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The UN Global Compact: The Challenge and the Promise

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Abstract: The UN Global Compact is a voluntary initiative designed to help fashion a more humane world by enlisting business to follow ten principles concerning human rights, labor, the environment, and corruption. The six-year-old Compact is a relatively successful initiative, having signed up over two thousand companies and more than two hundred of the large multinationals, and having begun some important projects on globalization issues especially helpful to developing countries. While the Compact offers an outstanding moral vision for businesses interested in meeting the legitimate expectations of society, there is concern centering around accountability issues. The accountability issues are in four major areas: 1. Accountability showing that the globalization of the economy actually helps the poor.

2. Accountability showing the corporate performance matches rhetoric.
3. Accountability that provides legitimacy to a two-tier pricing system and other measures that are designed to assist the poor in developing countries.
4. Accountability in the human rights area; what societal expectations are multinational companies accountable for? The article outlines the problems that the Compact brings to the fore and offers some insight from the ethical literature that may address company concerns or provide new ways of thinking about the issues. It further argues that the forum provided by the Compact may be the most effective means to gain consensus of the role of business in society.

The United Nations Global Compact is a new initiative intended to increase and to diffuse the benefits of global economic development through voluntary corporate policies and actions. Kofi Annan, secretary-general of the United Nations, addressing the Davos World Economic Forum in January 1999, challenged business leaders to join a "global compact of shared values and principles" and to provide globalization a human face. Annan argued that shared values provide a stable environment for a world market and that without

these explicit values business could expect backlashes , from protectionism, populism, fanaticism and terrorism.[1] Following the 1999 Davos meeting, Annan and a group of business leaders formulated nine principles, which have come to be known as the UN Global Compact. After lengthy consultation, a tenth principle against corruption was added in June 2004.

The ten principles of the Global Compact focus on human rights, labor rights, concern for the environment and corruption and are taken directly from commitments made by governments at the UN: the Universal Declaration of Human Rights (1948); the Rio Declaration on Environment and Development (1992); the International Labor Organization's Fundamental Principles and Rights at Work (1998); and the UN Convention Against Corruption (2003). The principles are:

Human Rights

Principle 1

Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence; and

Principle 2

make sure that they are not complicit in human rights abuses.

Labor

Principle 3

Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4

the elimination of all forms of forced and compulsory labor;

Principle 5

the effective abolition of child labor; and

Principle 6

elimination of discrimination in respect of employment and occupation.

Environment

Principle 7

Businesses should support a precautionary approach to environmental challenges;

Principle 8
undertake initiatives to promote greater environmental responsibility, and
Principle 9
encourage the development and diffusion of environmentally friendly technologies.

Corruption
Principle 10
Business should work against corruption in all its forms, including extortion and bribery.

The Global Compact was designed as a voluntary initiative. A company subscribing to the Principles is invited to make a clear statement of support and must include some reference in its annual report or other public documents on the progress it is making on internalizing the Principles within its operations. The company must also submit a brief description of this report to the Global Compact website. Failure to submit such a description within two years of becoming a signatory to the Compact (and subsequently every two years) will result in being removed from the list of participants. The intention is that, through leading by the power of good example, member companies will set a high moral tone operating throughout the world. The overall thrust of the Global Compact is to accent the moral purpose of business and is summarized well by Kofi Annan in a quote that appears in the promotional brochure:

> Let us choose to unite the power of markets with the authority of universal ideals. Let us choose to reconcile the creative forces of private entrepreneurship with the needs of the disadvantaged and the requirements of future generations.[2]

The Global Compact has particular relevance for Africa. Consider the world poverty situation where there are some grounds to celebrate. For example, according to the World Bank, extreme poverty in East Asia was reduced in the period from 1981 to 2001 from 58 percent to 15 percent; and in South Asia from 52 percent to 31 percent. Those same World Bank estimates, however, paint a much more somber picture of Africa; in the last twenty years, extreme poverty, which is defined as living on an income of less that $1 a day, has actually increased for 100 million people in Africa. 300 million people, almost half of Africa's

population, live in extreme poverty and are without adequate food, shelter, medical care, education, and such simple things as safe drinking water and proper sanitation.

One dimension of the Global Compact is to develop local networks, that is, groups of companies, NGOs and other key actors, in a region, a country or industrial sector. Through such networks—and there were over forty of them in operation in late 2004—multinational companies and organizations involved in the Global Compact at the international level have the opportunity to engage and to discuss issues at the regional level. Having agreed to be guided by the ten principles, the companies have an opportunity to explore what these principles might mean in a specific context. For example, the local network in South Africa is planning projects on black economic empowerment and HIV/AIDS, crucial issues for that region.

While there has been a good reception to the Compact, with over 2,000 companies signing throughout the world and some of the most influential companies from Europe joining, the majority of businesses in the world have not signed on.[3] In fact, only six of the major U.S. companies joined as of June 2004. Still, there are already some important signs of progress on the global level with the Compact. Two significant case studies have been produced, one on Novartis which shows how the company integrated the principles into its strategic planning process and another on Samarco's oil recycling program to reduce environmental damage from the fishing industry. Several global meetings have been held, one on Conflict Risk Assessment and Risk Management, and another on HIV/AIDS in the workplace. An important policy paper on Transparency has resulted from meetings as well as initiatives to increase sustainable business development in Least Developed Countries. Over 100 examples of good corporate practice are discussed on the Compact website as well as all the projects indicated above.

ACCOUNTABILITY: THE CRUCIAL ISSUE

Where there is reluctance to join the Compact, it often centers on the accountability issue. In an environment of increasing scepticism, without a traditional accountability structure or monitoring as part of the Global Compact, its legitimacy will be in question. There are two categories of critics and both need to be addressed. Some scholars who have contributed important research on codes of conduct see the Compact as another code without accountability, a

public relations document without substance. How does one know that a business that claims to be following the principles of the Global Compact is actually doing so? Code scholars argue that an independent group of monitors with quantifiable and objective measures that translate general principles into operating standards is the way to assure that companies are accountable. Without this objectivity, precision and transparency, these "code critics" will find little that is helpful in the Compact. Prakash Sethi, perhaps the code scholar most critical of the Compact, makes these points as well. As discussed below (cf. Accountability and Code Scholars), I argue that such critics assume that the Compact is something that it is not, a code, and that they miss the role envisioned for the Compact by Kofi Annan.

More fundamental criticism comes from NGOs and others critical of the globalization of the economy. They view the Compact as a cover story, giving legitimacy to an idea which has yet to prove itself. This group argues for a mandatory legal framework as the only way to guarantee that companies are accountable to the least advantaged in the global economy. Given this environment, many businesses ask whether signing the Compact will be more trouble than its worth. Further, should a comprehensive accountability structure be developed, will the loss of discretionary power, time and resources-what economists call transaction costs-be prohibitive?

An additional difficulty with the accountability issue, underscored by both schools of critics, is the elusive nature of the Global Compact's principles on human rights. Can we develop a consensus that captures the legitimate expectations of society in this area? While the companies are in broad agreement with the human rights principles of the Global Compact, there is some apprehension that joining the Compact could lead to societal expectations that companies routinely have the obligation of correcting rights abuses. Where and how do we draw the line on obligations of business in the area of human rights? While at least some leading multinational companies understand that they must become proactive and meet societal expectations in a global economy, there is also a growing awareness that these expectations in the area of human rights are often unclear. In the litigious environment of the U.S., companies have been reluctant to sign the Compact without a clear idea of their responsibility and accountability. What follows is a clarification of the accountability issue drawing on literature in the business ethics field which may encourage companies to rethink their reluctance to join the Compact.

Before proceeding, however, it is interesting to note some of the reasons the European companies have not shared, for the most part, in the U.S. reluctance to join the Compact. To have a sense of the problem here, in 2004, one hundred and ninety-two of the "Fortune Global 500" (which is the top five hundred corporations in the world in terms of revenues) are U.S. companies and only six (3.1 percent) have joined the Global Compact. One hundred and sixty-three of these companies are based in Europe and of these, sixty-four (40 percent) have joined the Compact. According to Georg Kell, the Executive Director of the UN Global Compact, European companies have not been deterred from joining either because their government regulatory environment has already mandated the substance of the Global Compact, or because they operate in a less litigious and adversarial context. A 2004 assessment of the impact of the Global Compact by McKinsey and Company, in addition to the point on fear of litigation, also cited two other concerns of U.S. companies: the implications of labor rights of the Compact; and the value of associating with a UN endeavor. European signatories are not overly concerned that corporate critics will use the Compact as a weapon in a struggle. This observation is similar to that of a study of various country codes of conduct employed during the apartheid era in South Africa where it was found that there was much less pressure on companies from NGOs and others for accountability in Europe than in the U.S. This was the case even when European companies were doing much less in the way of monitoring and verifying their attempts to dismantle apartheid than their U.S. counterparts who were participating in the Sullivan Principles and its accountability structure.[4]

ACCOUNTABILITY AND THE GLOBALIZATION CRITICS

An important group of critics do not believe that economic globalization, as it is presently conceived, will ever bring authentic development to the poor, even if the principles of the Compact were implemented. Accountability for this sort of critic would involve carefully assessing whether the poor and developing nations are indeed better off with economic globalization. They are angry that Kofi Annan with his Global Compact and its voluntary nature has assumed the answer. In the final analysis, this school of thought sees the only answer to the plight of the poor as a radical change, "a binding legal framework for the transnational behavior of business in the human rights, environmental and labor realms."[5]

A July 20, 2000, letter from prominent scholars and NGO leaders to UN Secretary General Kofi Annan summarizes this objection.

> We recognize that corporate-driven globalization has significant support among governments and business. However, that support is far from universal. Your support for this ideology, as official UN policy, has the effect of delegitimizing the work and aspirations of those sectors that believe that an unregulated market is incompatible with equity and environmental sustainability.. . . Many do not agree with the assumption of the Global Compact that globalization in its current form can be made sustainable and equitable, even if accompanied by the implementation of standards for human rights, labor, and the environment.... We are well aware that many corporations would like nothing better than to wrap themselves in the flag of the United Nations in order to "bluewash" their public image, while at the same time avoiding significant changes to their behavior... Without monitoring, the public will be no better able to assess the behavior, as opposed to the rhetoric, of corporations.[6]

It is well beyond the bounds of this study to make some final judgment on the merits of the contemporary practice of economic globalization, but I do submit that there is a convergence in the vision of the globalization critics and the Compact. Both are trying to retrieve the notion that there is a moral purpose of business and not only in wealth creation but also in its distribution.

Perhaps the moral philosopher who has developed the intellectual underpinnings for the most demanding vision of the moral purpose of business is Alasdair MacIntyre.[7] Will the higher standards of living, if they ever come to poor countries, in fact, lead to a better quality of life? MacIntyre, in the face of a globalized economy he characterizes as marked by individualism and acquisitiveness, opts for an economic community where the virtues of character essential for the good life can flourish. He uses the example of two fishing communities, one characterized by a single-minded quest for profits and the other by a wider range of objectives including sustainability, community preservation, and promoting excellence in the task of fishing.[8] It is helpful to focus on the convergence in the views of MacIntyre and Annan in that both are trying to retrieve the notion of the moral purpose of business.

One way to view the Compact is as an attempt to revive the moral underpinnings of the economy that were assumed by Adam Smith. While many would characterize the world view of MacIntyre's first fishing village as that of

Adam Smith (1723-1790), I join those who have another interpretation.[9] In *The Wealth ofNations*, Smith sought to understand why some nations were wealthier than others. Part of his answer was that nations that encouraged free competitive markets were wealthier. In a curious kind of way, in the context of the economy, *when each person pursues his or her self-interest the common good is enhanced* and all are wealthier. Given competition, the baker bakes the very best bread possible and sells it at the lowest price feasible so that he will have the resources to buy what he wants. Although motivated by self-interest, the result is that the community has good bread at a reasonable cost. Thus Smith showed how economic self-interest was beneficial for the community.

In my view, however, the crucial point in Smith's analysis is his assumption in *An Inquiry* that is quite explicit in his *The Theory of Moral Sentiments:* The "self-interest" of business people would be shaped by moral forces in the community so that self-interest would not always degenerate into greed and selfishness. Wealth creation enabled and sustained a humane community when it was practiced by virtuous people.

The Compact is not going to shape global business to be like MacIntyre's ideal fishing community any time soon. My argument is that Smith assumed that an acquisitive economy existed in the context of a moral community that would ensure that single-minded focus on making money would not perdure. Yet it is precisely this challenge of fostering the growth of humane values in the *global* society, a challenge heretofore managed by nation states for their own domestic situation, that marks the unique mission of the Global Compact.[10] The argument made by Global Compact officials is that unless the moral purpose of business is retrieved, economic globalization is doomed to failure.

> It is precisely because a backlash to globalization would represent a historically unmatched threat to economic prosperity and peace that the Global Compact urges international business leaders to take reasonable steps to secure the emerging values of global civil society in exchange for a commitment on the part of the United Nations to market openness.[11]

Globalization critics see little value in the Compact unless "the emerging values of global civil society" are somehow mandated by a world-wide legal framework. The Compact, seeing little prospect for world-wide legal statutes, advances a vision of the moral purpose of business that relies on transparency and the interest companies have in maintaining their good reputation as the ultimate sanction.

There is a growing awareness by multinational companies that global business is only possible in a world where basic ethical principles are assumed. Some evidence for this moral sensitivity of multinational companies is seen in the formation of the Caux Principles, a set of moral ideals not too unlike the Compact subscribed to by a number of prominent global companies. Founded in 1986, the Caux Principles do not have the visibility, global reach and convening power with many stakeholders that accrue under the umbrella of the United Nations, but they do represent a significant attempt by companies to accent the moral purpose of business.[12] Largely because of the UN sponsorship, I argue that the Compact has the potential to be a more effective vehicle than Caux has been.

The moral context assumed by Adam Smith in his *Wealth of Nations* and made more explicit in The *Theory of Moral Sentiments* is retrieved with the notion of a Global Compact. Without the values embedded in the Compact, for example, trust, fairness, integrity and respect for people, global capitalism would neither be effective nor considered legitimate for long. In my view, Smith offers two sorts of justification for doing the right thing. In the *Wealth of Nations*, a utilitarian moral logic is the primary justification, whereas in *Moral Sentiments*, one does the right thing because it is the right thing to do. Both of these types of justifications are assumed by the Compact. Principles concerning the environment and safety in the workplace, for example, are justified by the first sort, while the Principles concerning human rights are largely matters justified by the second type. The Compact brings to the fore that business has a moral purpose and this is highlighted by the quote from Kofi Annan cited above where he refers to business's role concerning "the needs of the disadvantaged and the requirements of future generations."

To be sure, the Global Compact of today is a far cry from a force that might shape significant changes in the moral values of the global community. Yet one has to start somewhere and the authors of the Compact envision it as an incremental process of learning and improvement, rooted in local networks sharing the same universal values, that is now only at the starting gate. Not too unlike the Reverend Leon Sullivan's famous Sullivan Principles, the initial programs are only the seeds of the many flowers to bloom in the future.[13] One key difference of the Global Compact from the Sullivan Principles is that the moral leadership for moving the process along will not come from one charismatic leader (Sullivan) but rather from a coalition of major firms, NGOs

and other members of civil society under the leadership of the UN Secretary-General which sees the value of the moral purpose of business.

Of course, one premise of the Compact is that there will always be NGOs, activists, social investors and others who will be on the scene to pressure firms and the Global Compact to be better corporate citizens.[14] There is a growing realization that non-governmental organizations (NGOs) or organizations of civil society play an important role in such a dialogue, for their focus is properly the common good—the culture of civility, health , environmental protection, and so on. This is certainly not to say that NGOs are always above reproach for they too need 'accountability structures. In economic terms, NGOs focus on overcoming the negative externalities of business. Already major NGOs, including Amnesty International, Oxfam, Human Rights Watch, World Conservation Union, World Wildlife Fund, and Transparency International have joined and are participating in the deliberations of the Compact. The International Confederation of Free Trade Unions, Business Associations, and Academic and Public Policy Institutions have joined as well.

Thus while I understand that globalization critics, such as those who signed the letter cited above (cf. endnotes 5 and 6), ultimately believe that some sort of international law is the only way to hold firms accountable for their moral purpose, I have argued that, in this far from perfect world, a very good vehicle to retrieve the moral purpose of business is the Global Compact. For their part, multinational companies should view Compact deliberations with NGOs and others as potentially a significant contribution to the shaping of societal expectations for business. For this reason alone they should join the Compact.

ACCOUNTABILITY AND CODE SCHOLARS

The great majority of scholars and activists in business related fields who have studied codes of conduct argue for accountability structures primarily to engender trust in an increasingly sceptical public. In an exhaustive study of what could be learned from the Sullivan Principles in South Africa for global codes today, one key finding was that "an independent oversight monitoring function is an absolute necessity."[15] This lack of an independent monitoring provision is the most significant criticism of the Compact. Given the current structure of the Compact, it is quite possible for a company with a poor record in labor or the environment to highlight another area of corporate citizenship in

its annual report where its record is superlative. The general public will only have the knowledge about a company that the company chooses to report. Granted the Global Compact's network structure is designed to enhance corporate learning through "best practices" and other measures, critics continue to call for some performance standards and verification procedures. Prakash Sethi writes: "The Global Compact ... provides a venue for opportunistic companies to make grandiose statements of corporate citizenship without worrying about being called to account for their actions."[16] Compact officials respond that this criticism misses the point. "The Global Compact is not designed as a code of conduct. Rather it is a means to serve as a (frame) of reference to stimulate best practices and to bring about convergence around universally shared values."[17] At this stage, the goal is to gain consensus on the moral purpose of business and to include the substance of the principles as a part of business strategy and operations. Since companies will include a discussion of their Compact-related activities in their annual reports, the power of public transparency and the watchdog role of the media and NGOs serves as an accountability structure. What Compact advocates have in mind is that when actual business practice falls short of ethical standards, public criticism is a good corrective. For example, Lynn Sharp Paine, in an insightful study of the merging of social and financial imperatives, discusses how Royal Dutch/Shell made a major change in policy and practice after strident criticism of its activities in Nigeria.[18] Although Shell has had serious problems in 2004 with top management overstating oil reserves, the company is still considered by many to be a leader in promoting and protecting the rights of workers and communities. Yet even with this role of the press and activist groups, while the Compact is a noble endeavor, unless the participating companies are involved in some sort of independent monitoring and verification system, corporate critics (even those in the moderate camp) may never acknowledge its legitimacy.

Some critics point out that the Compact may be the victim of "adverse selection," that is, the companies most eager to join are those tainted by bad press and in need of a good public image. Needless to say, should this be a valid criticism, the most highly regarded companies may shun the Compact. Called "bluewash" by some, the critique argues that the UN is being used by companies to overcome a poor track record on social issues, for example, bad press because of sweatshops or low wage rates. Critics often cite Nike, a signer

of the Compact, as an example of adverse selection. In all fairness, it must be said that after severe criticism by NGOs, Nike is now thought by many to be a model corporate citizen as far as assuming responsibility for working conditions in suppliers' plants. The typical position in the past was that, since multinational companies did not own suppliers' factories, they were not responsible for them. Auret van Heerden, the executive director of the Fair Labor Association (FLA), an NGO that monitors working conditions in the apparel industry, was recently quoted on Nike in the *Los Angeles Times*: "A company like Nike has moved way beyond that and has agreed that even though it doesn't own the factories, it will be responsible for conditions in any supplier's plant."[19]

Scanning the list of current signatories, adverse selection does not appear to be a problem at this time. For example, Compact member companies not based in the U.S. include five of the top ten Fortune Most Admired Companies (outside the U.S.): BMW, Nokia, Nestle, BP and Royal Dutch/Shell Group.[20]

Compact officials note that their endeavor is incremental and will evolve as the need arises and as the companies perceive the need for change.[21] As noted above, the requirement for some accountability structures is a need that almost all observers have identified. Just as accountability structures in quality management (ISO quality standards) have become a business imperative today, largely through pressures from competitors, consumers and the media, so too can they in the area of corporate responsibility.[22]

Perhaps the best hope for transparency and accountability standards is the reporting mechanisms that would enable verification and monitoring being developed by the Global Reporting Initiative (GRI). The GRI grew out of the work of the Coalition for Environmentally Responsible Economics (CERES). Originally the CERES Principles were concerned only with environmental reporting and, in its early days in the late 1980s, only small firms with intense interest in the environment were willing to join and publicly report in standard metrics. In recent years, most major firms have published reports which disclose and measure their environmental record using the standard metrics of CERES. This led to a call to develop comparable reporting mechanisms for the economic and social areas and thus the founding of the GRI by CERES.[23] Sometimes called the triple bottom line (economic, environmental and social), or sustainability reporting, the attempt to disclose and measure the full impact of a business is the ongoing project of the GRI. At present, the Global Compact

encourages signatory companies to participate in the GRI but does not require it.

The most recent GRI Sustainability Reporting Guidelines (2002) presents a framework indicating what should be in a good company report. While the Guidelines are a good start, they are still far from adequate. For example, they include fifty core indicators of quality yet sixteen of these indicators focus on whether the company has a policy or process that deals with an issue and not on how the company is performing on that issue. A policy on child labor or downsizing tells little about how the company performed in that area.[24] Tracking a company on certain issues from year to year requires some performance metrics that all can understand. While the indicators in the environmental area are clear and useful to stakeholders, the social reporting indicators are only in their infant stages and much more dialogue and consensus building is required. That being said, it should be noted that the GRI has always had a social performance indicator on bribery and corruption, which, until June 2004, was a glaring omission in the Compact.

While the Global Compact has no required standard reporting provision at this time, it does encourage signatory companies to use the GRI. In fact, it will likely be increasingly clear that for the Global Compact to be a significant force, either the Global Reporting Initiative or something similar to it will be a necessary complement. Nevertheless, the independent monitoring and verification feature will probably never be a task of the Compact itself. Further, Compact officials do not believe such a role to be part of the UN mandate. Imagine a group like the Rotary Club that forms a community, promulgates moral ideals and encourages people to formulate a lifeplan based on such a vision. Although this organization may expel members who flagrantly and publicly violate core moral ideals, it does not itself police, enforce, or measure how well individuals do. This self-understanding is an approximation to that of the Global Compact; as prescribed in the "Global Compact Integrity Measures" (see website), the Compact can expel members for egregious violations but it does not have a regular monitoring and verification feature.

ACCOUNTABILITY AND GAINING CONSENSUS: THE TWO-TIER PRICING SYSTEM

There are a number of issues where there is little consensus on how to justify the apportioning of responsibility, particularly in the area of the

environment and human rights. One example concerning the pharmaceutical industry meeting human rights may illustrate the role of ethical research in helping to gain consensus and shaping societal expectations. This example and the pages that follow are presented more to stimulate further thought and research rather than to provide a final answer, for the whole pricing structure of the pharmaceutical industry needs further understanding and analysis. Until this happens, there is little prospect that the Global Reporting Initiative will develop a comprehensive, standard metric responding to the right of health care and treatment built on societal consensus. Yet policies are being made in apportioning responsibility for health care, and normative theory can help in understanding them and formulating better ones.

One policy the pharmaceutical industry has produced to allow the poor in developing countries the possibility of affording life-saving drugs is a two-tier pricing system, that charges considerably more in affluent countries and thus covers the cost of current research for future products. This policy has caused no small controversy, particularly in the United States. There is considerable ethics research, however, which can provide a normative framework for this policy. For example, one might argue the case from a common good, a justice, or a rights perspective.[25]

One normative theory, which holds promise for clarifying and providing an ethical justification for a two-tier pricing system, is integrative social contract theory (ISCT). In ISCT, the most basic principles summarizing a broad consensus about behavioral norms are called "substantive hypernorms," principles "so fundamental to human existence" that they are found in "a convergence of religious, political and philosophic thought."[26]

The case of apartheid in South Africa may be helpful to illustrate briefly the justifcatory and explanatory role of ISCT. In South Africa up to the late 1980s, the rules that governed the society as well as individual firms (rules called social contracts or microsocial contracts in ISCT) assumed the black people should not have full political and civil rights. While social contracts do not have to be the same in all nations, companies, or groups—for there is a wide range of "moral free space"—all micronorms must be consistent with hypernorms in order to carry objective moral weight. Thus the apartheid laws and company policies, which denied people political and civil rights on the basic of skin color and race, were "illegitimate" micronorms. Although the apartheid policies were based on mutual consent of the voters (who were only

of the white race), and reflected in both their attitudes and actions, since these micronorms violated basic human rights (hypemorms), the country as well as the companies participating in apartheid policies were considered immoral.[27]

In brief, ethical obligations are recognized where there is consent in the local community as well as consent by "all rational contractors to a theoretical macro-social contract." While the local community of white Africaners saw no problem with a norm specifying racial hierarchy (apartheid) in South Africa, the world community saw that norm as "illegitimate," a violation of basic human rights and universal truths (hypernorms). Finally, following much protest from around the world, the relevant ethical obligation was made operational. After 1984 human rights were factored into business decisions of multinationals in South Africa. And in 1994 statutory apartheid was dismantled with the first election where all could vote.

ISCT can provide a justification for the two-tier pricing system and for other policies that provide lower prices or commercial concessions for poor countries and the Global Compact can facilitate the process of developing appropriate norms. One way to understand the ten principles of the Global Compact, then, is as an expression of either norms and hypernorms (fairness, respect for other people and integrity) or principles derived from hypernorms (workplace safety and discrimination). With its emphasis on local networks, the Compact encourages regions, nations and individual firms to develop the norms appropriate to implement the nine principles as long as these norms do not violate a hypernorm. Thus, for example, the pharmaceutical industry's pricing policy for life-saving drugs may be guided by a norm in developed countries which sanctions prices that include a significant amount that will be allocated for research costs for future products. While this norm will result in higher costs for patients, the assumption is that there is little prospect that a patient's right to health care will suffer since there are government social safety nets and other measures to assist the poor in affluent countries. (To be sure, this assumption itself needs further study and action). In developing countries with weak governments and meagre background institutions to assist, this same norm for a pricing policy would be illegitimate since it would likely mean no medicines for those in need and thus a violation of rights. While it is always difficult for consumers in affluent countries to understand how the same drug manufactured by the same pharmaceutical company can be sold much cheaper in poor countries, ISCT provides a helpful normative framework.[28]

ACCOUTABILITY AS A MOVING TARGET: FOR WHAT SOCIETAL EXPECTATIONS ARE MULTINATIONS ACCOUNTABLE?

A recent article on the HIV/AIDS pandemic in sub-Saharan Africa spoke of an activist who "unleashed a verbal broadside against the pharmaceutical companies, and their refusal to provide drugs at cost or, even better, no cost at all." Another article spoke of pharmaceutical companies being "threatened by the National Association of People Living with AIDS if the firms continued to refuse to provide antiretroviral drugs free of charge."[29] Needless to say, the multinationals are aghast at such proposals (there are thirty million people in the area with the disease and, for the most part, those persons have never seen a doctor or been in a clinic). In the face of weak and inadequate governments, NGOs and other civil society actors are increasingly pressuring multinational corporations to accept new social responsibilities to balance their newly acquired rights and power in the global community. In my view, what is going on in the pharmaceutical industry is only a dramatic, early warning signal of a rethinking and widening of the role of all of business in society and hence it is a helpful case study to consider. The question that comes to the fore is for what societal expectations are multinationals accountable?

The companies are in a difficult position summed up by one pharmaceutical company officer: "We take accountability for our obligations seriously." What the companies want to know is how to gain a consensus in society of what these obligations are. "The Universal Declaration of Human Rights (UDHR) and article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) are interpreted by some as embodying a right to essential medicines. Are pharmaceuticals private goods to be obtained through the market, or public goods to which all citizens have a right?" [30]

Do multinational pharmaceuticals have a moral obligation to satisfy this right for the poor in developing countries?

Drawing on research on human rights, including issues raised in Henry Shue's work, the Economic and Social Council of the United Nations, in 2000, stated that "Health is a fundamental human right indispensable for the exercise of other human rights." It based this right on the human dignity of the person.[31] The interdependent nature of basic rights is reflected in the fact that a certain minimum standard of health is required to enjoy other fundamental rights, such as freedom and equality. The right to health implies the right to access to what it takes to provide that health—care and treatment (since the right to *health* may

imply that others have the obligation to see that one never gets ill, I use the right to *health care* and *treatment* to avoid any misunderstanding). This would likely include doctors, nurses, essential medicines, and facilities. Indirectly, good health also requires provision for basic conditions such as nutritional food, safe water, sanitation, preventative medicine and relevant education. While the document calls for "the highest attainable standard of health," it recognizes that economic and social factors play a role in determining what is attainable in a particular society. Thus in the poorest countries extremely expensive medicines cannot be guaranteed by the government or multinationals although wealthy nations would have a duty to try to assist.

While there is a relatively good consensus about the right to health care and treatment, there is disagreement about how to fairly apportion these responsibilities, especially in developing countries. Where does one draw the line in assigning obligations to a multinational business? Is it the moral responsibility of the multinational to distribute society's scarce resources, to feed the poor, to provide health care? If that be the current societal expectation, should it be honored? This is a concern to some of those U.S. companies which have not joined the Global Compact. In the U.S. context where litigiousness is a fact of life, the fear of some U.S. companies is that the Compact may well be considered a contract by some stakeholders and that they may be subject to law suits.

A recent California court decision allowed an activist to sue if a company falsely colors its social image. The California Supreme Court on May 2, 2002, in *Marc Kasky vs Nike*, held that claims about safe working conditions are "commercial speech" and must be defended in court if challenged. Nike asked the U.S. Supreme Court to review the ruling and, after hearing oral arguments, the high court refused and sent the matter back to California for a final determination. In September 2003, Kasky and Nike agreed to a settlement, Kasky withdrawing his lawsuit and Nike agreeing to pay $1.5 million to the Fair Labor Association (FLA), a monitoring group that strives to improve factory conditions. While the settlement essentially means that the merits of the Kasky (and Nike) positions remain untested, the very fact that a similar suit may be brought forward in other cases may offer significant leverage to activists monitoring business theoretic and corporate actions. (For the court decision, see www.courtinfo .ca.gov/opinions). While for some companies this case may reinforce their reluctance to join the Global Compact, this is overly

cautious. This is certainly the judgment of the American Bar Association which, in 2004, drafted a standard entry letter which companies joining the Compact can use to preclude subsequent litigious claims. I side with major companies like Hewlett Packard, Pfizer, Cisco Systems, Starbucks Coffee, and DuPont who have reviewed the issues and decided that signing the Compact is not only in the best interest of the company but also the global community. Their course of action is the one that others should follow.

Scholars have argued that, although multinational companies do have a responsibility to honor human rights, they do not have an obligation to aid those deprived of life-saving resources, i.e., to provide medicines for the sick or food for the hungry. They may want to do those things when feasible but, under normal circumstances, these activities should not be considered as a part of business. Donaldson, following Henry Shue, makes helpful distinctions in the classes of the rights honoring duties: Three classes of duties are:

1. Refraining from depriving people of the object of a right.
2. Protecting (in some instances) the right from being deprived.
3. Restoring to people whose rights have been violated the object of the right.[32]

Thus while a company must never take medicines from the diseased (class number 1); and it may often protect people from being diseased (class number 2); it does not have an obligation to provide medicines to the diseased (class number 3).

There is clearly a compelling logic to this position which may be summarized as follows. While multinational corporations should and do assume extraordinary social responsibilities and corporate citizenship duties in developing countries, there is a limit to business's role in society. Individuals (especially wealthy individuals) and nations can and should help provide medicines to all who need them, limited only by their capability. For-profit corporations should see their primary duty as providing good products at a fair price in the context of listening to their many stakeholders. If a pharmaceutical company, for example, depleted its revenue in the process of providing antiretroviral medicines and developing medical clinics for the poor of sub-Saharan Africa, it could not generate the money necessary for research for a cure for HIV/AIDS.[33] Consumers would ultimately pay either by much higher prices or by no new, innovative products or cures (assuming the company survived). To assign the pharmaceutical business the *obligation* of aiding those

deprived of antiretroviral medicines and care would undermine the genius of the free enterprise system.

In spite of the compelling logic of the above position, there is growing realization that with the huge aggregates of money and power under the control of multinational businesses, these organizations *do have moral obligations* as corporate citizens in the global community to assume some responsibility for providing medicines. The very title of the UN program, the Global Compact, points us to the basis of these obligations. All organizations producing goods and services have an implied contract with society. Similar to the argument for the moral and political foundations of the state advanced by Locke, Rousseau, and Hobbes, this approach argues that companies have a duty to be social responsible and this involves honoring human rights.[34] That being said, the theory does not spell out just what responsibilities are appropriate for multinationals.

Michael A. Santoro, in discussing the duties of multinational firms in the face of human rights violations in China, offers a conceptual framework to assist in the analysis and clarification of the situation. Called a "fair share" theory of human rights, Santoro points us to four factors: "the diversity of actors, the diversity of duties; an allocation of duties among various actors; and principles for a fair allocation."[35] In any human rights problem, there are a number of possible actors, for example, international institutions, nation-states, multinational firms, NGOs and individuals, and each should be allocated a fare share of the duties. The principles proposed for a fair allocation of duties are: relationship to those whose rights are violated; the likely effectiveness of the agent in remedying the problem; and the capacity of the agent. Santoro's point is that while companies must do something, they should not be asked to do "more" than they are capable of doing effectively."[36]

Many of our best companies have formulated a philosophy of corporate citizenship and have taken steps to institutionalize this philosophy in their corporate culture. U.S. companies involved with producing antiretroviral medications include Abbott, Bristol-Myers Squibb, and Merck. Each of these have initiated programs to deliver better health care and treatment, in some limited way, to those suffering HIV/AIDS. I believe these companies correctly perceive that they must do these activities as a matter of moral obligation as corporate citizens and not merely as a matter of philanthropy or as a public relations gesture. From my discussions with some of the companies, I believe

they are employing allocation principles similar to Santoro's, largely effectiveness and capacity, and thus are trying to meet the morally required minimum.

The kind of moral leadership exemplified in Merck's Botswana Comprehensive HIV/AIDS Partnership may set a standard of how corporate citizenship can contribute to solving the pandemic. Botswana, with a population of 1.6 million people, has an HIV prevalence rate of 38.5 percent among those in the 15-49 age group. While having the political will to solve the health crisis, the government felt overwhelmed, not only because of the cost involved but also because they lacked the expertise. A partnership was formed with the government of Botswana, Merck and the Bill and Miranda Gates Foundation with the overall objective of improving the care and treatment of HIV/AIDS patients. Merck is donating medicines and financial assistance. Gates and Merck are each contributing fifty million dollars over five years and the government will assist in training health care professionals to ensure that antiretrovirals are used safely and effectively. The program is led by the former CEO of the South African unit of Merck. A Harvard Business School case has been written about the partnership and this model may hold much promise for replication in other developing nations suffering from a health crises.[37]

Some other examples of what the companies are doing may also offer models for the future. The UN/Industry Accelerating Access Initiative (AAI) is a cooperative endeavor among UNAIDS, WHO, the World Bank, UNICEF, the UN Population Fund and six pharmaceutical companies (Abbott, Boehringer Ingelheim, Bristol-Myers Squibb, GlaxoSmithKline, F. Hoffman-LaRoche, and Merck) to provide, among other things, antiretroviral medicines at more affordable prices. In addition to the AAI program, three other initiatives designed to improve access to HIV/AIDS medicines in the developing world are worthy of note: 1. *Secure the Future* is a five-year program where Bristol-Myers Squibb is contributing $115 million and working with South Africa, Botswana, Namibia, Lesotho and Swaziland to find ways managing HIV/AIDS among women and children; 2. *Diflucan Partnership Program* is a program where Pfizer pays for medical training, patient education and Diflucan for AIDS patients in 70 least developed countries; and 3. *Viramune Donation Program* involves Boehringer Ingelheim's donation to pregnant women with AIDS in developing countries of medicines to-prevent mother-to-child transmission.

It is instructive to note that while these companies are striving to meet moral responsibility, only one (Pfizer) has joined the Compact. One explanation for this reluctance to join, as discussed above, is that given that there is not a clear consensus on what is the moral responsibility of a multinational pharmaceutical company in meeting the needs of the poor, joining the Compact would expose them to added criticism and perhaps even legal action from critics.

Research-based pharmaceutical companies' contributions and donations for HIV/ AIDS and other diseases between 1998-2000 amounted to US $1.9 billion. To be sure, critics of the pharmaceutical industry claim that companies relax intellectual property rights and "lower their prices only when threatened."[38] Although the critics may have a point and further study in this area is surely warranted, the companies are, in fact, providing an answer to those societal expectations for which they believe they are capable of being held accountable.

Some companies active in sub-Saharan Africa, e.g., Coca-Cola, DeBeers, BP, and Anglo-American, have decided that they can provide antiretroviral medicines and care for their employees and their spouses with HIV/AIDS.[39] Pharmaceutical companies with antiretroviral medicines have initiated a whole series of programs to lower prices and deliver care for countries listed low or medium on the Human Development Index (HDI).[40] Again, the point of listing these company initiatives is not to foreclose criticism of the companies but rather to argue that companies with the resources can and must do something as a matter of moral obligation as good corporate citizens.

How much must they do? It is in the context of this question that companies are well advised to look to the Global Compact to help in the "recalibration going on of the public-private sector balance."[41] As said earlier, because the Compact has the visibility, global reach and the convening power that accrue to it as an instrument of the UN, it is likely to be more effective than other global credos with similar missions. Since the Compact is based on principles that were accepted by most governments of the world, it offers a vision of the global community accepted by all nations. To be sure, the UN principles are ideals which are far from realized and may not even be honored in some places, but one has to start somewhere. The unique feature is that the private sector is now being asked to be the agency which closes the gap between vision and reality, to be the standard bearer for promoting community

norms and to help shape the legitimate expectations of society. Even more than that, through the dynamic process of the Compact, new norms may be generated. Many U.S. companies have not joined the Compact because, given the litigious climate, they are apprehensive about growing societal expectations that companies routinely have the obligation of meeting basic human rights when nation-states cannot. Yet, as emphasized above, given the UN's role in the global community, it is in the forum of the Compact that this discussion can most effectively take place.

CONCLUSION

While it is true that, at present, the Global Compact lacks adequate accountability structures, since it is a dynamic process open to incremental change, given intelligent and persistent criticism, there is bound to be progress in this area. The best hope for accountability without undue transaction costs is the effort currently underway by the Global Reporting Initiative. The Compact has supported this endeavor. If the Global Compact does not succeed in developing adequate reporting procedures and meeting the legitimate concern of giving globalization a human face, some other world-wide policy forum will have to rise to the challenge. Businesses around the world would be well advised to join the Compact and help shape its future.

As to the potential obligations that trouble U.S. business, current issues in the pharmaceutical industry are a helpful case study. Most scholars argue that the right to medicines and care is a moral right but there is little consensus on how best to apportion the duties to meet this right. There is a growing consensus that with the large aggregates of money and power, multinationals have moral obligations as corporate citizens to assist the poor in the global community, but the extent of these obligations is unclear. The Global Compact offers a forum under the umbrella of the United Nations with its visibility, global reach and convening power where some of the best members of civil society—non-government organizations, academic and public policy institutions, individual companies, business associations and labor representatives—can come together to discuss the changing role of business and its moral purpose. Companies throughout the world are well advised to join the Global Compact and contribute to the shaping of these new expectations of business in society.

NOTES

1. Kofi Annan, "Business and the UN: A Global Compact of Shared Values and Principles," 31 January 1999, World Economic Forum, Davos, Switzerland, Reprinted in *Vital Speeches of the Day* 65(9) (15 February 1999): 260-61. See also Sandrine Tester and Georg Kell, *The United Nations and Business* (New York: St. Martin's Press, 2000), 51. Georg Kell is Senior Officer, Executive Office of the Secretary General and Director of the United Nations Global Compact Office.
2. See the Global Compact website at www.unglobalcompact.org for the principles, a comprehensive discussion of the organization and Kofi Annan's vision of the moral purpose of business.
3 Of the sixty-four U.S. companies that have joined the Compact, most are small and medium-sized firms. Major U.S. multinationals signing include Amerade Hess, Cisco Systems, DuPont, Hewlett-Packard, Starbucks Coffee, and Pfizer. Virtually all industry sectors on every continent are represented in the over 2000 signatories world-wide.
4 For information on the Global 500, see the special edition of *Fortune* on "The World's Largest Corporations," 148(2) (2003): 42-45; Fl-45. Georg Kell's point was made in a private discussion with the author in Pretoria, South Africa, on 24 April 2000. For a discussion of the contrast between Europe and the U.S. on the South Africa case, see S. Prakash Sethi and Oliver F. Williams, *Economic Imperatives and Ethical Values in Global Business: The South African Experience and International Codes Today* (Notre Dame, Ind.: University of Notre Dame Press, 2001), 183-219.
5 Letter to Kofi Annan, Secretary-General, United Nations, 20 July 2000, from: Upendra Baxi, Professor of Law, University of Warwick, UK, and former Vice Chancellor University of Delhi (India): Roberto Bissio, Third World Institute (Uruguay): Thilo Bode, Executive Director, Greenpeace International (Netherlands); Walden Bello, Director, Focus on the Global South (Thailand); John Cavanach, Director, Institute for Policy Studies (U.S.); Susan George, Associate Director, Transnational Institute (Netherlands); Oliver Hoedeman, Corporate Europe Observatory (Netherlands); Joshua Karliner, Executive Director, Transnational Resources and Action Center (U.S.); Martin Khor, Director, Third World Network (Malaysia); Miloon Kothari, Coordinator International NGO Committee on Human Rights in Trade and Investment (India); Smitu Kothari, President, International Group for Grassroots Initiatives (India); Sara Larrain, Coordinator, Chile Sustentable (Chile); Jerry Mander, Director, International Forum on Globalization (U.S.); Ward Morehouse, Director, Program on Corporations, Law and Democracy (U.S.); Atila

Roque, Programme Coordinator, Brazilian Institute of Economic and Social Analysis (Brazil); Elisabeth Sterken, National Director INFACT Canada/IBFAN North America; Yash Tandon, Director, International South Group Network (Zimbabwe); Vickey Tauli-Corpuz, Coordinator, Tebtebba (Indigenous Peoples' International Centre for Policy Research and Education), and Asia Indigenous Women's Network (Philippines); Etienne Vernet, Food and Agriculture Campaigner Ecoropa (France).

6 Ibid.

7 See Alasdair MacIntyre, "A Partial Response to My Critics," in *After MacIntyre*, ed. Charles Taylor (Oxford: Oxford University Press, 1994), 284-66.

8 While I find MacIntyre insightful and provocative, in the final analysis, I side with Andrew Wicks "I find enough coherence, hope, and possibility in both capitalism and 'modernity' to cast my lot with those who see the Enlightenment (and what followed) as something other than a disaster." See Andrew C. Wicks, "On MacIntyre, Modernity and the Virtues: A Response to Dobson." *Business Ethics Quarterly* 7(4) (1997): 133-35.

9 See Patricia H. Werhane, "Business Ethics and the Origins of Contemporary Capitalism: Economics and Ethics in the work of Adam Smith and Herbert Spencer," *Journal of Business Ethics* 24 (2000): 185-98; also Oliver F. Williams, "Catholic Social Teacher: A Communitarian Democratic Capitalism for the New World Order," *Journal of Business Ethics* 12 (1993): 919-23. The 1991 encyclical letter of Pope John Paul II, *Centesimus Annus*, makes this central point: "The life is absolutized, if the production and consumption of goods become the center of social life and society's only value, not subject to any other value, the reason is to be found not so much in the economic system itself as in the fact that the entire socio-cultural system, by ignoring the ethical and religious dimension, has been weakened, and ends by limiting itself to the production of goods and services alone." John Paul II, *Centesimus Annus* (Washington, D.C.: The US Catholic Conference, 1991), para. 39, p. 77.

10 A good overview of the issues addressed by the Global Compact was presented at the Keynote Address to the Society of Business Ethics and the Social Issues in Management Division of the Academy of Management meeting in Chicago, 7 August 1999. See Douglas Cassel, "Human Rights and Business Responsibilities in the Global Marketplace." *Business Ethics Quarterly* 11(2) (2001): 261-74.

11 Tester and Kell, *The United Nations and Business*, p. 51. The case for globalization and capitalism is made in the UN's 2002 edition of the *Human Development Report* but not without many caveats. For example: "The proportion of the world's people

living in extreme poverty fell from 29% in 1990 to 23% in 1999," and "During the 1990s the number of people living in extreme poverty in Sub-Saharan Africa rose from 242 million to 300 million." See the report: www.undp .org/hdr2002/.

12 Participants in the Caux Principles have been from twenty-seven countries and include such U.S. companies as 3M International, Chevron, Time Inc., The Prudential Insurance Company of America, The Procter and Gamble Co., The Chase Manhattan Bank, Medtronic Inc., Monsanto Company, Honeywell Inc., Cargill Inc., and the Bank of America. See the website www.cauxroundtable.org. Accountability as discussed here is even less a requirement in the Caux Principles and this endeavor has much less visibility. For the text of the Caux Principles see *Global Codes of Conduc*t, ed. Oliver E Williams (Notre Dame, Ind.: University of Notre Dame Press, 2000), 384-88. For two articles on the Caux Principles, see Gerald F. Cavanagh, "Executives' Code of Business Conduct: Prospects for the Caux Principles," *Global Codes of Conduct*, pp. 169-82; and Kenneth E. Goodpaster, "The Caux Round Table Principles: Corporate Moral Reflection in a Global Business Environment," *Global Codes of Conduct*, 183-95.

13 For a comprehensive history and analysis of the Sullivan Principles, see S. Prakash Sethi and Oliver F. Williams, *Economic Imperatives and Ethical Values in Global Business.*

14 For an example of this countervailing power of NGOs, see the letter by Louise Frechette, Deputy Secretary-General of the United Nations, of 3 June 2003, responding to the officers of Oxfam, Amnesty International, Lawyers Committee for Human Rights, and Human Rights Watch, who are pressuring for more accountability in the Compact. See the web site www.globalpolicy .org/ngos/business/2003/0626secret.htm. For a recent, similar criticism, see "Global Compact Leaders Summit: NGO Participants Raise Concerns," 24 June 2004, http://web.amnesty.org/pages/ ec-letter-240604-eng.

15 S. Prakash Sethi and Oliver F Williams, "Creating and Implementing Global Codes of Conduct: An Assessment of the Sullivan Principles as a Role Model for Developing International Codes of Conduct-Lessons Learned and Unlearned." *Business and Society Review* 105(2) (2000): 187.

16 S. Prakash Sethi, "Global Compact is Another Exercise in Futility," *The Financial Express*, 8 September 2003. Available on the web at: www.financialexpress.com/fe-full-story.php?content id=41523. For a comprehensive discussion of codes of conduct, see S. Prakash Sethi, *Setting Global Standards: Guidelines for Creating*

Codes of Conduct in Multinational Corporations (New York: John Wiley & Sons, Inc., 2003).

17 Tester and Kell, *The United Nations and Business*, 53

18 Lynn Sharp Paine, *Value Shift: Why Companies Must Merge Social and Financial Imperatives to Achieve Superior Performance* (New York: McGraw-Hill, 2003), 20-23.

19 An instance of where Nike is being cited as an example of adverse selection is in the letter to Kofi Annan, Secretary-General, United Nations, 25 July 2000, from the same signatories as listed in note 5 above. For an NGO critical of the Compact, see the web site www.corpwatch.org. The quote from Auret van Heerden is found in Lisa Giron, "Nike Settles Lawsuit Over Labor Claims," *Los Angeles Times*, 13 September 2003.

20 Nicholas Stein, "America's Most Admired Companies," *Fortune* (3 March 2003): 81-94.

21 This point has been made repeatedly by Georg Kell in conversations with the author. For example, in light of complaints one current issue Compact officials are discussing is what business behaviors necessitate asking a company to sever its relationship with the Compact.

22 Sandra Waddock, "Creating the Tipping Point Towards Corporate Responsibility: Reflections of Meeting Expectations in the Global Economy." The UN Global Compact Conference at the University of Notre Dame, 21-23 April 2002. Unpublished paper available on the web site of the Notre Dame Center for Ethics and Religious Values in Business www.nd.edu/ethics.

23 Robert Kinlock Massie, "Effective Codes of Conduct: Lessons from the Sullivan and CERES Principles," in *Global Codes of Conduct*, 287-88. See the web site of the Global Reporting Initiative www.globalreporting.org. For an example of the present state of the art of sustainability reporting, see the report of the Royal Dutch Shell Group www.shell.com.

24 For an analysis, see Mallen Baker, "The Global Reporting Initiative: Raising the Bar Too High?" *Ethical Corporation Magazine* (October 2002): 39-41.

25 See, for example, Manuel Velasquez, "International Business, Morality and the Common Good," *Business Ethics Quarterly* 2 (1992): 27-40; Norman Bowie, "A Kantian Theory of Capitalism," *Business Ethics Quarterly*, Special Issue No. 1, (1998): 37-60; and Richard De George, *Competing with Integrity in International Business* (New York: Oxford University Press, 1993).

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26 Thomas Donaldson and Thomas W. Dunfee, "Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory," *Academy of Management Review* 19(2) (1994): 260. See also Thomas Donaldson and Thomas W. Dunfee, *Ties That Bind: A Social Contracts Approach To Business Ethics* (Boston: Harvard Business School Press, 1999).

27 See Sethi and Williams, *Economic Imperatives and Ethical Values in Global Business*, for the history of the evolution of the conviction that participating in apartheid was immoral.

28 Pharmaceutical companies were reluctant to approve the two-tiered pricing system because of the fear of "round-tripping," fraudulently selling a deeply discounted drug meant for the poor in a developing country in an affluent country at the higher price. This would seriously erode the profit margin required for research for future drugs. After considering the options, most companies have moved to two-tier pricing although it has not been without problems. See Gregory Crouch, "Europeans Investigate Resale of AIDS Drugs," *The New York Times*, 29 October 2002, Wl; and "Africa's Cheap AIDS Drugs Threatened by Illegal Exports," Business Day, 12 May 2003, 10.

29 Stephen Lewis, "Silence = Death: AIDS, Africa and Pharmaceuticals," *Toronto Globe and Mail*, 26 January 2001, 12; and "Threatened," *Johannesburg Sunday Times*, 2 April 2003, 2.

30 In order to discuss the Compact with major U.S. multinationals and to increase U.S. membership, the United Nations Global Compact Office and the Center for Ethics and Religious Values in Business at the University of Notre Dame sponsored a conference at Notre Dame in April 2002. Several corporations that are already members of the Compact (Nike, Novartis, and Shell) and some considering joining (Freeport-McMoRan Copper and Gold, Hewlett-Packard, Merck, and Motorola) gave presentations. The statement summarizes the sense of some of the pharmaceutical company presentations at the Notre Dame-UN conference in April 2002.

31 "General Comment No. 14 on Substantive Issues Arising from the Implementation of the International Covenant of Economic, Social and Cultural Rights (ICESCR)," United Nations Economic and Social Council, 2000. Geneva. See www.unhchr.ch. See Henry Shue, *Basic Rights* (Princeton, N.J.: Princeton University Press, 1981). There is currently a UN draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, E/CN. 4/Sub. 2/2003/12 (2003)," but most believe this proposed policy needs considerable field testing before some consensus on how to apportion responsibility emerges.

32 These ideas are developed in Thomas Donaldson, *The Ethics of International Business* (New York: Oxford University Press, 1989), especially chapter 5. For a good application see Thomas Donaldson, "The Perils of Multinationals' Largess," *Business Ethics Quarterly* 4(3) (1994): 367-71. This article is a response to a critique of Donaldson in Kevin T. Jackson, "Distributive Justice and the Corporate Duty to Aid," *Journal of Business Ethics* 12 (1993): 547-51.

33 A study released in December 2001 by the Tufts Center for the Study of Drug Development reported that the average cost of developing a new drug is $802 million and takes, on average, twelve years. These figures are disputed by the Health Research Group, a consumer organization founded by Ralph Nader. See Robert Pear, "Research Cost For New Drugs Said to Soar," *The New York Times*, 1 December 2001, 1.

34 See note 25.

35 Michael A. Santoro, "Engagement with Integrity: What We Should Expect Multinational Firms to Do About Human Rights in China," *Business and the Contemporary World* 10(1) (1998): 25-54.

36 d., p. 48.

37 James E. Austin, Diana Barrey, and James B. Weber, "Merck Global Health Initiatives (B): Botswana," Number 9-301-089 (Boston: Harvard Business School Publishing, 2001). Also, the website for the African Comprehensive H1V/AIDS Partnerships (ACHAP) (www.achap.org/) has a description of the project.

38 See Donald G. McNeil, Jr., "Patents or Poverty? New Debate Over Lack of AIDS Care in Africa," *The New York Times*, 5 November 2001, 6.

39 Global Business Coalition on HIV/AIDS headed by Richard Holbrooke, former U.S. Ambassador to the UN, has enlisted many multinationals in the fight against AIDS. Some companies have gone well beyond the normal role of business in society. See the web site www.businessfightsaids.org/.

40 For example, GlaxoSmithKline cut the price of its AIDS and malaria treatments by 38 percent in the sixty-three poorest countries. "Glaxo Cuts Price of AIDS and Malaria Drugs," *Business Day*, 12 May 2003, 1.

41 John Gerard Ruggie, "Taking Embedded Liberalism Global: The Corporate Connection," unpublished paper, p. 29.

Governance and Catholic Social Teaching

MARILISE SMURTHWAITE

Overview

This article centres on the contribution which Catholic Social Teaching can make with reference to governance. In considering this issue, we shall firstly consider the significance of governance for human persons and the notion of governance in the local and global contexts. Secondly, we will examine the concept of governance itself and finally, we shall consider the possible contribution of Catholic Social Teaching to governance in the light of this examination.

2. Introduction

Governance is really about people. Like the concept of economics it is not always presented in this way. In fact it is often presented as being about structures and processes of direction and control. Like economics, it should bring about the common good and it should benefit all citizens in the community. But, like economics, it does not always produce fruits that ensure this common good. Like economics too, it is sometimes presented as an abstract concept with a life of its own independent of the human being. However, this is not the case. It is humans who plan and implement and monitor governance systems and such systems should be directed to serving the needs of human persons. When systems of governance fail, it is ultimately because human beings have failed and such failure has adverse effects on other human beings. It is because governance is ultimately about people, that Catholic Social Teaching has a considerable contribution to make in this area. This we will see in due course.

President Thabo Mbeki pointed out in his State of the Nation Address on 11 February 2005:

> It is a reflection of weaknesses in the governance system that the plans to build school infrastructure are unfolding at a much slower pace than envisaged

and, he added,

> We need massively to improve the management, organisational, technical and other capacities of government so that it meets its objectives (quoted in the *Sunday Times* 13/02/05, p 4).

These comments lead us to two issues pertinent to governance: the fact that governance is common to areas other than the public sector and so affects people in various sectors, and the fact that poor governance results in lack of delivery which, in the end, also harms people.

With respect to the first issue, while we do speak of governance in the public sector, we also refer to corporate governance in the business sector - more frequently now than before the 1990s, and we talk of governance in the educational sector with reference to those institutions like schools or universities which provide education to the members of the community. In fact, governance has become something of a buzzword nationally and internationally. An internet search on the topic, offers over 19 million references, one of which describes the concept of **global governance** contained in the *Co-Chairmen's Foreword* by Ingvar Carlsson and Shridath Ramphal of the Commission on Global Governance.[2] This text emphasises both the human aspect and the comprehensive reach of governance. It points to the fact that governance is about organisation, about cooperation, about compliance and about the common good. These in turn are about human beings. We also find references and movements towards global governance **standards** and **indicators** both in the political sphere (available from (http://www.worldbank.org/publicsector/indicators.htm) [accessed February 2005] and in the business sector, for example, the movement towards having global codes of ethics (Sethi, S. P. 2003). In this respect however, Judge Mervyn King, has said that

> One cannot have a single corporate governance code that pertains throughout the world. Each country has its own corporate laws and its own culture of doing business that has developed over many years. Each country therefore has to develop its own code of governance (King 2001:25).

With respect to our second issue, that of poor governance, we may note in passing that, for a number of years, there have been substantial failures in governance both nationally, in government and corporate sectors, as well as in the international arena. One has only to remember the local Leisurenet and Regal Treasury Private Bank sagas as well as the SAA debacle with Colemen Andrews, the Nedcor share incentive scheme and the arms deal to note the lack

of regard to good corporate and public governance. Of course, at international level, the Enron and Worldcom sagas provide endless material for governance and ethics discussions. Raymond Parsons, a well-known economist of the neoliberal persuasion, writing in *The Star* in 2001, stated that

> the common factor missing in government and market failures, of which we hear so much in South Africa, lies in better governance. This means coming to terms with the best policies and practices that will raise South Africa's status in the emerging market stakes.

Ann Crotty, writing in *Business Report* at the time of the release of King II, said

> All these corporate governance reports and recommendations are little more than an exhortation to the powerful, and invariably wealthy, of the corporate world to behave in a decent manner.
>
> They represent a plea to senior executives not to abuse the considerable power they have assumed as trustees of the resources of an economy….
>
> The 240-page King 2 report says so much that is obvious, that it should not have to be stated in black and white and with much fanfare.
>
> But the sad reality is that it does have to be stated – loudly and often – because powerful and rich people are inclined to assume an arrogance that renders them beyond restraint and accountability.

Given this context of both the importance of governance in many different areas of society, its involvement of and consequences for human persons and examples of the frequent failures in good and ethical governance, we would do well to explore the concept of governance itself, before we examine how Catholic Social Teaching may assist us in this sphere.

3. Governance: The Concept

Let us ask then,

What is Governance?

Let us try to unpack the concept by drawing on both political and business understandings.

It would seem that a study of governance literature allows us to deduce that whether we view governance in the context of the public or the private domain, certain notions/ principles/ concepts underpin the concept of governance and are commonly associated with it. Such notions may enable us to answer the above question. They are as follows:

- Leadership

- The concepts of authority, power, responsibility and accountability
- The purpose of governance and its relationship to the common good
- Stewardship
- Principles of good governance
- Governance 'activities'
- Reasons for the importance of good governance

3.1 Leadership

Governance is the task of the **leaders** in the business and public sectors. Whether such leaders are called CEOs or managers or directors, it is the 'top' who are responsible for governance in any organisation or state. Let us remember the old adage: 'the fish rots from the head'. If those who are our leaders do not ensure and practice ethical governance, the type of corruption and destruction that has been evident in such cases as Enron and Leisurenet as well as various public scandals too numerous to mention, will continue and become more commonplace than is now the case. MacLagan and Nel (1997:1), who are advocates of participative rather than authoritarian governance systems, make some observations relevant to leadership. Thus they note that 'The authoritarian form of governance has prevailed since people began to organise political, social, and economic institutions' in both public and private sectors. However, they believe that there is a shift to participative governance in the workplace which is both inevitable and necessary. In the authoritarian governance model they contend that

> A small, elite group rules, "thinks", and determines goals and resource use…. In authoritarian institutions, ethical requirements are often double standards. The people at the top can drink at company lunches to close deals, use company or government supplies and equipment for personal needs, and barter power and sex. The people at the bottom lose their jobs and are jailed for the same behaviours (MacLagan and Nel 1997:19).

While in the public sector authoritarian systems of governance may survive, these authors contend that business goes bankrupt if it fails to adapt. For a more participative system of governance to work, certain elements must become *more participative* namely,' values, structures, leadership, management processes, information, relationships, competencies, controls and pay' (MacLagan and Nel 1997:53).

Leadership influences both the structure and the processes of governance: it is important.

3.2 The concepts of authority, power, responsibility and accountability

Closely allied to the notion of leadership and of governance are the concepts of authority and power, responsibility and accountability. Such concepts are integral to an understanding of both leadership and of governance. While not wishing to spend a great deal of time defining these terms, it is useful to give a summary definition of each in passing:

Authority could be seen as 'the right to command or give orders. It includes the right to take action, to compel the performance of duties and to punish default or negligence' (Smit and Cronje 1997:240).

Power could be seen as 'the ability to influence the behaviour of others within an organisation' (Smit and Cronje 1997:247). Power, of course, may be variously used. It may be used for personal gain and self interest or for the benefit of others (Smit and Cronje 1997:247). McLagan and Nel (1997:62) believe that power means 'access and ability to mobilise money, people, technology, and other assets'. They make the interesting point that in authoritarian organisations power is 'treated as a scarce resource and restricted to those at the top' (:62).

Responsibility often refers to duty, to obligation and to commitment to meet certain objectives, although Caiden (in Jabbra and Dwivedi 1988:25) states that

> to be responsible is to have the authority to act, power to control, freedom to decide, the ability to distinguish (as between right and wrong) and to behave rationally and reliably and with consistency and trustworthiness in exercising internal judgement.

Accountability, on the other hand, is to answer for, to explain, one's actions, decisions and so on. Van Niekerk *et al* (2001:125) point out that

> Accountability should focus both on compliance with rules and ethical principles, and on achievement of results.

3.3 The purpose of governance and its relationship to the common good

Governance, whether public or corporate, aims at ensuring the welfare of all interested parties. In business, it should take account of the various stakeholders and their interests. These are compromised where governance is poor and only the interests of a small group of directors are fostered. In the public arena,

governance is aimed at benefiting all citizens, or at the public interest, or at certain broad groups of stakeholders.

That governance should aim at the advancement of the common good is noted in some of the literature. For example, Van Niekerk *et al* (2001:64-65) state that governance refers in broad terms to

> The ordering of a group, community, or society by a public authority. The purpose of governance includes the maintenance of law and order, the defence of society against external enemies, and the advancement of what is thought to be the welfare of the group, community, society, or state itself.
>
> Governance, therefore, implies the establishment of government structures within the context of the state, to ensure that services are rendered to the communities to ensure that their general welfare and quality of life are promoted. Individuals on their own are unable to provide the quantity and quality of services that a government representing the people can provide collectively to the community.

The focus of this understanding is that the purpose of governance is the common welfare, achieved by order, such that service is rendered to the people. Authority of government is assumed.

Another example comes from Dwivedi and Jabbra (1988) who provide us with some interesting insights into governance and the common good. They state:

> One of the fundamental concerns of the modern state is the manner in which power and authority are wielded by those who govern in the name of pursuing societal goals and objectives (1988:1)

In their view, the state has acquired greater power due, in part, to the demands of citizens that it contribute to "common endeavours". However, the result of this effort to "satisfy the collective needs of the society" is an increasing number of government officials who "play the roles of crusaders, policymakers, social change agents, crisis managers, program managers, humanitarian employers, interest brokers, public relations experts, regulators of the economy, bankers and spokespeople for various interest groups, including their own associations" (1988:1). Consequently, given these many and varied roles, they have gained great power, a power which is sometimes misused. These authors feel this power needs to be restrained and we need to ensure that "those who have power exercise it responsibly so that they can be held accountable for their actions" (1988:2).

3.4 Stewardship

Those who are responsible for governance hold in trust resources which they may not or ought not to deploy to further their own personal self-interests. This concept of stewardship is referred to by Wixley and Everingham (2002:1) in the context of *corporate* governance. They point out that after the Industrial Revolution there was a separation of the ownership and management of an organisation. This separation meant that owners needed a means to monitor the performance of managers. Corporate governance therefore incorporates the idea of stewardship and of the role of the auditor. The latter would check that proper stewardship had occurred. Those involved in Public governance must likewise apply the principle of stewardship to the use of resources entrusted to them for the general welfare.

3.5 Principles of good governance

We find that certain principles of good governance are listed in various sources. While there are some differences in such lists there are certainly some principles that are held in common. Let us look at a few examples:

Van Niekerk *et al* (2002:65-66) consider the main characteristics of a system of good governance to be:

- Openness and transparency
- Adherence to the principles of the Bill of Rights
- Deliberation and consultation
- Capacity to act and deliver (i.e. establish structures to enable delivery to meet people's expectations)
- Efficiency and effectiveness (i.e. to deliver services efficiently and effectively while being mindful that there are limited resources)
- Answerability and accountability
- Cooperative government where national, provincial and local government are interdependent and interrelated
- Distribution of state authority and autonomy (this refers to the devolution of power and authority to lower levels of government)
- Government and business cooperation to achieve reconstruction
- Influencing the way politicians address basic needs
- Monitoring government activities and insist on answerability and accountability

According to Waddock (2002:217-218), good corporate governance has the following standards:

- Accountability, meaning assuming responsibility for the impact of policies, practices, processes and decisions which lie behind these
- Transparency, that is, allowing corporate actions and decisions to be visible to interested stakeholders
- Equity, that is fairness in allocating and distributing company resources to relevant stakeholders
- Ensuring that voting methods are open and accessible to all stakeholders
- Codes of best practice including values-based and ethical codes
- A long-term vision

In examining the codes of governance in a number of countries, Judge Mervyn King found that there were four 'pillars' of governance:

> These are *fairness*, *accountability* – in the sense of accounting to the company – *responsibility* – acting responsibly towards the various stakeholders, and *transparency*. And all this must rest on a base of *intellectual honesty*, that is, being able to separate fact from assumption, and making good decisions based on all the facts. (King 2001:25)

What do these various lists of criteria have in common? It would seem that each mentions transparency, accountability, fairness and responsibility. These would seem then to be core principles in good governance.

3.6 Governance 'activities'

Certain 'activities', if we may call them this, are associated with the practice of governance irrespective of what sector we are referring to. These are well illustrated in definitions of governance and in lists of the activities associated with it. For example, Van Niekerk et al mention 'ordering' a 'group, community, or society by a public authority' (2001: 64) (my italics). Steiner and Steiner (2000:694) writing on corporate governance state

> Corporate governance is the overall *control* of activities in a corporation. It is concerned with the *formulation of long-term objectives* and plans and the proper management *structure* (organisation, systems and people) to achieve them. At the same time, it entails making sure that the structure *functions* to maintain the

> corporation's integrity, reputation and responsibility to its various constituents (my italics).

R. I. Tricker in his book on Corporate Governance published by Gower in 1984 (cited in Wixley and Everingham 2002:2) says there are two key elements in Corporate Governance, namely, *supervising and monitoring performance* of management and making sure of management *accountability* to shareholders and stakeholders. In addition there are four main activities:

- *Direction* i.e. formulating strategic direction for the future of the enterprise long-term
- *Executive action* i.e. being involved in important executive decisions
- *Supervision* i.e. monitoring or supervising management performance
- *Accountability*, i.e. .recognition of responsibilities to those who legitimately demand accountability (p.7) (my italics)

Wixley and Everingham (2002: 1) state:

> Corporate governance has been described as 'simply the system by which companies are *directed* and *controlled*' (King 1994:1). More specifically it is concerned with the *structures* and *processes* associated with management, *decision-making* and *control* in organisations. (my italics)

Carroll and Buchholz 2003: 569 state that corporate governance refers to

> …the method by which a firm is being *governed, directed, administered, or controlled* and to the goals for which it is being governed. Corporate Governance is concerned with the relative roles, rights and accountability of such stakeholder groups as owners, boards of directors, managers, employees and others who assert to be stakeholders (my italics)

Common to these understandings are the ideas of control, of structures, of monitoring and of decision making, especially strategic decision making.

3.7 Reasons for the importance of good governance

The reasons given for the importance of good governance are relevant to any consideration of the concept of governance given the numerous scandals both in the public and private sectors since the 1990s.One example will suffice. Wixley and Everingham (2002:5) contend that we need to strengthen corporate governance because of:

- Increased instances of creative accounting
- Increased numbers of business failures

- The “apparent ease” with which unscrupulous directors could expropriate other stakeholders’ funds
- The “very limited role of auditors”
- The “Apparently weak link between executive compensation and company performance”
- “a market place focused on short term perspectives, to the detriment of general economic performance”.

We could aptly apply such reasons to public governance. But in South Africa, I would certainly add, that poor governance in the public sector ultimately penalises the poor who suffer the consequences of corruption in areas where there should be delivery (take housing for example).

3.8 Conclusion

To conclude: We have seen that certain notions and principles underpin the concept of governance. However, in an analysis of this nature, it is easy to focus on all seven notions as if we were merely dealing with abstractions. This is not the case. Let us remember that it is people who lead; who either abuse or use constructively their authority and power; who contribute or do not contribute to the common good; who act as good or poor stewards of our resources and who implement or fail to implement the principles of good governance. If we can note and understand this, we can now ask:

How can Catholic Social Teaching assist us with the issue of governance? What contribution can it make?

4. Catholic Social Teaching and Governance

4.1 Introduction

How can Catholic Social Teaching help us in this area of governance?

I believe it can assist us in at least three ways.

Because governance is really about people, Catholic Social Teaching has a great deal to contribute firstly to an understanding of the concept of governance and secondly to the practice of ethical governance. In this respect the core principles of Catholic Social Teaching namely, the common good, solidarity, and the concept of stewardship, subsidiarity, justice and the option for the poor can form an ethical framework whereby we can both evaluate governance practice and, on the basis of which, we can debate, discuss and model ethical governance decisions. Thirdly, we can educate our leaders and

potential leaders such that these principles form the ethical foundation on the basis of which they make ethical decisions in their leadership roles, which in turn may benefit the common good. This is what we try to do at St Augustine College: to educate leaders and future leaders for ethical and intellectual leadership.

4.2 Catholic Social Teaching and the Concept of Governance

Let us begin with our first task: What can Catholic Social Teaching contribute to our understanding of the concept of governance? Firstly, Höffner (1997:21) reminds us that

> Christian Social Teaching is neither a bundle of practical instructions for the solution of social questions nor a skilful selection of certain findings of modern sociology useful for Christian social training, but an "integral component of the Christian doctrine of man" (*Mater et Magistra).*

In his view a suitable definition of this teaching and one which would be aptly relevant to our discussion of governance, would be

> … the whole of our knowledge about the essence and order of human society and the resulting norms and tasks applicable to any given historical conditions: it is acquired socio-philosophically from the essential social nature of man and socio-theologically from the Christian order of salvation (Höffner 1997:23).

The goal of Catholic Social Teaching is therefore

> …a system of order, "based as it must be, on truth, tempered by justice, motivated by mutual love and holding fast to the practice of freedom" (*Pacem in Terris* 1963:n.149 cited in Höffner 1997:71).

Such an understanding may illustrate at once that Catholic Social Teaching would have a contribution to make to governance: it is rooted in an understanding of the human person and advocates norms and tasks which are timeless in application to the ordering of society for the benefit of the humans who inhabit it. Ideally governance should likewise benefit the human person and the common good.

Secondly, Catholic Social Teaching (CST from here onwards) may contribute to our understanding of the political community which is clearly important to an understanding of the concept of governance.

In *Gaudium et Spes* (74) we read:

> The political community exists for that common good in which the community finds its full justification and meaning, and from which it derives its pristine and proper right.

While the various and diverse people in political life might do things in different ways

> if the political community is not to be torn to pieces as each man follows his own viewpoint, authority is needed. This authority must dispose the whole energies of the citizenry towards the common good, not mechanically or despotically, but primarily as a moral force which depends on freedom and the conscientious discharge of the burdens of any office which has been undertaken (GS: 74).

Consequently,

> the practical ways in which the political community structures itself and regulates public authority can vary according to the particular character of a people and its historical development (GS: 74).

Clearly, political authority, like the workings of economic life, must be exercised within the limits of morality and the focus must be the common good. To achieve this, means that some form of regulation and structure must be put in place. In this respect Michael Van Heerden, lecturing on the dignity of the human person, in 2000, submitted that 'Traditional Catholic teaching has always considered the state as a necessity founded on human nature'. While authority is ultimately rooted in God, the specific form that is adopted by the political community should be decided by citizens taking into account the common good. The main elements of traditional Catholic teaching on the state as outlined by Thomas Aquinas may be summarised as follows:

> Government is for the common good
>
> The common good must be in accord with revealed and natural laws
>
> Just law is not the will of the ruler but that law which follows justice
>
> The ruler is subject to God and to the law
>
> The people have a right to choose their rulers and form of government
>
> Rulers who do not provide for the common good may be checked and, in extreme cases, deposed (Van Heerden 2000).

The state, therefore, has a responsibility for both the order of society and for its welfare whether economic, social or cultural. For the state to perform its function, the citizens give up part of their freedom and a balance must be struck between freedom and control (Van Heerden 2000). Good governance should strike such a balance and ensure the welfare of all citizens.

Thus, what we find in CST on the issue of the political community, is reference to the concepts of authority, the common good, order and regulation. All of these concepts are embedded in a deep understanding of the concept of governance irrespective of whether it is participative or authoritarian in form. However, I would submit that the concept of leadership and its quality underlies the practical application of these concepts. It is the leaders who have the authority to make decisions and to act. It is they who ultimately will decide and act to regulate for or against the common good. It is their decisions and actions which will ultimately affect the lives of people. This is why governance is ultimately to do with people and not merely with systems and procedures. We will return to this later.

What then is the common good towards which governance should contribute? What is this common good which we have shown above to be the purpose of governance and which all involved in governance should understand? I would suggest that this is another contribution that CST could make to our understanding of the concept of governance: it could deepen and clarify this notion of the common good, which is often poorly articulated and somewhat vague in its definition. Thus the common good is not the sum total of 'individual goods' (Höffner 1997:47), nor does it mean that individual freedom and the dignity of each human person should be subsumed in the community, for the community or the society is made up of individual persons without whom it would not exist.

> The ultimate purpose of all sociality is the perfection of personhood. Society ultimately serves the person…(Höffner 1997:48).

The common good then

> embraces the sum of those conditions of social life by which individuals, families and groups can achieve their own fulfilment in a relatively thorough and ready way (GS 74).

and its

> …meaning is close to the traditional term "common weal". At times in the past the common good has been presented as an idea in opposition to the rights of individuals, therefore as a "collectivist" or "corporatist" political theory. But more recent social teaching has seen the common good as a guarantor of individual rights, and as the necessary public context in which conflicts of individual rights and interests can be

> adjudicated and reconciled (Catholic Bishops' Conference of England and Wales 1996:17).

What does this mean?

Michael McCarthy (1995) clarifies this concept of the common good and the common weal for us:

> By the common good I mean the philosophical conviction that the purpose of public institutions and practices is to preserve, augment, and perfect the commonweal, where the commonweal refers to the comprehensive good of the whole civic community (1995:1).

He notes that this notion was rejected by Locke and Hobbes who believed that the purpose of government 'was to serve essentially private interests - the preservation of life and property'. (1995:1). The principle of the common good points to the fact that individual rights (e.g. to property) '…may not override the needs of the community as a whole' (Smurthwaite 2001:47). In fact, the desire to live in a fair and just society would prompt the individual to contribute to the common good (Vallely 1998:6).

According to Van Heerden (2000) the **function** of the common good is twofold:

> *Teleological*, that is, the common good is the goal to which society directs itself .
>
> *Verification,* that is, societies can verify whether they promote the common good. The common good and its achievement must be measured in terms of personal and social development, not only in terms of institutions and technology.

Thus the Catholic Bishops' Conference of England and Wales tell us:

> Public authorities have the common good as their prime responsibility. The common good stands in opposition to the good of rulers or of a ruling (or any other) class. It implies that every individual no matter how high or low, has a duty to share in promoting the welfare of the community as well as a right to benefit from that welfare. "Common" implies "all-inclusive": the common good cannot exclude or exempt any section of the population. If any section of the population is in fact excluded from participation in the life of the community even at a minimal level, then that is a contradiction to the concept of the common good and calls for rectification. If the exclusion comes about from poverty, even if only "relative poverty" then that poverty demands attention (1996:17).

Such an awareness of their prime responsibility is essential for those involved in governance and governance issues: the common good must be their aim, but they must continuously strive to evaluate the extent to which this aim is achieved, particularly in the case of the marginalised in society.

In this respect, Bernard Lonergan has also made a contribution to broadening our understanding of the common good. The common good is not only the '*telos* of communal action' but also the *method* and the 'dynamic, self-correcting, intentional process from which the common good emerges' (McCarthy 1995:36). Therefore

> It is in and through the shared deliberative activity of a people that the common good is discovered, evaluated, decided upon and enacted. The classical tradition stressed government <u>of</u> and <u>for</u> the people; intentionality analysis directs attention to government <u>by</u> the people (McCarthy 1995:37).

The common good is thus a 'good' in itself, as well as 'a social reality in which all persons should share through their participation in it' (Dwyer 1994: 193). The common good is not a goal just for its own sake: the purpose of the common good is to help both society and the individual person to "achieve their proper end". It is the members of the society who, in fact, must foster the welfare of that society, each with differing degrees and types of responsibility. Those in governance could do well to consider their responsibilities and their facilitation of others' participation in this light.

This emphasis and commitment to the common good which would reject "that form of liberal thought rooted in the Enlightenment notion of human autonomy" (Dwyer 1994:193), leads us to another principle of CST which can inform our understanding of the concept of governance, namely, the principle of **solidarity**. This means that although each person is created as a unique individual, as an autonomous and free being, solidarity as both a moral and ontological principle, points to our mutual links and connectedness with other humans and to our mutual obligation and responsibility towards one another. We are part of a community and, as such, social beings, dependent on one another for such things as nurture, for love, for education, and for economic development. (see Smurthwaite 2001:46). We must therefore share with one another and such sharing refers also to resources. Thus the principle of **good stewardship** applies to resources which are given to us by God to be managed in such a way that they are shared among and benefit all people. Such an understanding is important for those with the responsibility of governance

and may engender an awareness that we are all interdependent and that resources may not be squandered or used for self interest. They must be deployed for the common good of all reflecting a sense of solidarity with all members of the community.

We understand from the above that the common good is to be achieved by the participation of all persons in society 'for the good of the person is attained when they are able to participate in a rich diversity of communal relationships, ranging from those as small as the family to those as large as the national and global societies' (Dwyer 1994: 195).

Now we must ask: how may such participation be attained? How do those involved in governance facilitate such participation?

We would suggest that public leaders involved in governance, which, as we have seen, involves structures and processes of direction, control and monitoring, must ensure that they apply the principle of **subsidiarity**, a principle aptly suited to the practice of what McLagan and Nel (1997) have called participative governance. CST can enlighten us here. This principle, first mentioned in *Quadragesimo Anno* (79) and also found in other encyclicals (*MM:*53; *PT*:140; *CA:*48; *GS:*86 as listed by McCann 2002:172), states that

> Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of the right order to assign to a greater and higher association what lesser and subordinate organisations can do (Höffner 1997:51, quoting *QA:*79-80).

This principle

> …is one of empowerment and autonomy for human beings who have a right to have a say in and to control their own lives and destinies – it is a principle which presupposes solidarity and the common good and is based on the concept of helping people to help themselves (Smurthwaite 2001:46).

and, in addition, this principle

> states that the larger forms of community such as political society should not replace or absorb those that are smaller but should rather provide help (*subsidium)* to them when they are either unable or unwilling to make their proper contribution to the community. The government provides such help by directing, restraining, and regulating the activities of these other communities "as occasion requires and necessity demands" (*Quadragesimo Anno* 80), to ensure that they in fact contribute to the common good rather than undermine it (Dwyer 1994:195-6).

We said at the beginning of this paper that governance is about human beings. Those involved in governance could also benefit therefore from the understanding that CST has of human dignity. Because human beings are made in the image and likeness of God, each person has an inherent dignity by virtue of his/her humanity. Such dignity is not conferred by the state or any other institution or practice. It is inherent to the human person. 'The highest reason for human dignity is man's vocation to communion with God' (*GS:*19). As such, each human person has equal dignity and is worthy of respect. In *Pacem et Terris* (*PT:*9) we read

> Any human society, if it is to be well-ordered and productive, must lay down as a foundation this principle, namely that every human being is a person, that is, his nature is endowed with intelligence and free will. Indeed, precisely because he is a person he has rights and obligations flowing directly and simultaneously from his very nature. And these rights and obligations are universal and inviolable so that they cannot in any way be surrendered.

Such rights apply to all. Governance is a vehicle to ensure that such rights are implemented and enjoyed by all. It is thus also important for those in governance to take into account the interests of the marginalised in society – CST advocates a preferential option for the poor. This term, coming from the context of Latin American liberation theology (Curran 2002:184-5),was initially used in the encyclicals of John Paul 11 (*SRS* n.42, also *CA* n.11). Those who have power in society must show particular concern for those who are poor, that is, economically disadvantaged, exploited and marginalised. The Church is called to show a "preferential" option for the poor, although this does not mean an "exclusive" option (Dorr 1991:91).

In South Africa and in Africa at large, poverty levels are extremely high. Those who have the responsibility would do well to be focused on the needs of the poor as was suggested in such documents as the Freedom Charter and the RDP document. Governance should facilitate the provision of services and the access to resources for all the community and this includes the poor.

4.3 Catholic Social Teaching as an Ethical Framework

Apart from informing our understanding of governance as a concept, an understanding of CST principles can be used as a basis for ethical decision making and problem solving. An ethical framework based on the principles of the dignity of the human person, solidarity, subsidiarity, the common good,

justice and the option for the poor, may be both substantial and foundational to the making of ethical decisions and to evaluating governance praxis How we do this is, regrettably, a topic for another whole paper. Suffice to say that I have used these CST principles as such an ethical framework in the area of economic justice and in one of the business ethics modules that I teach at St Augustine College. In this module, *The Moral Purpose of Business in the New Millennium*, I have used CST principles as the ethical framework for evaluating corporate codes of conduct. In my doctoral research, I have also developed such an ethical framework for the evaluation of economic justice in the context of the corporation. Likewise, in my previous academic research into economic justice and the uneven distribution of wealth in South Africa, Catholic Social Teaching was used as the ethical framework for evaluating the praxis and response of government, business and civil society to this problem. Such examples, serve to outline, albeit briefly, that Catholic Social Teaching has a significant contribution to make when applied in this way. But to apply these principles, means that one must first be exposed to them, then come to understand them and then come to a point where they become integral to the way one thinks and behaves.

4.4 Catholic Social Teaching and Leadership

Finally, CST can contribute to our understanding of the concept of leadership. In the first instance, it may serve to illustrate the difference between authentic values and inauthentic values and their importance in leadership and governance. Value means a 'good' and points to what is good for a person. However, in our society we are attuned to believing in what Aquinas called an 'apparent good'. We value what *appears* to be good for us, what we want. Thus our focus becomes 'things', 'having', 'it', 'achievement', 'power', 'productivity' etc. These are in fact inauthentic and destructive values. Values based leadership would strive to prioritise, live out and communicate **authentic** values, that is, those emphasising 'persons', 'being', 'love', 'you', 'justice', 'growth' and 'vitality'. Our primary values here would therefore be the human person, community and life. To lead on the basis of such values is to reflect the principles of CST namely solidarity, subsidiarity and concern for the common good including the option for the poor and a concern for justice.

While there are numerous approaches to leadership, which time prevents us from examining, it would seem that servant leadership, first advocated by

Robert Greenleaf in 1977 and now making a reappearance in leadership theory and the literature, stands for such authentic values and could be seen to exemplify a form of leadership which is closely related to and embodies principles very similar to those of CST.

> Greenleaf contends that the servant leader is **servant** first and that he is recognisable by the fact that he places people first and ensures that their priority needs are met. The 'test' to see whether someone is truly a servant leader lies in establishing whether the people being led **grow** in wisdom, health, autonomy and freedom (Smurthwaite 2001b: 15).

Such a leader has a vision and is able to get others to follow him/her. He/she has respect for others, is empathetic, listens carefully, has tolerance and is able to facilitate others. For Greenleaf power is not only vertical and 'top down', but also horizontal and vertical in the sense of bottom up. Power should have nothing to do with coercion or manipulation, but should rather use persuasion.

Power should be used to

> combat mediocrity, for the common good, to create opportunities and alternatives for others so that they may have an increase of freedom of choice and a growth in autonomy. Power should not be hierarchical – this is unnatural, lonely and corrupting for the leader. Greenleaf favours the *primus* model – the leader is at the centre where all converges, but he interacts with others horizontally, using his power to facilitate their growth in wisdom, freedom and autonomy (Smurthwaite 2001b:16).

Authority should likewise be deployed to facilitate others and to ensure that the principle of subsidiarity is implemented to help people to help themselves. Such a leader would foster and live by authentic values namely those of

> being, love, justice and truth rather than having, power, success and achievement. Primary values are the person and his freedom, autonomy, health and dignity – these the servant leader respects and fosters. His aim is to promote life, a concept that includes growth, vitality, education and involvement in community with its accompanying order, plurality, support, relationships and sharing (Smurthwaite 2001b:16).

Servant leadership reflects the practical application of those principles of CST that we have discussed. To broaden the understanding of leadership of those involved in governance could contribute to an improvement of governance standards in both public and private sectors. It might also serve to counter the materialistic, self serving mentality which so characterises our

consumer oriented and market oriented society. Servant leadership could, therefore, be a means to realising the achievement of the common good by those involved in governance.

5. Conclusion

Governance is about people. It is planned and implemented by people. It affects people. It should then be used as a means to create transformation, a transformation that realises the common good. For this to happen, we need to transform people so that in their leadership roles they may achieve this transformation through good and ethical governance, rather than seeing governance as an opportunity to exploit rules and processes as a means to serving their own self interest or the interests of a small, elite. CST can help us achieve such a transformation and place governance at the service of people, such that it is developed and implemented to their benefit.

Notes

1 This Paper was originally given as the keynote address on the conference on "Good Governance and the Faith Tradition" organized by the African Forum for Catholic Social Teachings (AFCAST) on 01 March 2005 in Cape Town.

2 *The 'Co-Chairmen's Foreword' by Ingvar Carlsson and Shridath Ramphal of the Commission on Global Governance*[1]*. Here we read, with reference to Our Global Neighbourhood, that*

> The development of global governance is part of the evolution of human efforts to organize life on the planet, …global governance is not global government. No misunderstanding should arise from the similarity of the terms. We are not proposing movement towards world government, for were we to travel in that direction we could find ourselves in an even less democratic world than we have--one more accommodating to power, more hospitable to hegemonic ambition, and more reinforcing of the roles of states and governments rather than the rights of people.
>
> This is not to say that the goal should be a world without systems or rules. … The challenge is to strike the balance in such a way that the management of global affairs is responsive to the interests of all people in a sustainable future, that it is guided by basic human values, and that it makes global organization conform to the reality of global diversity.
>
> *The Concept of Global Governance is explained in this document as follows:*
>
> There is no alternative to working together and using collective power to create a better world.

Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co- operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.

At the global level, governance has been viewed primarily as intergovernmental relationships, but it must now be understood as also involving non- governmental organizations (NGOs), citizens' movements, multinational corporations, and the global capital market. Interacting with these are global mass media of dramatically enlarged influence. (http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/globe/gove.htm#) (accessed 14 February 2005) (Full text of this report is online: http://www./cgg.ch/)

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The Legal Protection of Whistleblowers in South Africa: Issues and Prospects

KHALI MOFUOA

Introduction

Legal protections for whistleblowers are entering a phase of global convergence, driven by the growing recognition that employees are an invaluable source of information about official corruption. Indeed, the equation is clear: global capital will generally flow at favourable rates to where it is protected, but will not flow at all or will flow at higher -risk rates where protections are uncertain or nonexistent [Millstein, 2005: 4]. Of course, recognizing the importance of capital protection is only part of the equation. Knowing what to do and how to go about protecting capital is the other half, and for practical purposes, the most difficult one.

It is no surprise that the emergence of legal protections for whistleblowers is receiving a worldwide attention today [Kaplan, 2001: 37-42]. Indeed, whistleblower protection is perceived as a way of protecting capital against official corruption and malfeasance. Anti-corruption efforts become futile when employees are reluctant to become "whistleblowers" out of fear for victimization and/ or retaliation. To encourage employees to come forward and share their knowledge of official corruption and malfeasance, statutory protection for whistleblowers is now recognized. Ideally, whistleblower protection laws are intended to make it safe for employees to disclose misconduct that they discover during the course of their employment [Kaplan, ibid]. But in reality, as of 2005 whistleblowers are left to their own ingenuity and devices to call for protection of the law against retaliation [Mail and Guardian, 05 -11 August 2005].

This article grapples with the intricate issue of legal protection for whistleblowers with special reference to South Africa. South Africa's remarkable change in the last decade is recognized. The impact of this

overwhelming change in attempting to promote and encourage a culture of openness, transparency and accountability is the subject of discussion and debate in the text. Although broadly acknowledged that South Africa's change has contributed immensely to the country's governance, consensus over the extent to which it has built firm foundations for sustainable development and durable democracy remains elusive. The article examines, against the historical background of apartheid, the present status of legal protections for whistleblowers from victimization and / or retaliation in South Africa, with a view to identifying the factors responsible for employees falling foul of the law that is supposed to protect them.

South Africa - Whistleblowers in Various Contexts

In order to contextualise the current system for whistleblower protection provisions, which emerged in the awake of the demolition of apartheid, we need to examine the phenomenon of whistleblowing during the apartheid period in South Africa. In the South African apartheid context, whistleblowers were associated with 'impimpis' -apartheid era informants who betrayed their comrades often with devastating consequences [Camerer, 2001]. This historical context has unfortunately allowed the stigmatization of whistle blowing as an activity to be despised rather than to be encouraged [Camerer, ibid]. This apartheid legacy is largely the major cause of negative perception of whistleblowing in South Africa today. Because of this whistleblowers have unfairly acquired a bad reputation as "troublemakers," "busy bodies," "sellouts" and "deviants" [Camerer, 2001; Mathews, 1988].

In other South African social circles, the perception is that whistleblowers are 'dobbers' - persons who secretly tell someone in authority that someone else has done something wrong. To do this is seen as an act of betrayal. Hence the whistleblowers are regarded as being anti-social anti-comradeship. As William de Maria [2002] noted the “whistleblow [er] is anti-social because [s/he] erodes trust among work colleagues. We as a nation do not discriminate between whistle blowing and its ugly sister, dobbing. In our consciousness these are scrambled: we hate dobbers and we will continue to confuse them with whistleblowers for at least another generation.” William de Maria note refers to a historical epoch of whistleblowing in Australia that is not dissimilar to the South African context. Indeed, there is a prevalence of confusion about the meaning of the term 'whistleblowing' in South Africa [Camerer, 2001]. In fact

de Maria [2002] warned that there is a cost as “we move from a work culture where no one would, or could disclose, to one where today's workmate could be tomorrow's informer.” And indeed whistleblowers have become sole bearers of the price!

What happens after the whistle is blown? Nick Perry's [1998] *Indecent Exposures: Theorizing Whistleblowing* comments thus: The case material indicates that the characteristic tragedy of whistleblowers' careers (after they have gone public) is, with few exceptions, a downward spiral. There is the further prospect that this will be linked to a blame-the-victim strategy, i.e. that the associated psychological deterioration may be cited as a vindication of the imposition of sanctions in the first place. Whistleblowing might well be classified, therefore, as a form of occupational suicide - or perhaps as accidental career death. In agreement with Perry's comment, US whistleblower Sherron Watkins, in arguing against the term whistleblower because it has a pejorative ring to it, said that disclosing inappropriate behaviour at Enron was a "lonely road to take." This was her experience despite the fact that, in the United States, statutory protection for whistleblowers has existed for at least over 20 years [Kaplan, 2001: 37]. Further, constitutional guarantees of free speech have been interpreted to protect public employees who speak out on matters of public concern - including corruption and malfeasance [Kaplan, Ibid].

What can be learned from Sherron Watkins experience? That a culture that not only accepts, but actively encourages whistleblowing remains consistently wanting, and perhaps fighting an uphill battle in becoming part of business culture in societies. That whistleblower protection is currently much more academic than actual. That whistleblower protection laws alone cannot actually help foster an environment that rewards and encourages whistle blowing. Indeed, it is deeply unsettling to learn that this was Watkins's experience in USA community where well-established “systems for protecting public servants and private systems who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and basic principles of their domestic legal systems” [Kaplan, 2001: 37] exist. What then might it mean in South Africa - a society where a culture of openness, transparency and accountability is in the making?

Although popular culture in the United States suggests that its whistleblowers are held in high esteem as portrayed in Hollywood films like "Serpico", "Silkwood" and "The Insider," the Watkins's experience suggests

otherwise. Her experience underlines the fact that in real life attitudes are actually different.

The ugly reality is that, in "sticking their necks out" to raise concerns within their place of employment, [whistleblowers] more often than not risk victimization, recrimination and sometimes dismissal as it is often the case that the messenger, rather than the important message that is conveyed, is attacked [Camerer, 2001]. Whistleblowers are often viewed, not as heroes or heroines, but as disloyal "malcontents" [Kaplan, 2001: 38]. "This is especially true when their whistle blowing takes the form of going outside of their organizations to obtain redress" remarks Kaplan. "Ironically, whistleblowers are often forced to go outside to make their disclosures by an organizational culture that does not provide adequate assurances either that the whistleblower's underlying concerns will be addressed or that [s] he will be protected against retaliation" he concludes.

South Africa - Whistleblowing and Anti-Corruption Strategies Nexus

Despite having a pejorative ring to it, whistleblowing and anti-corruption strategies are inherently intertwined. Indeed, anti-corruption efforts are hampered when employees are reluctant to become "whistleblowers" by coming forward and sharing their knowledge of official corruption and malfeasance with proper authorities [Kaplan, 2001: 37]. This explains why whistleblowing must be correctly understood not to mean informing in a negative, anonymous sense [Camerer, 2001] nor indeed being an apartheid-era impimpi, or police spy. Put differently, whistle blowing is neither about informing prejudicially nor disadvantaging or injuring someone by prejudice. Rather, as the United Kingdom's Committee on Standards in Public Life puts it, it is about "raising a concern about a malpractice within an organization" and in this way is a tool in promoting individual responsibility and organizational accountability.

Terry Morehead Dworkin's [2002] *Whistleblowing, MNC's and Peace* complements the UK Committee on Standards in Public life viewpoint about whistleblowing. She commented thus: whistleblowing is seen as one-way to obtain, or regain societal control over the large organizations that increasingly dominate society. The premise behind recent governmental promotion of whistleblowing is that people of conscience work within these large, complex organizations, and would normally take action against wrongdoing except for fear of losing their jobs or other forms of retaliation. Thus, if adequately

protected from retaliation they will come forward with evidence of wrongdoing before it would be detected externally, if discovered at all. Harms from the wrongdoing could be reduced, wrongful behaviour stopped, and the expense of public oversight and investigation would be reduced if such reporting occurs. Moreover, if whistleblowing proved a relatively common occurrence, wrongdoers would be aware that their activities were not as secret as they might otherwise be. In this regard, the objectives of laws for protection of whistleblowers would be achieved, and indeed the culture of openness, transparency and accountability would be promoted and encouraged as well.

Similarly, in South Africa a useful start in the encouragement of best practice within organizations and community acceptance of whistleblowing in an environment where reporting is sometimes seen as "dobbing' or "unUbuntu" has been made. A survey conducted by the Institute of Security Studies among a panel of experts who attended anti-corruption conferences [in November 1998, April 1999 and November 1999] bears testimony to this. The survey confirmed the importance attached to whistle blowing as an effective tool in the fight against corruption in South Africa.

Indeed, without individuals who in some social circles have been termed "whistleblowers", "bell ringers" and "lighthouse keepers", sometimes also affectionately termed "people's witness", anti-corruption campaigns are empty and lifeless. The efforts of established ant-corruption bodies such as the Special Investigating Unit [The Scorpions] and other statutory institutions will remain futile. Indeed, people's witnesses are the lifeblood for efforts to prevent, investigate and prosecute corruption and malfeasance. They personify a basic premise of jurisprudence that "sunlight is the best disinfectant".

Clearly, therefore, witnesses' knowledge and intelligence needs protection for effective expression. This form of freedom of expression provides citizens of organizations with the freedom to be partners in genuine challenges to corruption. Without the free flow of information from knowledgeable witnesses, anti-corruption infrastructure remains a "white elephant". Indeed, there is ample evidence that in a repressive environment people's witnesses will be silent observers instead of speaking out on behalf of the public against corruption and malfeasance. Protecting them must be seen as being “good for society because it exposes wrongdoing and it gives a battery charge to tired old democracy” [de Maria, 2002].

In the case of South Africa, experience demonstrated that “ one of the key obstacles in the fight against corruption is the fact that, without legal protection, individuals are often too intimidated to speak out or "blow the whistle" on corrupt activities, they observe in the workplace” [Camerer, 2001]. "Although they may have duty to report misconduct in terms of their conditions of employment, those who stick their necks out and raise concerns are mostly victimized, intimidated and until recently would have little recourse to legal remedies" [Camerer, ibid]. Understandably, therefore, the enactment of the Protected Disclosure Act [PDA] in South Africa in 2000 was a step in the right direction. The Act, which seeks to protect whistleblowers from occupational detriment, is seen as a "crucial weapon in the armory of anti-corruption efforts to encourage honest employees to report wrongdoing ... [and] to promote accountability and fight corruption" [Camerer, ibid]. Indeed, it is now recognized that when whistleblower protection is visible, the multiplier effect of that visibility heightens the fight against corruption. As Kaplan noted, "when accompanied by other initiatives, such ... [legal protections for whistleblowers] can actually help foster an environment that rewards and encourages whistleblowing" [2001:37]. And indeed, Camerer and others strongly believed that PDA should be welcomed as a "crucial corporate governance tool to promote safe, accountable and responsive work environments in both the public and private sector[s]" [Camerer, 2001]. Although broadly acknowledged that PDA has contributed immensely to heightening anti-corruption campaigns in South Africa, the extent to which it has laid firm ground for sustainable and durable legal protections for whistleblowers remains a subject of debate.

South Africa - whistleblowers legal protection provisions set in motion

Since the adoption of the new South African Constitution in May 1996, and the subsequent accession of Thabo Mbeki to the South African presidency, the principle of "whistleblower protection provisions" has taken centre stage. In his first address to Parliament as the newly elected State President, Thabo Mbeki spoke extensively about the need for a partnership between the government and the people to fight against corruption. He made a strong call for "Open Democracy" to foster greater transparency, whistleblowing and accountability in all sectors of the South African society. He also reiterated his new government's commitment "to honest, transparent and accountable government

and determination to act against anybody who transgresses these norms" as espoused by the South African Constitution. Indeed, one of the overriding purposes of the South African Constitution, as stated in the Preamble, is to "[1] lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law." It was in the same address that President Mbeki undertook to ensure that the Open Democracy Bill was passed and that there be speedy movement to "ensure the implementation of the provisions relating to the protection of whistleblowers." Mbeki's will and commitment thus precipitated major initiatives to fast track the pursuit of the whistleblower protection section of the Bill as a separate legislation. It also triggered an agreement that the UK law would be used as a very important example to draw from when re-drafting the whistleblower protection sections of the Bill, and that the whistleblower protection sections of the Bill should be extended to include the private sector well.

The President's call for Open Democracy thus further precipitated the hosting of the Second National Anti-Corruption Summit in April 1999 whose resolutions made specific reference to:

> "Developing, encouraging and implementing whistle-blowing mechanisms, which include measures to protect persons from victimization where they expose corruption and unethical practices."

The outcome of the summit thus reiterated the First National Anti-Corruption Summit [1998] resolution relating to whistle blowing which read, "... As the basis of a national strategy to fight corruption ...[there is a need] to support the speedy enactment of the Open Democracy Bill to foster greater transparency, whistleblowing and accountability in all sectors [of South African society]." This call saw the drafting of the Open Democracy Bill, which had the section on whistleblower protection. But to make whistleblower protection more visible, the separate bill was proposed. Thus whistleblower protection provisions, the brainchild of the Open Democracy Bill, became law through the Protected Disclosures Act, which was passed by the Parliament on June 20, 2000. President Thabo Mbeki duly signed the Act on August 1, 2000 and it went into effect in October 2000. Like protection laws for whistleblowers elsewhere, the Act intends to make it safe for employees to disclose misconduct that they discover during the course of their employment, and to foster an environment that rewards and encourages whistleblowing.

The modus operand of South African Protected Disclosures Act [PDA] draws extensively on the British Public Interest Disclosure Act [PIDA]. Indeed, safe to say it could be said the SA's PDA is a "replica" or "carbon copy" of the UK's PIDA. Like its PIDA model, PDA conditions wider disclosures upon an employee's reasonable belief that internal procedures will either be ineffective or corrupt. Thus, it provides a modus operandi for the making of the protected disclosures in terms of both the specified and general procedures, details of which are comprehensively discussed elsewhere [see Camerer, 2001; Protected Disclosures Act Gazette, 2000]. The Act also has global coverage: it brings both the Public and Private sectors under its operational armpit. It allows and assists employees in both the public and private sectors to raise concerns about the unlawful or irregular conduct of their employees or co-workers. Various types of information disclosures are highlighted in the Act, including suspicion of criminal offence, failure to comply with legal obligations and so on.

In verbatim the Act further provides that, "no employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, or having made a protected disclosure." This reaffirms Parliament’s description of the purpose of the Act as being to, "create a culture which will facilitate the disclosure of information by employees relating to criminal or other irregular conduct in the workplace in a responsible manner."

Indeed, the Act recognizes the responsibility of both employers and employees to disclose criminal and other misconduct in the workplace. In this regard, it thus places the responsibility to promote and encourage a culture of openness, transparency and accountability in the workplace on the shoulders of both employers and employees.

The Act also further recognizes both the employer’s and employee’s obligations to each other. It provides that it is the obligation of the employer to protect the bona fide whistle blowers from occupational detriment. Like the phrase "personnel action" under US law, an "occupational detriment" is broadly defined to include, "any disciplinary action, dismissal, suspension, demotion, harassment, intimidation, transfer against will, refusal of transfer or promotion, refusal to provide employment reference or provision of an adverse reference or otherwise adversely affected in respect of employment, profession or office, including employment opportunities and work security." [Camerer, 2001; Kaplan, 2001].

Similarly, the Act recognizes the employee's obligation to make disclosures in "good faith" or "without prejudice" and to raise "legitimate concerns." To ensure that incidences of "personal vendetta " and/or "settling of score" do not come into play during the process of disclosure making, the Act protects essentially the same range of disclosures as PIDA and also contains limitations of the permissible channels for making such disclosures [Kaplan, 2002:41]. Like PIDA, the Act's preference is that the disclosures be made to the employer itself or an appropriate public authority, rather than, for example, the media [Kaplan, ibid]. Thus, it sets out "specific procedures" for disclosure of information as well as most comprehensive requirements in respect of making a " general disclosure."

In sum, Richard Calland, the former Executive Chair of the new Open Democracy Advice Centre said it all regarding the "spirit" and "philosophy" of the South African Protected Disclosures Act when he remarked:

> "At the heart of the Act is the notion that prevention is better than cure. It strongly encourages whistle-blowers to disclose first to the employer, in order that the employer should have the opportunity to remedy the wrongdoing. Potential whistleblowers need to know they must first go through this door where the test is that of good faith, rather than making a wider disclosure, which would require higher tests. " [Calland cited in Camerer, 2001:3].

Lala Camerer complements the Calland's remarks when she said,

> "the Act is specifically structured in a way that best serves the interests of accountable organizations. Only when internal channels have been exhausted or fail are wider disclosures to external bodies protected if they pass the significantly the higher tests. The fact that the Act highlights various types of information, including suspicion of criminal offences, failure to comply with legal obligations and a reasonable belief that health or safety of people is endangered, which all require the response of the Department of Labour means that it can and will make a difference in the way organizations and the state receive concerns about wrongdoing and the diligence with which these are addressed" [Camerer, 2001:3].

Now the critical questions are: has the law made a difference in the way organizations and the state managed the overall process of disclosure making? Has the law made it safe for employees to disclose misconduct that they discover during the course of their employment? The next section grapples with these issues by making some critical observations about legal protection for whistleblowers in South Africa.

South Africa - Some critical observations about legal protection for whistleblowers

That the Protected Disclosures Act of 2000 is a crucial corporate governance tool to promote safe, accountable and responsible work environments in South Africa is indisputable. Indeed, the importance of the Act as a tool to fight corruption is in no doubt. But the extent to which the Act upholds whistleblower protection is in doubt. The general feeling is that it has not yet done enough to turn the tide in favour of whistleblowers. Put differently, it has not done well at creating a safe alternative to silence [Calland, 2004]. Stories about the agony of whistle blowers that constantly 'hit' the media are the living testimony that the "occupational detriment" that the Act is designed to prevent, or provide recourse for, is rife [cf. Mail & Guardian August 05 to 11,2005].

Most significantly, the three well-publicised cases of Tatolo Setlai, Jakes Jacobs and Glen Chase provide ample evidence that whistleblowers are the "unsung heroes." First, the former governor of the Grootvlei Prison, Tatolo Setlai faced the wrath of authorities for blowing the whistle on an outrageous range of illegalities in the prison. Unfortunately, his "reward" for disclosure was suspension, arrest and charge. Indeed, his price was to be depicted by the authorities as a "very bad man." Although finally acquitted, the record has it that "Setlai is remarkably sanguine about what happened" despite the anguish he endured. Second, Jakes Jacobs' exposé of the sickening sight of the North East Rand Dog Unit Policemen setting their dogs on three unarmed Mozambican migrants has become a "living hell" for him. As with Setlai, he was initially suspended but reinstated later and subjected to work place ostracism. The record has it that "given the second chance he would not blow the whistle, and moreover, he would not advise others not to do so" [Calland and Stober, 2004]. Third, the case of Glen Chase, a former Senior Accountant in Northern Cape's Transport Department, further demonstrates that it is still not safe for whistleblowers in South Africa. Chase was suspended and then dismissed for blowing the whistle on the use of state funds for private use by some of the senior officers of the Transport Department. "Releasing official information to the public without authority" was the basis of her dismissal from employment [Calland and Stober, 2004].

Lastly, the recent news headline "whistleblowers face dismissals" in the Mail & Guardian of the 05 to 11 August 2005 further sheds light about the position of legal protection for whistleblowers in South Africa. The newspaper

reported that, "several Eastern Cape government officials suspected of blowing the whistle on a fraudulent R16-million agricultural empowerment deal are fighting for their careers after they were suspended following the public exposure of the scandal nearly a year ago." The Kangela saga thus further reaffirms the general feeling that whistleblowing is a form of "occupational suicide" - or perhaps an "accidental career death" in South Africa. Indeed the well-publicised submission from the Kwazulu-Natal Society of Advocates reaffirms this view. In its submission to a Law Commission working group that is exploring ways to strengthen the PDA, the learned Society of Advocates is on record to have argued thus "[there is] something distasteful in the notion of encouraging and protecting informers, whistleblowers and other odious individuals. " If anything, the submission and the shenanigans revealed in the whistleblowing cases of Tatolo Setlai, Jakes Jacobs and Glen Chase [Calland & Stober, ibid] as well as the recent case of Menzela, Tom and Neil [Mail & Guardian, ibid] demonstrate that legal protection for whistleblowers remains consistently wanting, and is perhaps still fighting an uphill battle to become part of the business culture in South Africa.

This is absurd! It means that the good intentions of law and policy makers would have been sabotaged as whistleblowers continue to become "scape-goats" and "sacrificial-lambs" when they expose corrupt and unethical practices. Such a situation renders whistleblowers irrelevant, and indeed becomes a fertile ground for a culture of silence, which has profound implications for the fight against corruption and malfeasance. Indeed as the previous cases illustrate, the bare existence of the statutory protection for whistleblowers is not a panacea. It is only just part of the equation, albeit an important part. There are special challenges that face South Africa's noble efforts to implement systems to protect and encourage whistleblowing. Without attempting to be exhaustive, such challenges are discussed below:

Changing the response and culture to whistle-blowing

That a whistleblower is someone who discloses significant acts of waste, fraud, mismanagement, law breaking or abuse of authority by public officials or public programs, all of which threaten the public good, is not always the case. Unfortunately, many people equate whistleblowers with "tattle tales." For example, until the early 1980s, legal indices often listed the law of whistleblowing under the word "snitch" or "informant" [Taylor, n.d]. Worse

still, much of that negative attitude has not changed today. Although whistleblowers have many different backgrounds, skills, professions, interests and experiences, their adversaries customarily paint them in "one-dimensional negative terms" [Taylor, ibid]. Frequently, whistleblowers are described as "whining, disgruntled, problem employees with low standards or no talent, who are seeking publicity, money or special privileges for themselves" [Taylor, n.d]. A popular accusation is that whistleblowers are not "team players." Often their employers shamelessly accuse them of "suffering from severe psychological problems, low morals or serious defects in job performance," and in most cases they are unfairly referred to as "M & Ms — misfits and malcontents." [Taylor, ibid]. Indeed, a rule in whistleblowing seems to be that the more serious the whistleblower's allegation, the more hostile and one-dimensional is the employer's description of the whistleblower. This is the time-tested tactic that is used to diminish the message by attacking the messenger [Taylor, ibid]. Ironically, this is the very culture and response to whistleblowing that the Protected Disclosures Act, as a legal protection law for whistleblowers in South Africa seeks to change. Recognizing that whistleblowers perform a selfless and valuable service to society by striving to protect our society, enforce its enacted laws and promote society's stated ethics, should be appreciated. Without their noble acts of courage, all done at great risk to themselves, their careers, and their loved ones, South Africa would be a more dangerous, deceitful and difficult place to live.

Organizational leadership will and commitment to whistle blowing culture

That the law is at times a blunt instrument when it comes to whistleblowing is indisputable. Changing the culture not just in society but also in the work place is axiomatic, as whistleblowing cases in South Africa illustrate, but reality is that organizations in South Africa as elsewhere are constantly battling to maintain their boundaries in an "eat-or-be-eaten competitive environment" [Alford, 2001]. Because organizations try to maintain total control over their internal environments, whistleblowers are viewed as "traitors in our midst" who represent external interests that threaten the organization's integrity. In response, the organization "will remove [the whistleblower], not just beyond the margins of the organization, but all the way to the margins of society" [Alford, 2001: 54]. Alford offers damning evidence that most legal protection for

whistleblowers is "illusory" since it is "the purpose of law to enshrine existing power differences in society" [2001: 111].

As such, he presents organizations and society as institutions dedicated to the destruction of moral individualists – the whistleblowers. Alford's presentation thus challenges organizational leadership's will and commitment to whistle blowing. Indeed, the civil approach to whistle blowing must start at the top of the organization. There is no way it can be implemented unless there is "tone at the top." It has to come from the senior management and the board of directors; there has to be an absolute acceptance that whistle blowing is good for business, indeed that good conduct is good for business, and doing business with integrity is good for business. In this sense, whistleblowers fighting to improve organizations should receive unwavering support and assistance from organizational leadership.

Increasing investment in internal systems and policies

That whistleblowing is a sine qua non of a risk management strategy in organizations is not doubted.. Evidence abounds that whistleblowers act as early warning systems in safe environments. However, some whistleblowers appear to regard formal channels as too risky and instead rely on the classical leakage of documents or the briefing of a journalist, a task that calls on skills in media management on the part of organizations. Impediments to the success of internal whistle blowing include but are not limited to:

- lack of trust in the organization's system for identifying and responding to malpractice
- perceptions that whistleblowers are "dobbers"
- concerns about retaliation in the workplace, including lack of legal protection
- concerns about potential defamation or other litigation and
- expectations about little support from unions and alienation from peers [Caslon Analytics, July 2004].

These impediments have profound implications for the effectiveness of internal systems and policies in the fight against corruption and malfeasance in organizations. As such, they call for increasing investment in internal whistle blowing systems and policies in organization, which aim to:

- underpin corporate standards and codes of ethics

- encourage employees to bring legal, financial and other malpractice to the attention of an internal authority for action on a timely basis
- minimize the organization's exposure to the damage that can occur when employees circumvent internal mechanisms and
- obviate the need for intervention by another body, e.g. in response to inaction after concerns were brought to the attention of an authority within the organization [Caslon Analytics, ibid].

With these, a safe environment for employees to disclose misconduct that they discover during the course of their employment would be created, from whence whistleblower protection mechanisms would be developed and nurtured to promote and encourage a culture of openness, transparency and accountability in organizations in South Africa.

Creating whistleblowers support infrastructure

That whistleblowers do not get the support and assistance they need for disclosures they make in South Africa seems undeniable. The cases of Tatolo Setlai, Jakes Jacobs and Glen Chase are illustrative of this point. The South African law does not provide for any independent agency of the state to investigate whistleblower complaints or assist the whistleblower [Kaplan, 2001: 41]. Instead the whistleblower may invoke the jurisdiction of any court or tribunal in order to protect himself/herself against retaliation [Kaplan, ibid]. Furthermore, under the law, where it is practicable, a whistleblower who reasonably believes that s/he is going to be subject to an occupational detriment must, at her or his request, be transferred to another position by the employer [Kaplan, ibid]. This absence of support infrastructure for whistleblowers as Jakes Jacobs's case illustrates, has exposed them to intolerable and chilling retaliation and victimization. It has also somewhat precipitated a lack of confidence and trust in already established institutions. Confidence and trust deficit in such institutions could stifle the promotion and encouragement of a culture of openness, transparency and accountability, which the PDA purportedly or supposedly seeks to create in South Africa. Indeed, without visible and credible support accompanied by rewards, whistleblowing as a tool for uncovering corruption will be rendered irrelevant and people would pay lip service to whistleblowing.

Reporting concerns in confidence

There is a need for the establishment of systems for protecting whistleblowers who, in good faith report acts of corruption, including protection of their identities. Anti-corruption efforts are hampered when employees are reluctant to become "whistleblowers" by coming forward and sharing their knowledge of official corruption and malfeasance with the proper authorities [Kaplan, 2001: 37]. Due to widespread publicized incidents of direct retaliation, whistleblowing activists are now demanding the law to consider "reporting of concerns in confidence" by whistleblowers to the authorities. While they have a point, unfortunately the duty of confidentiality does not ordinarily preclude whistleblowing [Camerer, 1996: 3]. The law of confidence provides that "there is no confidence as to the disclosure of iniquity." Thus alongside the law of confidence there exists a public interest exception. This means that the public interest may at times be overridden where there is a countervailing public interest in disclosure, which is sufficient to override it. The law of confidence conflicts with the law of fidelity in this regard. The law of fidelity provides that "confidence should be preserved and protected by the law [no matter what!]." Whether PDA can resolve this conflict remains a challenge. What is clear is that there is a need to find a "middle ground" to weigh the public interest in maintaining confidence against a countervailing public interest that favour disclosure.

Strengthening education programs for whistle blowing

It is clearly necessary for a whistleblower to be familiar with the legal statutory mechanisms s/he can invoke in making disclosures. Frequently whistleblowers do not use extreme care when selecting the forum in which they attempt to pursue their legal rights and seek redress for injury done to them [Taylor, n.d]. More often than not, statutory schemes require whistleblowers to pursue their legal rights in an administrative arena before allowed to pursue them elsewhere. Lack of knowledge or ignorance in procedures has often landed whistleblowers in "hot water," whereby hostile or retaliatory actions are taken against them.

Sometimes a specific administrative proceeding is conducted in a manner that is counterproductive to what the whistleblower is seeking [Taylor, n.d]. For example, the rules of allowable and relevant evidence vary greatly amongst these forums. Further, most statutes impose strict and differing time frames within which the whistleblower must institute the proceeding or forever be

barred from pursuing her /his legal rights to seek relief [Taylor, ibid]. Clearly, therefore, whistleblower education programs have to be strengthened to teach whistleblowers about their legal rights. These educational initiatives would go a long way toward equipping whistleblowers with knowledge of their world and the "ammunition" at their disposal against retaliation or victimization.

As the foregoing demonstrates, there are numerous challenges that face whistleblower protection laws in South Africa. Indeed, there is urgent need to tackle these challenges, particularly those of ignorance and distrust. Many surveys across the globe suggest that majority of employees remain unaware of statutory protections or of the many avenues that exist for them to make their disclosures [Kaplan, 2001:47]. Similarly, the majority of them are reluctant to blow the whistle either because they fear retaliation or because they believe that nothing will be done in response to their disclosures [Kaplan, ibid]. The next section attempts to provide some policy recommendations regarding how some of the alluded to challenges can be dealt with.

South Africa - some recommendations beyond whistleblower protection challenges

As suggested, whistleblower protection presents difficulties and challenges to South Africa's law. But these challenges are not insurmountable. On the contrary, there are ways forward if South African leadership [public & private] demonstrates necessary political will and commitment to turn the tide against "societal negativity" toward whistleblowing. One way of addressing whistleblower protection is for South Africa to create sustainable and durable conditions for it. In doing so, the effectiveness of the whistle blower protection structures and processes in meeting the demands placed on them will improve. Whistleblower protection structures and processes need constant tinkering for expediency or to meet prevailing whistleblower exigencies, and indeed may produce great shifts in whistleblower response and attitude outcomes. Whistleblower protection systems suffer violent breakdown when channels of communication fail to function effectively, when institutional structures and processes fail to resolve conflicts among demands and to implement acceptable policies, and when the system ceases to be viewed as responsive to the individual and groups making demands on it.

Secondly, alongside the above efforts to help alleviate the current whistleblower protection problems, South Africa needs to develop a widespread

sense of the legitimacy of whistleblower protection agencies' authority and some general agreement on appropriate forms of whistleblower protection action. Whistleblower protection systems suffer their gravest handicap when they must operate without consent or when the legitimacy of their regimes is widely questioned. Further, to obtain whistleblower trust and confidence, those agencies must be given the resources and support to allow them to function effectively. Many of the whistleblower protection regimes in developing countries have found this a source of great difficulty. They have often emulated the form of western institutions but failed to achieve their spirit. Borrowing eclectically from western philosophies and its system of law has created whistleblower protection frameworks and institutional structures that lack meaning to people, and that fail to generate loyalty and support.

Thirdly, closely related to the aforementioned solution, South Africans have to develop a fundamental consensus on what constitutes appropriate whistleblower protection behaviour and protocols. This simply means that there should be well-established, open channels of action and credible procedures for addressing whistleblowers' concerns. The importance of such "rules of the game" coupled with appropriate infrastructure support is that they can actually help foster an environment that rewards and encourages whistle blowing. They can also promote a culture that not only accepts, but also actively protects whistleblowers from retaliation and rewards them.

Fourthly, building a whistleblower protection culture capable of transforming societal response to whistle blowing will go a long way to bringing benefits of a "protected" disclosure to the South African organizations and society. This achievement should be based on the development of democratized patterns of whistleblowing control processes and the growth of popular education about them to gain their trust and confidence. In this regard, whistleblower protection systems will demonstrate an impressive capability for performance. The key to their success will be their ability to control social development, to manage change and to bring under governmental direction all the forces that may result in innovations that promote and encourage a culture of openness, transparency and accountability.

Furthermore, South Africans have to understand that performance of whistleblower protection does not depend on the detailed management of the society or close governmental control over social processes. Rather it is also the result of a sensitive response to the forces of change, of flexible adjustment of

the structures of the system to meet the pressures of innovation, and of open processes that allow gradual and orderly development of culture of openness, transparency and accountability.

Finally, it has to be recognized that the above proposals are possible when whistleblower protection institutions provide effective channels of communication of demands and criticisms to governments that rely upon majority support. In this situation, social and economic problems are quickly transformed into issues in the open arenas of politics. In addition, governments are obliged to shape policies that reflect a variety of pressures and effect compromises among many conflicting demands. In fact the whistleblower protection mechanisms are subject to a continuous process of adjustment and mutation. As such, whistleblower protection institutions have to develop in ways that reflect social and economic developments in the society or they will lose their legitimacy in the minds of the people. This process of dynamic adjustment is crucial, for institutions that remain static in a changing society are unable to serve as appropriate agencies in a changing environment.

In sum, the above list of measures is not exhaustive but their effective implementation can help South Africa to address whistleblower protection comprehensively and sustainably. As Kaplan correctly noted,

> "statutory protection for whistleblowers is only part of the equation, albeit an important part. Cultural change and [leadership] support [infrastructure and education] must accompany whistleblower protection laws in order for them to achieve their objectives" [2001:42].

Concluding remarks

Putting legal protection in place for bona fide whistleblowers is crucial to fight corruption in South Africa. Indeed, one of the key obstacles in the fight against corruption in South Africa is the fact that people are often too intimidated to blow the whistle on corrupt and unlawful activities out of fear of retaliation. For them, whistleblowing is a form of occupational suicide - or perhaps an accidental career death. As such, legal protections and procedures for protecting and encouraging whistleblowing are seen as key instruments to turn the tide against a culture of silence, which is a breeding ground for corruption. Indeed, it is now recognized that the bare existence of legal protection for whistleblowers without supporting resources is no panacea. For it to foster an environment that rewards and encourages whistleblowing, leadership

commitment, supporting culture, education and infrastructure must be its close acquaintances. Otherwise the whistleblowers' freedom of expression, which is the lifeblood for efforts to prevent, investigate and prosecute corruption, will be stifled. Without a free flow of information from whistleblowers, anti-corruption campaigns are empty and lifeless - a situation that South Africa must avoid at all costs if the fight against corruption is to be won, and a culture of openness, transparency and accountability is to take root.

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ABOUT ST AUGUSTINE COLLEGE OF SOUTH AFRICA

The idea of founding a Catholic university in South Africa was first mooted in 1993 by a group of academics, clergy and business people. It culminated in the establishment of St Augustine College of South Africa in July 1999, when it was registered by the Minister of Education as a private higher education institution and started teaching students registered for the degree of Master of Philosophy and Doctor of Philosophy.

It is situated in Victory Park, Johannesburg and operates as a university offering values-based education to students of any faith or denomination, to develop leaders in Africa for Africa.

The name 'St Augustine' was chosen in order to indicate the African identity of the College since St Augustine of Hippo (354-430 AD) was one of the first great Christian scholars of Africa.

As a Catholic educational institution, St Augustine College is committed to making moral values the foundation and inspiration for all its teaching and research. In this way it offers a new and unique contribution to education, much needed in our South African society.

It aims to be a community that studies and teaches disciplines that are necessary for the true human development and flourishing of individuals and society in South Africa. The College's engagement with questions of values is in no sense sectarian or dogmatic but is both critical and creative. It will explore the African contribution to Christian thought and vice versa. Ethical values will underpin all its educational programmes in order to produce leaders who remain sensitive to current moral issues.

The college is committed to academic freedom, to uncompromisingly high standards and to ensuring that its graduates are recognised and valued anywhere in the world. Through the international network of Catholic universities and the rich tradition of Catholic tertiary education, St Augustine College has access to a wide pool of eminent academics, both locally and abroad, and wishes to share these riches for the common good of South Africa.