaldi, 1998; Hamilton and Hoch, 1997; Keffer and Hill, 1997; Oberman, 2004; Woodstock Theological Centre, 2002). These maxims can be applied to argue that responsible lobbying demonstrates a number of features and characteristics which are discussed below.

The first formulation of the CI implies the "self-defeating nature of immoral actions," (Bowie, 2002: 4). This can be translated into a maxim that ethical lobbying does not erode democracy or undermine political equality. Lobbying that restricts the access and voice of other citizens in the political system undermines the very meaning of democracy, rendering the concept meaningless. A practice or rule that permitted such forms of lobbying could not be rationally willed as a universal law, and would be irrational, and therefore not ethical. Hamilton and Hoch reflect this thinking when arguing that "(i)nstitutional democracy works best when its players are restrained by ethical concern

for the ... viability of the institutions in which they contend,” (1997: 122). Similarly Oberman (2004: 252) asserts that ethical lobbying requires that “advantaged actors in the system are held to be under an obligation to pay attention to the effects of their actions on contestability and to refrain from those actions that damage it ... preserv[ing] ... a contestable system of democratic representation” (Oberman, 2004: 252). This ethical obligation extends to recognising the legitimacy of elected and public officials as legislators and policy-makers (Bauer, 2014: 71). This principle is enshrined in several lobbying codes of conduct, including the American League of Lobbyists Code of Ethics (2010) and the Canadian Government’s Lobbyists’ Code of Conduct (2015). The US National Association of State Lobbyists Statement of Lobbying Principles (2010) includes the statement: “We believe in the representative system of government and its processes, and that its strength is based in informed decision makers and fair participation by all interested parties and opponents.” It also includes an injunction against acting “in any manner that will undermine public confidence and trust in the governmental process” and a requirement to “always seek to strengthen and protect the integrity of the public policy process.”

Bowie (2002: 8) explains that the second formulation of the CI requires that people should not be coerced or deceived. Ethical lobbying therefore recognises and respects the inherent dignity of others, it does not seek to manipulate or mislead society with exaggerated or false information, nor is it threatening. Oberman explains that “(e)fforts to manipulate public opinion based on half-truths and deceptions treat citizens as means rather than ends,” (2004:256). Lobbying regulation typically focuses on disclosure and promoting transparency (see for example Pross, 2007, AccountAbility, 2005: 42, House of Commons, 2009: 3, and SustainAbility, 2005: 18), through the establishment of a public registry of lobbyists and lobbying activities. For example, the lobbying codes of conduct of the governments of Australia¹² and Canada¹³ include disclosure requirements, as does the voluntary

¹² The Australian Government’s Lobbying Code of Conduct (2013) establishes a register of persons, companies or organisations who lobby government on behalf of their employers or clients.

code of the UK's Association of Professional Political Consultants' Code¹⁴. In a review of lobbying in the UK, the House of Commons (2009: 44) stated that "(t)ransparency could be both a guardian against unethical activity and a means of assurance to a sceptical public." Transparency is central to accountability in virtue of opening up lobbying to scrutiny. It enables the public to determine whether or not the positions being advocated and the benefits being sought are indeed reflective of its interests. This is why Hamilton and Hoch (1997: 124) refer to Kant's third maxim as "the publicity test". What would the public reaction be if the corporation's lobbying activities were published: "If the society is made up largely of ethical individuals, then their collective judgement regarding the rightness or wrongness of a course of action should carry some weight" (Hamilton and Hoch, 1997: 124).

Yet while transparency is essential, it is not sufficient. AccountAbility (2005: 43) clarifies that transparency and responsibility are not the same things. Corporate lobbying may be conducted transparently, with all policy positions published and all engagements with government disclosed, but the positions being advocated may be at odds with the public interest. That is why lobbying regulation that only addresses disclosure is an inadequate safeguard. AccountAbility (2005: 46) proposes an additional check for responsible lobbying: consistency. This is, are the lobbying positions consistent with the corporation's own espoused values, strategy, and corporate social responsibility statements? Are they consistent with commitments to stakeholders and to widely-recognised benchmarks like the UN Global Compact, UN Sustainable Development Goals, or in the case of South Africa the National Development Plan? Utting (2007: 701) writes that many corporations are guilty of lobbying for causes that are at odds with their own Corporate Social Responsibility programmes. Transparency of corporate lobbying activities is essential for the public to be able to test for consistency in the conduct of a corporation.

¹³ The Canadian Government's Lobbyists' Code of Conduct (2015) includes rules related to transparency: a duty to disclose lobbying and the provision of accurate information when lobbying.

¹⁴ Association of Professional Political Consultants' Code (2014).

What the third maxim gives us in the context of Kant's ethics is that a corporation ought to act simultaneously as if it is both a sovereign and a subject (Bowie, 2002: 10). The "Kingdom of Ends" formulation of the CI states that moral agents have a "fundamental moral obligation to act only on principles which could earn acceptance by a community of fully rational agents each of whom have an equal share in legislating these principles for their community" (Johnson, 2014: 25). The following quote from Anastasiadis (2014: 266) reveals an application of this maxim to describe responsible lobbying:

In lobbying, the corporation is government-like because it is in a sense co-creating the legal/regulatory environment within which it will operate, but it is also citizen-like because it will be bound by the laws thus created and is ultimately subject to these laws and their enforcement by the state.

Responsible lobbying therefore proscribes seeking legal exceptions to suit only the corporation's interests as the resulting laws would not be acceptable to everyone or every corporation. Only laws that are in the public interest would enjoy widespread societal endorsement. Both Grimaldi (1998: 247) and Hamilton and Hoch (1997: 124) identify this as a critical feature of ethical lobbying.

The three formulations of the categorical imperative together provide guidance for ethical lobbying. For corporations seeking to conduct their lobbying in a morally responsible manner, the CI enjoins them to adhere to the following injunctions:

- (a) the corporation's lobbying should be fully disclosed to the public;
- (b) the corporation should develop its lobbying agenda after stakeholder engagement;
- (c) the corporation's lobbying should be consistent with its commitments to its stakeholders and society, and;

(d) the corporation's lobbying should not restrict the access of other stakeholders to the policy process.

Keeping these injunctions in mind then policy-makers seeking to promote responsible lobbying, are enjoined by the CI to include the following prescripts in lobbying regulation: *Lobbying should be fully disclosed and transparent; and public consultation processes should be equally accessible to all stakeholders.*

Objection to Lobbying only for Public Interest

Both consequentialist and Kantian ethical theories suggest that corporate lobbying must promote the public interest to be morally legitimate, despite a corporation's moral right to lobby. My claim that corporate lobbying is responsible only if it is directed towards public interests and that lobbying to promote purely private interests is morally suspect can be challenged on the basis that private interests are not inherently immoral. The legitimacy of narrow, purely private interests coheres with the views associated with Milton Friedman (1970) and neoclassical economic theory that corporations collectively pursuing their private self-interest produce optimal outcomes for society. Ostas (2007: 49) suggests that in pluralist societies, self-interested competition by different constituencies without concern for any wider impact is regarded by some as the best way to promote the general welfare of society. In such societies, it is the role of the state to arbitrate between the different interests, find the optimal balance, and promote the common good (Ostas, 2007: 49). Indeed, this contestation of interests may be seen as the very essence of democracy (Weber, 1996: 257), and the essence of capitalist, market-based economic growth and development.

As outlined in the previous chapter, unfettered political contestation as the best way to arrive at the public good assumes that all stakeholders are capable of effectively representing their interests in the contest, that certain stakeholders are not able to unfairly dominant and sway the process (Ostas,

2007: 51, and Weber, 1996: 257), and that the democratic process is truly competitive (Oberman, 2004:246, 248). In emerging democracies and in countries which are characterised by stark inequalities the practice of democratic pluralism may be flawed, and political competition will be “an imperfect guarantor of the public interest” (Oberman, 2004:246, 248). Ostas (2007: 51) argues that in these contexts “where all sides may not be heard, pursuit of unbridled self-interest may appear to be an exercise of power and privilege.” Keffer and Hill (1997: 1375) argue for a more communitarian definition of pluralism, where there is competition between interest groups “but with a concentration on the common interests of the community.” Given the potential benefits and harms of corporate lobbying in regard to either deepening or eroding democratic institutions, it is crucial that lobbying is practiced within a normative framework that recognises that democracy may be imperfect or still emerging (Bauer, 2014: 61, and Oberman, 2004: 247). Therefore, ethical constraints on lobbying are “indispensable to the functioning of a democratic society,” (Ostas, 2007: 51).

In considering the ethics of lobbying, Weber proposes that: “(a) question that may need much more attention is the question of what sorts of interests a business should pursue and promote through its political activity” (1996: 256). The answer provided by Hamilton and Hoch (1997: 120) is that the ethical standards for responsible lobbying should not be based on a strict separation of public versus private interest, but rather on a more nuanced assessment of the “standards and value claims that determine what is legitimate in both public and private goods.” At times, society will legitimately expect that private interests will be subordinated to the public good. As I have claimed elsewhere in this essay, the invisible hand theory of free markets – the approach to corporate responsibility that argues that the “business of business is business” - is no longer tenable. At a minimum, society now expects corporations to demonstrate an alignment of the corporation’s private interests with beneficial societal outcomes. Increasingly corporations recognise this and frame their lobbying

arguments as public interest issues; however, this is often just window-dressing of self-interested rent-seeking (Barker, 2008: 23).

Is it possible to distinguish between advocacy that truly pursues public good and advocacy that purports to do so as a disguise for private gain? To provide a definitive answer would require empirical analysis and would be fraught with multiple measurement challenges common to regulatory impact assessments and programme evaluations. Another epistemic challenge to public-interest based corporate lobbying is whether or not there is a settled view of what constitutes “the public good”, especially in a pluralist and diverse society. How can a corporation really know what is in the public interest, even if it is well-intentioned? The solution is a process of discovery involving stakeholder dialogue and listening to the views and concerns of multiple voices in society. Hamilton and Hoch (1997: 120) propose that the public good is determined through a deliberative dialogue in society about ethical principles, beliefs, and values (Hamilton and Hoch, 1997: 120). It is through dialogue that legitimate definitions of what constitutes the public good can be arrived at (Scherer, Bauman-Pauly, and Schneider, 2012:479, and Bauer, 2014: 63, 71). The implication is that corporations need to formulate their lobbying positions after wide stakeholder engagement and with a sound understanding of society’s expectations. This conforms with the second formulation of the CI which entreats moral agents to respect the inherent dignity of others and to treat persons as ends in themselves, and not mere means to an end. This maxim places a duty on the corporation to consider the impact of its lobbying on all those affected thereby, irrespective of their relative power or influence (Keffer and Hill, 1997: 1375).

Conclusion

In this chapter I have sought to describe responsible lobbying with reference to consequentialist and Kantian ethical theories. Consequentialist and Kantian Ethics both provide a justification for restricting a corporation’s inherent right to influence public policy; a right that arises from a

corporation's moral personhood. Regulatory restrictions on corporate lobbying, whether statutory or voluntary, that limit the moral right of a corporation to lobby can be defended if these restrictions are grounded on the ethical principles outlined above. A corporation's moral duty can be given greater substance and direction through the application of these same ethical tenets.

CONCLUSION

This research report has examined a type of corporate conduct that is widely-regarded as pernicious and unethical: lobbying to influence public policy and regulation. The following questions have been considered: Can corporations be regarded as moral persons capable of moral agency? Are attempts by corporations to influence public policy morally suspicious and illegitimate? What justifies the moral right and duty of corporations to influence public policy? And what moral principles should guide lobbying by business?

I have argued that a corporation is a type of moral person enjoying similar moral rights and duties as natural persons, and as such a corporation has a moral right to engage in activities that influence public policy, and that this does not erode the principle of political equality and justice. Drawing on social contract theory, I have also argued that a corporation has a moral duty to influence public policy in the interests of its shareholders and stakeholders, and as a corporate citizen in a pluralist, democratic system. Furthermore, this duty to influence public policy is a duty that should be performed in a responsible manner that is guided by consequentialist reasoning and Kantian ethics.

In making an argument in support of a corporation's right and duty to lobby, a number of concepts and questions have been briefly explored which deserve further enquiry in future research. These concepts and questions include:

- The ontology of the modern corporation and the implications for corporate moral responsibility.
- The concept of corporate citizenship and its potential contribution to corporate accountability.
- The normative value of a theory of the firm as a political actor.

- The ethics of other forms of corporate political action, especially campaign finance or political party funding.
- Moral challenges that may be generated by other types of organisations, such as trade unions, special-interest groups, and non-governmental organisations, engaging in lobbying.
- Moral challenges potentially arising from the political participation of wealthy individuals.

Corporate political action is a worthy subject for the application of moral philosophy. The power of corporations is immense and the participation of corporations in politics has significant implications for social justice and equality. There is a real risk that the state can be captured by unelected and unaccountable private interests, especially in newly-established democracies, potentially ushering in Alzola's "corporate dystopia". Those who are concerned about preventing such outcomes can turn to ethics to provide an opportunity for a different outcome, one where the resources and influence of powerful corporations are harnessed in service of the greater good, and the strengthening of democracy. In a country like South Africa, where democratic governance is still in its infancy, government would be well-served to consider the regulation of lobbying in order to promote responsible lobbying and prevent abuse. A corporation's moral rights should not be exercised blindly without regard to the impact on others, and to the rights of others. As such, corporations that seek to be responsible corporate citizens should exercise voluntary moral restraints on their political activities by implementing internal lobbying codes of conduct based on ethical principles. Responsible corporations should also promote the adoption of self-regulation of lobbying by the trade associations and business organisations of which they are members.

I have focused this research report on a particular business practice that I believe is of great importance: lobbying. If my reasoning is correct and the arguments for this are justified it can therefore be concluded that not only do corporations enjoy a right to lobby, corporations have a moral duty to lobby to influence public policy.

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