



Hobbes on authority, representation and the corporation

Dr Samuel Mansell

School of Management, University of St Andrews

Criticisms of shareholder primacy

- Shareholder primacy, it is claimed, is legally mistaken:
 - Shareholders own *shares* rather than corporate assets.
 - The corporation is an independent legal person ‘external’ to the shareholders.
 - Directors’ duties are to the *corporation* and not to shareholders.
 - ‘Asset lock-in’: shareholders’ investments are corporate property.
 - ‘Entity shielding’: shareholders’ creditors cannot claim against corporate assets.
 - The corporation is its own residual claimant.
- (Ireland, 1999, 2003; Phillips, 2003; Stout, 2002, 2012; Ciepley, 2013; Robé, 2011, 2012; Deakin, 2012; Veldman and Parker, 2012)
- If the corporation is legally separate from its shareholders and other stakeholders, what entitles any of the latter to a claim on its purpose?

Directors' authority

- Authorisation of the board to represent the corporation, to pursue its purpose and act in its name
- Understood as a *transfer of right* (directors are not self-authorizing)
- Transfer from whom? If the corporation cannot represent itself, some 'natural' person(s) must authorise a representative to speak in its name.
- For discharging their duty to serve the corporation's purpose, to whom should directors be accountable?

Sources of authority

- Shareholders (Friedman, 1970; Sternberg, 2004; Mansell, 2013)
- Employees (McMahon, 1994)
- Government/law/the state (Ciepley, 2013; Claassen, 2021)
- Civil society (Scherer and Palazzo, 2007)
- A social contract of stakeholders (Freeman, 1994; Sacconi, 2006)
- How do any of these groups authorize directors to act in the *corporation's* interests?

Hobbes on incorporation

- Explores the conceptual relationship between representation, authorization and the corporation
- Hobbes distinguishes ‘independent’ civil persons (states) from ‘subordinate’ civil persons (corporations)
- Distinguishing feature of a civil person is *union*: the wills of many persons included in the will of one person.
 - The representative person can be an assembly of individuals acting together.
- By forming this *union*, the aggregate of individuals represented by a single will becomes artificially *one person*.
 - How is the corporate representative appointed?

Hobbes on personhood, authority and representation

- Authority = a right of doing any act.
 - The representative is *authorised* individually by each member of the body politic.
- The representative bears or ‘presents’ the person of the group: everyone is *author* of all that he does in their name.
- *Many* authors are made *one person* through the unity of the representative. The body corporate is formed through the act of electing a representative.
- In a ‘company of merchants’, the representative is an ‘assembly of all the members’.
 - The state ‘binds’ or ‘limits’ the representative’s power.

Incorporation in modern company law

- UK Companies Act 2006 (Section 16): *Effect of registration* - ‘The subscribers to the memorandum, together with such other persons as may from time to time become members of the company, are a **body corporate** by the name stated in the certificate of incorporation.’
- Delaware Code (Title 8, Section 106): *Commencement of corporate existence* – ‘Upon the filing with the Secretary of State of the certificate of incorporation... the incorporator or incorporators who signed the certificate, and such incorporators or incorporators' successors and assigns, shall, from the date of such filing, be and constitute a **body corporate**, by the name set forth in the certificate...’

Implications for member responsibility

- Hobbes defines an ‘author’ as one who owns the actions of his representative.
 - Authors (members) have a duty to ‘own up’ and ‘take responsibility’ for their representative’s actions (Skinner, 2002)
 - The corporation can only act through its representative so cannot have this responsibility
- Members individually cannot hold their representative assembly accountable, but can *participate* in its decision-making to hold directors to account.
- Assemblies, unlike the corporations they represent, are *active* persons whose will is expressed by majority voting.
 - Assemblies can therefore take positive moral action on the corporation’s behalf.