

1

Introduction

The relationship between corporations and the public is in crisis. After surveying more than 33,000 people in twenty-eight countries, a recent report found that only 52 per cent of those surveyed indicated that they trust business.¹ The results were worse for individual countries, with only 48 per cent of Americans and only 43 per cent of the British expressing trust in businesses.² The report further found that such trust has been on the decline for a number of years.³

The world's largest investor has proposed a solution to the problem of declining trust. BlackRock founder and chief executive, Larry Fink, wrote to the CEOs of some of the world's largest companies, noting that society is demanding that companies serve a social purpose. According to Fink, firms must deliver both financial performance but also demonstrate how they contribute positively to society.⁴

Fink's message to corporations is not a new one. There has been a gradual recognition of the relationship between corporations and society. In some ways, this is reminiscent of the notion of corporate social responsibility, an amorphous term that lacks a precise definition.⁵ Yet, while the content of and scope of corporate social responsibility has evolved over the last 70 years, today it remains primarily a voluntary endeavour. That is, it is widely thought of as a discretionary business practice of taking into account societal issues.⁶

However, rather than focusing on what is traditionally understood as corporate social responsibility, this book examines the relationship between business corporations and society, or, more broadly, the public. It is based on the fundamental idea that corporations should be working to align their business activities with public

¹ 2018 Edelman Trust Barometer Global Report (2018), available at, <https://cms.edelman.com/sites/default/files/2018-01/2018%20Edelman%20Trust%20Barometer%20Global%20Report.pdf>.

² *Ibid.*, p. 38.

³ *Ibid.*, p. 43.

⁴ A. R. Sorkin, *BlackRock's message: contribute to society, or risk losing our support*, *New York Times* (15 Jan. 2018).

⁵ See, for example, J. Moon, *Corporate Social Responsibility: A Very Short Introduction* (Oxford: Oxford University Press, 2014), p. 5.

⁶ *Ibid.* Defining corporate social responsibility as business practice at the discretion of the corporation.

interests, resulting in corporations bearing duties to the public. *The Oxford English Dictionary*⁷ defines ‘duty’ as ‘a moral or legal obligation; a responsibility’ and it is in this sense that we generally use the term ‘corporate duty’ in this book. We understand duty to encompass binding legal obligations, but also – where the law has failed to outline such obligations or they are not enforced – certain responsibilities in the form of voluntary or discretionary practices.

1.1 COMMON ARGUMENTS FOR A CLOSER RELATIONSHIP BETWEEN CORPORATIONS AND THE PUBLIC

There are four theoretical justifications that support the enactment of corporations’ duties to the public, an issue we explore in greater detail in Chapter 2. However, at this point, we highlight some common arguments supporting this notion. The first argument is that companies must take into account issues relating to the public interest due to the ‘licence’ given by the people to corporations that allows them to engage in business activities.⁸ As the CEO for BlackRock has cautioned, companies that do not take into account public issues ‘will ultimately lose the licence to operate from key stakeholders’.⁹ The idea that the corporation holds a licence from the public is based on social contract theory, first espoused by political philosophers in the context of the relationship between government and the people.¹⁰ In the same way that the government’s role *vis-à-vis* its citizenry is justified by its respect of the terms of the social contract with the people, a corporation’s existence can similarly be justified by its respect of the terms of the social contract; that is, the indirect obligations it has with the people.¹¹ As Henry Ford II has observed:

The terms of the contract between industry and society are changing. . . . Now we are being asked to serve a wider range of human values and to accept an obligation to members of the public with whom we have no commercial transactions.¹²

A second commonly cited reason for the deepening relationship between corporations and the public is the increasing provision by corporations of goods and services

⁷ ‘Oxford Dictionary of English’, third edition (Oxford: Oxford University Press, 2010), p. 548.

⁸ A. Dahlsrud, How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions (2008) 15 *Corp. Soc. Responsible Environmental Management* 1; K. Buhman, Public Regulators and CSR: The ‘Social Licence to Operate’ in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR (2016) 136:4 *Journal of Business Ethics* 699.

⁹ Sorkin, *supra* note 4.

¹⁰ T. Donaldson, *Corporations and Morality* (Upper Saddle River, NJ: Prentice-Hall, 1982), p. 37; T. Donaldson and T. W. Dunfee, Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory (1994) 19:2 *The Academy of Management Review* 252, at 259.

¹¹ Donaldson, *supra* note 9, p. 37.

¹² H. Ford II, *The Human Environment and Business* (New York: Weybright & Talley, 1970), as cited in N. Polunin, What Organizations and Industry Should Do. *The Environmental Future: Proceedings of the First International Conference on Environmental Future, held in Finland from 27 June to 3 July 1971* (Basingstoke: Palgrave MacMillan, 1972), p. 512.

traditionally provided by governments. Provision of healthcare services is one area in which corporations have made significant inroads, for instance, despite states being the traditional purveyors of such services. For example, in the UK, private companies provided £8.7 billion of healthcare services, a number that is destined to grow as the government increases the number of tenders for health services contracts.¹³ Similarly, in the USA, Amazon, Berkshire Hathaway, and JPMorgan have recently announced a joint effort to begin their own employee healthcare program, with the possibility of extending it later to all Americans.¹⁴

Corporations are also becoming important players in the provision of education services. Some are even building their own universities.¹⁵ They have equally undertaken other areas of traditional state governance, including space travel, transportation planning, and water services, among others.¹⁶

Corporate usurpation of public services may be in response to governments failing to provide these goods or services or it may be because governments simply cannot keep up with the rapid pace of technological advances that ‘nimble’ corporations can.¹⁷ As the CEO of Apple has observed, government has become ‘less functional and isn’t working at the speed it once was’, requiring business ‘to step up’.¹⁸ The CEO of BlackRock agrees, noting that government failure to prepare for the future on certain issues means that society is turning to companies to respond to broader societal challenges.¹⁹ It may also be because corporations are more forward thinking or solution-oriented than governments – on issues ranging from climate change to immigration – enabling corporations to fill a void left by governments.²⁰ In fact, in this context, the deepening relationship between corporations and the public may actually be instigated by corporations as they seek to fill holes in areas not covered by the state.

Finally, the importance of the corporate relationship with the public may be framed in terms of providing a fair return to the public. UK Prime Minister Theresa May has observed:

Whether it’s the schools that educate employees, the roads that goods are delivered on, or even the courts that enforce contract law, every successful business is built on a thriving, supportive society.²¹

¹³ G. Plimmer, *Private companies given more chances to win NHS work*, Financial Times (2 Jan. 2017).

¹⁴ N. Wingfield et al., *Amazon, Berkshire Hathaway and JPMorgan team up to try to disrupt health care*, New York Times (30 Jan. 2018).

¹⁵ *Keeping it on the company campus*, The Economist (16 May 2015).

¹⁶ F. Bruni, *Corporations will inherit the Earth*, New York Times (10 Feb. 2018); A. Shiraz Rahaman et al., *Trust, Morality, and the Privatization of Water Services in Developing Countries* (2013) 118:4 *Business and Society Review* 539.

¹⁷ Bruni, *supra* note 15; Sorkin, *supra* note 4.

¹⁸ A. R. Sorkin, *Apple’s Tim Cook barnstorms for ‘Moral Responsibility’*, New York Times (28 Aug. 2017).

¹⁹ Sorkin, *supra* note 4.

²⁰ Bruni, *supra* note 15; Sorkin, *supra* note 17.

²¹ T. May, *Boardroom excesses can no longer be tolerated. The economy has to work for all*, The Guardian (20 Jan. 2018).

In other words, corporations are beneficiaries of public goods and services. As beneficiaries, they are expected to provide benefits to the public. Of course, corporations already provide myriad benefits to the public ranging from employment to provision of goods and services, and so on. However, beyond these benefits there is a further expectation that corporations will endeavour to provide a *fair* return to the public. Commentators have deemed paying an adequate amount in taxes,²² not harming the operating environment, and abiding by the ‘same rules’ as individuals all as examples of such fairness.²³ The idea of a fair return is thus premised mainly on corporations ‘giving back’ to society as well as not abusing their positions at the expense of the public.

In many ways, the common arguments suggesting a need for a closer relationship between corporations and the public are a rejection of the long-standing view of the corporation as exclusively a vehicle for maximizing shareholder wealth.²⁴ Today, labelling corporations as mere vehicles for the pursuit of private transactions is incomplete, at best, and misleading at worst. Corporations are better described as monolithic entities, responsible for the provision of a multitude of goods and services that we see as essential in our lives. This book, for instance, is being written on a Dell computer, using Microsoft programming, linked to Virgin Broadband, on an IKEA desk, and powered by EDF energy. With such an enormous presence in everyday life, it is apparent that the contours of the relationship between corporations and the public, and how it is, or should be, governed by the law, should be explored in more depth. This is the aim of this book.

1.2 THE STRUCTURE OF THE BOOK

The central thesis of this book is that corporations bear a duty to the public. Duty, as we described before, encompasses both legal and non-legal obligations. By the ‘public’, we mean the people as a whole. Moreover, our focus is generally on third parties unconnected to the corporation; that is, we do not specifically focus on employees, shareholders, and other connected parties.

Although we focus on the people as a whole, we recognize that people in different parts of the world have different issues. Accordingly, we have attempted to discuss public issues that are relevant regardless of whether an individual lives in Brighton, Baltimore, or Bangalore. Yet, because of their influence, and due to space limitations, we focus primarily on UK and US laws and policies, although we frequently refer to jurisdictions beyond those two where countries offer notable solutions or otherwise enhance our understanding of specific issues. We have further

²² P. Foster Back, *Avoiding tax may be legal, but can it ever be ethical?*, The Guardian (23 Apr. 2013) (arguing business should ensure that corporate tax contributions are a demonstrably fair return to society).

²³ May, *supra* note 20.

²⁴ See Chapter 3 of this book for a more thorough development of this argument.

endeavoured to include relevant international, regional and/or transnational laws and initiatives to reflect the growing cross-boundary movement of corporations. Finally, our discussion focuses primarily on large, multinational corporations, rather than small-and-medium-sized enterprises or other types of business entities, as these are the business entities with the maximum reach into the public sphere.

The book is divided into individual chapters that examine some of the most pressing areas in which the issue of corporations' public duties arises. These areas are corporate law – which encompasses corporate governance and parent company liability – tort law, criminal law, human rights law, environmental law, corruption, and tax law.²⁵ Following this introduction, the book begins with an in-depth examination of the concept of corporate duties to the public in Chapter 2. There, we outline the evolution of corporate duties to the public from medieval times to the present before examining recent developments in this area. We find that corporations' responsibility for public issues is long standing and, despite a move away from public issues to an increased focus on private welfare for a period of time, recent developments suggest that the relationship between corporations and the public is becoming more pronounced once again. In the second part of the chapter, we discuss the justifications for imposing public duties on corporations. These include the power of corporations, their role as rule makers, their increasing invocation of international arbitration practices, and their ability to commit large-scale negative externalities.

Having explored the trajectory of corporations' relationship with the public and the reasons justifying the imposition of public duties on corporations, we then explore specific examples of public issues with which corporations must grapple. We begin, in Chapter 3, by discussing the purpose of corporations, which provides the framework through which we define the corporate relationship with the public. We outline the predominant view of corporations as vehicles by which shareholder wealth can be maximized before turning to examine alternative models for defining the corporate purpose. This part concludes with a suggestion for a re-calibrated, broader corporate purpose.

In Chapters 4 and 5, we look at specific instances of corporate law's interactions with public issues. Chapter 4 begins by exploring the connections between instruments of corporate governance and public issues. Drawing from three specific examples, we examine the use of corporate governance measures to address public interests, looking at whether their role is justified or whether other regulatory avenues are better suited to fit this purpose. We find that while it may be appropriate for corporate governance mechanisms to include public goals, there is currently an over-reliance on disclosure requirements and on indirect regulation in this field. Thus, we suggest that corporate governance mechanisms with public policy goals

²⁵ In fact, corporate duties may involve other areas as well, such as competition law, but these were considered beyond the scope of the book.

should be seen as complementary strategies, not as substitutes, to direct external regulation.

In Chapter 5, we explore a second instance of the interactions between corporate law and public issues by examining the judicial recognition of direct liability for parent companies for acts committed by their subsidiaries or other group members. Long-standing corporate law principles would normally not allow holding a parent company liable for acts of other members of its groups, which means, in particular, that third party tort victims have limited recourse if they are harmed by a subsidiary's activities. However, developments in this area indicate that courts in several jurisdictions are moving to impose direct liability on parent companies for tort and human rights violations. This suggests a conflation of corporate law and public interest issues. We assess this developing trend and ultimately propose a broader model of group company liability.

Following the previous chapter's discussion, which began the foray into tort law, Chapter 6 takes a more specific look at tort law and its application to corporations *vis-à-vis* the public. Surprisingly, we find that the precise mechanics of attribution of tortious liability to legal entities are not as clear as it might be assumed. Following a look at justifications for corporate tortious liability, the chapter then focuses on how corporations are and should be held liable for tort violations that affect the public. The discussion also examines initiatives to develop alternative means of liability attribution, and an exploration of the merits of enterprise liability and other strict forms of corporate responsibility for torts.

Having explored how to hold corporations civilly liable, Chapter 7 focuses on corporations' criminal liability. This chapter assesses the merits of corporate criminal responsibility, discusses current mechanisms by which criminal liability is attributed to corporate entities, and outlines a broader model for imposing corporate criminal liability than today's predominant – and often very limited – approach. Furthermore, it examines contemporary accounts that challenge or defend corporate criminal liability and determines the proper balance that should be accorded between corporate and individual criminal liability. The chapter concludes by exploring different options for structuring corporate criminal liability, tying it back to our earlier-explored proposed model.

Chapter 8 is dedicated to the role of corporations in the human rights context. It examines the trajectory of the global corporations and human rights movement throughout history and the difficulties with establishing human rights duties for corporations at the international level. It then moves to look at contemporary developments in the area, which primarily focus on establishing (voluntary) responsibilities rather than legal human rights-related obligations for corporations. Given the preponderance of voluntary responsibilities, the chapter identifies the weaknesses of this approach and argues in favour of mandatory corporate human rights duties that should operate even if the law does not prescribe them. It concludes that both economic and non-economic arguments support the enactment of such a duty.

In Chapter 9, we look at corporate responsibility for the environment. We begin by examining the justifications for imposing such responsibilities on corporations, finding that they should be shaped by the interminable nature of both corporations and the environment, which demands that both of their continued existences should be maintained. We then look at current mechanisms that define corporate environmental responsibility. First, we explore both voluntary and non-voluntary initiatives in this area as well as influences from human rights law at the international level. We then move to domestic initiatives, including corporate environmental litigation. Finally, by drawing from the international and domestic efforts to delineate corporate responsibilities for the environment, we identify the established standards corporations should adhere to and propose methods by which corporate environmental responsibility can be better established in both law and practice.

In Chapter 10, we discuss the problems associated with corporations engaging in corruption. This chapter begins by defining what is meant by corruption before examining the reasons why corporations should combat it. It then moves to discuss the rules and regulations outlawing corporate corruption practices, looking at both mandatory as well as voluntary initiatives. It concludes by exploring the shortcomings of the existing rules and regulations before proposing mechanisms by which corporations can better address issues of corruption.

The penultimate chapter, Chapter 11, tackles the thorny issues relating to tax law. It begins with a discussion of the justifications for taxing corporations, rather than individuals. It then addresses the mechanics and effects of a common corporate strategy known as ‘aggressive tax planning’ as well as national and international initiatives on tackling aggressive tax planning and similar issues. The third part of the chapter moves to define the parameters of corporate duties in tax matters. We ultimately find that under the existing framework corporations do not have a legal duty to refrain from aggressive tax planning, although we conclude that they have a non-legal responsibility to do so. This part finishes by discussing how multi-national regulatory frameworks can seek to extend this responsibility.

Finally, Chapter 12 – the conclusion – ties together the various themes explored in the book. It also provides lessons we have learned from our explorations into the individual topics that can globally inform the quest to better shape the corporate–public relationship.

2

Background

The corporate duties discussed in this book are best understood against the background of the long-standing relationship between corporations and the public. In this chapter, we unpack that relationship, first, by looking at historical aspects of the societal role of corporations, moving from the origins of business entities to recent developments. This is followed by a more nuanced examination of four specific reasons that justify the imposition of public duties – or the strengthening of such duties – on corporations.

2.1 BRIEF HISTORY OF THE CORPORATION AND ITS RELATIONSHIP WITH THE PUBLIC

In this section, we take a historical look at the relationship between corporations and the public. Our discussion begins with medieval guilds, moves to trading companies and vehicles requiring charters, and ultimately concludes with the corporate entities we are most familiar with today. The section highlights the origins of corporations as public or quasi-public institutions and the subsequent transformation to the focus on private profit generation. It ends with a look at contemporary developments that re-emphasize the connection between corporations and the public.

2.1.1 *Public Functions of Early Corporations and Precursors*

During early medieval times, the first prominent corporate bodies emerged. These bodies had distinctly public functions. They were institutions founded to support religion and learning – for example, the Roman Catholic Church and European universities – as well as towns and guilds of merchants and tradesmen.¹ Medieval guilds, with their principles of exclusion and hierarchy can already be seen as

¹ See M. Aoki, *Corporations in Evolving Diversity: Cognition, Governance and Institutions* (Oxford: Oxford University Press, 2010), pp. 3–7.

precursors of contemporary forms of *business* corporations.² In addition to the core function of organizing and advancing the interests of their members, guilds assumed useful public roles and made financial contributions to the sovereign, which were seen to justify the special privileges they were given by the state.³ For instance, various guilds in London helped maintain public order and played a role in governing the city.⁴ It was also guilds in England, and later Britain (and other European monarchies), that led to the formation of trading companies – royally chartered associations of merchants who were granted monopolies of trade with specific foreign markets – that rose to prominence particularly in the sixteenth to eighteenth centuries.⁵ Similar to the guilds, these bodies were given special privileges based on their valuable contributions to the state, including in the form of substantial financial assistance, governmental administration, and military protection of overseas territories. In many ways trading companies constituted a symbiosis of state and private interests, representing an extension of governmental power bolstered through the means of private capital and initiative.⁶

A key difference between guilds and trading companies was that the latter engaged in the pooling of capital in order to finance bigger, more costly ventures that had the potential to boost financial benefits to investors.⁷ The reliance on pooled capital evolved from funding that was raised from fewer investors and used for specific overseas voyages (these less sophisticated precursors of the full-fledged trading company can be referred to as ‘regulated companies’)⁸ to the issuance of permanent stock to investors.⁹ This method of financing, which became the norm by 1650, meant that the stockholders benefitted from profits, but, given the absence of limited liability at this time, were normally also fully exposed to their companies’ liabilities. Although trading companies pursued private aims – returning profits to their investors – they also had features that implied public functions, including armies, police forces, a system for conducting criminal trials, and jails.¹⁰ The British

² The concept of public or municipal corporations also developed from these early precursors but their treatment is beyond the scope of this book. On guilds, see T. Nace, *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy* (San Francisco: Berrett-Koehler Publishers, 2003), pp. 19–23; J. Micklethwait and A. Wooldridge, *The Company: A Short History of a Revolutionary Idea* (New York: Modern Library Chronicles, 2005), p. 13 (stating that ‘[f]or much of the Middle Ages, guilds were the most important form of business organization’). On earlier forms of commercial organizations, see Micklethwait and Wooldridge, pp. 3–14, who describe partnership-like structures used by Sumerian families in Mesopotamia in 3,000 BC, and J. Barron Baskin and P. J. Miranti, *A History of Corporate Finance* (Cambridge: Cambridge University Press, 1997), pp. 29–54.

³ Barron Baskin and Miranti, *supra* note 2, p. 59.

⁴ Nace, *supra* note 2, p. 21.

⁵ *Ibid.*, pp. 19–23.

⁶ See Barron Baskin and Miranti, *supra* note 2, pp. 59–63.

⁷ Nace, *supra* note 2, p. 22.

⁸ See P. Lawson, *The East India Company: A History* (Abingdon: Routledge, 1993), pp. 20–21; Barron Baskin and Miranti, *supra* note 2, pp. 58–59.

⁹ Nace, *supra* note 2, p. 24.

¹⁰ *Ibid.*, pp. 24–25.

East India Company, in particular, was immensely important for and in various ways intertwined with the state. Among others, a third of Parliament owned its shares, it provided payments to members of Parliament and the King to protect its continued existence against attacks by rivals, and a tax on its tea at one point constituted 10 per cent of the government's revenue.¹¹

By the middle of the eighteenth century, however, the large British trading companies had collapsed and there was widespread hostility towards the concept of monopolistic trade companies, which also led to negative views on incorporated entities as vehicles for conducting business.¹² The Industrial Revolution that began around this time was thus not driven by the dominant players of the past but, instead, family enterprises, partnerships, and unincorporated joint stock companies.¹³ The reference to the latter category of businesses requires some clarification. Until the end of the eighteenth century, the term 'company' did not necessarily signify that a business was *incorporated*. Both incorporated companies and *unincorporated associations*, which were also called companies, co-existed. The main difference between these two types of companies lay in the act of formation. Incorporated companies were formed through grant of a charter (by the crown and later by an Act of Parliament, in some cases also by way of statute), while unincorporated companies were formed through informal understandings between the members.¹⁴

Importantly, incorporated companies' charters implied certain public responsibilities or at least an association with the public good on the part of these entities, with early canal building schemes, the construction of railroad lines, and other infrastructure related ventures being prime examples.¹⁵ Business companies, at this stage, were still closely connected to the state and the difference between private and public companies crystalized only later.¹⁶ Additionally, some unincorporated companies were also used to carry out societal functions. Initially, this earned them a more lenient judicial approach towards enforcement of the Bubble Act 1720,¹⁷ which, until its repeal in 1825, prohibited the sale of freely transferable shares by companies operating without charters. The Act eventually still ended the near similar treatment

¹¹ *Ibid.*, pp. 25–28.

¹² See R. Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720–1844* (Cambridge: Cambridge University Press, 2004), pp. 203–07. Critics of monopolistic merchant companies included Adam Smith, who believed that although they may have initially been useful, they 'have in the long run proved, universally, either burdensome or useless, and have either mismanaged or confined the trade'. A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol. II (London: Macmillan and Co., 1869), pp. 316–17.

¹³ Nace, *supra* note 2.

¹⁴ L. Talbot, *Progressive Corporate Law for the 21st Century* (Abingdon: Routledge, 2013), p. 4.

¹⁵ Barron Baskin and Miranti, *supra* note 2, pp. 132–34, emphasizing the quasi-public nature of these ventures; see also Harris, *supra* note 12, pp. 216–24; Talbot, *supra* note 14, p. 7; P. Ireland et al., 'The Conceptual Foundations of Modern Company Law' (1987) 14:1 *Journal of Law and Society* 149.

¹⁶ Barron Baskin and Miranti, *supra* note 2, p. 132; Harris, *supra* note 12, pp. 112–14.

¹⁷ Talbot, *supra* note 14, p. 14.