CHAPTER EIGHT

Autonomy as a Central Human Right and its Implications for the Moral Responsibilities of Corporations

If the responsibilities of corporations consisted solely of their legal responsibilities, then, apart from the moral responsibility to obey the law, the question of 'the moral responsibility of corporate organisations' — and so the purpose of this volume — would be moot. This is not to say that it is a trivial matter to assert that corporations should take obedience to law to be a non-negotiable obligation. Exponents of the 'nexus of contracts' view of the corporation have suggested that managers bear no general obligation to avoid violating regulatory laws, but should simply include the expected penalty for such violations in their cost-benefit analysis. But while some corporations may indeed make such calculations, most legal as well as scholarly analyses of the moral responsibilities of corporations generally presuppose that they will meet their legal responsibilities, in order to ask whether there are further moral responsibilities which go beyond those currently implied by law. If there are, these will require one or two responses: either corporate virtue, or legal reform. Without any depreciation of the importance of the latter, or of institutional mechanisms for controlling corporate behaviour generally, this chapter will inquire into the moral responsibilities which corporations should be asked to shoulder in relation to human rights as a matter of voluntary compliance.

A problem for any such inquiry, however, is that corporations are in their essence creatures of law. The parameters within which a corporation is constituted and can act are set by on the particular legal regime within which it is chartered. While a general moral discussion like this one must abstract from such parameters, they will force themselves upon our consideration as soon as the case of any specific corporation comes into question. Let us however confine ourselves to the moral domain, so far as possible. This is a domain which is potentially vast, but which the present volume usefully delimits by its focus on human rights. The advantage of such a focus is that human rights have been defined in internationally recognised conventions and treaties: they have legal standing. But human rights also have the peculiar feature of asserting a claim to moral validity regardless of whether any

See, for example, Frank H. Easterbrook and Daniel R. Fischel, 'Antitrust Suits by Targets of Tender Offers', 80 Michigan Law Review 1155 (1982), p. 1177 n. 57: 'Managers not only may but also should violate the [legal] rules when it is profitable to do so.'
given legal regime obtains, or whether a given country has ratified a given convention.

The resultant tension between the legal duties associated with human rights, and the moral claims which they express, is exacerbated in the case of corporations. International law recognises a few basic peremptory norms which make anyone—individual or state, natural person or legal person—criminally liable for committing such crimes as genocide, piracy, war crimes, crimes against humanity, aircraft hijacking, or enslavement. Although case law in relation to corporations and such crimes is less well established than is the case for individuals and states, the unusual weight and definiteness of the duties involved gives corporations good reason to keep well on the safe side of such laws. There are other crimes—such as torture, execution, rape, and forcible displacement—explicitly defined in international law as being actionable only against states. And the major international human rights instruments also impose the duties involved more or less explicitly on states. The responsibility of non-state agents, including corporations, in relation to human rights is an open and currently evolving legal question. Appeal to the legal duties of corporations cannot therefore shut off debate about their moral responsibilities in relation to human rights, both because the law is unsettled, and more fundamentally because the moral claims embodied in human rights always potentially reach beyond the positive rights and duties already established in given laws.

If the law as it currently stands cannot exhaustively establish the moral responsibilities of corporations in relation to human rights, who has the authority to do so? Arguments about moral responsibilities implicitly assert the authority of reason, and in particular of reasoning about morality. But reasonable people, including philosophers, notoriously disagree about what morality requires. If corporations do not, and arguably should not, restrict their responsibilities to those dictated by law alone, the question remains how they are to determine what their further responsibilities are, and how to carry them out. The international human rights community contributes to this decision through its own evolving discussions, elaborating accounts of best practice and publicising cases of egregious violation. This chapter suggests that while it is crucial that corporations attend to these evolving practical and philosophical discussions, it is equally critical that they attend to the claims made in relation to human rights by the people whose rights they are—

the people affected by their operations. The argument touches both on the importance of autonomy as a human right, and the inseparability of social-economic from civil-political rights: points which are broadly accepted in the human rights literature, but which have not been brought sufficiently to bear on the question of responsibility or in particular on the responsibilities of corporations. The thesis of this chapter is that taking autonomy seriously as a human right will dramatically affect the moral responsibilities which corporations may be thought to have to those whom their actions affect, and in particular can introduce a concern with the popular as well as moral acceptability of corporate actions.

We must begin by confronting a fundamental problem for the entire enterprise of this volume. For if some academics deny that corporations have a moral responsibility to obey the law, others deny that corporations can bear, recognise, and carry out moral responsibilities at all. The latter denial is partly a function of academic discipline. While corporate policymakers and academic ‘business ethicists’ both discuss the question of corporate moral responsibilities assuming that these are possible and actual, lawyers and philosophers writing about corporate crime debate whether and under what conditions a corporation can be held morally and legally responsible for the actions of individuals holding various offices within it. The attribution of criminal responsibility after the fact does not always follow the same lines as the formulation of corporate policy before the fact, although in both cases the essential issues is that of who rightly counts as representing (speaking or acting for) the corporation. But the tendencies in post-facto judgment either to dissolve the corporation into the actions of individuals, or to assign strict liability irrespective of corporate policy, should not obscure the necessary assumption that corporations are capable of formulating and executing intentions on which prospective judgment and decision depend. Academic debates about whether corporations are capable of forming or acting upon intentions at all are most plausibly resolved by considering corporate policy as the structured means by which they do so.

1 See in this chapter, Chapter Two by James Griffin on autonomy, and Chapter Three by David Archard on social and economic (‘welfare’) rights.

2 See the useful collection of views on both sides of this question, focusing on the work of Peter French who is mentioned below; Hugh Curttell (ed.), Shame, Responsibility and the Corporation (New York: Haven Publications, 1986), a reference the mention and use of which were kindly given me by Jill Horwitz. The literature on corporate crime and the attribution of responsibility thereof is voluminous: there is an extremely helpful summary discussion by Brent Fiss and John Braithwaite, ‘The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability’, Sydney Law Review 11, (1985), p. 468.

3 David Runciman has in his writing and in conversation emphasised the significance of the fact that corporations must always be acted for by representatives: see David Runciman, Pluralism and the Personality of the State (Cambridge: Cambridge University Press, 1997).

4 On this point I concur with the identification of ‘corporate internal decision structures’ or CIDEs, in Peter A. Frey, Collectivism and Corporate Responsibility (New York and Guildford, Surrey: Columbia University Press, 1984), pp. 41-66, although French’s view of corporations as moral persons is criticised below. Note that the debate over criminal corporate liability hinges not only on intentional or mens rea, but also on the question of whether the kinds of sanctions which the criminal law applies can succeed in effecting whatever its purposes are taken to be in relation to corporations. See on this point Celia Wells, Corporations and Criminal Responsibility (Oxford: Clarendon Press, 1993).
If corporations can form and act upon intentions, they can count as rational agents as well as ‘legal persons’. Can they, further, be moral agents — and need they be so in order for moral responsibilities to apply to them? Debates among business ethicists and philosophers about whether corporations are capable of moral agency hinge in part on differing definitions of what moral agency requires. At one extreme, Peter French insists that corporations can be full moral agents, but defines moral agents simply as those agents capable of forming intentions — so collapsing the specific question of moral agency into that of agency per se. At the other extreme would be a strong Kantian picture of a moral agent as one capable of being moved to act morally because and only because it wants to do so. In between lie a range of possible considerations, such as the ability to reconsider one’s judgments in light of the discursively reasoned reaction of others (so distinguishing corporations from intention-forming cats) and the ability to be moved by concern for one’s reputation and self-image (so, arguably, distinguishing corporations from intention-forming computers). Discursively self-conscious agency, concerned with coherence and reputation, may be enough to make corporations responsive to certain moral concerns, without classing them as ‘moral agents’ per se.

It seems plausible, then, that corporations are capable of recognising and acting on moral considerations albeit not for ideally Kantian reasons, and that they be assigned moral responsibilities not in virtue of their peculiar status as ‘artificial persons’ but in virtue of some more general theory of morality and its implications for various kinds of entities and agents (otherwise, corporations could turn out to have radically different moral responsibilities from, say, partnerships, which would be an odd result from a moral point of view). For example, while some moral obligations are ill-formed with respect to corporations (such as those of parenthood or friendship), it may be that corporations can serve as agents of justice. The moral claims which corporations recognise typically function as side-constraints on the pursuit of their basic financial goals. It is not that they substitute some specific moral goal for the goal of amassing profits, but rather that they recognise a limit on their actions in pursuit of that goal, and/or recognise certain other acts or omissions which are incumbent upon them in its pursuit. For example, a corporation may adopt the value of safety (and in particular of protecting lives) as an overriding value which can trump any cost-benefit analysis; or they may adopt the value of reducing pollution as a constraint on the way they do their business. In neither case would the conception of the company’s core mission necessarily alter. Rather, the way in which that mission is to be carried out is specified in one way rather than another.

Some human rights considerations can function in this same way, as straightforward side constraints on corporate action (‘don’t kill’, ‘don’t torture’, ‘don’t enslave’). But some responsibilities associated with human rights may be more complex, and it is to their specification that we now turn. Because the normative value of respecting human rights is already contained within the assertion of the rights themselves, it is plausible to suggest that any competent agent — natural or artificial — capable of acknowledging those rights should do so. The term ‘acknowledge’ in the previous sentence is deliberately vague: to show that it needs specification, by the identification of the specific duties which human rights impose, and which may differ according to different agents. States themselves may have at least four different kinds of obligations in relation to human rights. Consider the helpful typology given by Mark Bovens for the related case of constitutional rights:

1. An obligation to respect: the government must respect the freedoms of the citizens and refrain from violating these.
2. An obligation to ensure: the government shall actively work to give direct and concrete substance to the rights of citizens.
3. An obligation to promote: the government has an obligation to foster the realisation of these rights, for example, by means of long-term policy programs.
4. An obligation to protect: the government must protect citizens against unlawful violations of their constitutional rights by other citizens.

Which, if any, of these obligations do corporations share, or is the content of their obligations quite distinct from those of governments? The obligation to respect is the only one which would seem uncontroversially to apply to corporations as to any other agent. The formulation of the United Nations Secretary-General’s Global Compact essentially restricts itself to this one point: its first principle calls on corporations to ‘support and respect the protection of international human rights within their sphere of influence’, and its second, to make sure that they themselves ‘are not complicit in human rights abuses’. This formulation seems to reserve

\[\text{\textsuperscript{8}}\text{French, Collective and Corporate Responsibility, p. 38: ‘to be a party in responsibility relationships, hence to be a moral person, the subject must be at minimum an intentional agent’, although he observes that practices of responsibility attribution go beyond the consideration of intentionality alone.}
\[\text{\textsuperscript{9}}\text{Thomas Donaldson draws the contrast to his Corporations and Morality (Englewood Cliffs, New Jersey: Prentice-Hall, 1982, p. 23, in the service of his denial that corporations are moral agents; see his comments on the various exchanges between him and French in ‘Personalising Corporate Ontology: The French Way’, in Curler (ed.), Shame, pp. 99-112. The computer or ‘intelligent machine’ is offered as a metaphor (not as a contrast, as in the text here) for corporate agency by Meir Dan-Cohen, Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society (Berkeley, Los Angeles, and London: University of California Press, 1986), pp. 49-51, another reference which I owe to Jill Horwitz.}
\[\text{\textsuperscript{10}}\text{On the significance of discursive status for free agency, see Philip Pettit, A Theory of Freedom: From the Psychology to the Politics of Agency (Cambridge: Polity Press, and Malden, Mass.: Blackwell, 2001). One important advantage of not classing corporations as ‘moral persons’ is that one can more easily avoid assigning them the kind of respect for their own interests and rights which moral persons ordinarily deserve. The recent tendency of American courts to find that corporations enjoy certain constitutional rights is an alarming illustration of the danger of the latter route.}
\[\text{\textsuperscript{11}}\text{Alyssa Bernstein has made this point vividly to me, as does Dan-Cohen, Rights, pp. 41-51.}
\[\text{\textsuperscript{14}}\text{The statement of the principles can be found on www.unsocialcompact.org (last checked 4 December 2003).} \]
responsibility for human rights to states, as does the UN Universal Declaration of Human Rights, while asking corporations only to respect their ‘protection’ while offering their ‘support’ to those (presumably states) who actually provide that protection.

Is there anything more which corporations can and should do in relation to human rights? The notion of ‘protection’ in both Bovens’ typology and the Global Compact has at least one inherent weakness. For both restrict themselves (Bovens with good reason given his own purposes) to the consideration of ‘protection’ of human rights as something provided by the state: the state is to protect individuals from the violations of their rights by other individuals or agents. But it is a tragic commonplace that states themselves can be the most grievous and systematic violators of the rights of individuals, both their own citizens and others. Corporations operating in such perverse states may be able to ‘respect’ human rights in their own operations — although in reality, the interests of such states in exploiting or fostering corporate activity very often puts companies in the position of profit from, and sometimes collusion with, ‘profitable’ violations of human rights conducted or condoned by the state. But to ‘support … the protection of human rights’ in such circumstances, as the Global Compact demands, could require a far more affirmative stance by the company: pressuring the state to act, not simply waiting for it to do so. Here, the auxiliary function envisaged by the Global Compact of ‘supporting’ action by others, may merge into the more demanding stance of helping to ‘promote’ (adapting Bovens) the long-term realisation of human rights by promoting a change in state policy towards protection and support.

What about the possibility that corporations may and should themselves work to ‘ensure’ (adapting Bovens: ‘work to give direct and concrete substance to’) human rights — is this a legitimate aim for corporations to (be expected to) adopt, and what exactly might it involve? Consider first the latter question. For some rights, working to give them direct and concrete substance might be close to the work of promoting by pressuring the state already canvassed above: to ensure the right to be free from torture, for example, might involve companies in pressuring states to reform their judiciaries and rein in death squads, though it could also involve indirect pressure on the state such as supporting the work of local human rights groups. For other rights, working to give them direct and concrete substance might involve actions which the company could take itself: to ensure the right to education, for example, could involve building schools.

We must distinguish here between such modes of ‘ensuring’ rights, and what might be termed the ‘securing’ of rights. Emma Rothschild has observed that ‘security is a political relation’; it follows that to secure a right is to give a person an effective political claim, something which cannot be done without the involvement of the state. But without securing someone’s right to X, it may be possible to secure their possession or enjoyment of X (itself a step beyond their mere

but insecure possession or enjoyment of X). To ‘work to secure the direct and concrete substance of a right’ might reasonably be interpreted as providing someone with a fairly secure possession or enjoyment of some X, which can itself serve as a basis for making a more effective political claim to having or enjoying that X as a (as of) right. Corporations can help to ensure rights for example by helping people to understand their moral entitlement and how it might be converted into a legal or political one, and perhaps helping governments on the one hand or people on the other to establish the appropriate relation in which rights would be respected. Alternatively, with state backup, corporations could also legally undertake to make certain goods or services available to a certain population, and to set up a monitoring mechanism through which people could claim their entitlements to those goods or services. This would begin to approach the securing of a right to the good or service by the corporation, although this would be bounded by the legal frameworks in which the right and the corporation were respectively embedded.

Some of the examples of how corporations might relate to human rights in the preceding paragraph are quite radical. The reader may be wondering, is it really right for corporations to pressure governments into abolishing torture, let alone for corporations themselves to establish schools? The argument here has not established that such actions are morally obligatory, only that they represent a possible and plausible interpretation of the human rights responsibilities of corporations which must be considered. Context is certainly a crucial factor here. The role of the corporation in pressuring governments belongs in the context of what were called above ‘perverse’ states — states which are ignoring or actively violating human rights. In these circumstances companies — like other agents operating in the area, such as church groups or unions — may well incur moral responsibilities to do what they can to stop other agents from violations on which they are bent. A possible role for corporations in establishing schools or hospitals, on the other hand, arises for consideration in the context of weak states as well as perverse ones. It must be recognised as an historically and morally fraught suggestion in the context of past colonialist practices by non-state actors, including companies; the legitimacy of such actions, as well as the danger that a weak state will be made still weaker by corporate philanthropy taking over infrastructural responsibility, must be carefully weighed. But it is important to recognise the possible range of actions open to corporations in relation to human rights, and to be willing to debate the circumstances in which each such action is appropriate — rather than simply

15 Ramaasry, Corporate Complicity, a point I owe also to a talk at the BP/Cambridge Executive Education Programme in March 2002 by J. Adam Tooze.
18 I am indebted to Tom Campbell (moral rights), Geoffrey Brennan (‘more or less’ secure rights) and Philip Pettit (institutional mechanisms) for raising these points with me in discussion of this paper.
19 The dangers of such attitudes in the eighteenth century were impressed on me by Emma Rothschild and Richard Tuck, at a Common Security Forum meeting on a previous version of this paper at the Centre for History and Economics, Cambridge University, January 2002, though I doubt that I have taken their full measure into account even here.
assumed that all corporations can or should ever do is stand passively by, even in an evil, collapsed, or disintegrating state.

Unfortunately many discussions of corporations and human rights have assumed a rather traditionalist picture not only of the state, but also of the range of human rights involved. The focus has tended to be solely on the ‘negative’ civil rights such as freedom from torture, or if ‘positive’ economic and social rights are raised at all, these are primarily labour rights. 50 But as James Griffin’s chapter in this volume (Chapter Two) argues, the best philosophical account of human rights treats civil, political, economic and social rights as inextricably linked. Thus one cannot simply assert one’s eyes from the question of corporations’ moral responsibilities to provide schools, food, or housing, though one may reach varying conclusions about it. Further, the value of autonomy is both an important right in itself and a key organising and generating principle for the whole domain of human rights. It is to the implications of autonomy as a human right that we now turn.

Autonomy is the ability to be meaningfully self-determining within the social world, or as Joseph Raz has said, to be the ‘(part) author of one’s life’. 21 This is why it is central to a philosophical understanding of human rights and their social function: one must understand oneself as autonomous in this way in order to be able to recognise and claim one’s rights as rights (though one need not be autonomous, nor able to recognise and claim one’s rights, in order to have them). Fully to be able to assert and exercise any other human right, is to be able to do so autonomously. This is why the state’s prerogative of deciding how to institutionalise certain human rights, makes best sense when the state is democratic. For only then will people (ideally) secure a voice in choosing how their rights will be operationalised and realised. Without a meaningful right to political participation as equals, the meaning of all other rights risks distortion to serve the interests or concerns of the powers that be. This is why political autonomy and personal autonomy are two sides of the same coin, or co-constitutive as Habermas has argued. 22 But the constituting relationship does not run only from personal to political autonomy. Political autonomy can also help to shape personal autonomy, by fostering a range of adequate options to choose among, the relevant information to inform that choice, and the internal capabilities and skills to make meaningful choice possible. 23

21 But see the assertion of the indivisibility of human rights (albeit with emphasis on ‘labour rights in the workplace’) as part of the justification for holding multinational enterprises as well as states responsible for ‘observing’ fundamental human rights, in Peter T. Muncinski, ‘Human Rights and Multinationals: There’s a Problem!’, International Affairs 77 (2001), pp. 31-47 at 43. Note that the terminology of ‘negative’ and ‘positive’ rights is crude and misleading, since the paradigm negative rights such as freedom from torture can require a great deal of positive action to establish judicial oversight of the police and so on. See Chapter Three in this volume for further remarks on this point.

22 Joseph Raz, The Morality of Freedom (Oxford: Clarendon, and New York: Oxford University Press, 1986), p. 365: ‘The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.’


24 The importance of an adequate range of options for autonomy is emphasised by Raz, Morality, while...
This brings us to the second major point about autonomy in relation to corporate moral responsibilities, which turns on the difference between what might be called moral acceptability and popular acceptability. Now there is one way of understanding this distinction which is inimical to the meaning intended here. This misleading interpretation would set moral and popular acceptability as in principle (or at least potentially) wholly opposed. Moral acceptability would reflect whether a decision or action were acceptable before the ‘court of morality’, while popular acceptability would reflect whether a decision or action were acceptable to a particular group of people: if the group in question had no concern for, or no adequate grasp of, moral principles, the two forms of acceptability could come apart altogether. But there is another and better way to understand the distinction, and that is to cast (the valuable face of) popular acceptability as a subset of moral acceptability itself. Here the function of popular acceptability would be the ability of a group to specify rather than to reject what morality demands in the case of (say) their own rights or the rights of others. On this view popular acceptability counts as a form of moral acceptability, one which it is morally permissible (if not obligatory) to consider, and which works to make moral demands concrete rather than to nullify them. The abstract demand for human rights would in this latter case have to be interpreted by what those rights concretely mean to the people whose rights they are. It is in this latter sense that this chapter suggests popular acceptability should count as one element in corporate moral responsibilities in relation to human rights. To respect human rights is (inter alia) to respect autonomy, and to respect autonomy is to seek popular acceptability for the policies one chooses to try to respect, support or promote human rights.

It is worth noting that the rough distinction between moral and popular acceptability appears within the current waves of criticism of the operations of multinationals. Some campaigners who are primarily exercised by the way unregulated economic globalisation can undercut political protection, demand (in effect) that the moral and legal regulations applied to corporate operations in the West be extended to their operations elsewhere; why should workers in the Philippines have fewer rights than those in Australia or America? This is a moral approach rather than a popular one: the concern is not that the Filipino workers have no voice in formulating the correct standard of rights, rather that they simply don’t enjoy the benefits those rights would provide to Western workers. In contrast, campaigners who are primarily opposed to the powers of multinational corporations to transform local environments and societies in virtue of their operations, will tend to call for a voice for local people in controlling such development – this is an example of the popular approach which may shade into the legal approach, or which may challenge the latter in order to give local people more of a voice than is currently provided them by law.

There is of course an important third dimension of acceptability for corporate action: legal acceptability. Many human rights claims are made in order to assert that the moral right involved should be recognised by the law: the goal is for the moral to become the legal, which would save companies from having to consider separate moral claims beyond their general duty to obey the law. Similarly, one of the best ways to make popular accountability a reality, while avoiding the pitfalls of trying to define who ‘the [relevant] people’ are for a given question, and how to ensure their voice will be heard, is to fold it into the legal mechanisms provided by the state. But there are inevitable gaps in the provision of the law. First, there will always be a gap between the recognition of need for some legal action, and its being taken – sometimes a considerable one. Second, there may be cases where a given state will not pass a law, yet the moral and/or popular demand must be met. Third, there are cases where a moral or popular claim may not be legitimately impossible by law, being outweighed by other principles, yet the claim still has a broad moral force. As stated at the outset of this chapter, then, we cannot expect a discussion of ‘the moral responsibilities of corporations’ to resolve itself wholly and without remainder into their legal responsibilities. And this holds true also for that subset of the moral domain where popular acceptability belongs. While in some sense legal acceptability must itself be a subset of the popular, where the relevant ‘public’ is that involved in the law-making procedures of the state, it is more helpful here to keep the two categories distinct.

The notion of popular acceptability is deliberately broad, and in its modal formulation blurs across two axes of continua of ways in which acceptability might be manifested. On one extreme of the first axis is a case without any formalised expression of acceptability (the fluidity of public opinion or riot), on the other, cases where there are express governmental procedures for gauging acceptability. On the extreme of the second axis is a case where consent is assumed unless dissent is expressly registered, on the other extreme, cases where procedures are used to elicit more or less explicit forms of consent from everyone (compulsory voting at the very extreme). And one might also divide the space into more and less deliberative forms of expressing acceptability. The point in this three-dimensional space which is achieved in any one case will be the result of interaction, perhaps by negotiation, perhaps by confrontation, between groups of people, or individuals, and the corporation.

Who are the people who may assert a claim of popular acceptability against a corporation? There are a very large numbers of candidates for this role, many of them often described as ‘stakeholders’ – employees, consumers, creditors, suppliers, local residents where the company operates, as well as shareholders. Of these groups, shareholders and consumers have probably the greatest freedom of exit: the issue of employees is a major one which requires a separate study of its own; and the role of creditors and suppliers is only beginning to be recognised. Of the groups just mentioned, moreover, while the corporation may owe them certain moral responsibilities, it is implausible (with the major and critical exception of employees) to consider these to derive primarily from human rights. The remainder of this chapter will accordingly focus on the case of local residents where companies operate, and in particular, on the case of local residents in the areas where multinational extractive corporations operate. Most of these areas are in relatively

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26 James Griffin helped me to see in discussion that popular acceptability must be a subset of moral acceptability if it is to be morally acceptable.
weak states, a fact which will colour the analysis here significantly. The reason for choosing this context is to bring out the difficult choices which can confront corporations, but it must be remembered that the ideal would be for such weak states to be replaced with strong states, rather than that the weak state be considered as a paradigm for the state as such.

It is in primarily in relation to local residents that corporations exercise a subset of their powers which may be termed ‘prerogative powers’. These powers are best understood by reference to a rough classification of corporate powers, as follows:

1) agency powers: powers to act as an agent relative to other agents in the marketplace or to a state, states, or international bodies
   a) contractual power;
   b) prerogative power: powers to act not exhausted by contract
2) communicative powers
   a) ability to try to create or reshape preferences of individuals or other agents
   b) ability to try to create or reshape the political rules of the market game
3) managerial powers: powers to direct and control the actions of their workers
4) possible result of effective combination of 1, 2 & 3: market power, or in extreme case, monopoly power

Contractual power is a central and characteristic feature of that agency: the power to bind and be bound by contracts both with workers (which then inducts them into the realm of managerial power) and with other firms and even states and other actors. But the power to contract does not exhaust the domain of corporate agency. Corporations have constrained discretion to decide how to exercise their contractual powers; they also have powers gained in virtue of their contracts, as well as in virtue of the property they hold: powers to alter local environments by acting on their own property, for example. They also have some freedom to act within the broad constraints of their charters so as to meet the objectives set down therein: to set up corporate charitable foundations, for example, consistent with their fiduciary duties to shareholders. Some of these powers are already regulated by the state, while others could be, should sufficient cause be shown and the necessary political processes achieved. But just as was argued for the relation between moral and legal rights, so it is true for the relation between prerogative and regulated powers: either because of temporal lags, state failure, or principled state restraint, there will remain an ineradicable grey area in the exercise of prerogative powers and of quasi-monopoly powers, which authorisation by the state cannot wholly eliminate. I call such powers ‘prerogative’ by analogy with Locke’s discussion of the prerogative of the political ruler, who may act for the public good where the laws are silent.27 So where contracts and political authorisation fall silent, corporations retain the power to act in ways which may be based on contract, but which affect many people who are not directly party to that contract. It is the exercise of such discretionary powers which NGOs and anti-capitalists often find most objectionable, in that they can give corporations broad sway over the conditions and way of life of a local people most of whom have never chosen to contract with it. Yet if such discretionary powers are inevitable, as I believe they are, then the question becomes whether they can be made subject to popular acceptability. This demand cannot be evaded by a corporation’s claim that their moral responsibilities have been exhausted by the granting of legal authorisation, say by a national state, to operate.

Legal acceptability, for example via the authorisation of a company to extract a certain resource, does not in itself guarantee the popular acceptability of the company’s specific actions. This parallels democratic politics, in which authorisation of an official or body to act does not in itself guarantee that the decisions made will be in the public interest. In both cases people may seek additional controls. But such a search may itself involve new kinds of tensions and difficulties. These claims can be illustrated by looking at the specific case of intervention by extractive corporations in localities: oil and gas or mining corporations which need to establish large-scale plant over a period of years. One advantage of extractive corporations is that they typically have to make large and fixed investments over comparatively long periods of time in specific areas (mines, wells); thus they should be a good case for popular acceptability, as their operations touch specific local communities which might seek to make them more acceptable; on the other hand, the national authorisation required for them to be present can come into tension with such efforts to exert local control over acceptability. The difficulties I will examine apply even where national institutions are relatively meaningfully democratic in their functioning. These difficulties arise at two stages, authorisation and operations.

To begin with authorisation.28 State ownership of mineral, oil and gas resource rights is asserted in many countries and the decision to develop those resources will typically be taken by the national state, in view of the ‘impact’ on national pressure for corporations to conform to moral standards is as attempting to bring them more securely within the realm of operation of the law of opinion – to give the artificial person of the corporation the same interest in a good reputation as natural persons, even if the source of the interest may be partly different – and so to make it more likely that their actions will aim at or at least be constrained by the interests of the public good.

27 Barry Hindess observes that Locke and other liberals recognised that similar prerogatives might be exercised by individuals against one another in civil society, but that they were not concerned to regulate these politically, believing that individual concern with reputation – with what Locke called the ‘Law of Opinion and Reputation’ – would make the domain of civil society sufficiently self-regulating. See Barry Hindess, ‘Democracy and the Neo-Liberal Promotion of Arbitrary Power’, Critical Review of International Social and Political Philosophy 3 (2000), pp. 68-84, at pp. 73-74. One way of seeing the...

28 In addition to the state-locality tensions on which I focus, it is worth noting that the autonomy of state decisions is itself sapped by the assertion of international environmental standards: ‘To the extent that international media and NGO attention is placing pressure on companies to conform with contemporary developed world standards wherever they operate, this trend is effectively subverting the legitimate state-company relationship, impinging on the sovereignty of states in the region [this discussion is about the Asian Pacific, though the point applies generally] by taking the power to decide on issues of environment and development, and about acceptable and unacceptable corporate behaviour, away from the host country.’ Glenn Banks, ‘Changing Norms of Certainty and Security in Asia-Pacific Mining’, in Donald Denoon, Chris Ballard, Glenn Banks and Peter Hanceck (eds), Mining and Mineral Resource Policy Issues in Asia-Pacific: Prospects for the 21st Century (Canberra: Research School of Pacific and Asian Studies, Australian National University, 1995), pp. 38-44, at 41.
power of sabotage: they cannot usually exit as a group (although individuals can move away) but they can seek to risk, or to force the company’s decision to exit. Thus mining companies in the Pacific region have concluded that they must “place the locals or forget mining.” Sometimes due to state recognition of this fact, sometimes to company recognition of it, and sometimes to both, recent trends in Pacific mining development have swung toward the benefit of locals at the expense of the state, even in the contracts of authorisation drawn up by the state. Either state or company or both recognise, sometimes as a result of agitation and organisation by local groups, that the benefit flow must go primarily to the locality if the mining operation is to be viable. In this case the generalisation that “the essential strategy of the global corporation makes it an antagonist of local interests everywhere” will not apply – though just what definition of local interests the corporation will have reason to advance in such a situation remains to be seen.

This trend may both result from and reinforce local perceptions of the weakness and insignificance of the state. An extreme version of pre-existing local views is recorded in the case of the Lihir development in Papua New Guinea by Colin Filer. Mark Soipang, Chairman of the Lihir Mining Area Landowners Association, declared in the course of negotiations with the national and provincial governments over the distribution of equity in the mine: “The developers are foreigners, and the State [sic] is only a concept. It is us, the landowners, who represent real life and people.”

Even if pre-existing views of the state are more moderate than this, the skewing of equity and royalties away from the state to the locality (in the Lihir case, eventually by 100%, as the state gave up its claims altogether in order to meet local landowner demands) is likely to undermine state legitimacy both symbolically and practically. The practical effect again has two interacting sources, as the state is deprived of the resources with which to make its presence felt in the region, and the locals are meanwhile able to lean on the company to provide services in its place.

If we turn from the stage of authorisation to the stage of operation, we find several interesting developments. First, companies may discover that the undermining of the state caused by or reflected in the authorisation contract, has landed them with a new set of responsibilities as perceived by the locals. And those responsibilities may not be easily or prudently circumscribed by the authorisation contract itself. Indonesian and PNG contracts specify no requirement to provide further benefits to the local community, for example, beyond the compensation agreed in the contract itself in PNG (Indonesian contracts have not in the past required local compensation at all). But companies have come to recognise either the instrumental need for infrastructure, and/or the need to pacify a restless community by providing it, and the fact that the compensation contractually agreed will not exhaust those needs. For benefits flow exclusively to a single privileged group (such as landowners, as opposed to squatters or migrants) severe social divisions and dislocations will result. So it turns out to be in the interest of the

development, despite the very specific ‘impact’ which will be felt in a given locality. The fact that the state itself may earn royalties cannot be ignored in any attempt to assert democratic control over the ministers and bureaucrats who may somehow contrive to benefit from those royalties. But in any case the decision to extract a valuable natural resource, owned by the state, will be likely to hinge on national-level considerations rather than on representations from the locality. (Note that such decisions are different from the standard NIMBY cases, where an incinerator (say) may be situated in any one of a number of sites; extractive resources such as oil, gas, and minerals are found in specific and limited locations, though logging may be more like a NIMBY case depending on the distribution of forest cover in a given country.)

We need not infer here that the locality necessarily wishes to block development. In case of the Alaskan National Wilderness Refuge, for example, many locals and the state government are strongly in favour of development, against what they perceive to be national-level arguments about ecology which ignore or override the particular interests of region and state. Similarly, mining developments in Papua New Guinea have elicited a wide range of local responses, from the eagerness of the local community (I will unpack that term shortly) and the company to set up the Porgera mine, to the state’s ‘shotgun marriage’ between community and company in the case of Lihir.

There are two complementary dangers in the relation between locality, state, and corporation at the authorisation stage, which comprises the decision to develop, the awarding of a contract to one company or venture scheme, and the agreement of compensation and royalties. They can be summed up in relation to the role of the state by Albert O. Hirschman’s lapidary comment: ‘Political power is very much like market power in that it permits the power-holder to indulge either his brutality or his flaccidity.

The danger which comes more readily to liberal minds is state brutality, that is, the danger that local interests will be overlooked or overridden. It may happen that the interests of the locality are unlikely to be decisive or even influential in the national context which will track national interests as a whole, including local interests among these but not giving them priority. This is so even if the consequences for local life may be very serious. (The decision to close enterprises for national reasons can have similar effects: the coal mining towns in England and Wales suffered disproportionately and grossly when the nationalised coal mines were closed down under Thatcher and Major.)

The other danger, less apparently likely but documented in the case of recent developments in Papua New Guinea, is that the state will capitulate to local demands in an attempt first to secure authorisation, and then or subsequently also to ensure that the development can proceed un molested by protest or sabotage. For while states hold the official power of authorisation, local populations hold the ultimate

company to provide additional extra-contractual benefits more generally. Thus the exercise of company prerogative powers to provide benefits to the locals will almost inevitably come to exceed the bounds of its contractual obligations.\(^{34}\)

The significance of such prerogative powers is heightened by the fact that the corporation also confronts locals with an agency which monopolises (by contractual right) significant powers which can affect their ecological and social environment. In the case of the extractive industries, typically a single company or consortium is authorised to make substantial alterations to the local environment. Local communities are not brought into the market in the sense that they can choose voluntarily whether to interact with the company or not. Rather, they are confronted with a monopoly agent which has been granted control of local lands and resources and which will inevitably become a major and often the overwhelmingly dominant force in the local economy. What on a national level looked like a legitimately national decision made by representative means, serves to establish a monopoly of certain kinds of power in the local area. The citizens face that monopoly as probably the overwhelmingly dominant source of employment, as the agent entrusted with the power to modify the local environment and to carry out forms of compulsory purchase, and possibly as the source of consumer goods by operating a local store as well.

One standard solution to the existence of monopoly – break it up to foster competition, and/or introduce competition from other sources – is obviously unavailable here. The other standard solution to the existence of monopoly is regulation. This is something which the national government may try to introduce as far as it goes. But it is important to notice that the situation here is potentially worse for local people than in the ordinary case of monopoly. There the monopoly is over some service, or sector, and the ensuing disadvantage is typically suffered by consumers. Here the monopoly may cover the entire humanly relevant local environment, a source of food, shelter, and other goods; and also will dominate the local employment scene to the extent of foreclosing other possible industries (while the employment offered by the monopoly may or may not be attractive). The response to monopoly on a group level, where there is no group exit although there is individual exit, can only be voice.

Thus the company cannot consider its acceptability to local people to be exhausted by authorisation from the national government. It must acknowledge its monopoly powers, and other powers, in relation to the local population of the area of operations, powers which the national government conferred but which the local population will wish to be able to engage in order to reduce the arbitrariness of their exercise. This is where the need for popular acceptability on the part of the corporation, and the possibility of active participation by local people, comes in. The company may (and should) feel an obligation to listen to locals in virtue of the powers it exercises, both prerogative and monopoly, over them. And locals will certainly seek to participate vocally in influencing the company's exercise of such powers.

There is a further complication however in the operation of such 'voice'. Companies need to define the locals who are relevant to their operations (for purposes of compensation or general benefit or legitimating voice), and this will almost certainly not coincide with pre-existing political or geographical identity boundaries. If those owed are defined as landowners, for example, then it becomes imperative for as many people as possible to define themselves as landowners. Thus the corporation seeking legitimate partners is always going to be involved in a mutual process of definition of those partners, as locals reorganise themselves to take advantage of corporate offers and intentions. It is the state which would seem to be the legitimate authority in this process. But the contest between state and local power may de-legitimise or marginalise the state's role. And as the corporation will tend to be more immediately responsive than the state, both because of its greater interest in resolving immediate conflicts and often because of its greater institutional capacity to act, there will be an incentive for locals to marginalise the state even further and deal exclusively with the company.

Thus arises the possibility both of Potemkin groups defined by the company, and of Potemkin groups defined by some locals against the interests of others. Moreover, the success of one group of locals in striking a deal with the corporation may either undermine the position of localities elsewhere, or spur emulation, so that the distribution of power and resources among localities will be a function of what they can each get for themselves rather than a national conception of distributive justice. Finally, those adults authorised to receive compensation or benefits may squander them so as to deprive future generations (including their own already living children), as well as dependents (such as wives and widows) of the economic support which they would have derived from the resource for which compensation is being paid. Democratic legitimacy in the isolated kingdom of civil society is difficult to fix and to check.

The best solution to these difficulties lies in the state, where that state is neither too weak nor too perverse to play a constructive role. States can establish legal forums for the expression of popular acceptability, similar to those involved in the planning process for land use in most advanced democracies.\(^{35}\) And they can adjudicate between the groups of locals contending for the ear of the corporation. One way in which the needs and desires of both corporation and people affected by its actions could be addressed, would be by setting up under the aegis of the initial authorising action by the state, a forum for review and discussion of the use of the powers so authorised, with independent representation in addition to that of state and company, and advisory status to both state and company. Such a forum would be

\(^{34}\) Chris Ballard, 'Citizens and Landowners: the Contest over Land and Mineral Resources in Eastern Indonesia and Papua New Guinea', in Denis et al., Mining, pp. 76-81, commenting on p. 78 on the 'pro-active' position which companies can and must take beyond their contractual agreements. See also Alan Stevens (of the Pongura Joint Venture in PNG), 'Social Planning through Business and Infrastructural Development', in Denis et al., Mining and Mineral Resources, pp. 122-128, on the need to go beyond contract and in so doing to attend to all sections of the local community, not just those specified in the contract, at p. 123.

\(^{35}\) The relevance of the planning process to these kinds of concerns was urged on me by both David Howarth and Peter Muchiniskit.
bound by agreed norms for publicity and transparency of the comments and responses made by all parties. This would provide a focus for community concerns and a way of relating them to the national powers of authorisation, while not pretending that all community concerns could have been exhausted in that initial act.

In conclusion, it is important to remember that a single-minded emphasis on the popular acceptability of corporate action has problems and pitfalls, many of which can be mitigated by remembering the companion roles of moral and legal acceptability as well. Considering popular acceptability alone, one sees that a local community may benefit from their assertion of their potentially subverting power, or the company’s or state’s recognition of it; but they, as well as the state and company, may suffer from the subversion of the state’s capability and legitimacy which may entail in turn. Similarly, some locals may be empowered by being included in the groups with which company (or state) are willing to contract or to interact with otherwise, but others may lose out from the process of (re-)constitution of group identity which democratic involvement with the corporation demands. Finally, companies and groups of locals may become locked in mutually self-defeating games of calling others’ bluff, that is in locals are not simply sidelined (or worse) by companies who have decided to draw and hold a line in terms of their contribution to the local community.

Nevertheless, popular acceptability remains an ineradicable dimension of the achievement of genuine moral acceptability on the ground in a specific situation, even if the relevant public is divided. The promotion of human rights in relation to corporate activities, in particular, requires concern for autonomy which can be expressed in part by the acknowledgment of popular acceptability. The challenge is to maintain a healthy tension between legal and popular forms of acceptability, while not sacrificing moral acceptability but remaining sensitive to different interpretations of what morality might demand. Popular forums to monitor the implementation and consequences of legal authorisation agreements, may help to enable both companies and local groups to articulate their understandings of acceptable behaviour and acceptable interaction. In the realpolitik world of power differences between multinational corporations and many local groups in particular, NGOs may play a brokering role in enabling the voices of the latter to be heard, but observers and evaluators of this role should be sensitive to the problems of representativeness and group definition discussed above.

One might think of the powers thus expressed and developed as popular ‘auditorial’ powers in relation to corporations (drawing on the senses both of ‘auditory’ and of ‘auditing’). These would in some cases fall short of the ‘editorial’ powers recently proposed by Philip Pettit in relation to democratic political institutions, which allow citizens the chance to try to ‘edit’ state decisions, in that they would not give specified powers to change corporate behaviour, but only specified and formalised opportunities to be heard either in live or electronic forums. But in other cases, especially where implementation of an authorised agreement was in question, auditorial powers might become truly editorial. The exercise of power, particularly monopoly power, where exit is impossible or difficult, requires the exercise of voice on both sides: on the side of the monopolist, explaining itself and its activities, and on the side of the citizens, interrogating, advising and sometimes demanding. Where the control and equality of the vote are lacking, establishing institutional channels of auditability will at least allow scrutiny by all parties of the voices being heard and the content of what they say. The aim would be for the auditorial powers of citizens (both in home and host countries) to inform the exercise of prerogative and monopoly powers of the corporation and to monitor whether further legal controls or corporate self-modification are needed in order to ensure that the exercise of these powers are popularly acceptable. State, community, and corporation will and should contest the terms and voices to be listened to, and the results of that contest, while imperfect in any given case, will provide the only way of ensuring multiple faces of acceptability for corporate agents and so of respecting, promoting, and helping to ensure the autonomy of at least some of the agents with whom they interact.37

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