

# Reimagining the Corporation: Narratives of Corporate Social Responsibility

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# **Reimagining the Corporation: Narratives of Corporate Social Responsibility**

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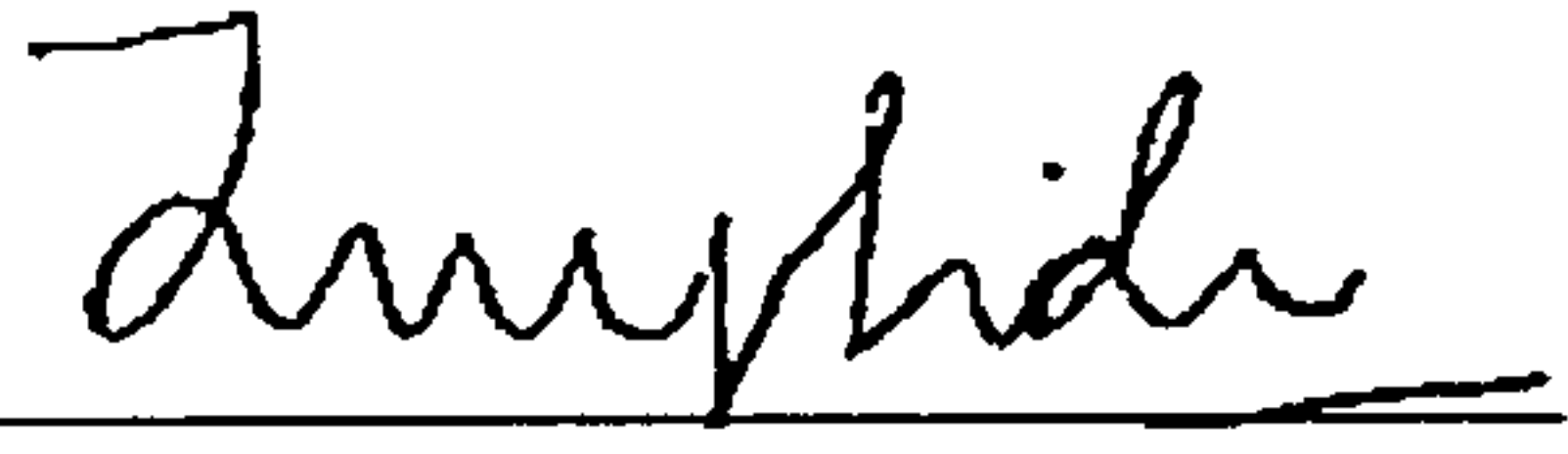
This thesis is submitted in fulfilment of the degree of Doctor of  
Philosophy, University of London



## DECLARATION

Thesis title: *Reimagining the Corporation: Narratives of Corporate Social Responsibility.*

I declare that the work presented in this thesis is my own.



Jayanthi Naidu  
2008

## ABSTRACT

This thesis evaluates standard setting initiatives in corporate social responsibility or 'CSR' engagements. Chapter 1 establishes how standard setting initiatives are developed through narratives of CSR. In chapter 2, the thesis unpacks hard and soft CSR which is seen as the key step to unlock the possibilities of standard setting. By showing that there is a nexus between hard and soft CSR, the regulatory divide is bridged. From here, CSR is seen to consist of internal and external narratives. When the narratives merge, standard setting can evolve in a coherent and meaningful way.

In developing internal narratives, chapters 3 and 4 evaluate the normative-theoretical underpinnings of the corporation and examine how it can sustain the notion of the socially responsible corporation. The corporation is bounded by institutional roots, political limitations and legal parameters. The theoretical make up of the corporation, informed by historical insight, shows that the corporation is a real institution, capable of absorbing values from the community within which it operates and provides something back as a community member.

External narratives are then discussed in chapters 5 and 6 in order to create a framework for the CSR actors to work together. Standards tend to be anchored within various brackets, including state borders and beyond, between public and private notions of authority as well as positive and negative aspects of responsibility. The rule of law holds the key towards providing legitimacy to these standards. Ultimately, chapter 7 looks at convergence in standards through the rigours of good decision making. A call for procedural integration is made through an administrative base which will be able to draw out a common language between the actors.

Calibrating the internal and external narratives reveals the evolving nature of standards which attempt to reimagine the corporation as an institution of responsibility.



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This thesis has been my attempt to search for a notion of corporate responsibility in the face of legal walls, political parameters and institutional borders. The pursuit has led me to meet people and institutions working along similar lines in diverse fields. I hope that this work will be a small contribution in this important area and it is to this cause that the thesis is dedicated.

I have used my best endeavours to ensure that the URLs of all external websites are correct and active at the time of submission.

Jayanthi Naidu



## TABLE OF ABBREVIATIONS

Anglo-Am.L.R.	Anglo-American Law Review
Fed L. Rev	Federal Law Review
Harv.L.Rev	Harvard Law Review
Hous. L. Rev	Houston Law Review
ICLQ	International and Comparative Law Quarterly
Ind. J. Global Legal Stud.	The Indiana Journal of Global Legal Studies
JLS	Journal of Legal Studies
Law & Soc. Inquiry	Law and Social Inquiry
LQR	Law Quarterly Review
Mich. L. Rev	Michigan Law Review
MLR	Modern Law Review
N.Y.U. L. Rev	New York University Law Review
OJLS	Oxford Journal of Legal Studies
PL	Public Law
Stan. L. Rev	Stanford Law Review
Tex. L. Rev.	Texas Law Review
U. Miami Inter-Am. L. Rev.	University of Miami Inter-American Law Review
Vand. J. Transnat'l L	Vanderbilt Journal of Transnational Law.
Wash. & Lee L Rev.	Washington & Lee Law Review
West Virg. L. Rev	West Virginia Law Review
Wm. & Mary L. Rev	William and Mary Law Review.

## TABLE OF CASES

*Dartmouth College case of 1819* (1819) 17 U.S.17.

*Hutton v West Railway Cork* (1883) 23 Ch. D. 654 at 672

*Louis K. Liggett Co et al v Lee, Comptroller et al* 288 US 517 (1933) at 548.

*Poplar Housing & Regeneration Community Association Ltd v Dohnaghue* [2002] Q.B.48.

*R v The Panel on Takeovers and Mergers ex p Datafin & Anor* (1987) 1 QB 815.

*R. (on the application of Heather) v Leonard Cheshire Foundation* [2002] 2 All E.R. 936.

*R. v North and East Devon Health Authority Ex p. Coughlan* [2001] Q.B. 213.

*Re Halt Garage* [1982] 3 All ER 1016.

*Re Horsley and Weight Ltd* [1982] 3 WLR 431 CA,

*Re Smith and Fawcett* (1942) Ch 304

*Salomon v Salomon* [1897] AC 22.

*Sutton Hospital Case* in 1612 10 Coke Rep22b.

## CHAPTER 1 Introduction

*It's all a question of imagination. Our responsibility begins with the power to imagine. It's just as Yeats said: In dreams begin responsibility. Turn this on its head and you could say that where there's no power to imagine, no responsibility can arise.*

H. Murakami, *Kafka on the Shore* (Vintage: London, 2005) at 141.

### 1.0 Narratives of Corporate Social Responsibility

This thesis intends to evaluate standard setting initiatives in corporate social responsibility or 'CSR' engagements. The notion of CSR has deep resonance when questions about the role of the corporation in society emerge. This is due, in part, to the magnitude of power wielded by corporations, some of which straddle jurisdictions and increasingly have the capacity to rival sovereign governments. Corporate power is magnified by the dynamics of the various economic and social relationships that clash with it. The deep sense of dissonance that has emerged from corporate activity has generated various initiatives to align the corporation with its social responsibilities.

The particular concern in this thesis is with the role and position of CSR standards, how they work and the legitimacy concerns that follow from the amalgamation of public and private actors involved in the task. Attempts to embed the corporation with socially responsible standards itself can be seen as an evolving narrative. Currently, CSR is site for ideological struggle in that it is either espoused in degrees or dismissed entirely. The ambiguous definitions that accompany the various agendas make CSR identification problematic. There is no real CSR 'story' to speak of. This is why standard setting initiatives are used as a starting point in the attempt to tell the 'story' of CSR. Standards are seen as weaving the emerging narratives of CSR, providing a source of 'values, culture and meaning' to the discourse.<sup>1</sup> Further, standard setting tends to spring from multiple sites of public and private authorities. They need to be placed in a coherent theoretical framework or will lose their currency in structuring CSR. From here, standards can be used to uncover a framework for regarding corporations as a

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<sup>1</sup> I.M. Young, 'Communication and the Other: Beyond Deliberative Democracy' in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (New Jersey: Princeton: Princeton University Press, 1996) at 131.



recognized social form. What becomes important then is a way or method to evaluate the prolific CSR standards that have mushroomed over the last few years.

This Introductory chapter is organized in the following way: the first section considers the problems with the general dichotomy in CSR literature which tends to look at CSR as either an internal issue for the corporation or an external one involving stakeholders. It goes on to suggest that for CSR standards to make sense, both dimensions of internal and external narratives need to be considered. Further, a more cogent way to understand CSR is to move away from a rights based understanding of CSR. This is because it is responsibility that sits at the heart of the issue and it is from here that the enquiry should move forward. Two further sections aim to place the CSR question in context as well as provide an overview of standard setting initiatives. The final section discusses the methods and the structure of the thesis.

### **1.1 Internal and External Narratives**

This thesis casts a regulatory lens at standard setting initiatives to ultimately examine how procedures of good decision making can lead to convergence in standards. This is done by first looking at the ‘internal’ corporation, the normative-theoretical foundation which enables such initiatives to be realized in the first place. The analysis here will be particularly concerned with the foundational assumptions that have gone into conceiving the corporate institution as it stands. It explores the theoretical basis for the socially responsible corporation and suggests how such a base can be used to institutionalize the notion of CSR within the corporation.

The discussion will then move on to the ‘external’ corporation. This is based on the understanding that CSR realization cannot be merely reliant on the corporation itself. The corporation can only act if the community that surrounds it enables CSR initiatives. Those actors involved in CSR initiatives including governments, non-governmental organizations (NGOs) and supranational authorities like United Nation (UN) agencies need to be engaged along with the corporation. The collision of regulating the internal corporation with external actors is seen to provide cohesion in CSR narratives. Regulation here is taken not just to mean conventional forms of rules originating from the imprimatur of governments. It is also seen to refer to standard setting initiatives that



arise from the efforts of various other institutions, including CSR actors. Such an effort tries to bridge the plurality of regulation beyond the state, drawing on the public-private intersection in governance.

Both internal and external CSR narratives, as they currently stand, rest on very promising ideals. They generally seek a broader commitment from the corporation by demanding responsibility to the society within which it operates. CSR envisages wider constituency or stakeholder claims on the corporation. The suggestion is that provision should be made for various affected constituents to be considered in corporate decision making, either directly or indirectly. Recognizing multiple constituencies gives rise to multiple rights claims against the corporation. Corporate decision-making must mediate amongst the multiple rights claims. Nevertheless, the weight attached to each may not necessarily be equal.<sup>2</sup> This ideal is problematic for the corporation, which is organized to pursue profits, particularly maximization of shareholder wealth.<sup>3</sup>

CSR poses problems for the understanding of the corporation. By itself, the corporation is an amorphous institution and tends to be interpreted on differing terms.<sup>4</sup> Most CSR initiatives ignore smaller corporations and dwell on the responsibility of larger corporations, labeled variously as multinational corporations (MNCs), multinational enterprises (MNEs) or transnational corporations (TNCs).<sup>5</sup> Within sovereign states, the

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<sup>2</sup> 'The multiple accountability of [corporations] to shareholders, banks, employees, suppliers and distributors, not to mention strategic allies, means that like renaissance Princes, they can usually divide and rule', S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge, Cambridge University Press, 1996) at 197.

<sup>3</sup> Fiduciary obligations require directors to act in the best interest of the company. They must always act 'bona fide in what they consider, not what a court may consider, is in the best interests of the company and not for any collateral purpose', *Re Smith and Fawcett* (1942) Ch 304, per Greene M.R. The 'best interests of the company' has been deemed to be the interests of present and future shareholders, see P. Davies, *Gower and Davies' Principles of Modern Company Law* (London: Thomson Sweet & Maxwell, 2003) at 374-6, 381.

<sup>4</sup> 'Corporations have an ambivalence to them on both left and right. They do not fit easily into the main categories whether liberal or socialist, because it has never been clear on which side of the line between the public and the private they fall. They are much more than the sturdy self-reliant individuals of liberal discourse. But neither are they unambiguous collective instruments of the popular will. They are agents of the market and subject through competition to the disciplines of the market, but their internal organization is not governed by the market. They are hierarchies with a complex internal pattern of authority relationships. Each company is a little empire, a miniature socialist state, where rational planning and bureaucratic hierarchies of control held sway', A. Gamble and G. Kelly, 'The Politics of the Company' in J. Parkinson, A. Gamble and G. Kelly (eds) *The Political Economy of the Company* (Oxford-Portland: Hart Publishing, 2000) at 26.

<sup>5</sup> Clapham argues that the term 'transnational' emphasizes the fact that there is usually a single legal corporation operating in more than one country, with a headquarters and a legal status incorporated in the national law of the home state. In other words, 'the transnational corporation is one single corporation even if it is composed of corporations with separate identities under the corporation law of the states in which they operate. As legal systems become more comfortable with piercing the corporate veil to reveal the true nature of control, multinationality captures the fact that nationality of incorporation may no longer be the



role of the corporation is seen to be dependant on the regulatory stringency of authorities. Outside these boundaries, there are further problems in making corporations accountable. This is because of the ambiguous position of corporations at the level of international law. It is often seen to have no binding responsibilities. States remain the most important subjects of international law and one of the ways corporate activity is made binding at this level is through state ratification of various international law instruments.<sup>6</sup>

With this conceptual background to the corporation, the question to ask is if CSR is merely a public relations gloss that once sat in the peripheries but has since become a trendy marketing pitch, often perpetuated by corporations themselves? Or are the demands meaningful enough that the corporation must now learn to exist with the community within which it operates? These ongoing questions are seen as being symptomatic of the bigger problem in literature supporting or arguing for CSR itself. The general dichotomy in CSR literature can be said to ail the progress of CSR discourse. Corporate governance and company lawyers tend to see CSR as an internal matter which must be reconciled with the overriding duty of shareholder profit maximization.<sup>7</sup> This is the perennial shareholder versus stakeholder question. On the other side are scholars in disciplines ranging from law and development, business ethics to political scientists who see CSR purely as a 'stakeholder issue' involving concerted effort between stakeholders to basically 'force' the corporation to be socially responsible. At its extreme, the corporation on this end is seen as no more than being a tool for development, essentially decimating its economic characteristics.

There are two points to be made with regards to the current state of literature. First, in order for CSR to be seen in a more coherent way, it is necessary to look at both the normative, internal structure of the corporation, including theoretical concerns and stakeholder issues. Then, externally there must be some kind of thought as to structure

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sole determinant for deciding issues of jurisdiction. The corporation may be both operating transnationally and be the bearer of multinationality. So, the adjective transnational and multinational can be employed to emphasize different characteristics of certain corporations without really changing the nature of the corporation as a legal entity', A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: OUP, 2006) at 199-201. See also F. Rigaux, 'Transnational Corporations' in M. Bedjaoui (ed) *International Law: Achievements and Prospects* (Dordrecht: Martinus Nijhoff, 1991) at 124.

<sup>6</sup> International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism Human Rights and the Developing International Legal Obligations of Companies* (Geneva: ICHRP, 2002) at 57, P. Alston (ed), *Non-State Actors and Human Rights* (Oxford: OUP, 2005), M. Freeman, 'Beyond Capitalism and Socialism' in J. Dine and A. Fagan (eds), *Human Rights and Capitalism* (Cheltenham: Edward Elgar, 2006) at 5-7.

<sup>7</sup> T. Donaldson and T. Dunfee, *Ties that Bind* (Boston, Mass: Harvard Business School Press, 1999).



the various actors involved in a sustained framework. The corporation is not the lone CSR actor. CSR is only properly reconciled through an interaction with the other actors, collectively seen as CSR actors. Undoubtedly, for the corporation to be known as a social, political and economic institution, it cannot be viewed as an isolated institution. A sense of interaction between the CSR actors will emerge. Thus, reimagining the corporation is only possible with structural changes. Such changes cannot be effected by only relating the corporation to the community within which it operates but also rebuilding community itself.

Secondly, another problem with CSR narratives is that it is trapped within liberal-utilitarian language. Here, the corporate lawyers range from the influential law and economics school whose analyses tend to be premised on contractual rights. At the other end are scholars working in areas like law and development as well as human rights who focus on rights of societal members and the environment generally. Such analyses tend to revolve around recipient rights and how to strengthen claims against the corporation. Some level of success can be said to have emerged as a result of these studies. The studies nevertheless revolve around consequentialist arguments. These arguments often fall afoul when they run into problems with the competing and overlapping nature of rights based claims.

There is a missed opportunity to look at the corporation as an institution of responsibility. Responsibility must sit at the heart of CSR narratives because only from here does it become possible to draw and understand the corporation as being part of the community within which it operates. After all, CSR must be seen as ‘a public, not a private, issue of responsibility within society’.<sup>8</sup> As it stands, the corporation is a bounded institution. It is bounded by institutional roots, political limitations and legal parameters. Such a background has fragmented the understanding of CSR and can be said to cause the prevailing incongruence in standard setting initiatives. It becomes necessary then to scrutinize the bounded corporation and essentially open it to the community through a sense of responsibility.<sup>9</sup>

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<sup>8</sup> K. Wedderburn, ‘The Legal Development of Corporate Responsibility’ in K. Hopt and G. Teubner (eds), *Corporate Governance and Directors Liabilities* (de Gruyter, Berlin: 1987) at 44.

<sup>9</sup> P. Selznick, *The Moral Commonwealth* (Berkeley: University of California Press, 1992), M. Walzer, *Spheres of Justice* (New York: Basic Books, 1983), D. Miller, *Market, State and Community* (Oxford: Clarendon Press, 1990), A. MacIntyre, *Whose Justice, Which Rationality?* (London: Duckworth, 1988).



## 1.2 Situating the CSR Question

The notion of CSR itself appears to be contested. It is difficult to pin down a clear statement of what it entails due to its open and varied nature. According to Carroll, certain categories represent society's expectations of corporate obligations, and therefore form the corporation's social responsibilities.<sup>10</sup> Carroll's definition encompasses categories ranging from economic, ethical and discretionary which are seen to overlap. Some obligations may simultaneously fall into more than one category. In other words, CSR is said to include compliance with corporate legal responsibilities but tends to go 'beyond compliance' to encompass the economic, ethical and even discretionary expectations of society.<sup>11</sup> It is popularly seen as a voluntary commitment.<sup>12</sup> The ambiguity of the definition however leaves many actors with a stake in contesting how it is defined. As a result, CSR is often seen as a vague and peripheral concept, especially as much of it is non-enforceable.<sup>13</sup>

The definitional problem appears not just to be a matter of semantics or interpretation. It is the concept itself that is highly contextual, mutating to serve sometimes competing agendas. The many-headed versions of CSR include corporate citizenship,<sup>14</sup> environmental responsibility,<sup>15</sup> sustainability,<sup>16</sup> social and environmental accountability,<sup>17</sup> human rights<sup>18</sup> and beyond. The precise points of similarity and difference are difficult to distinguish. Not all these norms are necessarily compatible with each other and, in any case, the full impact of these emerging norms is yet to be realized. Standard setting initiatives in CSR struggle with this conceptual problem. Such

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<sup>10</sup> A. Carroll, *A Three Dimensional Conceptual Model of Corporate Performance* (1979) 4 *Academy of Management Review* 497 at 500.

<sup>11</sup> *Ibid.*

<sup>12</sup> CSR is taken to mean '...the voluntary contribution of finance, goods or services to community or governmental causes. It excludes activities directly related to firm's production and commerce. It also excludes activity required under legislation or government direction', J. Moon, *The Social Responsibility of Business and New Governance* (2002) 37 *Government and Opposition* 385-6.

<sup>13</sup> D. Vogel, *The Market for Virtue: The Potential and Limits of CSR* (Washington DC: Brookings Institution Press, 2005) at 4-6, *The Economist*, *The Good Company-A Skeptical Look at CSR* (January 2004), R. Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of CSR* (2004) 38 *Law and Society Rev* 635.

<sup>14</sup> S. Zadek, *The Civil Corporation: The New Economy of Corporate Citizenship* (London: Earthscan, 2004), J. Moon, A. Crane & D. Matten, *Can Corporations be Citizens? Corporate Citizenship as Metaphor for Business Participation In Society* (2003) 13 *ICCSR Research Paper* 1.

<sup>15</sup> W. Adam, *Green Development* (London: Routledge, 1990).

<sup>16</sup> H. Brundtland, *Our Common Future* (Oxford: OUP, 1987) at 65.

<sup>17</sup> P. Newell, *Citizenship, Accountability and Community: the Limits of the CSR Agenda* (2005) 81 (3) *International Affairs* 541.

<sup>18</sup> J. Dine and A. Fagan, above n6.



a background poses questions with regards to standard setting, particularly what is the standard of responsibility that should be adopted by the corporation and how satisfactory are these standards.

CSR arguments can be situated in a broader political context. Harbouring behind the discourse are larger issues including neo-liberal individualism and the divisive gaps between developed and developing countries. The corporation's overriding economic role means that there has not been any real, concerted connection with community or any attempt to embed itself as a member of its community. The complexity of CSR discourse and its links to political commitments can be seen in the new 'class struggle' which is marked by corporate hegemony. Society, in its various constituent parts, as employee, investor, consumer, producer and beyond struggles against this hegemony. CSR is seen as the attempt to increase accountability and has profound implications as it contextualizes deep set questions about the way society is structured:

At heart CSR - whatever it is called - is about the obligation of the corporation to society. This obligation may differ from industry to industry, and firm to firm. They may change over time and in the light of events. But they won't go away; they are an integral part of the social relationship between business and society.<sup>19</sup>

What is apparent is that there is increasing demand for the corporation to be made accountable for the social implications of its actions. Faced with such pressure, corporations themselves are getting deeply involved in community activities beyond philanthropic measures. The pharmaceutical company Novo Nordisk for example co-operated with the Zambian Ministry of Health in developing programs by providing funding and staff to establish a national diabetes initiative.<sup>20</sup> In 2003, ExxonMobil issued its commitment to improvement of human rights standards in its annual Corporate Citizenship report concerning its petroleum operations in Chad and Cameroon:

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<sup>19</sup>H. Ward and C. Smith, *The Future of CSR* (London: IIED, 2006) at 28.

<sup>20</sup> In 2002, as part of its World Partner Programme (WPP), Novo Nordisk developed a model for sustainable diabetes care for helping people with diabetes in poor countries to gain access to diabetes care, see [http://www.novonordisk.com/sustainability/news/2003-03\\_tanzania\\_clinic.asp/global\\_health.asp?bPrint=true](http://www.novonordisk.com/sustainability/news/2003-03_tanzania_clinic.asp/global_health.asp?bPrint=true) (last accessed at 29.5.07).



... We believe corporations play an important role in supporting human rights, and that our presence in developing countries positively influences issues relating to the treatment of people. We condemn human rights violations in any form. We seek to be responsible corporate citizens, and recognize that we have both the opportunity and responsibility to improve the quality of life wherever we do business.<sup>21</sup>

It is accepted that statements like this are often seen as public relations gimmick especially as there is no clear way to measure if the corporation upholds such commitments. Nevertheless, as little as 10 years ago, corporations rarely made direct statements about improving human rights or health standards.

The economic, environmental and social footprint of the corporation can only be truly reconciled by understanding the magnitude of corporate power. The power accumulated in the corporation can today rival nation states and regional entities. This has made them to be seen as the new 'Leviathan'. Hobbes 17<sup>th</sup> century book 'Leviathan' tried to provide a metaphoric analysis of the notion of a commonwealth or state. The model he used to conceive his new body politic, its 'matter, forme and power' was an entity representing the physical body with mind and soul. Today, Chandler and Mazlish describe: '...a new kind of Leviathan has risen from the depths of humanity's creative powers-the [corporation]'.<sup>22</sup> The issue of corporate power comes to acute focus when discussing CSR due to the underlying need to harness that power in the quest to reimagine the corporation. Because of their huge economic power and their capacity for global mobility, corporations are widely perceived as capable of evading public control and getting away with behaviour that is harmful to society.

### **1.3 CSR Standards in Context**

A United Nations Conference on Trade and Development (UNCTAD) survey reveals that the social responsibility of the corporation is a question that has been raised through the adoption of various generalized and specialized approaches:

The concept of CSR is potentially very wide and may encompass most matters pertaining to the economic and social impact of corporations. However, a

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<sup>21</sup> ExxonMobil, *Corporate Citizenship Report* (2003) at 20.

<sup>22</sup> A. Chandler and B. Mazlish (ed), *Leviathan- Multinational Corporations and the New Global History* (Cambridge University Press: Cambridge, 2005) at 2.



specialized approach is also emerging. As a result, a number of aspects, including developmental obligations, socio-political obligations as well as consumer protection and others (especially ethical business standards and the observance of human rights) seem to be emerging issues. This is in addition to obligations particularly as regards the environment and employment issues, which are sufficiently developed in relation to their operation. CSR can, for example, mean different things to practitioners seeking to implement CSR inside corporations and to researchers trying to establish CSR as a discipline; it can also mean different things to NGOs and to companies. Although these differences are an inevitable and potentially fruitful element of the innovation process, they can be frustrating, not least to company managers who might prefer a bounded concept similar to quality control or financial accounting.<sup>23</sup>

There appears to be two main purposes of CSR standards. One is to help drive and improve corporate performance by underlining responsible business practices. The other is to provide a clear and common understanding of what is meant by CSR.<sup>24</sup> In essence, standard setting initiatives frame the social responsibility of corporations. The role of the corporation in setting standards is an important one. Nevertheless, a broad brushstroke reveals the negotiated nature of those standards. This is recognition of how corporations have the capability to govern themselves and their relationships with others. Underlying standard setting initiatives here is the public-private interaction. It is suggested that the public-private distinction cannot be seen as a 'static border'. It is 'closer to a battleground, with ideological forces wishing to shift the frontline in order to consolidate their own gains'.<sup>25</sup>

From here, standard setting increasingly appears to move into a public, regulatory realm. Harnessing CSR standard setting initiatives with a public law, regulatory lens involves some level of legal transplanting. Yet, such an approach becomes crucial in the light of the circumstances within which standards operate. CSR standard setting cannot be said to be contained within national boundaries and solely created by government led environments. They operate in a world that 'is bound not by nation states but invisible colleges, markets and branches, invisible professional communities, invisible social networks'.<sup>26</sup> Teubner points out that this shifts the emphasis to the plurality of legal discourses rather than a hierarchy of legal orders. Further, there is a need to move away from control based regulation of CSR which tends to be premised on the notion that the

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<sup>23</sup> UNCTAD, *Social Responsibility*, Series on Issues in International Investment Agreements (United Nations: New York and Geneva, 2001) at 3.

<sup>24</sup> E. Ligteringen and S. Zadek, *The Future of Corporate Responsibility Codes, Standards and Frameworks* (London: Accountability, 2005) at 2.

<sup>25</sup> A. Clapham, above n5 at 1.

<sup>26</sup> G. Teubner (ed), 'Global Bukowina' in *Global Law Without a State* (Dartmouth: Aldershot, 1997) at 14.



corporation is a monolith, bad institution.<sup>27</sup> It must not be forgotten that the corporation is also an important regulatory resource that can be of great benefit to developmental needs. They are diverse institutions, ranging from small high street operations to giant MNCs,<sup>28</sup> capable of contributing in various ways to the social development of the community within which they operate.

This environment confronts the legitimacy issues that surround the emerging CSR standards which face before it what can be called a legal *tabula rasa*. It sits in the interstices of legal understanding of public and private and is inclusive of the law but also transcends the minimum requirements of law, seen as being 'beyond the law'. It operates within state borders but can be applied globally. From this blank slate, the values of good decision making are sought to be drawn together in order to develop the social responsibility of the corporation. The aim is to integrate the proliferating standards through procedural mechanisms.

#### **1.4 Method**

This thesis intends to evaluate standard setting initiatives in CSR. With the central questions in place, there have been a few options in structuring the methodology. Very often, CSR studies revolve around empirical research, for example tracking the impact of corporate activity down the supply chain. Researchers tend to look at countries in the South to understand challenges faced as a result of corporate operations. However, this does mean that the location of such CSR studies tends to be trapped in 'hot and poor countries'.<sup>29</sup> At one level, such an approach downplays the way processes in which corporations influence 'trade rules and realities and the policies of governments and international financial institutions'.<sup>30</sup>

With this in mind, the methodology is theoretically grounded in order to properly address systemic and structural issues. It draws on a significant communitarian notion of responsibility in exploring the normative foundations of the socially responsible

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<sup>27</sup> J. Bakan, *The Corporation* (London: Constable, 2004).

<sup>28</sup> F. Patfield (ed.), *Perspectives on Company Law Vol. 2* (London ; Boston : Kluwer Law International, 1995) at 49-67.

<sup>29</sup> J. Bendell, *Barricades and Boardrooms A Contemporary History of the Corporate Accountability Movement* (Geneva: UNRSID, 2004) at 2.

<sup>30</sup> *Ibid.*



corporation. From there, it goes on to employ a discourse theoretical framework to import the tools of administrative law. Administrative law is seen to provide the procedural base of good decision making which provides the ability for standards to converge. A study of CSR assurance systems will be undertaken in the final substantive chapter in order to evaluate standards with clarity. In that chapter, a rigorous overview of CSR assurance schemes will be provided through studying assurance mechanisms, namely audits and annual reports. It will show that effective evaluation of CSR standards must be premised on principles of good decision making.

## **1.5 Structure**

The thesis is divided in two parts to reflect how CSR should be understood. Part I consists of chapters 2, 3 and 4. This is the internal narrative or conceptual part of the thesis which looks at normative issues of the corporation's foundational assumptions in order to accommodate the notion of CSR. Chapter 2 attempts to provide an overview of the magnitude of the proliferating CSR standards and reconcile 'hard' and 'soft' CSR. Understanding standards this way is key to moving on to Chapters 3 and 4. Both chapters build on the real entity theory of the corporation as offering the theoretical support for developing CSR. The historical overview will draw out the changing forces and influences that shaped the corporation over various time frames. From here, it becomes possible to evaluate the breakdown of the material origins of the corporation and connect the corporation to society.

It is only after developing the internal narrative can the operational part be activated. Part II thus builds on this by looking to develop the external narrative. This is done by creating a framework for the CSR actors to work together towards convergence in standards. This part of the thesis attempts to link the CSR actors within a governance mechanism. Part II of the thesis begins with Chapter 5. Chapter 5 confronts what it means to be responsible and explores the notion of 'positive' and 'negative' responsibilities. This chapter will argue that if corporations are to be normatively considered as public-regarding, apart from negative duties, there must be in place positive duties for corporations to nurture and sustain a climate of CSR. Positive duties require standards of social responsibility to be embedded in the corporate decision-making process. Institutionalizing CSR in such terms attempts to define a credible

relationship between the effects of corporate activities and the responsibilities sought to be imposed. It further goes on to show that the doctrine of rule of law is undermined when the corporation is continued to be deemed as purely 'private'.

Chapter 6 develops the notion of deliberation as the source of standards and how the messiness of standards lead to the creation of a common procedural language through procedures borrowed from administrative law. Chapter 7 tests the theoretical framework by evaluating standards through an analysis of CSR assurance systems and Chapter 8 provides concluding thoughts.



## CHAPTER 2 Hard and Soft CSR: Transcending the Regulatory Divide

*There is no standard solution.*

K. Abbott and D. Snidal, *International Standards and International Governance* (2001) 8 *Journal of European Public Policy* 345 at 367.

### 2.0 Introduction

At one time, there was secure assumption that the corporation can be controlled by mandatory regulation, backed by some form of sanction. The inadequacy of mandatory instruments which bear 'hard' rules has brought forth a proliferation of voluntary instruments. Voluntary instruments contain soft laws which generate various standards that inform CSR. CSR narratives grapple with this underlying dichotomy between hard and soft standards. The range of instruments that structure socially responsible standard setting can be said to generate 'hard' and 'soft' CSR. Understanding standards this way becomes important as it provides a perspective on the magnitude of CSR narratives. It is also an attempt to reconcile with the social and environmental character of the corporation which sits alongside its economic side. Further, such an overview will also provide a starting point to critically evaluate CSR standards. Unless there is in place some kind of framework to evaluate standards, the standards will continue to proliferate indiscriminately and possibly threaten to undermine CSR narratives.

The chapter begins by looking at standard setting initiatives generally. In doing this, it makes a functional comparison of what is meant by voluntary and mandatory instruments as regulatory mechanisms in CSR. The ambition here is to provide the context within which standard setting initiatives in CSR emerge. This part will sketch the parameters of both sides of the divide by providing various examples and then proceed to draw the nexus between them. The chapter will show that the interaction between the two supposedly distinct types can give rise to a fruitful regulatory dynamic. The chapter will then move on to look at how standard setting, understood like this, could open up various possibilities for the CSR actors. Taken together, this chapter suggests that it is possible to devise and operate mandatory and voluntary or hard and soft CSR together. CSR narratives should work as a comprehensive whole in recognition of the interdependence between the CSR actors and the linkages that arise as a result.



## 2.1 Standards of Social Responsibility

The emphasis of regulatory standard setting in CSR is to align corporate decision making towards social responsibility. Standard setting involves the establishment of certain requirements on broad categories of activities in order to institutionalize CSR. A standard can be seen as a 'benchmark' or 'guide for behavior and for judging behavior.'<sup>1</sup> Standard setting in CSR are taken to be non-product related benchmarks.<sup>2</sup> The process of developing social and environmental standards is markedly different from other product based standard setting processes as it has a different range of public policy implications as well as various impacts on a wide range of stakeholders. Nevertheless, it could be useful to include a recommended structure for CSR standards. A standard is seen to be based on defining a hierarchy of elements including scope, principles, criteria, indicators, verifiers and should be able to give guidance.<sup>3</sup> In short, standards can be seen as a form of rule making and part of the regulatory structure. Such an overview is broad enough to encompass the standards set by formal, recognized standards bodies such as the International Organization for Standardization (ISO), the British Standards Institution (BSI), and its counterparts in other jurisdictions, as well as those normative documents developed by corporations, NGOs and other entities outside the formal standards system.<sup>4</sup>

Non-product based standards can be seen as benchmarking processes or performance.<sup>5</sup> Process standards sometimes specify procedures for the establishment of stakeholder engagement and create management systems. Performance standards on the other hand permit certain conduct and prohibit others.<sup>6</sup> In other words, they generate rules that can act as a guide in implementing a particular aim. Different combinations of these standards are possible. For instance, individual corporations may set a particular

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<sup>1</sup> K. Abbott and D. Snidal, *International Standards and International Governance* (2001) 8 *Journal of European Public Policy* 345, N. Gunnigham and P. Grabosky *Smart Regulation Designing Environmental Policy* (Oxford: OUP, 1999) at 40-1.

<sup>2</sup> For an excellent analysis of product based standards, see H. Schepel, *The Governance of Private Constitution* (Oxford and Portland: Hart Publishing, 2005).

<sup>3</sup> ISEAL Alliance, *Issues for Discussion in the ISEAL Code of Good Practice for Standard-Setting Procedures* (British Columbia: ISEAL, 2003) at 6.

<sup>4</sup> K. Webb and A. Morrison, 'Introduction' in K. Webb (ed) *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton: Carleton Research Unit for Innovation, Science and Environment, 2004) at 10-11.

<sup>5</sup> M. McIntosh R.Thomas, D. Leipziger, G. Coleman, (ed), *Living Corporate Citizenship* (London: FT Prentice Hall, 2003) at 100. The authors include foundation and certification standards on their list.

<sup>6</sup> *Ibid.*



standard and self-certify. Increasingly, corporations utilise standards generated by third parties.<sup>7</sup> Also, standards and the compliance thereof can be set to apply collectively by a whole industry.<sup>8</sup> Standards can thus be seen to come in many shapes, forms and legal categories. Some are public, some private and most are captured somewhere in between.

Within standard setting initiatives, corporations find themselves straddling two different regulatory environments, namely the mandatory and voluntary ones. The dominant mode for regulating the social responsibilities of the corporation has been through soft laws which are encapsulated in voluntary instruments. These are presented to invoke better corporate performance in the social aspects of its activities, for example those that affect the environment, human rights or labour. This is seen as creating 'soft' CSR. As a method that generates standards to guide corporate behaviour, soft CSR offers adherence through moral force. As there is no sanction accompanying soft initiatives, they are seen as non-binding or voluntary in nature. It is utilized in various corporate self-regulatory attempts as well as government and international initiatives. The panoply of soft CSR ranges, among others, from guidelines,<sup>9</sup> codes<sup>10</sup> to policy reports.<sup>11</sup>

This regulatory approach sits in opposition to hard laws which serve to prescribe, prohibit or restrict certain corporate activity.<sup>12</sup> Hard laws contain provisions that have the command and force of formal law, thus creating 'hard' CSR. The rules that arise directly from hard provisions are seen to arise from the government and enforced by public authorities. They therefore are seen as having mandatory application. Hard CSR can be said to be legally binding obligations that are precise or can be made precise. Precision is sometimes achieved by adjudication or through the issuance of detailed

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<sup>7</sup> See for example, ISEAL, SA8000, Fair Labour Association Certification (FLA) and Ethical Trade Initiative (ETI) (see Appendix I for explanation of terms).

<sup>8</sup> See Responsible Care which is the chemical industry's commitment to continual improvement in all aspects of health, safety and environmental (HS&E) performance to openness in communication about its activities and its achievements. See <https://www.responsiblecare.org/>

<sup>9</sup>In the Organisation for Economic Co-operation and Development (OECD) revised Guidelines for Multinational Enterprises, there is an extensive range of social obligations for MNEs including a duty to contribute to the sustainable development of the countries in which they operate, to respect human rights, to encourage local capacity building or to refrain from seeking or accepting exemptions to local regulatory frameworks in the area of environment, health and safety, labour, taxation, financial incentives and other issues.

<sup>10</sup> An inventory of corporate codes of conduct is available at the OECD Directorate for Financial, Fiscal and Enterprise Affairs, *Codes of Corporate Conduct: Expanded Review of their Contents* (OECD: Paris, 2001).

<sup>11</sup> Commission of the European Communities, *Green paper: Promoting a European framework for corporate social responsibility* (COM 2001 366 final 18.7.2001).

<sup>12</sup> Gunningham and Grabosky, above n1 at 5.



regulations. Authority can be delegated for interpreting and implementing the law.<sup>13</sup> Application wise, as centralized and bureaucratic instruments, hard laws can be structured to apply to specific prescribed areas and institutions with enforcement targets. An example of a hard law type of regulation can be seen in command and control legislation which is generally characterized by a target, for example a limit on chemical emission in water and subsequent penalties that apply if the target is not met.<sup>14</sup>

Soft CSR is sometimes accused of being a compromise solution in the face of inability to accommodate demands for tougher policies. This is not a new issue. CSR initiatives have increasingly faced such a criticism as the various impacts of corporate involvement arise. The voluntary nature of soft CSR has also been taken to imply that they are less comprehensive than hard, government regulation. This is because soft laws are dependant on the enlightened self-interest of corporations to pursue action. Another problem is legitimacy. Legitimacy of standards are derived from various substantive qualities including determinacy, coherence and the procedures by which they were approved, in other words, as having hard law-like characteristics.<sup>15</sup> The recurrent question that continues to plague CSR standard setting initiatives is if the dominant voluntary approach can move on to a more comprehensive adaptation and take a mandatory tone. The unease with soft law can also be seen in other legal areas. In international law for example, soft law is sometimes either taken to be irrelevant or as a mere transitory tool until a hard legalized approached is arrived at.<sup>16</sup>

The choice between hard and soft CSR is however not a binary one. The approach taken here is that there is a nexus between hard and soft CSR. Building on the argument that the relationship between both sides of the divide is much more complex than acknowledged, this chapter will show that CSR standard setting initiatives must tap on the interaction. The next part makes a functional comparison between both sides of the divide. It seeks to identify the advantages and disadvantages of both hard and soft CSR before moving on to analyze the implications of the interaction.

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<sup>13</sup> K. Abbott and D. Snidal, *Hard and Soft law in International Governance* (2000) 54 International Organization 424.

<sup>14</sup> Gunnigham and Grabosky explain: 'The term command and control refers to the prescriptive nature of the law (command) supported by the imposition of some form of negative sanction (control)', above n1 at 4, 39.

<sup>15</sup> Abbott and Snidal, above n13 at 424.

<sup>16</sup> C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law* (1989), 38 *International and Comparative Law Quarterly* 850 cf A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: OUP, 2006).



### 2.1.1 The Appeal of Soft CSR

Soft CSR produces standards that are popularly used in CSR engagement. As observed earlier, the range of soft interventions has broadened to include stakeholder dialogues which are practised through external monitoring, verification, audits, certification, labelling as well as public-private partnerships.<sup>17</sup> To illustrate how soft CSR works, the example of codes of conduct is useful. Codes of conduct are seen as instruments that introduce various principles of ethics in the corporate decision making process. Codes are not of recent vintage. Where they typically differ is in the understanding of 'responsibilities, obligations, rights and duties'.<sup>18</sup> They are integral attempts to underline ethical responsibilities of participants. Corporate codes of conduct are an addition to the pantheon of codes of conduct.<sup>19</sup>

Early examples of codes of conduct in relation to the corporation can be seen in both the Sullivan and McBride Principles, which attempted to guide corporate involvement in countries where high levels of discrimination were present.<sup>20</sup> This movement gave rise to calls for corporations to disengage from countries under strife. Increasingly, prominent corporations have adopted codes of conduct that make protection of human rights, the environment, employees and various social matters an explicit corporate objective. Jenkins divides CSR related codes into a few categories including individual corporate codes, trade association codes, multi-stakeholder codes, model codes as well as inter-

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<sup>17</sup> See P. Utting, *Rethinking Business Regulation: From Self-Regulation to Social Control*, UNRISD Publications, Business and Society Paper No.15 (Geneva: UNRISD, 2005) at 8.

<sup>18</sup> A. Warwyk, 'Regulating Transnational Corporations through Corporate Codes of Conduct' in S. Pegg and J. Frynas (eds) *Transnational Corporations and Human Rights* (London: Palgrave Macmillan, 2003) at 53. See also H.W. Arthurs, 'Corporate Codes of Conduct: Profit, Power and Law in the Global Economy' in W. Cragg (ed) *Ethics Codes, Corporations and the Challenge of Globalization* (Cheltenham: Edward Elgar, 2005) at 51.

<sup>19</sup> W. Cragg, 'Ethics, Globalization and the Phenomenon of Self Regulation: An Introduction' in W. Cragg (ed) *ibid* at 1.

<sup>20</sup> The Sullivan Principles in South Africa were originally a brief set of Principles, drafted by the Rev. Leon Sullivan, an African-American Baptist minister, whilst he was a member of the Board of Directors of General Motors Corporation in 1977. The Principles were intended to put pressure on American companies with operations in apartheid-era South Africa to comply with a set of labour and anti discrimination standards in their South African operations. The focus of concern in South Africa was the position of the non-white workforce. Some years later, in November 1984, and following the model of the Sullivan Principles, a separate private group promulgated the MacBride Principles. These are a set of Principles which are intended to put pressure on American companies operating in Northern Ireland to adopt a set of anti-discrimination and weak affirmative action goals in their Northern Ireland operations. The focus of concern in Northern Ireland is the need to ensure equality of opportunity in employment between the two main (religious) communities. See C. McCrudden, *Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?*(1999) OJLS 167 at 173-181.



governmental codes.<sup>21</sup> Examples of codes of conduct include those developed by individual companies or industry sectors,<sup>22</sup> governments<sup>23</sup> or NGOs.<sup>24</sup>

In short, soft CSR reflects a regulatory strategy which is dependant on corporate will and moral appeal. They create a baseline for corporations to work towards such engagement. There are two main points with regards to drawing codes of conduct and voluntary instruments generally. One is the tremendous variety of voluntary instruments in operation. These instruments are initiated at the behest of the CSR actors for various reasons. Application wise, some have international status while others may just be corporation-wide. Multi stakeholder codes involving various actors appear to have more 'bite' than unilateral ones.<sup>25</sup> Such multi stakeholder initiatives have contributed to improved standards and harmonized implementation. Attempts like these have tried to encourage systematic internalization of social and environmental standards throughout the corporate structure. A voluntary instrument that applies to wider stakeholders beyond corporations is the Tripartite Declaration of Principles Concerning Multinational Enterprises. The Declaration focuses on observance of good corporate practice by setting out principles which governments, employees and workers organizations are recommended to observe.<sup>26</sup> These types of multi stakeholder standards are then seen to 'bite' in various ways. For example they may provide the last word on an issue, be an entrance into a rating system such as the Dow Jones Sustainability Index (DJSI) and the FTSE4Good Index Series or codify stakeholder concerns.<sup>27</sup>

The other point with regards to codes of conduct is normative. Various instruments have differing emphases. The content that should be listed or invoked within a voluntary

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<sup>21</sup> R. Jenkins, *Corporate Codes of Conduct: Self Regulation in a Global Economy, Technology, Business and Social Program* (Geneva: UNRISD, 2001, No2 April).

<sup>22</sup> A sample can be seen in the Shell Group Health, Safety and Environment (HSE) Policy and Commitment Endorsed by the Committee of Managing Directors, March 1997, subsequently adopted by all Shell chemical companies, [www.shell.com](http://www.shell.com)

<sup>23</sup> For example, the Ethical Trading Initiative (ETI) is an alliance of UK retail companies, NGOs and trade unions working to improve conditions in the supply chains of its corporate members. The Department for International Development helped to set up the ETI in 1998, and have supported and worked closely with it ever since. The employment standards adopted by ETI members are international standards arising from the core conventions of the International Labour Organisation, see <http://www.ethicaltrade.org/> .

<sup>24</sup> Among others, a global standard for social accountability, the SA8000, has been created to guide and assess corporate compliance with human rights norms across industrial and geographical boundaries, see <http://www.sa-intl.org/>.

<sup>25</sup> The demand for 'bite' or instruments with 'teeth' is increasingly highlighted as an issue in CSR instruments, see Clapham, above n17 at 196 .

<sup>26</sup> Adapted in 1977, amended in 2000, *Official Bulletin* 2000, Vol LXXXIII, series A, No.3.

<sup>27</sup> See S. Zadek, P. Raynard, M. Forstater and J. Oelschlaegel, *The Future of Sustainability Assurance* (London: Certified Accountants Educational Trust, 2004) at 8.



instrument is often a question of choice bound by ideological considerations. In the Organisation for Economic Co-operation and Development (OECD) revised Guidelines for Multinational Enterprises, there is an extensive range of social obligations for MNEs including a duty to contribute to the sustainable development of the countries in which they operate, to respect human rights, to encourage local capacity building or to refrain from seeking or accepting exemptions to local regulatory frameworks in the area of environment, health and safety, labour, taxation, financial incentives and other issues.<sup>28</sup> On the other hand, the UN Global Compact has nine principles distilled from human rights, labour and the environment.<sup>29</sup> The differing emphasis in various instruments does not help the overall narrative as it causes confusion as to the scope and appeal of CSR engagements.

At the European Union (EU) level, the approach is again for a voluntary or 'beyond the law' position. This approach was endorsed by the Green Paper 'Promoting a European Framework for Corporate Social Responsibility'.<sup>30</sup> The Green Paper showed a reluctance to impose overly strict requirements on MNEs operating within one of its member states, except for a vague emphasis on the voluntary contribution that corporations should make towards 'a better society and a cleaner environment'.<sup>31</sup> More precisely, corporations must 'integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'. In short,

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<sup>28</sup> Adapted in 1976 and amended various times subsequently, see OECD, *The OECD Guideline for Multinational Enterprises: Text, Guidelines, Commentary*, DAFFE/IME/WPG (2000) 15 Final available at <http://www.oecd.org/department>. Similar principles are embodied in the United Nations Code of Conduct for Transnational Corporations, Current Studies Series No.4/E.86.II.a.15 (Geneva: United Nations Publications, 1986). Obligations range from respect for the sovereignty and political system of the host state, respect for human rights, prohibiting from corrupt practices, full disclosure or observance of tax and competition laws to obligations on TNCs not to abuse their economic power in a manner damaging to the economic well being of the countries in which they operate.

<sup>29</sup> The Global Compact was introduced in 1999. It is not a regulatory instrument or code of conduct, but a value-based platform designed to promote institutional learning. It now has ten principles which utilize the power of transparency and dialogue to identify and disseminate good practices based on universal principles. The principles embodied in the Global Compact broadly include respect for human rights as defined in the Universal Declaration of Human Rights (UDHR), the ILO Declaration on Fundamental Principles and Rights at Work which requires respect for freedom of association, recognition of collective bargaining, elimination of all forms of forced and compulsory labour, the effective abolition of child labour and elimination of discrimination in respect of employment and occupation and thirdly, the Rio Declaration of the UN Conference on Environment and Development, see <http://www.unglobalcompact.org/>

<sup>30</sup> Commission of the European Communities, *Green paper: Promoting a European framework for corporate social responsibility* (COM 2001 366 final 18.7.2001).

<sup>31</sup> *Ibid*, Para 8.



for the EU, CSR is 'essentially a concept whereby companies decide voluntarily to contribute to a better society and cleaner environment'.<sup>32</sup>

However, as of March 2007, the European parliament passed a resolution, entitled 'Corporate Social Responsibility: a new partnership'.<sup>33</sup> The recommendations to the Commission include provision to extend the responsibility of directors of companies exceeding 1,000 employees to encompass the duty for the directors themselves to minimise any harmful social and environmental impact of the companies' activities. Further, it forwards a proposal for social and environmental reporting to be included alongside financial reporting requirements. It also proposes a mechanism by which victims, including third country nationals, can seek redress against European corporations in the national courts of the Member States.

National level standards are varied and dependent on government initiatives. For example, in the UK, contemporary CSR policy is seen as part of a wider re-orientation of governance schemes whereby corporate roles have become more important as a result of greater market reliance through privatization and contracting. The interaction is enhanced through networks between government and civil society.<sup>34</sup> One example here can be seen in the UK Export Credit Guarantees Department (ECGD) requirements.<sup>35</sup> The ECGD will not only look at the payment risk but also the underlying quality of the project including its environmental, social and human rights impact.<sup>36</sup>

Voluntary instruments like codes of conduct have displayed various levels of success. Some do improve corporate responsiveness as targeted. Discerning modifications of

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<sup>32</sup> The EU's voluntary approach appears to be premised on the basis that an increasing number of European corporations recognize their social responsibility and consider it as part of their identity. Their responsibility is expressed towards employees and more generally towards all the affected stakeholders which in turn can influence its success. A similar view was expressed again in *CSR: A Business Contribution to Sustainable Development* (COM 2002 347 final 2.7.2002) which built upon the reactions received on the presentation of the Green paper. See also Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee-Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility for similar position, Brussels, 22.3.2006 COM (2006) 136 final.

<sup>33</sup> European Parliament resolution of 13 March 2007 on Corporate Social Responsibility: a New Partnership(2006/2133 (INI).

<http://www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2007-0062&language=EN>

<sup>34</sup> J. Moon, *Business Social Responsibility and New Governance* (2002) 37 Government and Opposition 385-408. For general policies regarding CSR, see the Department of Trade and Industry at <http://www.dti.gov.uk/sustainability/sus/corp.htm>

<sup>35</sup> ECGD's Business Principles (2000).

<sup>36</sup> ECGD, *Mission and Status Review 1999-2000* (London: HMSO, 2000) CM4790, para 1.26, [www.ecgd.gov.uk/ecgdgoodbusinessprinciples.pdf](http://www.ecgd.gov.uk/ecgdgoodbusinessprinciples.pdf).



corporate behaviour can be particularly seen in CSR initiatives that are penetrating deeper into supply chains. This is done by harmonizing standards and implementation procedures. A prominent example in this regard is Chiquita Brands International Inc's partnership with the Rainforest Alliance. The progressive partnership has enlightened Chiquita's involvement in the sustainable banana trade.<sup>37</sup> With regards to worker protection, there is also considerable evidence of corporations requiring that their supplier factories provide protection to their workers, particularly women and children. This is often done by having in place some form of voluntary audit or inspection.<sup>38</sup> The notion is also being developed through various certification schemes. Forests certification schemes have worked towards sustainable forests.<sup>39</sup> Similarly, more products that reach consumers are being reformulated under fairtrade certification programs.<sup>40</sup> These examples show that the impact of voluntary approaches can be far reaching in terms of changing mindsets and aligning practices towards CSR.

Examination of soft CSR suggests that its main advantages centre, among others, on flexibility and speed. Adaptation of standards can be done through a process that may be quite informal. The advantage is also seen in amendments which need not go through a formal procedure. It is important that necessary changes can be made easily because of the robust developments in CSR engagements. It also navigates well around jurisdictional concerns which hamper hard rules. With regards to speed, the design and implementation of voluntary instruments can be quickly settled, even at the level of multilateral codes as there is no formal bureaucracy. Acceptability is another key point as most voluntary instruments do not have coercive force. It can be very attractive to corporations as it presents an opportunity to be shown as being socially responsible to stakeholders. As a result, many have jumped on the CSR bandwagon with wide publicity. At the same time, soft CSR creates a framework of ethics to structure the conduct of even the most reluctant corporation.

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<sup>37</sup> In 1991, the Rainforest Alliance developed the 'Better Banana Project' to address environmental and social problems on banana farms in Latin America. It is reported that 90% of Chiquita bananas sold in Europe and two thirds of the corporation's bananas in the U.S. market come from farms that have been certified by the Rainforest Alliance as meeting its standards for rainforest conservation, wildlife protection, soil conservation, waste management and worker benefits.

See <http://www.rainforest-alliance.org/news/2000/chiquita.html>

<sup>38</sup> N. Kabeer, *Globalization, Labor Standards and Women's Rights* (2003) 10 *Feminist Economist* 3.

<sup>39</sup> See the work of the Forest Stewardship Council (FSC), [www.fsc.org](http://www.fsc.org).

<sup>40</sup> The Fairtrade Labelling Association was established in 1997 and co-ordinates the Fairtrade certification mark in 20 countries to date. The certification mark is an independent consumer label which appears on products as an independent guarantee that disadvantaged producers in the developing world are getting a better deal. See [www.fairtrade.net](http://www.fairtrade.net).



The innovations spurred by soft CSR are also important as they can be tailored according to the needs of the various CSR actors. The innovation is stemmed from the desire to benefit from a 'win-win' situation by all stakeholders. The CSR actors are largely free to create new instruments and operate them as they choose. This creates a climate conducive to considerable rule innovation aided by media and advancing technology.<sup>41</sup> Further, the standards are not bound by national constraints and can develop internationally. The international dimension can be said to provide impetus for the prolific growth of soft CSR. One result can be seen in CSR initiatives that are penetrating deeper into MNE supply chains as opposed to remaining at the level of parent firms and affiliates.<sup>42</sup>

The strategic importance of voluntary standards can especially be seen in the advantage they pose. It has fuelled CSR institutionalization by highlighting the various principles by which corporate conduct should be aligned. Soft CSR can thus be said to represent the outcome of the various CSR actors coming to the forefront of CSR initiatives. In the UK, the Department for International Development (DFID) has even stated that international legally binding frameworks for MNCs may divert attention and energy away from encouraging CSR.<sup>43</sup> The DFID approach appears to endorse the divorce of legal standards from CSR initiative. This view reinforces the thought of CSR as being 'beyond the law' or an initiative for the corporation to go beyond the minimum requirements of the law. There are however serious flaws with the 'beyond the law' argument which will now be looked at.

### **2.1.2 The Drawbacks of Soft CSR**

Many of the initiatives at the international, regional and national levels have addressed some of the more obvious limitations inherent in corporate self-regulation. Nevertheless, engagement with the CSR agenda should not be taken to mean that CSR practices have been internalized throughout the corporate structure. For example it is

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<sup>41</sup> Webb and Morrison, above, n4 at 115.

<sup>42</sup> Utting, above n17 at 8. Florini comments: a company with a brand name such as Levi Strauss or Wal-Mart effectively controls a long chain of frequently shifting suppliers based primarily in low-wage countries, see A. Florini, *Business and Global Governance: The Growing Role of Corporate Codes of Conduct* (2003) Brookings L. Rev. at 4, 5.

<sup>43</sup> Department for International Development, *DFID and Corporate Social Responsibility* (London: Department for International Development, 2003) at 9.



unclear whether codes of conduct increase compliance rates. Essentially, voluntary measures and self-regulation create an impression of CSR-based decision making. This impression disregards the choices made by corporations to work with CSR only when it is economically viable to do so. The situation is aggravated by standards in social and environmental auditing which leave much to be desired. Collectively, voluntary standards raise serious questions with regards to effectiveness.

Typical drawbacks of soft approaches include generally lower visibility and credibility. It is sometimes unclear how voluntary instruments are created. The role played by the actors involved can be questionable which in turn diminishes credibility. It also may not be accessible to all who are affected, nor may its mode of operation be very visible or applied at all. One need not go far for an example. Enron had a comprehensive ethics policy in the form of its code of conduct.<sup>44</sup> Further, certain standards created can lead to dubious results. British American Tobacco (BAT) for example, won a UNEP/Sustainability reporting award for its annual social report in 2004. Nonetheless, a sceptic might question why a tobacco corporation, given the massive damage its products inflict, should be rewarded for its otherwise socially responsible behaviour.<sup>45</sup> Further, there is the problem of applicability. It is difficult to impose these rules to those who do not wish to participate in the program. This in turn can lead to the possibility of less rigorous standards being developed. Such a problem highlights the issue of 'free riders'.<sup>46</sup>

Soft CSR can also be vague, especially when couched in wide language. When this is the case, the voluntary instruments fail to give guidance. It can be very open-textured, for example by setting out principles but making no attempt to prescribe any institution or individual to audit, inspect or analyze the said principles. To aggravate such vagueness,

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<sup>44</sup> In 2000, Enron boasted a 63 page code of ethics, prefaced by a note written by CEO Kenneth Lay indicating the importance of ethical behaviour in the company on the part of Enron employees. Current and new employees were required to sign a certificate of compliance indicating that they had read and complied with the code, see M. Schwartz, 'Legally Mandated Self-Regulation: The Potential of Sentencing Guidelines' in W. Cragg, above n19 at 304-5.

<sup>45</sup> D. Doane, *The Myth of CSR* (2005) Stanford Social Innovation Review 3. On how tobacco companies should pursue their CSR objectives, see G. Palazzo and U. Richter, *CSR Business as Usual? The Case of the Tobacco Industry* (2005) 61 *Journal of Business Ethics* 387: 'Tobacco companies should abstain from any attempt to link their business to the common good. They should rather pursue an integrity-based CSR approach on the transactional level of their operations. Such a strategy at the level of integrity has to be built upon painful transparency and a clear and uncompromising rupture with the old business practices that spoil the perception of their authenticity'.

<sup>46</sup> The basic free-rider problem is that companies may take advantage of the willingness of other companies to incur costs and resources on CSR related matters, while refraining from doing so itself as a matter of rational, economic self-interest, thereby 'free-riding' on the efforts of others, see M. Olson, *The Logic of Collective Action* (Cambridge: Harvard University Press, 1965).



there sometimes can be rivalry between standard setting authorities. NGOs have different features and aims, sometimes their views clash, as do the CSR standards that are generated. Thus, for example, in the case of sustainable forest certification programs, there may be open competition among rival certification initiatives, with each pointing out their strengths and their counterparts' weaknesses.<sup>47</sup> It does not help that CSR engagement resides in the goodwill of the corporation. This optional basis to CSR is particularly acute because it tends to be considered a luxury afforded only by big companies and the policies tend to be sacrificed when the going gets rough.

In fact, soft CSR is reliant on the 'business case'. Corporations are naturally keen to be aligned with CSR schemes because they offer good public relations. It is seen to be in the interest of the corporations' long term future or the 'business case'. This leads some companies to even capitalize on well-intentioned efforts, say by signing the UN Global Compact without necessarily changing their behaviour.<sup>48</sup> Ironically in some instances, commitment to CSR can actually lead to marginalized groups being seen as a threat to a corporation's claim to be a responsible operation. Nike and Adidas for instance, have reduced the amount of outsourcing to smaller producers in part because it is difficult to monitor these facilities. Such a policy means that the most disadvantaged groups like non-unionized and short-term contract workers as well as women inadvertently find themselves out of income. Since inclusion or exclusion of stakeholders is not based on legal rights, recognition of any particular interest remains contingent upon the 'business case'.<sup>49</sup>

In this situation, soft CSR unwittingly promotes dominance. Voluntary initiatives may simply permit the most knowledgeable and powerful CSR actors to reinforce their position. For the corporation, it can be a strategy to deflect interests from the political process, stave government regulation and provide freedom to set the standards it so wishes to. The leadership role taken by some corporations in the CSR debate which has moved from being defensive to proactive can be said to be an attempt to claim hegemony

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<sup>47</sup> See G. Rhone, D. Clarke and K. Webb, 'Two Voluntary Approaches to Sustainable Forestry Practices' in K. Webb (ed) above n4 at 249 which highlights the tug-of-war between Canadian Standards Association and Forest Stewardship Council in sustainable forestry initiatives.

<sup>48</sup> Corporate Watch, + 10: *The U.N.'s Global Compact, Corporate Accountability, and the Johannesburg Earth Summit* (Corporate Watch: January 2002). The involvement in UN related programs without necessary commitment is dubbed 'bluewash'.

<sup>49</sup> P. Newell, *Citizenship, Accountability and Community: the Limits of the CSR Agenda* (2005) 3 International Affairs 541 at 5 and J. Bendell, *Barricades and Boardrooms A Contemporary History of the Corporate Accountability Movement* (Geneva: UNRSID, 2004).



in the matter. Clearly, the ambiguity in content and the voluntary tone of CSR proves to be problematic. Voluntary instruments become questionable when they fail to achieve what they set out to do. At worst, they are reduced to empty rhetoric. In reality, CSR practices often remain limited to specific, ad hoc interventions. For example, this is apparent in relation to the overall lacklustre reporting on CSR best practices by corporations involved with the Global Compact. Indeed, a 2004 evaluation of the Global Compact carried out by McKinsey and Company found that membership of the compact stimulated only 9 per cent of the participating corporations to take actions that they would not have otherwise taken had they remained outside the initiative.<sup>50</sup> Thus, while multi stakeholder initiatives attempt to address some of the limitations of corporate self-regulation, involvement in programs like the Global Compact end up having a very mixed result. This is particularly because they involve only a small fraction of corporations, each with varying agendas.<sup>51</sup>

The problems of content and enforceability underline the real issue that arises with regards to international, regional and national soft standards. The weaknesses of soft CSR force the question of when and how the myriad voluntary 'codification' can be turned into binding legal provisions or uniform standards. Voluntary standard setting lacks features found in public rule making mechanisms. In order to address this, the discussion now moves to mandatory instruments which although have certain advantages, do come with their own set of cautions.

### **2.1.3 The Appeal of Hard CSR**

Mandatory CSR approaches contain hard laws. Increasingly, CSR initiatives are becoming enshrined in a number of legislative provisions. The UK Pension Act 1995 for example requires pension funds to have a statement on CSR investments. There are similar legislative provisions in various countries including Belgium, Germany and Australia. Also, the UK Companies Act 2006 strives for a new, more positive way

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<sup>50</sup> McKinsey & Co, *Assessing The Global Compact's Impact* (2004). It was found that in the vast majority of cases (91 per cent), companies were doing things they would have done anyway (51 per cent), albeit more efficiently or quickly, or had remained largely inactive (40 per cent). See [http://www.unglobalcompact.org/NewsAndEvents/news\\_archives/2004\\_06\\_09.html](http://www.unglobalcompact.org/NewsAndEvents/news_archives/2004_06_09.html)

<sup>51</sup> See also, Utting, above n17 at 4.



ahead.<sup>52</sup> One of the most progressive pieces of company legislation in the world to date, section 172 of the Act requires directors to ‘have regard’ to society, environment and supply chain. The Act is a first step in making CSR agendas part of the corporate legal decision making structure.<sup>53</sup> Another example of a hard approach is the King Report on Corporate Governance for South Africa 2002 which is a mandatory requirement that stipulates certain sustainability standards for companies listed on the Johannesburg Stock Exchange.<sup>54</sup>

Contrary to expectations and prevailing wisdom, mandatory standard setting can inspire innovation, particularly technological development and thus enhance competitiveness.<sup>55</sup> The German automotive industry is a good example. Tough command and control regulations in the early 1980s have been credited with increasing the ability of German companies to meet the demands of pollution control through technological innovation. As a result, when the acid rain campaign arose in the late 1980s, German industry was

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<sup>52</sup> The Companies Act 2006 is the biggest reform of UK company law for 150 years. It is the largest Act ever, with 1300 sections. About a third of this is a straightforward restatement of the previous law in clearer and simpler language. It replaces the company law provisions of the 1985 Companies Act, the 1989 Companies Act and the 2004 Companies (Audit, Investigations and Community Enterprise) Act, except for the self-standing provisions on community interest companies and provisions on investigations (which go wider than companies). The Act promotes forward looking narrative reporting by companies covering risks as well as opportunities, together with explicit requirements for quoted companies to report, as part of their business review and to the extent necessary for an understanding of the business, information on environmental matters, employees and social and community issues. See [www.dti.gov.uk](http://www.dti.gov.uk)

<sup>53</sup> Section 172 Duty to promote the success of the company:

1) A Director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to-

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company’s employees,
- (c) the need to foster the company’s business relationships with suppliers, customers and others,
- (d) the impact of the company’s operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

<sup>54</sup> J. Burke, ‘The Reporting Implications of South Africa’s King Code on Corporate Governance’, *Accountability Quarterly* (London: AccountAbility, 2003) at 21.

<sup>55</sup> M. Porter, *The Competitive Advantage of Nations* (London: Macmillan Press, 1990).



heavily involved in lobbying for European level nitrogen oxide emission reductions. As the German industry was at the forefront of emission reducing technologies, they could see the advantage of the new policy for them.<sup>56</sup>

Some of the main advantages of hard CSR include dependability. Hard rules are dependable in the sense that behaviour can be specified with considerable clarity, for example through prescription of minimum national standards. This makes it relatively straightforward to identify breaches of the legal standard and to enforce the law. The operational part of the rules becomes defined with clarity and corporations themselves have an understanding of their regulatory obligation.<sup>57</sup> Another important feature is transparency and accessibility. In keeping with the democratic nature of rule-creation processes (at least in most developed countries), the development of statutes is normally characterized by a high degree of formality and attempts to ensure that the process is fair and transparent. This means that it can be openly scrutinized by members of the public. It also has an element of predictability. Government authorities can structure commands so that they know how to enforce them and corporations can act accordingly. Reputation costs are also borne in a more far reaching manner. Violating legal commitments can possibly plague the reputation of a corporation for many generations.

The advantages of hard CSR must not be taken lightly. One of the major strengths with hard CSR regimes is dependability and consistency. Gunningham and Grabosky argue that critics often overlook the fact that part of the reasons for failure of legislation is generally not due to design but largely because governments are constrained by lack of resources or funds. Notwithstanding the serious difficulties confronting many government authorities, command and control legislation have achieved significant victories. In the field of environmental law for example, it has been at the forefront in the halting or at least in slowing some forms of environmental degradation.<sup>58</sup> It can have a similar role to play in the formal institutionalization of CSR. There are however drawbacks to hard CSR which will be discussed next.

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<sup>56</sup> J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at 268.

<sup>57</sup> Gunningham and Grabosky, above n1 at 41.

<sup>58</sup> Gunningham and Grabosky at 6-7.



#### 2.1.4 The Drawbacks of Hard CSR

Even though conventional hard law rules such as command and control regulation are powerful in many circumstances, they are not without limitations. Some of the main disadvantages include derailment. Because of the formal, lengthy nature of legislative rule making, with its many checks and balances, there are considerable opportunities for legislative projects to be derailed. As a result, proposed legislation frequently get stalled or vitiated due to successful lobbying by particular interest groups.<sup>59</sup> There are also implications of costs and time. The expense and slowness of statute development result in taxpayers bearing the costs of developing statutes. At the same time, government resources are limited. For example, premises or factories can only be inspected at certain periods. Also, a government department or agency may not have the time or money to launch prosecutions.

It is also important to remember that hard rules can sometimes be reduced by generalization. Provisions concerning controversial social issues can be put in very general and probably meaningless, hortatory language. Some provisions are couched so widely and often, without corresponding enforcement mechanisms that it becomes increasingly clear that these so called mandatory provisions have no real legal effect or binding standards.<sup>60</sup> This is particularly pronounced in developing countries. On paper, countries which are home to some of the biggest sweatshops like Cambodia and Bangladesh have adequate labour laws which enshrine basic International Labour Organization (ILO) requirements.<sup>61</sup> Further, hard rules can also be a rather blunt instrument which cannot really address a varied set of regulated actors, ranging from

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<sup>59</sup> For example, the limitations in the Companies Act 2006, particularly with regards to statutory reporting have been attributed to strong lobbying by industry groups, see Compass and CORE coalition, [www.corporate-responsibility.org/](http://www.corporate-responsibility.org/). Further, the withdrawal of the Operating and Financial Review (OFR) has been attributed to industry lobbying. The OFR came into force on the 1st April 2005 and applied to all GB quoted companies. The Government took the decision in November 2005 to repeal the mandatory requirement on quoted companies to prepare an OFR as contained in the OFR regulations so that they are required to prepare a Business Review instead which is now contained in the Companies Act 2006, see [www.dti.gov.uk](http://www.dti.gov.uk)

<sup>60</sup> P. Muchlinski, *The Regulation of International Business* (2003) 3 Non State Actors and International Law 123 at 128-9, International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism* (Geneva: ICHR, 2002) at 100.

<sup>61</sup> In Cambodia, labour laws stipulate a \$45 monthly minimum wage and a six-day, 48-hour workweek with no more than two hours of daily overtime. Bangladesh has similar labour laws but it is noted that they do not apply at all in Export Processing Zones (EPZ).

See

[http://www.betterfactories.org/content/documents/1/Guide%20to%20the%20Cambodian%20Labour%20Law%20\(en\).pdf](http://www.betterfactories.org/content/documents/1/Guide%20to%20the%20Cambodian%20Labour%20Law%20(en).pdf) and <http://www.nlcnet.org/campaigns/shahmakhdum/1001/laborlaws.html>.



those who consistently make efforts to fully comply and even attempt to exceed regulatory requirements, to those who comply only when prodded, right down to those who are in chronic non-compliance.<sup>62</sup>

Mandatory instruments tend to be more successful in some circumstances than others. For example, the Companies Act 2006 may be a breakthrough in the legal organization of CSR. Nevertheless, it does not articulate a clear legal standard for directors to adhere to when having 'regard' to the various constituents and how such a requirement is to be undertaken. Some critics suggest that the clear, precise standards embodied by hard, command and control mechanisms are easier to be enforced against corporations which are readily identifiable and accessible.<sup>63</sup> A success story is the United States Clean Water Act 1972 which created effluent discharge standards for all new and existing point source discharges. In doing so, it employed a permit system to ensure that companies complied with these standards. As a result, water quality in the US visibly improved.<sup>64</sup> On the other hand, mandatory instruments are particularly ineffective in dealing with transitory, mobile issues and those involving remote corporations which are difficult to identify and keep track of.

## **2.2 Transcending the Regulatory Divide**

What emerges from the foregoing comparison of hard and soft CSR regimes is that each approach has distinctive features. Each carries strengths and weaknesses which influence the course of CSR narratives. Of course, what has been presented is a generalized picture and generalization can be extremely dangerous. As with any instrument, both hard and soft approaches work better individually in some circumstances than in others. Nevertheless, there is a clear severance between both approaches. Both are seen as unitary and often, as standing in opposition to the other. This dichotomy is particularly endemic in CSR though it has been experienced in other policy areas like the environment.<sup>65</sup>

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<sup>62</sup> T. Mcinerney, *Putting Regulation Before Responsibility: The Limits of Voluntary Corporate Social Responsibility* (2005) GWU Law School Public Law Research Paper No. 123 available at SSRN: <http://ssrn.com/abstract=658081>

<sup>63</sup> Gunnigham and Grabosky, above n1 at 42-3.

<sup>64</sup> Ibid at 43.

<sup>65</sup> Environmental policy has matured since it became central in the 1970s through utilization of various regulatory techniques, sometimes called 'smart regulation', see Gunnigham and Grabosky, above n1.



In essence, the polarized approach takes hard and soft CSR to be distinct, sometimes competing initiatives. Such an approach has fragmented CSR narratives and can be said to be one of the key limitations in standard setting. Dwelling overly on essentially what is a legal and beyond legal demarcation has diverted attention from the range of approaches that can be utilized. The severance between both approaches has not only created a tension in regulatory initiatives but also hampered new responses to CSR standard setting. In order to transcend CSR narratives beyond the current divide, it becomes necessary to show how the regulatory baseline for CSR is much more dynamic. Hard and soft approaches can both co-relate and create pluralized responses in CSR standard setting initiatives.

The first point with regards to the nexus is that rules on both ends can harden and soften accordingly. At various levels, soft rules can actually harden into a more formal rule system. This is because voluntary instruments can promote various flexible soft rules that can be a starting point before moving on to harden. It may begin at the point where articulation of a particular soft rule has a sequential effect. Voluntary instruments in such an instance act as a precursor, paving the way for harder or legalistic initiatives once a particular standard gains broader 'cultural' acceptance and is internalized by the CSR actors.<sup>66</sup> Soft rules under such circumstances can be said to incubate hard rules until a broader acceptance can be achieved. Some examples illustrate the successful transfer. The U.S. Occupational Safety and Health Administration (OSHA) converted a large number of voluntary health and safety standards into regulatory requirements.<sup>67</sup> The Brazilian state of Acre has made certification under the Forest Stewardship Council's sustainable forestry program a requirement for practicing forestry in the state.<sup>68</sup> Zimbabwe has incorporated ISO 14001 into its regulatory system.<sup>69</sup>

At the other end, hard rules act through implicit or explicit threats of legal action when appropriate but at the same time, may soften on application. For example, legislation can expressly provide for voluntary initiatives in order to improve corporate performance.

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<sup>66</sup> K. Webb and A. Morrison, above n4 at 101, 171.

<sup>67</sup> E. Meidinger, *Environmental Certification Programs and US Environmental Law: Closer Than You May Think* (2001) 31 *Environmental Law Reporter* 10162.

<sup>68</sup> See Forest Stewardship Council at [http://www.fsc.org/en/whats\\_new/news/news\\_notes/25](http://www.fsc.org/en/whats_new/news/news_notes/25).

<sup>69</sup> P. Stenzel, *Can the ISO 14000 Series Environmental Standards Provide a Viable Alternative to Government Regulation?* (2000) 37 *American Business Law Journal* 237 at 6. With regards to ISO 14001, ISO 14001 is an environmental management system developed by ISO (International Organization for Standardization) which aims to improve environmental performance at the same time as making a positive impact on business results. See <http://www.iso.org/iso/en/aboutiso/introduction/index.html>



The European Eco-Management and Audit Scheme (EMAS) is a management tool set under EU regulation for companies and other organizations to evaluate, report and improve their environmental performance.<sup>70</sup> EMAS aims to recognize and reward those organizations that go beyond minimum legal compliance and continuously improve their environmental performance. Another level of softening can be seen in compliance. A public authority may consider compliance with voluntary standards as an aid to avoid or reduce penalties.<sup>71</sup>

The second point to be made about the nexus is that both approaches can co-exist and buttress or reinforce each other. In this sense, a close and mutually reinforcing relationship between hard and soft CSR exists. The weaknesses of each instrument may be used to supplement and complete each other. In the process, the regulatory framework becomes strengthened. For example, the enforceability of some corporate and NGO led instruments can be reinforced through legal instruments. To illustrate, ethical certifications that penetrate the supply chain can be said to be able to give rise to claims of misrepresentation. With regards to implementing the terms and conditions of operation in various voluntary initiatives, reliance can be placed on contract law. The benchmarks articulated through voluntary codes and standards initiatives may be recognized by courts in regulatory actions or in various private law actions as constituting the accepted 'standard of care' for that activity. In such circumstances, the ability of the industry associations or standards organizations to stimulate compliance with those codes or standards may be enhanced.<sup>72</sup>

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<sup>70</sup> European Eco-Management and Audit Scheme (EMAS) is a voluntary scheme established by law. It has been mandated via Council Regulation (EEC) No 1836/93 of 29 June 1993. On 7 September 2001, the European Commission adopted a Decision (C (2001)/2591) whereby the Commission politically engages in a process of applying the EMAS Regulation into its activities. European businesses which already have been forced to accept strong continuous environmental improvement and auditing standards under EU Regulation 1836/93 are working for a tougher global environmental voluntary standard through EMAS. The driving factor is the belief that EMAS will become the prominent standard setting mechanism and drag US and Asian companies up towards EMAS standards. It is believed that this will give European businesses a distinct advantage. See J. Braithwaite and P. Drahos, above n60 at 281.

<sup>71</sup> For example, ISO 14001 environmental management systems have been used in Canadian provincial courts. In *R v Prospec Chemicals* (1996) 19 CELR (NS) 178 (Alta.Prov.Ct.) following a finding of guilt for exceeding sulphur emission limits contrary to Alberta environmental legislation, the judge agreed that the defendant, Prospec had to complete the ISO140001 certification as part of the court ordered sentence. The defendant was to post a letter of credit for \$40,000, subject to forfeiture if the company failed to comply with the certification order. See also: *R v Calgary (City)* (2000) 272 AR 161, 35 CELR (NS) 253 (Alberta Prov. Ct).

<sup>72</sup> Webb and Morrison, above, n4 at 125-6. The English courts have been flexible about standards generated through various actors. Although British Standards Association (BSA) generated standards are seen as 'non binding' they are taken to 'reflect the knowledge and expertise of the profession at the date when they were issued', see *The Board of Governors of the Hospitals for Sick Children v. McLaughlin & Harvey Plc* (1987) 19 CLR 25 at 93, *Ward v. The Ritz Hotel (London) Limited* [1992] PILR 31



Further, promotional information of corporate good conduct can become legally binding when met by laws on false advertising. A prominent example in the interplay can be seen in how courts have started to use voluntary standards to evaluate corporate conduct. In the US case of *Kasky v Nike*,<sup>73</sup> Kasky, an activist, challenged that Nike had made a series of false statements and omission of material fact concerning the working conditions under which Nike products were manufactured. The statements included promotions made by Nike of the processes by which it monitored compliance with its code of conduct. The California Supreme Court ruled in favour of Kasky on the grounds that Nike was making statements for commercial purposes and factually misrepresented in making its promotion.<sup>74</sup> Nike therefore was held to have breached unfair competition law in the state of California. Nike appealed to the Supreme Court. In September 2003, before the appeal was heard, Nike agreed to pay US\$1.5 million to the Fair Labour Association (FLA) and settle the case. As such, embracing a voluntary code of conduct can be used in courts to inform standards of social decision making of the corporation.<sup>75</sup>

The third point to be made is that some instruments hover between hard and soft, making classification elusive. In order to illustrate the interpenetration between the hard and soft law continuum, Abbott and Snidal refer to the combination of obligation, precision and delegation in each mutation.<sup>76</sup> The realm of soft law can be said to begin once legal arrangements are weakened along one or more of the dimensions. This softening can occur in varying degrees along each dimension and in different combinations across dimensions.<sup>77</sup> The dual nature of certain instruments impacts application. For example, the revised OECD Guidelines for MNEs are an illustration of an emerging body of international process that is not legally binding but has the commitment from OECD governments to promote their observance. The OECD Guidelines are politically binding on participating countries (consisting of 30 OECD member countries and six non-OECD members) that are required to establish 'national contact points' to deal with issues that are raised about the implementation of the

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<sup>73</sup> *Kasky v Nike* (2003) 123 S. Ct. 2554.

<sup>74</sup> Nike's defence was freedom of speech. The court, in a nuanced judgment, declared that Nike's statement was made for commercial purpose and therefore not subject to freedom of speech.

<sup>75</sup> A series of other cases are pending in US courts, see the International Labour Rights Fund (ILRF) public interest litigation against, among others, Wal-Mart and Silverstone (2005) at [www.ilrf.org/annualreport](http://www.ilrf.org/annualreport)

<sup>76</sup> Abbott and Snidal, above n14 at 424.

<sup>77</sup> Ibid.



Guidelines. Corporations may be subjects of investigations through government officials designated as the contact point.<sup>78</sup>

Even within individual hard and soft initiatives, in light of this variety, it is useful to view them in a continuum. Some have more formal rule-making, implementation and adjudication institutions and processes with others being less formal and elaborate.<sup>79</sup> In fact, the fusion of hard and soft CSR is a more fluid interaction between the standards than recognized in CSR narratives. From these examples, the potential for symbiotic, constructive interaction between both sides of the initiatives becomes apparent. Some combination of the two types of instruments may work better than either could on its own.

Essentially, voluntary approaches to CSR can co-relate in a legal context and vice versa. Voluntary approaches impact law by refining or elaborating general legal concepts. Mandatory approaches on the other hand can play a role in shaping and structuring voluntary ones. Both inform and improve each other. With regards to the movement between the two ends, the evolution of hard law from soft law is easier to achieve. This is in comparison to developing hard law from scratch, particularly in an area with competing stakeholders like CSR. Nevertheless, not all hardening of soft law may provide an optimal solution. In some areas, it is best that soft law remains as it is because it is more superior in applicability. The movement from soft to hard or vice versa may not then always be inevitable or desirable.<sup>80</sup> Greater reliance on hard and soft CSR need not therefore be a sharp break from the other. Instead, both approaches can be seen to operate within a broader regulatory framework. Clarifying the nexus between both allows for the relationship to be incorporated into regulatory design.

In short, it is reiterated that there are three main points to summarize the interaction between hard and soft CSR. First, instruments on both sides can harden or soften according to circumstances, needs and design. Hardening may sometimes be an

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<sup>78</sup> Generally, the performance of the contact points has been disappointing. Many countries have failed to create one altogether and contact point officials were unaware of their responsibilities. Responding to such criticisms, the 2000 revision of the Guidelines gives contact point offices an enhanced role in dealing with disputes about the Guidelines and states that they should operate in accordance with the 'core criteria of visibility, accessibility, transparency and accountability' see International Council on Human Rights Policy, above n60 at 100.

<sup>79</sup> Webb and Morrison, above n4 at 103.

<sup>80</sup> Abbott and Snidal, above n13at 447.



unexpected conclusion of a particular soft rule. At times, softening is used as a conscious design in order to achieve applicability. Second, both instruments can improve the defects contained in each other. The complementarity works towards creating a more dynamic regulatory baseline. As such, the failure to take account of the hard dimension of CSR substantially weakens the chances of creating meaningful standards in some of the most difficult 'boundary' areas.<sup>81</sup> The third point emphasizes that sometimes, the distinction between hard and soft is difficult to make and clear demarcations may not be helpful. The blurring between the divide is much more fluid and symbiotic. Individually both hard and soft approaches to rule making and implementation have their advantages and disadvantages. The challenge is to determine how to make both approaches as effective as possible and determining when the nexus can be used to maximum advantage.

### **2.3 Enabling CSR**

What the preceding discussion shows is that the relationship between both sides of the hard and soft divide uncovers various conceptual problems that are endemic to CSR and points this out to the CSR actors. It also highlights that awareness of the nexus creates room for a more optimum regulatory design. In showing that hard and soft CSR has an interconnected relationship, an imagery that can be drawn is that of a web of mutually influencing forces. While the role of law can be crucial as an architect of CSR, the bricks and mortar to this layout must be supplied by institutional support. The analysis shows that as the definitional debate about CSR rages, the legal baseline for CSR is itself changing. Failure to take account of the legal dimensions of CSR substantially weakens the chances of making meaningful progress in some of the most difficult boundary areas about the proper balance between the state, the corporation and NGO roles and responsibilities.<sup>82</sup>

The hard and soft nexus really forces a rethink of the uniform understanding of CSR and repeated limited responses that have been generated as a result. This perspective necessitates a critical understanding of what is meant to be achieved with CSR. What is its underlying purpose and what can it actually do?

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<sup>81</sup> H. Ward, *Legal Issues in Corporate Citizenship* (London: IIED, 2003) at 6.

<sup>82</sup> Ward, *Ibid* at 31.



Mainstream CSR approaches assume a set of conditions that do not exist in most of the world. CSR can work, for *some* people, in *some* places, on *some* issues, *some* of the time. The challenge is to identify and specify those conditions in order that inappropriate models of 'best practice' are not universalized, projected and romanticized as if all the world were receptive to one model of CSR (emphasize in original).<sup>83</sup>

Importantly, CSR is not the 'homogenous coherent concept' that it is often presented to be.<sup>84</sup>

Further, whilst the current CSR agenda transmits with a distinctly Anglo-American shade, the meaning of CSR can differ from one society to another. This 'CSR as culture'<sup>85</sup> is illustrated in a World Business Council for Sustainable Development (WBCSD) survey where people from different countries emphasized different CSR issues.<sup>86</sup> In short, it may not actually make sense to search for one 'common denominator, one common concept or one direction' in CSR discourse.<sup>87</sup> Indeed, one concern is that the use of the term CSR has become so broad as to allow various interpretations to intercept and adopt it for many different purposes. The vagueness restricts standard setting initiatives and guidance. This is further aggravated by conflicting scientific findings on the technical aspects of standards.<sup>88</sup> Establishing processes and procedures of CSR will be a better way to align a more pluralistic approach towards standard setting. As the hard and soft nexus integrate the spectrum of rule making, CSR actors can tap on the ability to draw a more coherent policy mix that will address the role of the corporation in society. The interconnected instruments provide a regulatory mix that can be utilized with sensitivity to the developmental implications of CSR policies. Hard and soft approaches offer a sympathetic confluence of instruments towards this end.

What the hard and soft thesis ultimately does is create an enabling environment for the institutionalization of CSR. The nexus acts as information rich method of discourse among various CSR actors. These mutually influencing instruments reflect a restructuring in the way CSR actors operate and the changing nature of the roles and responsibilities between them. As a result, a richer tapestry of instruments becomes

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<sup>83</sup> Newell, above n49 at 556.

<sup>84</sup> M. Blowfield and G. Frynas *Setting New Agendas* (2005) *International Affairs* 499 at 501, 3.

<sup>85</sup> *Ibid.*

<sup>86</sup> World Business Council for Sustainable Development, *CSR: Making Good Business Sense* (Geneva: WBCSD, 2000).

<sup>87</sup> Blowfield and Frynas, above n84.

<sup>88</sup> A. Giddens, *Risk and Responsibility* (1999) 62 *MLR* 1.



available for the CSR actors. The nexus can be said to pave the way for a more conscious regulatory design. Beyond that, the nexus provides the possibility of integrating principles with processes. The first step in this direction is done by generating a culture of joint learning and integration. Mutual capacity building heralds the creation of epistemic communities. Epistemic communities are loose collections of knowledge based experts who share certain attitudes, values and knowledge as well as ways of thinking on how to use that knowledge.<sup>89</sup> Through the soft and hard nexus, the epistemic CSR community can learn from each other.

## 2.4 Conclusion

By way of conclusion, this chapter has identified the dynamics of standard setting initiatives by exploring hard and soft approaches. CSR narratives have been hampered by the ongoing tendency to sever both ends. They are two sides of the same coin and need to be considered in an integrated way. The linkage between hard and soft CSR can accommodate new and pluralized responses in standard setting initiatives. It invokes a rich, consultative method to be harnessed between the CSR actors. The nexus is complex as it attempts to integrate the various standards with the various CSR actors. It also opens up exciting possibilities for the future of CSR narratives. Transcending the regulatory divide provides the framework for a more robust regulatory baseline. The CSR actors can draw on the benefits that the strategic linkage provides them and work towards a transformative agenda in CSR narratives.

This overview also provided a broad canvas as to how standards operate. Such an understanding of standards is important in order to eventually evaluate the magnitude of standard-setting initiatives with clarity. Further, this understanding of standards clears to a certain extent the various political misreading that CSR can be reduced into. If social responsibility notions become exclusionary, its vision is lost and impact will fail. The critical overview of CSR presents the vantage point for the project that lies ahead. The thesis next turns to see if the corporation itself can normatively sustain the notion of CSR. Chapters 3 and 4 pick up on the hard and soft interaction to present the conceptual foundations of the corporation and review the implications of corporate power. These

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<sup>89</sup> P. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control* (1989) 43 International Organization 377-403.



conceptual chapters will provide the analytical base to build the constructive regulatory framework that will be sought in the later chapters.



## CHAPTER 3 An Institutional Understanding of the Corporation

### 3.0 Introduction

In Chapter 2, it was established that the nexus between hard and soft CSR provides for a dynamic regulatory baseline. In this chapter, established institutional practices need to be questioned as a transformative agenda is sought for the corporation. CSR can be said to question the institutional structure between the actors. This chapter intends to look at the corporation as an institution. The focus is particularly important because as was observed in Chapter 2, there is a tendency within the field of CSR for different actors and perspectives to overstate the relative importance of one or other determinant to the exclusion of others. Further, any analysis of CSR is often compartmentalized into distinct disciplines and sub disciplines. As a result, different actors fail to engage with each other.<sup>1</sup> With an institutional understanding, it is hoped to clarify that CSR is not about whether certain actors can make claims on the corporation but whether the foundational assumption of the corporation can be structured towards achieving social responsibilities. It will be observed that the institutional make up is dependant on the profit motivation being in tandem with corporate commitment to social responsibilities.

The aim of this chapter is to underline how the development of the corporate legal genetic code has distorted the language of CSR. This chapter will first look at corporate institutional arrangement and how institutionalization occurs. Next, the chapter uses the institutional background to trace the lineage of the corporation and the climate that nurtured its expansion. It will attempt to deconstruct some of the misconceptions, particularly the legal make-up that has obscured a realistic approach in realizing the socially responsible corporation. Drawing on the historical insight will provide a base from which the role of the corporation can be reimagined. Finally, the chapter will trace early CSR interactions between the actors, a crucially missing part in CSR narratives. CSR is not a modern phenomenon. An overview of historical CSR interactions will enlighten the place and shape of the current debate.

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<sup>1</sup> P. Utting, *Rethinking Business Regulation: From Self-Regulation to Social Control*, UNRISD Publications Business and Society Paper No.15 (Geneva: UNRISD, 2005) at 13.



### 3.1 Corporate Institutional Arrangement

Commercial corporations are institutions with a distinctive purpose. To create profits. If they stop creating profit, they are failures. However, it is argued that the profit motivation cannot obscure its role in society. What is needed then are rules for corporations to take a broader view of their responsibilities. It is proposed therefore that that the governing rules should align with that purpose rather than work against it:

Corporations...exist only because laws have been enacted that provide for their creation and give them a license to operate...The corporate law establishes rules for the structure and operation of corporations. The keystone of this structure is the duty of directors to preserve and enhance shareholder value –to make money...Nothing in the system encourages (let alone requires) corporations to be socially responsible or to contribute, cooperate or sacrifice for the benefit of the community or the common good.<sup>2</sup>

In light of this, corporate institutional arrangement needs a rethink. Polanyi highlights the problems in institutional set up with his analysis of the ‘double movement’. The double movement is essentially the tension between the need to establish and maintain self regulating markets (SRM) and the need to embed institutions to protect the negative results of the SRM.<sup>3</sup> Polanyi suggested that the crude liberalization and excessive reliance on the SRM that characterized late 19th century economic development generated institutional separation of society into an economic and political sphere. This, he said, was a departure from the reality of society, a fiction that was used to organize labour, land and money which then resulted in perverse social conditions. For example, labour in the SRM was a mere commodity, disposed of the physical, physiological and moral entity ‘man’. The social and political reaction that resulted was in the re-embedding of markets through various institutional and political arrangements.<sup>4</sup>

From this perspective, it can be observed that the condition characteristic of modern capitalism did not emerge spontaneously but was the product of a complex set of institutional interventions. With this background, it will be observed that the corporation

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<sup>2</sup> R. Hinkley, ‘The Profit Motive Can Work with A Moral Motive’ *The Australian Financial Review*, 7 April 2000, 33, cited in B. Horrigan, *Teaching and Integrating Recent Developments in Corporate Law, Theory and Practice* (2001) 13 *Australian Journal of Corporate Law* 182.

<sup>3</sup> K. Polanyi, *The Great Transformation The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1957) at 68-76.

<sup>4</sup> Polanyi, *Ibid.*





in its present shape does not fit how community is practically structured. This clash is deeply problematic, especially as corporate power became more pronounced.

What is promising, as will be observed in the proceeding discussion, is that the corporation, as an institution, is remarkably adaptable to change. The adaptability can be used to reconfigure the corporation. The task begins by asking first what values should be protected and enhanced. This 'functional' understanding of CSR shifts attention from the demands of constituencies to the requirements of 'institutional well being and integrity'.<sup>5</sup> It will be observed that asking what groups or constituents have claims against the corporation is problematic and can result in a rights based tug-of-war. Approaches along those lines encourage political bargaining and compromise. Instead, it is proposed that the corporation should be expanded to reflect its role in the community. This expansion is key to emphasize the sustainability of CSR measures. For example, the ability of the corporation to sustain environmental concerns in its operation will also include its ability to adapt to economic and social changes. Thus, the responsibility of the corporation, like that of the natural person, can be said to run primarily to the control of its own conduct. This responsibility revolves on how corporate activities affect the community, especially the 'persons, institutions and values in which it is directly implicated'.<sup>6</sup>

### **3.2 Institutionalizing CSR**

In order to understand how responsibility is to be attached to the corporation, there is a need to look at the institutional evolution of the corporation. This is necessary in order to weigh up the different factors and forces that shape institutional outcomes and trajectories of change. In other words, an historical evolution informs the institutional form of the corporation.<sup>7</sup> Towards this end, an understanding of institutions becomes necessary. The notion of institution is understood by Selznick as a product of social adaptation. He distinguishes the notion of 'institution' from 'organization'. An organization, he says, is a special-purpose tool, a rational instrument engineered to do a

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<sup>5</sup> P. Selznick, *The Moral Commonwealth* (Berkeley: University of California Press, 1992) at 351, G. Teubner, 'Corporate Fiduciary Duties and their Beneficiaries' in K. Hopt and G. Teubner (eds), *Corporate Governance and Directors Liabilities* (de Gruyeter, Berlin: 1987) at 156-60.

<sup>6</sup> Selznick, *Ibid* at 350-1.

<sup>7</sup> North says this about institutional evolution: 'History matters. It matters not just because we can learn from the past, but because the present and the future are connected to the past by the continuity of a society's institutions. Today's and tomorrow's choices are shaped by the past. And the past can only be made intelligible as a story of institutional evolution', D. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990) at vii.



job. It is a 'lean, no-nonsense system of consciously coordinated activities'. An institution on the other hand, may refer to a group or social practice.<sup>8</sup> This is a wide and ambiguous definition which Selznick admits to but nevertheless argues that its utility lies in explaining how the 'larger social system' tends to serve 'the aspirations and needs of those whose lives it touches'.<sup>9</sup> North provides a more robust definition of the interconnection between institutions and organizations. According to North, institutions refer to 'any form of constraint that human beings devise to shape human interactions'. North explains the relationship between institutions and organizations:

[Organizations] are groups of individuals bound by some common purpose to achieve objectives...Both what organizations come into existence and how they evolve are fundamentally influenced by the institutional framework. In turn they influence how the institutional framework evolves.<sup>10</sup>

It is noted that North uses a contractarian but 'functional' and 'enabling' explanation of institutions.<sup>11</sup> North therefore premises his analysis on the efficiency of institutions. This understanding can be traced back to a neo-classical understanding of the corporation which North modifies to suit institutional analysis. It will be observed later in this chapter that such an understanding stands in direct opposition to the historical evolution of the corporate institution. Nevertheless, the definitions set out by North are very useful to understand the dynamics of institutional set up, particularly how the corporation is influenced by the community that surrounds it. North's analysis is therefore applied to the extent that it supplies a framework to understand the corporate institution and its interaction in the community.

Institutions thus can be said to structure incentives in human exchange, whether political, social or economic.<sup>12</sup> For communitarians, institutions are patterns that define purposes and practices, including patterns embedded in and sanctioned by customs and law.<sup>13</sup> They are 'patterns of social relationship' that structure 'experience and shape character by assigning responsibility, demanding accountability and providing

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<sup>8</sup> Selznick, above n5 at 232.

<sup>9</sup> P. Selznick, *Law, Society and Industrial Justice* (New York: Transaction Books, 1969) at 44.

<sup>10</sup> North, above n7 at 5.

<sup>11</sup> See P. Cox, *The Public, the Private and the Corporation* (1997) 80 *Marquette L. Rev* 391 at 475.

<sup>12</sup> J. Hollingsworth and R. Boyer (eds.) *Contemporary Capitalism: The Embeddedness of Institutions* (Cambridge: Cambridge University Press, 1997) at 3. See also K. H. Muller and J Hollingsworth (eds.) *Advancing Socio Economics: An Institutional Perspective* (Lanham: Rowan and Littlefield, 2002).

<sup>13</sup> W.M. Sullivan, 'Institutions and Democracy' in A. Etzioni (ed) *New Communitarian Thinking* (Virginia: University Press of Virginia, 1995) at 175.



standards'.<sup>14</sup> Through this, individual lives can be measured and individual identity developed. An institutional understanding is therefore useful to understand whether an institution is 'good' or 'bad'. This is because institutional patterns can be used to judge 'praiseworthy or blameable' conduct. For example, critics of family laws may say that in certain instances, the institution of marriage inhibits the development of women or fails to provide for the adequate needs of children. Institutional life therefore is always 'making some form of activity possible and others impossible, some kinds of life legitimate and others illegitimate'.<sup>15</sup> Indeed, individuals and society become 'embedded' in institutional arrangements.<sup>16</sup>

The attempt here then is to use institutional insights to understand and rebuild the corporation. North elaborates that by providing a structure to everyday life, institutions reduce uncertainty. They may be created like the United States Constitution or may simply evolve over time like the common law.<sup>17</sup> The corporate institution can be said to be an evolving one, bearing the influence of various time frames. Institutions also structure a sense of responsibility:

While it is common to think in the realm of moral responsibility as a very private and lonely weighing of choices, it is also the case that typically the most important moral decision an individual makes are made within and on behalf of institutions....the moral choices of spouses, parents, educators and judges but also of business persons, pilots, clerks and physicians are almost always exercised in their capacity, we might say their identity, as participants in institutions.<sup>18</sup>

Responsibility evolves because institutions can be said to fix processes that are 'essentially dynamic'.<sup>19</sup> This fixing legitimizes and thereby establishes social groupings. The starting mechanism is often a formal act, such as the adoption of a rule or statute. To be effective, the enactment must build upon 'pre-existing resources of regularity and legitimacy and must lead to a new history of consistent conduct and supportive belief. Institutions then are established not by decree alone but as a result of being bound into the 'fabric of social life'.<sup>20</sup> Whether as a group or practice or both, a social form becomes 'institutionalized' through growth and adaptation. It then takes on a distinctive character

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<sup>14</sup> Sullivan, *Ibid* at 175.

<sup>15</sup> Sullivan, *Ibid* at 176.

<sup>16</sup> See Hollingsworth and Boyer, above n12 at 444-5.

<sup>17</sup> North, above n7 at 3-6.

<sup>18</sup> Sullivan, above n13 at 177.

<sup>19</sup> M. Douglas, *How Institutions Think* (London : Routledge & Kegan Paul, 1987) at 92.

<sup>20</sup> Selznick, above n5 at 232.



or function.<sup>21</sup> The corporation in this manner becomes a 'dense network of relations, vested interests and customary practices'.<sup>22</sup> Commitments are made to employees, clients, customers, investors and a surrounding community. At a minimum, standards of law abiding conduct must be met. Most obligations along these lines are useful and empowering. They 'open channels, mobilize energies and foster cooperation'. They also 'impose costs'. A distinctive culture or character is created. This is 'institutionalization'.

From an analytical point of view then, institutionalization may be positive or negative, depending on what is institutionalized. Selznick says that there may be built-in deficits, as when a rule or practice becomes rigid or outmoded or a corporation becomes irresponsible and unresponsive. Further, institutionalization can be disabling, if for example, racism, shoddy production or corruption becomes part of an institutions way of life.<sup>23</sup> But what can be seen is that institutions can and do take account of multiple values. The worth of an institution is said to be determined by knowing its character and what ends it serves.<sup>24</sup> Nevertheless, to describe the corporation as a responsible institution and that it can be institutionalized with social values in not to deny that the corporation is primarily a seat of economic activity. If it doesn't make profits, it fails as an institution. An institutional understanding accepts the limitations of what can be legitimately pursued and identifies the procedures to enable such action.

Informed by the institutional understanding of the corporation, the chapter now turns to look at the historical development of the corporation and its social responsibilities. This part is largely historical but the purpose is not to search for 'convincing sequence of outstanding events'.<sup>25</sup> What is being sought is an explanation of the historical trends that have played a role in developing the corporate institution. In order to flesh out the notion of the corporation as an institution of responsibility, a study is first needed of any implications of its historical emergence.

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<sup>21</sup> Ibid at 233.

<sup>22</sup> P. Selznick, *The Communitarian Persuasion* (Baltimore and London, Johns Hopkins University Press, 2002) at 98 .

<sup>23</sup> Selznick, Ibid.

<sup>24</sup> Selznick, above n5 at 234, 240.

<sup>25</sup> Polanyi , above n3 at 4.



### 3.3 Historical Review of the Corporation

Historical review becomes necessary because history contains 'essential information about the corporation'.<sup>26</sup> Legal questions regarding the role of the corporation in society has been debated through a number of cycles.<sup>27</sup> Such questions reflect the impact of the overwhelming corporate power behind its seemingly private façade. At the same time, the analysis here looks further afield at the political and social swings of changing times.<sup>28</sup> It is based on the belief that the genealogy of the corporation will clarify how the early corporation was fleshed, drawing out the changing forces and influences that shaped the corporation. This will be able to provide an insight into the significance of the corporation as an institution; how it originated and how it has changed as well as how it might be now reformed. Indeed, by following the course of the historical review and conflicting projections about the nature of its foundation, this chapter will be a starting point from which any corporate responsibilities can be analysed.

The focus here is primarily on the British corporation due to the country's position as the first industrial nation,<sup>29</sup> which explains its early eminence and continued influence in corporate development. In one sense, it is impossible to trace the development of the corporation in an insular, single-nation analysis. As Ruggie describes it, the corporation increasingly operates in a 'single global economic space'.<sup>30</sup> In fact, the corporation transcends geographical boundaries, political regimes and cultural mores. This inevitably necessitates comparison with the growth of the corporation and the governance models adopted in various countries. Further, the corporation has changed over the years, the various time periods having defined its functions and roles. The analysis

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<sup>26</sup> See H.N. Butler, *General Incorporation in Nineteenth Century England: Interaction of Common Law and Legislative Processes* (1986) 6 *International Review of Law and Economics* 169. See also, W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History* (1989) 41 *Stan. L. Rev.* 1471 at 2: 'History rarely tends to be pursued in corporate law contexts. Usually this has no ill effect, since lack of historical perspective only trivially impairs discussion of the latest technical regulatory problems. As the context of discussion becomes wider, however, relentlessly ahistorical perspectives become limiting and damaging'.

<sup>27</sup> 'Just as sunspots come in cycles, so too does the corporate social responsibility debate', S. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship* (1997) 82 *Cornell L. Rev.* 857 at 902.

<sup>28</sup> G.A. Mark comments: 'By slighting the history of corporations, legal scholars have perhaps inadvertently cut themselves off from at least some of the larger social and political culture in which corporations have existed. The reintegration of historical context into our understanding of corporations would allow us to analyze whether and how, social and political factors have affected the corporation', see *Realms of Choice: Finance Capitalism and Corporate Governance* (1995) 95 *Columbia L. Rev.* 969.

<sup>29</sup> A. Chandler, *Strategy and Structure: Chapters in the History of the Industrial Enterprise* (Cambridge, Mass; London: M.I.T. Press, 1962) at 251.

<sup>30</sup> J. Ruggie, *Sustaining the Single Global Economic Space* (*UN Chronicle*: Volume Number 2, 2000).



undertaken next will take account of this underlying dynamic. This is done by breaking down the historical insights into four distinct time frames. These time frames are not rigid. Corporate evolution is influenced by various factors and the time frames need to be ultimately understood as a whole. Nevertheless, the division has been drawn out as such for ease of narrative, to show major upheavals in history and the implications as a result.

### **3.3.1 Period 1: Until 1720 before the Bubble Act was passed**

The notion of the corporation is well established at least as early as the 14<sup>th</sup> century.<sup>31</sup> Some writers trace the lineage to ecclesiastical bodies, guilds and boroughs; both craft and mercantile.<sup>32</sup> Once the idea of corporation was turned to commercial organization, its functions began to grow. The common law had come to accept the form of partnership to these commercial outfits, known to Roman law as the *commenda* and the *societas*, both of which were forms of medieval partnership.<sup>33</sup> The medieval law merchant supported a predominantly private commercial order, generating merchant laws and institutions that operated outside the local political economy of the period. These rules became known as *lex mercatoria*. *Lex mercatoria* can be seen as a set of good mercantile practices, growing out of the needs and customs of the marketplace that ultimately gave rise to law in a more recognizable and enforceable form.<sup>34</sup>

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<sup>31</sup> Blackstone locates the earliest corporate structure in Rome, particularly the Numa Pompilius (715-672 B.C.) with the development of the corporation as a means to dilute the power of two warring Roman factions by dividing them into smaller trade and professional groups, W. Blackstone, 'Commentaries on the Laws of England', quoted in S. Williston, *History of the Law of Business Corporations Before 1800 (part 2)* 2 Harv. L. Rev. 468-69. Another writer, Baker also places the earliest corporate structures in Rome, in approximately 700 B.C., then traces the development of the modern multinational corporation from fifteenth century merchant families with businesses throughout Europe, M. B. Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?* (1993) 24 U. Miami Inter-Am. L. Rev. 399 at 401-2. With regards to multinationals in particular, some writers trace it back to the religious capital of ancient Assyria, Ashur placing it over 2,000 years ago, see K. Moore and D. Lewis, *Birth of the Multinational: 2000 Years of Ancient Business History-From Ashur to age of Augustus* (Copenhagen: Copenhagen Business School Press, 1999).

<sup>32</sup> F.W. Maitland, *Township and Borough* (Cambridge: Cambridge University Press, 1898), H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass: Harvard University Press, 1983).

<sup>33</sup> 'In the commenda, which is traceable to foreign trade, the investor or commendator provided the capital and the partner or the commendatarius managed the investment. In the societas which was more popular in England, the partner or commendatarius himself contributed a portion of the capital. By the 16<sup>th</sup> century, the societas became firmly established features of common responsibilities and common privilege among all partners', W.S. Holdsworth, *A History of English Law Vol VIII* (London: Methuen & Co, 1927) 197-8. See also W.R. Scott, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720 Vol 1* (Cambridge: Cambridge University Press, 1912,) at 2, C.A. Cooke, *Corporation, Trust and Company* (Manchester: Manchester University Press, 1950) at 45-7.

<sup>34</sup> R. Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria' in P. Alston (ed) *Non-State Actors and Human Rights* (Oxford: OUP, 2005) at 179, C. Cutler, *Private Power and Global Authority* (Cambridge: Cambridge University Press, 2003) at 62 ,130.



During this time frame, trading ventures with the name 'company' had begun to appear. These ventures were regulated companies in the sense that each member traded on his own stock and account, subject to obeying the rules of the company.<sup>35</sup> Authorization for these corporations was normally given in the form of charter (or letters patent) and occasionally, by way of Act of Parliament bearing the King's explicit consent, or a combination of an act or charter.<sup>36</sup> The original purpose of incorporation by Royal Charter seemed to have been to confer protection and status. The grant was not for private gain. It was, in theory at least, a grant for public benefit.<sup>37</sup>

This notion of corporation for trade created an entity that was funded by separate, distinct subscribers and linked together by an accounting system of debit and credit. Ideas of separation of the shareholder and the corporation as well as a sophisticated accounting system first took root in Continental Europe following the reception of the Italian theory of corporations which centres on the *persona ficta*. The concept was only applied in England after the 17<sup>th</sup> century. By this time, the corporation and the partnership were already established.<sup>38</sup> The important point to note is in the shift in the centre of gravity of the internal power exercised by these mercantile chartered corporations. In the case of the old civic, craft or professional guilds, their governing bodies were democratically constituted and were concerned primarily with regulating the affairs of the members of the guilds and their relations with outsiders. The main function of the chartered corporations was to further the objects for which they had come into being.<sup>39</sup>

The next development was the concept of joint stock. DuBois describes the joint-stock as 'a device for organizing a business on the basis of a stock of freely transferable shares owned by a relatively large number of people'.<sup>40</sup> For example, the constitution of the East India Company represented a compromise between a regulated company, formed primarily in order to run and manage a particular trade, and the more modern type of

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<sup>35</sup> P. Davies, *Gower's Principle of Modern Company Law* (London: Sweet & Maxwell, 1997) at 20.

<sup>36</sup> R. Harris, *Industrializing English Law* (Cambridge: Cambridge University Press, 2000) at 17-18. By 1628, an *ex ante* and direct authorization by the King became the only mode of incorporation of these institutions.

<sup>37</sup> Cooke, above n33 at 51-2.

<sup>38</sup> *Ibid* at 185.

<sup>39</sup> D.L. Mazumdar, *Towards a Philosophy of the Modern Corporation* (Delhi: Asia Publishing House, 1967) at 136-7.

<sup>40</sup> A.B. DuBois, *The English Business Company After the Bubble Act 1720-1800* (New York: Octagon Books, 1971) at 1.



company, designed to trade for the profits of its members.<sup>41</sup> The development of the joint stock seemed linked to the grant of a monopoly, especially to meet the demands of colonial expansion. The emergence of large joint stock companies like the East India Company and other colonial monopolies began to cause concerns about the impact of these corporations.<sup>42</sup>

Later, as Parliament rose to dominance, the method for establishing corporations began to change. An Act of Parliament or a charter coupled with an act became the more common method of forming a company. Incorporation only by charter became rare. Incorporation was seen as offering the joint stock company certain legal privileges.<sup>43</sup> Nevertheless the conception of the joint stock company was considered to be based on partnership laws. The shareholders of both incorporated and unincorporated companies were conceptualized as the equitable owners of the company's assets, whether realty or personalty. Shareholders were thus seen not only to be 'the company' but they were also the owners of the assets.<sup>44</sup> Early company law was thus treated as an adjunct to the law of partnership which had implications for judicial interpretation of the nature of the corporation. In the *Sutton Hospital Case* in 1612,<sup>45</sup> the general law of corporations was discussed at some length. Coke said that the corporation was an 'aggregate of many' and is thus 'invisible, immortal and resteth only in intendment and consideration of the Law'. Coke's dictum was adopted in Blackstones *Commentaries*<sup>46</sup> and later in the US by Chief Justice John Marshall in the *Dartmouth College case* of 1819.<sup>47</sup>

Sugarman and Rubin point out that there was little consensus as to what partnership meant in the first place. A variety of conflicting definitions abounded which resulted in

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<sup>41</sup> DuBois, *Ibid* at 1, Cooke, above n33 at 54-8.

<sup>42</sup>The British East India Company operated with sovereign like powers during its existence from 1600 to 1858. It often minted its own currency, maintained its own army and exercised legal jurisdiction within the regions where it did business. Its failures brought on, amongst others, the Indian Mutiny in which thousands perished. Other such famous foreign trading companies included the Levant Company (1581) and the Russia Companies (1533, incorporated 1555). See J. Sullivan, *The Future of Corporate Globalization : from the Extended Order to the Global Village* (Westport, Conn. : Quorum Books, 2000).

<sup>43</sup> P. Ireland, *Company Law and The Myth of Shareholder Ownership* (1999) 62 Mod. L. Rev 32 at 9.

<sup>44</sup> Ireland, *ibid* at 40-1. He points out that this fact is made clear in the title of Lindley's book, *A Treatise on The Law of Partnership including its Application to Joint Stock Companies* (1860). See also L. Sealy, 'Perceptions and Policy in Company Law Reform' in D. Feldman and F. Miesel (ed) *Corporate and Commercial Law Modern Developments* (London: Lloyds, 1996) at 23-4.

<sup>45</sup> 10 Coke Rep22b.

<sup>46</sup> W. Blackstone, *Commentaries on the Laws of England* (1768 Vol.1) at 476.

<sup>47</sup> (1819) 17 U.S.17. The corporation, Justice Marshall wrote, 'is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.'



various methods and forms which sometimes contradicted each other.<sup>48</sup> These conceptual ambiguities posed problems towards understanding the precise nature and status of joint stock company shareholding. Some companies treated shareholders rather like lenders, paying interest on all paid up capital from the outset, even in the period before the company had become productive and profitable.<sup>49</sup> It is suggested that one of the problems can be traced back to the under developed nature of the share market at that time. In the absence of a developed share market, shareholding money was tied up in almost similar means to that of an investor in a partnership.<sup>50</sup> The general view at the time was that corporations should be created only for very specific purposes. Adam Smith commented that only banking, insurance, canal building and waterworks justified incorporation.<sup>51</sup> He believed that producers and dealers conspired to distort the market with controls and tariffs in order to benefit from this structure.<sup>52</sup>

In short, the corporation had grown as an effective vehicle for commerce, although the influence of partnership laws caused confusion in the sense that the principles of partnership law were thought applicable to all joint stock companies. The joint stock's origin was to serve public interest but this became obscured due to the continued influence of partnership laws as well as the late development of the share market. The appetite for large corporations kept growing. It was the unchecked growth of the large corporation that would cause a bubble effect in the economy which will now be looked at.

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<sup>48</sup> D. Sugarman and G.R. Rubin, 'Towards a New History of Law and Material Society in England 1750-1914' in D. Sugarman and G.R. Rubin (eds) *Law Economy & Society Essays in the History of English Law 1750-1914* (Oxford: Professional Books Limited: 1984) at 5.

<sup>49</sup> G.H. Evans, *British Corporation Finance* (Johns Hopkins: Baltimore, 1996) at 76.

<sup>50</sup> P. Ireland, *Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality* (1996) 17 *Journal of Legal History* 40 at 62-3. See also G. P. Gilligan, *The Origins of the UK Financial Services Regulation* (1997) 18(6) *Company Lawyer* 167-176. For a history of the London Stock Exchange, see R. Michie, *The London Stock Exchange: A History* (Oxford: Oxford University Press, 1999).

<sup>51</sup> A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Methuen: London, 1961) at 279, 280-1.

<sup>52</sup> Smith's seminal work, *The Wealth of Nations* undermined the mercantilist approach and entrenched the philosophy of laissez faire. According to Smith, the whole panoply of mercantilist regulation was a conspiracy in the interests of a few producers at the expense of the majority of consumers. Essentially, Smith's legacy left a central belief that the best method of allocating goods and services should be with market forces. The idea that individuals who were pursuing their own interests would be guided by competition to act in the economic interests of society, as though 'by an invisible hand'. Smith wrote his thesis at a time when industry was made up of many small businesses and when the economists ideal of a market in which there was a perfect competition did not seem, at first sight, to be too remote from reality. Yet, Smith did envisage a positive role for the state in providing public services as seen in his criticism of incorporation. See D. Fraser, *The Evolution of the British Welfare State* (Hampshire: Palgrave Macmillan, 2003) at 101.



### 3.3.2 Period 2: From 1720 until the Bubble Act was repealed in 1825

It was observed that the growth of the corporation gathered many milestones from its medieval form to the founding of the joint stock company. The joint stock company's popularity soared due, among others, to colonial expansion. By the end of the 17<sup>th</sup> century, private ventures began to raise capital by offering joint stock to subscribers.<sup>53</sup> Many joint stock ventures had no charter or obtained a charter for quite a different purpose. Early in 1720, there was a boom in share prices of which the increasing premiums in the joint stock of the South Sea Company were the most mercurial.<sup>54</sup> When the speculative market exploded, Parliament decided to intervene. In April 1720, a committee of the House of Commons which had been appointed to investigate, 'ignored the causes and merely emphasized the effects of the rash speculation'.<sup>55</sup> The committee recommended legislation to prevent the misuse of charters and to restrain the rush of highly speculative undertakings. This led to the passage of the Bubble Act 1720,<sup>56</sup> which has been described as 'prolix and confusing' though with concession that the statute forms the first attempt to conceive a Companies Act.<sup>57</sup>

One of the results of the Bubble Act was that it became both 'difficult and costly' to obtain the necessary legal authorization for the starting of a new enterprise which required a large capital.<sup>58</sup> This exigency was met by invoking elements of partnership and trust through an instrument called a deed of settlement. The rights and obligations of the members wishing to start an enterprise were settled in the deed. Trustees, who could be persons other than the directors, were appointed to hold the property of those who were parties to the deed. The business was managed by directors. This type of company became known as the 'deed of settlement company'.<sup>59</sup> The directors or officers of the deed of settlement companies were permitted to initiate representative suits at the Court of Chancery. However, there were practical difficulties to do so because in law, a

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<sup>53</sup> The growth during this period of time has been attributed particularly to the formation of the Bank of England, around 1694, see W.R Cornish and G. de N. Clark *Law and Society in England 1750-1950* (London: Sweet & Maxwell: 1989) at 249. For development of the Bank of England during this period generally, see J. Giuseppi, *The Bank of England : a History from its Foundation in 1694* (London: Evans Bros, 1966.).

<sup>54</sup> Scott, above n33 at 436. For an account of the South Sea Bubble and its aftermath, see J. Carswell, *The South Sea Bubble* (Sutton Publishing: London, 1992).

<sup>55</sup> Davies, above n35 at 24-25.

<sup>56</sup> *Ibid.* 6 Geo. 1, c 18.

<sup>57</sup> Davies, above n35 at 25.

<sup>58</sup> Scott, above n33 at 438.

<sup>59</sup> DuBois, above n40 at 210-218, Davies, above n35 at 31-2.



corporation of this nature was still seen as a partnership.<sup>60</sup> Problems notwithstanding, the deed of settlement company proved to be extremely popular.<sup>61</sup> It is an example of the innovation forced upon by trade necessities when being stifled by rules and regulations.

It has been argued that the actual effects of the passage of the Bubble Act on the joint stock market were very limited. The speculation frenzy ended not because of the Bubble Act but because of the economic crash which was brought about by a combination of complex economic factors. This includes an 'overextended money market, tight credit and external drains of capital as well as the nervous behaviour of inexperienced investors'.<sup>62</sup> In any event, the Bubble Act was problematic in itself and could not cure the ills it had been legislated for. The deficiencies of the law finally led to the Bubble Act being repealed in 1825.<sup>63</sup> When the liberalization of English company law occurred, gradually over the period after 1825, limited liability and general incorporation was already available in New York, Ireland, Belgium, Holland, Germany and Scotland.<sup>64</sup> Liberalization occurred late although England pioneered the Industrial Revolution.<sup>65</sup> The delay in liberalization was caused primarily by legislative inertia in realizing limited liability, the development of which will now be scrutinised.

### **3.3.3 Period 3: Before the Registration as of Right, 1844 and it's Effects in the 19<sup>th</sup> Century**

As observed above, the repeal of the Bubble Act marked the beginning of greater state led involvement in corporate activity, particularly through legislative control. State involvement continued in the duration afterwards in shaping the corporate form. Towards the mid-19<sup>th</sup> century, major legal changes occurred towards realizing this, starting when Parliament passed the Joint Stock Companies Act 1844.<sup>66</sup> The 1844 Act recognized the need for facilitating incorporation of trading companies.<sup>67</sup> The Act drew a

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<sup>60</sup> Davies, above n35.

<sup>61</sup> DuBois, above n40 at 219-20. See also H.A Shannon, *The Coming of General Limited Liability* (1931) *Economic History* Vol 2, reprinted in E.M. Carus-Wilson(ed.) *Essays in Economic History* (Edward Arnold: London, 1954) at 361, 364-65, Sugarman and Rubin, above n48.

<sup>62</sup> R. Harris, *Industrializing English Law* (Cambridge: Cambridge University Press, 2000) at 60-81.

<sup>63</sup> Davies, above n35 at 32-35.

<sup>64</sup> Sugarman and Rubin, above n48 at 6.

<sup>65</sup> Ibid.

<sup>66</sup> 7 & 8 Vict cc 110 and 111. The Act was introduced by William Gladstone when he was President of the Board of Trade.

<sup>67</sup> This Act was preceded by a series of ineffective legislative solutions since 1825. This included the Trading Companies Act 1834 and Chartered Companies Act of 1837.



distinction between partnerships and joint stock companies. Incorporation was allowed by registration. Two stages were involved; provisional registration with limited powers, followed by full registration on filing the deed of settlement. Limited liability was not yet introduced, but the liability of a member ceased after three years from the time at which he transfers shares by registered transfer. The 1844 Act adopted also the principle of full publicity as the best means of protection against fraud.<sup>68</sup> By registration, the Act generated a 'coalescence of the joint stock economic form with the corporate legal form'.<sup>69</sup>

The next step was the attainment of limited liability. Without limited liability, investors were at financial risk. It is noted that the question of limited liability was one that touched class sensitivities. Hunt mentions that championing for limited liability was one tinged with 'benevolent exertions to ameliorate the conditions of the poor'.<sup>70</sup> The middle and working class would have fair competition when investing in corporations if the obstacle to limited liability was lifted. In 1855, an amendment to the Act of 1844 allowed shareholders liability to be limited subject to certain terms. This was followed by the first modern Joint Stock Companies Act of 1856, which was followed in turn by a consolidating Act, the Companies Act 1862. The deed of settlement was superseded by memorandum and articles. Provisions for winding up were made and the modern company had finally found form.

Ireland argues that in exchange for limited liability, shareholders had given up virtually all of the rights traditionally associated with ownership of assets.<sup>71</sup> In a short period of time, shareholders of joint stock companies had become 'functionless' rentiers or investors.<sup>72</sup> As a result, shares ceased to be seen as an equitable interest in the assets of the company and instead were regarded as rights to profit. In other words, shares no longer constituted a direct proprietary interest. At the same time, there was rapid development of the railways which promoted a more robust share market.<sup>73</sup> The combination of these developments saw to a transformation of the nature of the joint

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<sup>68</sup> Davies, above n35 at 38.

<sup>69</sup> Cooke, above n33 at 26.

<sup>70</sup> B. C. Hunt, *Development of the Business Corporation in England 1800-1860* (New York: Russell&Russell, 1936) at 118.

<sup>71</sup> P. Ireland, *Property and Contract in Contemporary Corporate Theory* (2003) 23 *Legal Studies* 453 at 464-5, 8.

<sup>72</sup> Ireland, above n43 at 42, 45.

<sup>73</sup> Ireland, above n50 at 63-9.



stock company share in both economic reality and law. By 1850, shares had become readily marketable commodities or liquid assets. The title to revenue was seen to be easily converted by their holders into money. With the share being now seen as an entirely autonomous form of property, shareholders were effectively 'externalized'. The company was now the sole legal and equitable owner of 'industrial capital' and the shareholders the sole owners of 'money capital'.<sup>74</sup> The emergence of the joint stock company share as an autonomous form of property can be seen as actually supplying the doctrine of separate personality with its complete separation of company and members.<sup>75</sup> This doctrine is said to have been confirmed in the landmark case of *Salomon v Salomon*.<sup>76</sup>

Thus, it is after the 1844 Act that shares were established as legal objects in their own right, as forms of property independent of the assets of the company. The quick crystallization of the core features of the corporate form in the late 19<sup>th</sup> century is notable. The separate personality doctrine continues to influence company law and the perception of the nature of companies. State policy and legislative changes has clearly had impact in shaping corporate form and focus. Corporate growth will be even more robust in the early 20<sup>th</sup> century with the advent of large scale industrialization.

#### **3.3.4 Period 4: Developments in the early 20th century till 1932**

It was noted that registration of right transformed the earlier restrictive corporate form. While the growth of large-scale corporations is historically related to the boom in industrialization, the link between the two is neither simple nor direct. Large corporations predate industrialization and small corporations remain common even in later mature industrial societies.<sup>77</sup> Chandler was concerned to explain the development of large corporations which were administered by a hierarchy of salaried professional managers.<sup>78</sup> Chandler attributes the shift from small, personally managed corporations to the large modern corporation particularly to technology and markets.<sup>79</sup> According to Chandler, the large modern industrial enterprise became 'multiunit', operating a number

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<sup>74</sup> Ireland, above n50 at 68-9.

<sup>75</sup> Ireland, above n50 at 41-2.

<sup>76</sup> [1897] AC 22. The case provides that even a one man company was by virtue of its corporate status at law a different person altogether from the subscribers to the memorandum.

<sup>77</sup> L. Hannah, *The Rise of the Corporate Economy* (London: Methuen & Co Ltd, 1976) at 8.

<sup>78</sup> Chandler, above n29.

<sup>79</sup> Chandler, above n29 at 8.



of plants and offices. It also quickly became 'multi functional' in which established units carried out 'distribution, research and sometimes transportation as well as production'. The sustained expansion of the economy later saw the expansion of multiunit industrial enterprises, what later became known popularly as the MNC.<sup>80</sup>

In 1932, Berle and Means identified that shares had ceased to carry the traditional incidents of property ownership. Corporate power was instead located in the hands of management. The 'Berle-Means corporation' model basically suggests that there was 'a separation of ownership and control' in America's large public corporations by the 1920s.<sup>81</sup> In other words, separation of ownership and control developed because of dispersal of ownership among many shareholders. No one shareholder in this situation could materially affect management. Therefore, the centre of power in the corporation was said to reside with management, not the dispersed shareholders. It is noted that the advent of the Berle-Means corporation took much longer in the UK than the US. Although the publicly quoted company was becoming a well-established part of the UK economy as the 20<sup>th</sup> century began, the managerially dominated corporation did not move to the forefront until later.<sup>82</sup> In Europe, the general preference was for state regulation of cartels and industry groups. The stronger socialist variant advocated nationalization which would realize the potential for socialized production relations.<sup>83</sup>

### **3.3.5 Period 5: Mid-Late 20<sup>th</sup> century and Beyond**

The period of mid 20<sup>th</sup> century and beyond saw new challenges. The generally accepted Anglo-American governance model envisioned an independent board of directors. Corporate directors were given immense discretion. Within this discretion, directors had to comply with national and state legislation apart from direct duties to shareholders. Consciousness of fiduciary duty and fear of shareholder action had a certain influence.

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<sup>80</sup> A. Chandler, 'Technological and organizational underpinnings of modern industrial multinational enterprise: the dynamics of competitive advantage' in A. Teichova et al (eds.) *Multinational Enterprise in Historical Perspective* (Cambridge: Cambridge University Press, 1986) at 30-1.

<sup>81</sup> A.A. Berle and G. C. Means, *The Modern Corporation and Private Property* (New York: Macmillan: 1932) at 4.

<sup>82</sup> Chandler, above n29 at 235-7. With many British companies which joined the stock market, 'the founders and their heirs retained a sizeable percentage of the shares and played a prominent role in managerial decision-making. A commitment to personal ways of management was therefore perpetuated. Family control became less of a strong hold in the decades that followed, but it is not precisely clear when matters had progressed sufficiently so it could be said that the Berle-Means corporation became a dominant feature in the United Kingdom', B. Cheffins, *Law, Economics and the UK System of Corporate Governance* (2001) 1 J of Corporate Law Studies at 81-2.

<sup>83</sup> Chandler, above n29.



Increasingly, international organizations led by United Nations agencies played a role in shaping the role and place of corporations particularly through the use of treaties and agreements.<sup>84</sup> This gave rise to a global connectedness between corporations. In one sense, with global networks of corporations, it can be said that there is a return to a more global world order. The medieval merchants who operated *lex mercatoria* appear to have re-emerged under the rubric of 'global capitalism' which structures the relationship of the corporation with society.<sup>85</sup> Corporations were increasingly involved in setting some of the rules in this state of global capitalism as much as government and other institutional actors.<sup>86</sup>

With regards to corporate governance issues, it became possible to classify the corporate governance model into two distinct ones, the shareholder-oriented Anglo-American and the state or stakeholder oriented model. Cheffins has characterized the Anglo-American model or Berle-Means as the 'outsider/arms-length system'.<sup>87</sup> He explains that the 'outsider' typology is suitable because share ownership is widely dispersed. Shareholders, being investors, give managers a free reign. Further, most of the major corporations in this 'outsider' model are owned by hundreds of shareholders, few of whom 'owns enough equity to have any sort of 'inside' influence'.<sup>88</sup> The second model is the 'insider', where there is a majority shareholder monitoring the management closely. This model is prevalent in some continental and Asian countries. For example, the corporate governance system in Germany and Japan rests on bank-centred capital market and may also be characterized by large groupings of related companies, including the Japanese *keiretsu*, Korean *chaebol* and European holding company structures. There are also some countries with a notable concentrated family control of large business like Italy.<sup>89</sup>

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<sup>84</sup> See A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: OUP, 2006) at Chapter 6.

<sup>85</sup> A. Chandler and B. Mazlish (eds), *Leviathan Multinational Corporations and the New Global History* (Cambridge: Cambridge University Press, 2005), G. Teubner, 'Global Bukinowa' in *Global Law Without A State* (Aldershot : Dartmouth Publishing, 1997).

<sup>86</sup> J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

<sup>87</sup> B. Cheffins, *Law, Economics and the UK's System of Corporate Governance* (2001) *J. of Corporate Law Studies* 71 at 72, E. Berglof, 'A Note on the Typology of Financial Systems' in K.J. Hopt and E. Wymeersch (eds) *Comparative Corporate Governance : essays and materials* (Berlin, New York: Walter de Gruyter: 1997).

<sup>88</sup> *Ibid.*

<sup>89</sup> See E. Charkham, *Keeping Good Company : A Study of Corporate Governance in Five Countries* (Oxford : Oxford University Press, 1994).



The Berle-Means corporation continued to influence the analysis of corporate structure. There is strong argument to suggest that the rise of the Berle-Means corporation was not due to economic efficiency but was politically and ideologically contingent. This is the 'law matters' thesis. The 'law matters' because a legal regime provides the necessary protection to allow investors to feel confident.<sup>90</sup> A series of empirical studies found that the Anglo-American common law countries are more protective of shareholders than civil law countries. As a result, it has been argued that ownership concentration is a consequence of poor legal protection of minority shareholders.<sup>91</sup> Because the 'law matters', the Berle-Means corporation will only emerge when there is investor protection. This ultimately creates the Anglo-American dispersed ownership structure and fortifies the law matters thesis.<sup>92</sup>

One of the important theoretical claims in the 'law matters' thesis was made by Roe. Roe argued that corporate governance was constrained by 'path-dependence'. Path dependence of corporate governance is the assumption that corporate structures are dependent in part on the structures a country had in earlier times, in particular the structures with which the economy started.<sup>93</sup> These structures bias the legal rules in terms of what is efficient in any given country and the group politics that determine which rules are chosen.<sup>94</sup> In other words, this argument suggests that institutions of all national systems were shaped not only by efficiency, but also by history and politics. Roe does not dismiss the Berle-Means corporation as an inevitable product of unencumbered market forces, but as a product of the political economy, taking seriously the background of history, politics and economics. Roe does this by illustrating, inter alia, that at several points in the 20<sup>th</sup> century, major financial institutions wanted to obtain shareholding interests. On various occasions, the state intervened and deterred banks, insurance

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<sup>90</sup> B. Cheffins, *Law as Bedrock: The Foundations of an Economy Dominated by Widely Held Public Companies* (2003) 23 OJLS 1.

<sup>91</sup> A. Shleifer and R.W. Vishny, *A Survey of Corporate Governance* (1997) 52 *Journal of Finance* 737 at 754 and R. La Porta, F. Lopez-de-Silanes, A. Shleifer, *Corporate Ownership Around the World* (1999) 54 *Journal of Finance* 491 at 491-97. Ireland points out that there are problematic assumption made in the work: 'Much of it is underlain by the assumption that the Anglo- American corporation is inherently superior, the economically most efficient organisational form which would triumph if economic forces were allowed to operate without impediment', Ireland, above n74 at 4.

<sup>92</sup> Cheffins, above n90.

<sup>93</sup> M. Roe, *Strong Managers, Weak Owners: the Political Roots of American Corporate Finance* (Princeton, N.J : Princeton University Press, 1994), L. Bebchuk and M. Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' in J.N. Gordon and M. Roe (eds) *Convergence and Persistence in Corporate Governance* (Cambridge University Press: Cambridge, 2004) at 69.

<sup>94</sup> R.J. Gilson, 'Globalizing Corporate Governance: Convergence of Form or Function' in J.N. Gordon and M. Roe (eds), *Convergence and Persistence in Corporate Governance* (Cambridge University Press: Cambridge, 2004) at 129.



companies and various other financial intermediaries from gaining a firm hold of corporations. Corporate ownership remained fragmented as a result.<sup>95</sup>

Cheffins argues that the law's role in corporate affairs is complicated. Clearly, legal rules do matter sometimes. Nevertheless, they are certainly not always of fundamental importance. Even when the corporation does pay attention to the law, it is 'just as likely to be contracting around legal rules' as complying with them. As a result, he says that it cannot be simply assumed that the law is a key dictate in the corporate decision making process. Instead, the law is 'only one factor which influences corporate activities, and in many circumstances is not the key one'.<sup>96</sup> The clarity and consistency of law in developing the corporate institution comes into question in this instance.

### **3.4 Historical Development in Perspective**

The historical overview provides an insight into the understanding of the corporation. The corporation has evolved from being an instrument of government chartered for specific purpose to being granted a statutory life independent of the state. During this time, the relationship of the corporation, the state and the various corporate constituencies have changed. The corporation had become central to economic development, crucially as a player in national and global affairs. Technological innovations have also played a role in influencing the face of the corporation. It is the line between the economic and social roles of the corporation that cannot easily be drawn. The corporation appears to be affected by a path dependence, drawing from historical, culture and social changes. The idea that the corporation evolved smoothly should be questioned. Instead, the corporation needs to be understood as an institution which had in part been 'deliberately constructed through political and legal agency'.<sup>97</sup> Now, a look at the perspectives drawn from the historical overview of the corporate institution.

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<sup>95</sup> Bebchuk and Roe, above n93, Gilson, *Ibid*, at 128-129.

<sup>96</sup> See B. Cheffins, *Company Law, Theory Structure and Operation* (Oxford: Oxford University Press, 1998) at 31.

<sup>97</sup> A. Gamble and G. Kelly, 'The Politics of the Company' in J. Parkinson, A. Gamble and G. Kelly (eds) *The Political Economy of the Company* (Oxford-Portland: Hart Publishing, 2000) at 22.



### 3.4.1 The Corporation as an Institution

A number of specific conclusions can be made with regards to historical institutionalization. The results inform the development of internal CSR narratives. First, the early development of 'joint stock company law' simply became company law. However, by this time, its basic conceptual structure was already in place. With the development of limited liability, the corporation was arranged 'so that the people who call the shots do not have to bear the full responsibility'.<sup>98</sup> In short, a body of law designed for application to joint stock corporations in which the shareholders were generally identifiable and had direct control came to be applied to the multi-unit, multi-divisional Berle-Means corporation.<sup>99</sup>

Secondly, the emergence of large scale corporations posed questions beyond ownership. Large scale corporations brought a sharp focus on questions of governance and how it may be explained in the light of prevailing economic and legal institutions. As observed, the question of governance came to the fore with the rise of the Berle-Means corporation. The growth of the Berle-Means corporation was problematic for the classical conception of the corporation. This is because the real change represented by the Berle and Means corporation was the fragmentation of ownership rights and the rise of management discretion. Such a situation brings to the fore the legitimacy of power held in the hands of management. It also questions the shareholder supremacy model and whether it is possible for management to accommodate the interests of various constituencies as well. The overriding importance that has been placed on the rights of shareholders can thus be said not to be an inevitable response to the economic role of shareholding, but the product of judicial and legislative choices.<sup>100</sup>

The issue of governance becomes more pronounced when juxtaposed with the magnitude of corporate power. Berle and Means viewed the corporation, as 'centers of real, potentially coercive power' in society.<sup>101</sup> This is because they have multiple owners,

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<sup>98</sup> C. Stone, *Where the Law Ends The Social Control of Corporate Behaviour* (Illinois: Waveland, 1991) at 46.

<sup>99</sup> Ireland, above n43 at 44.

<sup>100</sup> P. Ireland, 'Defending the Rentier : Corporate Theory and the Reprivitisation of the Public Company' in Parkinson, Gamble and Kelly (eds) *The Political Economy of the Company* (Oxford-Portland: Hart Publishing, 2000) at 143-5.

<sup>101</sup> 'A Machiavelli writing today would have very little interest in princes, and every interest in the Standard Oil Company of Indiana' Berle and Means proclaimed shortly before the publication of *The Modern*



were controlled by appointed managers, were financially complex as well as could exist in perpetuity. According to Berle and Means, power is an 'elusive concept, for power could rarely be sharply segregated or clearly defined'.<sup>102</sup> Comparing corporate power and state power was the basis upon which Berle and Means drew on separation of ownership and control in the corporation.<sup>103</sup> The Berle-Means corporation provided scrutiny on the social and political role of the corporation, apart from its economic facet. Bowman explains that Berle and Means were referring to both the internal and external power. The internal dimension of power can be seen as the power wielded over individuals within the corporation, particularly power over employment decisions.<sup>104</sup> The external dimension looked at the impact on society at large.<sup>105</sup> Further, it is noted that 'corporate power is not merely a matter of the resources and market share of formally independent entities'. It also results from coordinated activity between corporations.<sup>106</sup> The implication of the vast power aggregated in the corporation sits uncomfortably with its purely economic role.

Corresponding to this is the third point which treats property rights as unproblematic. They are the 'unquestioned starting points of analysis rather than artefacts whose existence and distribution themselves demand justification'.<sup>107</sup> This truncated approach has constrained the understanding of the corporation. The property rights of shareholders, the extent of their powers and their legal entitlement to insist that the company be managed in a particular manner can be seen as one of the central aspects of a share, and therefore as a principal concern of shareholders.<sup>108</sup> The nature of the rights

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*Corporation and Private Property*, quoted in D. Tsuks, *From Pluralism to Individualism: Berle and Means in 20<sup>th</sup> Century American Legal Thought* (2005) 30 Law & Soc. Inquiry 179.

<sup>102</sup> Berle and Means, above n81 at 69. Though Berle and Means were not the first to write about corporate power, their seminal work was one of the earliest attempts to comprehensively connect the growth of giant corporations with the political and social changes occurring in a rapidly growing industrialized society. See J. Frank, describing the book as the '[f]irst detailed description [of] a new economic epoch,' during which corporate rulers had become 'princes who ... are sovereigns subject to no effective legal checks'. *Book Review: The Modern Corporation and Private Property* (1933) Yale LJ at 989, 10.

<sup>103</sup> Tsuks argues that Berle and Means' comparison between corporate power and government power disappeared in legal debate largely due to the private, individualist approach influenced by Coasian law and economics analysis in the years following World War II, Tsuks, above n101.

<sup>104</sup> S. Bowman, *The Modern Corporation and American Political Thought: Law, Power, and Ideology* (Pennsylvania: Penn State University Press, 1996).

<sup>105</sup> Bowman, *Ibid*.

<sup>106</sup> J. Parkinson, *Corporate Power and Responsibility* (Oxford: Clarendon Press, 1996) at 6.

<sup>107</sup> Parkinson, *Ibid* at 34-5

<sup>108</sup> S. Worthington, *Shares and Shareholders: Property, Power and Entitlement: Part 1 and 2* (2001) 9 and 10 *Company Lawyer* at 258-266, 307-314.



held by shareholders has been argued to be a 'bundle of rights',<sup>109</sup> giving the shareholder neither ownership of the company's assets nor ownership of the company as a 'thing', but nevertheless attracting to itself the protection of the law to a degree that warrants the label 'property'.<sup>110</sup> When applied to the corporation, it dims the legal perception of how property is organized and what values are at stake:

A doctrine rooted in another age-John Locke's image of lonely, resolute, pioneering man appropriating material objects through toil and binding self to possessions-is carried into a world of complex organizations and fragmented investment.<sup>111</sup>

It is submitted that such property rights can be said to be a 'social construct', as opposed to natural or inalienable rights. The extent of shareholder powers in the light of the limitation of their rights can thus be said to be a constrained one.<sup>112</sup> As a result, to regard the shareholders as owners at all is a mistake. This is because they are investors and property arguments merely serve to highlight the impotency of ownership claims.<sup>113</sup> The corporation, without overriding duties to shareholders can thus be said to be able to legitimately recognize various other constituents. Teubner uses a more forceful phrase, saying that a corporation does not exist simply as a 'self-serving and self-realizing institution' for the unique benefit of its shareholders and workers, but rather exists, above all, to 'fulfill a broader role in society'.<sup>114</sup>

This overview legitimizes the more interventionist, hard law approach towards CSR that was explored in Chapter 2. The legal approach adapted in the UK is based on the recommendations of the Company Law Review Steering Group (CLSG).<sup>115</sup> The

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<sup>109</sup> The traditional concept of ownership was outlined by A.M. Honore, 'Ownership' in A.G. Guest (ed), *Oxford Essay in Jurisprudence* (Oxford: OUP, 1961) at 107: 'Ownership in respect of physical assets is not one right but a complex bundle of rights, which includes the right to possess, the right to sue, the right to control, and the right to alienate. These rights are in principle separable: it was their concentration in the hands of single individual which inspired the ideal of an economic order based on individual ownership. But there was nothing in principle to stop these right being dispersed...'

<sup>110</sup> S. Worthington, above n08. For Harris, 'it is one thing to say that a person is vested with either a right or a bundle of rights; it is another to say that what is vested with is that particular set of open ended privileges and powers over a resource which counts as an ownership interest', J.W. Harris, *Property and Justice* (Oxford: OUP, 1996).

<sup>111</sup> Selznick, above n5 at 345-7.

<sup>112</sup> Worthington, above n110.

<sup>113</sup> See Ireland, above n43. M. Kelly argues in stronger terms 'It is inaccurate to speak of stockholders as investors, for more truthfully they are extractors'. *The Divine Right of Capital: Dethroning the Corporate Aristocracy* (San Francisco: Berret-Koehler, 2003).

<sup>114</sup> See Teubner, above n85 at 157.

<sup>115</sup> When the Company Law Review was initiated in 1998, the Company Law Review Steering Group (CLSG) was charged with providing a framework of company law that encouraged competitiveness as well as improving accountability, see Company Law Review Consultative Meeting Note for Record, 21 July 1998



enlightened shareholder value approach of the corporation favoured by the CLSG is based on shareholder value. This approach involves directors having to act in the collective best interests of shareholders but seeks to be more inclusive by valuing other relationships as well.<sup>116</sup> The concept of the enlightened shareholder value approach was adopted by the Government in its White Papers of July 2002 and March 2005, the Company Law Reform Bill 2005 and ultimately the Companies Act 2006. By endorsing the enlightened shareholder value approach, the Department for Trade and Industry (DTI) appears to contend that society is served best through a policy of profit maximization. The Companies Act 2006 (the Act) reinforces the enlightened shareholder value approach through S172.<sup>117</sup> The Act assumes that corporate profit making will always go hand in hand with responsible behaviour. The assumption however becomes weak when corporate directors can always make a business case against having regard for environmental or community issues.

The limitations of the legal framework thus become particularly acute when juxtaposed with the nature of the corporation and effects of corporate activity. The pluralist approach asserts that directors are required to balance shareholders interests with those of others committed to or affected by the company. This pluralist understanding recognizes the corporation as a socio-political space as much as an economic one by arguing that companies should be run in a way which maximizes overall wealth and welfare for all.<sup>118</sup> In fact, as early as 1973, the Confederation of British Industry recognised responsibilities of the corporation to members, creditors, customers, employees and to society at large.<sup>119</sup> The pluralist approach underlines that other constituencies have claims as strong as the shareholders.<sup>120</sup>

Finally, the historical overview points out that the cycle of merchant laws has appeared to re-emerge. An examination of the historical evolution of the law merchant reveals a movement in the consolidation and expansion of corporate power. This movement

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quoted in Select Committee on Trade and Industry (6<sup>th</sup> Report)  
<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmtrdind/439/43905.htm>

<sup>116</sup> Company Law Review, *Modern Company Law for a Competitive Economy: Developing the Framework* (DTI: London, 2000) para 2.11, 2.22

<sup>117</sup> See Chapter 2, n53.

<sup>118</sup> See A. Keay, *Company Directors' Responsibilities to Creditors* (London: Routledge-Cavendish, 2007) at 151.

<sup>119</sup> *The Responsibilities of the British Public Company*, Final Report of the Company Affairs Committee, as endorsed by the Confederation of British Industry Council (Watkinson Report, 1973).

<sup>120</sup> Parkinson, above n106.



parallels the transnational expansion of capitalism beyond the nation state.<sup>121</sup> A rich and variable array of state and non-state actors has been involved in this movement and in creating and enforcing the law merchant over its history. Because these features reappear in some emerging forms of commercial practices in the 21 century, these new pockets of law have been called the new *lex mercatoria*.<sup>122</sup> Standard setting initiatives in CSR that are being driven by corporations and other non-state actors can be said to reflect a resurgence of the new *lex mercatoria*. What the example of *lex mercatoria* shows as a self-regulatory system is the capacity of the corporation to be part of the regulatory design not just as a regulated entity, but in many ways, as a co-regulator. It confirms how the corporation can actually generate and dictate various important standards as was observed in Chapter 2.

The historical perspective highlights some of the legal and political constructions of corporation. It is easy to lose sight of the myriad of policy and legislative choices that have gone into the current corporate form. A short recount of the history of the corporation was an essential reminder that the form and the rules that govern the corporation were not handed down on stone tablets. It evolved over time with much trial and error and remains subject to continuing re-evaluation. The corporation's identity as a social institution has been obscured by developments that focused exclusively on profit maximization. The path dependency makes it clear that the corporation is an institution that bears the imprint of the historical construct. While this overview has proved to be important in building the base for the normative structure of internal CSR narratives, it is however not enough. This is because a scrutiny of the historical emergence of CSR is still missing from the picture. Early notions of CSR will be able to show how institutionalization of responsibility can be activated, particularly as to how the co-operation of the various actors was sought. The thesis now turns to consider historical CSR interactions.

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<sup>121</sup> Cutler, above n34 at 62.

<sup>122</sup> R. Steinhardt, above n34 at 221-6, Teubner, above n85 at 1-12.



### 3.5 The evolving notion of CSR

Based on the preceding discussion, this part intends to look at early understandings of CSR. It will be observed that it is not possible to discuss early CSR activities without looking into the role played by the various CSR actors and the extraneous factors that governed the interaction. The notion of social responsibility itself has been in existence for as long as trade has been in existence. Cicero wrote about immoral buying and selling as far back as 44 BC.<sup>123</sup> Medieval canonists and jurists had a strong stand on usury and wage labour.<sup>124</sup> In the East, the philosopher Kautilya in India talked about immoral trade in the 'Arthashastra' as early as 4<sup>th</sup> century BC<sup>125</sup> and Islam has pronouncements on the morality of usury.<sup>126</sup> It is also significant to note that African slaves used for the purpose of trade saw the rise of the abolitionists movement. By 1783, the anti-slavery drive had gathered momentum and began to be seen as driven by the inhuman rapacity of traders.<sup>127</sup> From a historical perspective then, CSR is simply the latest manifestation of earlier debates on the role of business and trade in society. Yet, much of the literature on CSR has characteristically lacked historical insight.<sup>128</sup>

#### 3.5.1 The Web of Actors

In order to understand early CSR and the interaction between the web of CSR actors, a closer overview of the economic landscape becomes necessary. Here, the Industrial Revolution (IR) can be said to be the real starting point of the modern regulatory state<sup>129</sup> and therefore, the modern notion of CSR. The effects of the IR were said to be really felt

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<sup>123</sup> 'We must, therefore, take away all lying from business dealings; the seller will not engage a bogus bidder to run prices up, nor will the seller engage some other person to bid against himself to keep them down', (Cicero, *De Officiis*, book III, c. 15) quoted by T. Aquinas in *Summa Theologica* II-II, q. 77.

<sup>124</sup> R.H. Tawney, *Religion and the Rise of Capitalism* (Harmondsworth: Pelican, 1938).

<sup>125</sup> R.C. Sekhar, *Ethical Choices in Business* (Delhi: Response Books, 2002).

<sup>126</sup> J. Zinkin, *Islam and CSR* (Kuala Lumpur, CSR Agendas for Asia Conference, 13-14 April 2006) available at

<http://www.nottingham.ac.uk/business/ICCSR/AsiaConf06/FullPapers/Zinkin.pdf>

<sup>127</sup> See E. Williams, *Capitalism and Slavery* (London : Deutsch, 1964) Williams describes how the profits made from the slave trade provided capital for the Industrial Revolution. He argues however that the abolition of the slave trade was not merely the results of rising political consciousness but also a matter of cutting losses.

<sup>128</sup> See however T. Cannon, *Corporate Responsibility* (London: Pitman: 1992) and M. Marinetto, *Corporate Social Involvement: Social, Political and Environmental issues in Britain and Italy* (Brookfield, VT : Ashgate, 1998).

<sup>129</sup> R. Baldwin and M. Cave, *Understanding Regulation: Theory Strategy and Practice* (Oxford ; New York: Oxford University Press, 1999).



a few years after the 1830s.<sup>130</sup> The explosive social change brought about by the IR was accompanied by new ideas in economic and social affairs.<sup>131</sup> With regards to the technological advancement, it is noted that the nature of the corporation was radically transformed with the introduction of new machines, technologies and the application of steam power to manufacturing processes. The factory employing hundreds of workers became the representative of the corporation.<sup>132</sup> It is the emergence of large corporations and the implications of their activities which prominently brought issues of what is now known as CSR to the fore.

At this juncture, the philosophy of state intervention in manufacturing is important to note. The dynamics of constraining 'private' economic activity and the interplay between the various actors emerged prominently at this point due to the impacts of industrialization. The concentration of power would threaten the state and established ways of allocating resources.<sup>133</sup> In part this was a reflection of the power of the new industrial processes to reshape age-old relationships. For example, the factory owner had the privilege of the 'old lord of the manor but none of the responsibilities'. Labour was seen as a replaceable cash nexus.<sup>134</sup> Major issues of responsibility and morality became acute. Engels for example observed:

One day I walked with one of those middle-class gentlemen into Manchester. I spoke to him about the disgraceful unhealthy slums and drew his attention to the disgusting condition of that part of the town in which the factory lived. I declared that I had never seen so badly built a town in my life. He listened patiently and at the corner of the street at which we parted company, he remarked: 'and yet there is a great deal of money made here. Good morning, sir!'<sup>135</sup>

The implications brought about by changes that were taking place were not fully recognized at the time.<sup>136</sup> Marx, observing these changes, remarks that due to their position, the capitalists cannot help being cruel to employees. According to him, the

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<sup>130</sup> Cannon, above n128 at 2. E. Hobsbawm says that the IR 'broke out' in the 1780s and wasn't fully felt until the 1830s or 1840s. See *The Age of Revolution: Europe 1789–1848* (London: Weidenfeld and Nicholson Ltd, 1999) and *Industry and Empire: From 1750 to the Present Day* (New York: New Press, 1969).

<sup>131</sup> See Fraser, above n52 at 1.

<sup>132</sup> Hannah, above n77 at 29.

<sup>133</sup> Fraser, above n52 at 1-10.

<sup>134</sup> Fraser, above n52 at 6.

<sup>135</sup> F. Engels, *The Condition of the English Working Class* (1848, trans) (Oxford: Basil Blackwell, 1971) at 312.

<sup>136</sup> See G. Jones, *The Evolution of International Business* (Routledge: London and New York, 2000) at 25.



capitalist did not have to mean ill for the workers to be treated badly. It was the system, structured in divisive ways, that made them behave that way.<sup>137</sup>

The deterioration of the labour condition saw religious organizations, friendly societies and philanthropic institutions being involved in improving social conditions. Such attempts reflected how civil society begun to take it upon themselves the task of ameliorating the worst social effects of the time. Businesses were accused of having 'no conscience' and sought only the aggrandisement of its owners.<sup>138</sup> For example, fraud, dishonesty and corruption in business dealings were highlighted by several Victorian novelists by drawing attention to the financial swindles.<sup>139</sup>

Rapid industrialization combined with civil society pressure forced the state to grapple with the social consequences. The first strand of creating responsibility in the hands of the new wealth owners, the manufacturer's, was codified by a succession of statutes attempting to ameliorate labour conditions. Its beginnings have been traced to the Chartist movement.<sup>140</sup> Early attempts at welfare laws include the Factory Acts (1819-1901) and Poor Laws (1782-1834).<sup>141</sup> The Factory Act 1833 for example, attempted to deal with child labour.<sup>142</sup> Another such example is the Mines Act of 1842 which aimed to improve the working conditions in the silk and lace mills.<sup>143</sup> These statutes acknowledged the right of the state to intervene where there was a need to protect exploited sections of the community and continued to be enforced when the registered companies were

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<sup>137</sup> K. Marx 'Capital vol.1' in *The Marx-Engels Reader*, R.C. Tucker (ed) *The Marx-Engel Reader* (New York: W.W. Norton & Co 1978) at 297.

<sup>138</sup> J. Fielden, *The Curse of the Factory System* (1826) quoted in Cannon, above n128 at 9.

<sup>139</sup> See for example Charles Dickens in *Hard Times* and George Eliot in *Middlemarch*.

<sup>140</sup> 'In the period of time when Sir Robert Peel formed his second administration in 1841 the country was undergoing serious depression, brought about by diminishing trade and succession of bad harvest. It was in that setting that the movement known as Chartism had emerged, drawing its main support from a segment of the working population which was entirely unrepresented in Parliament. Chartism really originated out of the total inability of the lowest paid sections of the labouring poor to improve their basic conditions', A. Babington, *The Rule of Law in Britain* (Chichester: Barry Rose, 1995) at 219-20.

<sup>141</sup> The Act of 1834 set up workhouses in England and Wales to be administered by locally-elected guardians, who were supervised by a central authority. It reflected Victorian attitudes to the able-bodied poor based on the belief that any man who wanted a job could find one if he looked hard enough and was prepared to accept a cut in wages. All applicants for poor relief had to be prepared to enter the workhouse, where a rigorous regime and hard labour would ensure that the poor would prefer to find work or family support outside. See G.C. Peden, *British Economic and Social Policy* (Philip Alan: Oxford, 1985) at 3-5.

<sup>142</sup> The 1833 Factory Act may be viewed as decisive extension of the state's social policy, which among others, forbade the employment of children under 9. Children from 9-13 were limited to an 8 hour work day while young persons under 18 were restricted to a 12 hour day. 2 hours a day was set aside for education, see Fraser, above n52 at 11-32.

<sup>143</sup> The Act forbade the employment underground of woman, girls or boys of less than 10 and instituted an inspectorate to ensure that this regulation was observed. In 1844, a maximum 6 1/2 hour statute was prescribed for women and girls, Fraser, above n52.



formed in 1844. What emerges at this point is that changes in socio-economic conditions invoked new configurations of societal and political relations. The various actors involved were thus forced to interact and find measures of change.<sup>144</sup> The motivation behind state involvement in ameliorating the effects of industry can be seen to be driven by increasing civil society awareness. What will be particularly noted in this interaction next is how the corporate industrialists themselves became involved in the early social responsibility dialogue through philanthropic involvement.

### 3.5.2 From Philanthropy to Regulation

With regards to the early industrialists themselves, there was a surge of philanthropic activity in the light of industrial deprivation. The state was unable to adapt to the task of providing assistance to mass urban society with the industrial explosion. Into this gap stepped general philanthropy, often premised on religious values. Christianity, from Methodism to Anglicanism was particularly influential in providing the impetus towards philanthropy.<sup>145</sup> Various early industrial owners became involved in social responsibility activities with philanthropic contributions, seen as a *noblesse oblige*. One outcome of philanthropy was that the direct corporate responsibility for society narrowed to community philanthropy, mainly in the form of charitable donations.<sup>146</sup>

The effect of philanthropy is mixed. First, tangible difference in corporate decision making was missing without state policy to that effect. The law with regards to philanthropy also echoed this thinking in that monies were held to only be extended for the benefit of the company. In *Hutton v West Railway Cork*, Bowen LJ recognized that corporate generosity was permissible under the law only to the extent that it benefited the company.<sup>147</sup> Also, by and large, charitable action in the business community was

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<sup>144</sup> Marx was concerned about the coercive function of law as illustrated in the passing of the Factory Act. The legislation was said to have contributed the transformation from the feudal mode of production into the capitalist mode of production but without a real understanding of the effects of the legislation. Gramsci later argued that the series of legislation obscured the crucial role played by liberal theories of contract in the concealment of laws other, coercive face. This 'double face of law' as a concealing movement between consent and coercion is reflected in Gramsci's insight that law exists at the intersection of hegemony (consent) and coercion. See A. Gramsci, *Selection from Prison Notebooks* trans (London: Lawrence and Wishart, 1971).

<sup>145</sup> Cannon, above n128 at 12-3.

<sup>146</sup> J. Moon, 'United Kingdom-An Explicit Model of Business-Society Relations' in A. Habisch et al (eds), *Corporate Social Responsibility Across Europe* (Berlin: Springer, 2005) at 11.

<sup>147</sup> (1883) 23 Ch. D. 654 at 672: 'The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company...charity has no business to sit at boards of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of



confined to a limited number of entrepreneurs. Adding to the problem was the inconsistent behaviour of certain business philanthropist. For example, *The Northern Star* ran a report in 1842 disclosing that employers were funding philanthropic activities by deliberately underpaying their employees.<sup>148</sup> Another illustration can be drawn from the so-called US 'robber barons'. While the company supported missionary work in China, the employees of Colorado Fuel and Iron Company were being shot or burned alive in industrial strife.<sup>149</sup>

From the period of early 20<sup>th</sup> century, there was increasing corporate involvement in society through various forms of paternalism. For example, some corporations provided social infrastructure for workers and their families. These included housing, education, baths, pubs and other recreational facilities. Companies like Rowntree's, Cadbury's, Boots and Lever Brother became by-words for corporate philanthropy.<sup>150</sup> Interestingly, some of the pioneering works and standards of these corporations set the standards for subsequent public sector provision in later decades. A successful example can be seen in the local government emulation of Rowntree's housing standards, 1910-1920.<sup>151</sup>

The political dimension of social responsibility really matured in the inter-war years. State involvement in corporate activities became more prominent when economic depression, which reached its height in 1933 became a central fact in the interwar experience. As economic activity became more complex and an increasing number of products became increasingly important, the state had to step in to provide essential services. These activities were particularly those which the private sector was not prepared to undertake. Examples include the construction of a wide range of facilities including canals, roads and railroads. Activities like this involved a high ratio of fixed to variable costs of production and had extremely long pay back periods.<sup>152</sup> By this time, the corporation-state relationship had been institutionalized through numerous formal and

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those who practise it, is to that extent and in that garb ...charity may sit on the board, but for no other purpose'. The exception however seems to be if the memorandum of the company has included an express object to make any gifts, see *Re Horsley and Weight Ltd* [1982] 3 WLR 431 CA, *Re Halt Garage* [1982] 3 All ER 1016.

<sup>148</sup> Cited in Marinetto, above n128 at 32-5.

<sup>149</sup> The men referred as 'robber barons' are synonymous with the captains of American industry in late 19<sup>th</sup> century. See F. Luthans and R.M. Hodgetts, *Social Issues in Business* (New York: The Macmillan Company, 1972) at 7-11.

<sup>150</sup> J. Moon, *Government as a Driver of Corporate Social Responsibility* (2004) ICCSR Research Paper at 4-5.

<sup>151</sup> *Ibid* at 5.

<sup>152</sup> Fraser, above n52 at 8.



informal links and channels variously through 'councils, commissions, planning procedures and trade societies'.<sup>153</sup> States could be seen as being able to accelerate the transfers of best practice across corporations and across sector boundaries and perhaps offset some of the costs.<sup>154</sup>

As the role of state grew, so did the states role as an architect of social responsibility. Nevertheless, national policies varied. CSR policies in the UK paled in reflection to its US counterpart. Some of the early US government initiatives are fine examples of organized state intervention towards creating a framework for social responsibility.<sup>155</sup> In fact, state intervention in the US seemed to be fuelled because of the prevailing belief on the evils of the emerging large corporation. Brandeis J in a Supreme Court judgement called corporations 'Frankenstein monsters'.<sup>156</sup>

Two assumptions seemed to become apparent in the relationship between the CSR actors. First, that there is an identity of interest between the actors for economic progress. They have a stake in improving the impact of industrialization and the changing economy. Secondly, the growth of CSR actors does mean that there has been a more complex regulatory network accompanying awareness of the impact of corporations in society. These networks involve new forms of regulatory cooperation and coordination between states as well as the other actors. It is also apparent at the sub-state level between a wide range of administrative and public authorities, as well as various forms of private governance.<sup>157</sup>

There is no doubt that the mid to late 20<sup>th</sup> century and subsequent world economy differs significantly from previous time periods in many respects. It was in the 1960s and 70s that commentators like J.K. Galbraith<sup>158</sup> and Nader<sup>159</sup> propelled CSR back into the

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<sup>153</sup> G. Wilson, *Business and Politics* (London : Macmillan Education, 1985) at 16-21.

<sup>154</sup> J.M. Stopford, 'Implications for National Governments' in J. Dunning (ed.) *Transnational Corporations* (London: George Allen & Unwin Ltd, 1974) at 265.

<sup>155</sup> E. Charkham, above n89 at 21-2.

<sup>156</sup> *Louis K. Liggett Co et al v Lee, Comptroller et al* 288 US 517 (1933) at 548.

<sup>157</sup> Braithwaite and Drahos, above n86.

<sup>158</sup> Galbraith argued that the denomination of corporate enterprise as 'private enterprise' is a 'formula for hiding public business behind the cloak of corporate privacy'. It has thus become a 'device for diverting the eyes of government and the general public from things like executive compensation, lobbying, political activity by executives and employees, profits, and bureaucratic error or nonfeance', see J.K. Galbraith, 'Corporate Power in America, On the Economic Image of Corporate Enterprises', in R. Nader et al (eds), *Taming the Giant Corporation* (New York : Norton, 1976) at 5-6, 24.

<sup>159</sup> See generally R. Nader, *Consumer and Corporate Accountability* (New York: Harcourt Brace Jovanovich, 1973).



limelight. Among other things, changes in labour management and various policy frameworks regarding labour, consumer rights and environmental issues had challenged accepted notions of the role of the corporation.<sup>160</sup> As corporate presence prominently transcended jurisdiction, control of activity was also beginning to be seen in a global light.<sup>161</sup> In fact, Bendell argues that the term TNC or MNC gave the impression that corporations were operating based on diffused resources and authority. He says that perhaps the better term would be transgovernmental corporation (TGC) because these corporations were able to pick and choose from different governments. In doing so, they dictated to their advantage in terms of production, finance and political activities.<sup>162</sup> Hertz calls the environment where corporations dictate terms to sovereign states as 'the silent takeover'.<sup>163</sup>

Further, civil society movement had become increasingly activists. The electronic media and cheaper mass access to advanced information and communications technology has helped fuel movements scrutinizing corporate conduct.<sup>164</sup> Corporations who thought that they were global realized that they may not, in fact, understand the hostile implications of their expanding economic influence.<sup>165</sup> Towards the end of the 20<sup>th</sup> century and beyond, geo-political issues have become prominent in the CSR debate. For example,

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<sup>160</sup> W. Hutton and A. Giddens (eds) *Global Capitalism* (New York: New Press, 2000).

<sup>161</sup> Note that some writers argue that there is serious doubt as to whether corporations can be regarded as global in a commercially meaningful sense. Fleenor suggests that the global corporation is a fable. It cannot be defined because it simply cannot exist. A global company is one in which the corporation and its management have been transformed into an entity in which it is difficult to discern a single country bias. They say that today, very few if any corporations qualify as global; that is a company without a country. In fact, national governance systems have persisted despite the globalization explosion. Doremus et al, suggest that there is enduring influence of national structures within the home states of the world's leading corporations. Those structures continue to account for striking diversity in the character of core operation undertaken by those corporations. Thus, few corporations have purely global strategies and matching organizational structures. When most people say 'global' all they really mean is 'very international'. See D. Fleenor, *The Coming and Going of the Global Corporation* (1993) 28 *Columbia Journal of World Business* 6 at 8, P.N. Doremus et al, *The Myth of the Global Corporation* (Princeton University Press: Princeton, 1998) at 1, H.J. Mertens, *Lex Mercatoria: A Self Applying System Beyond National Law?* in G. Teubner (ed), *Global Law Without a State* (Dartmouth: Aldershot, 1997).

<sup>162</sup> J. Bendell, *Barricades and Boardroom: A Contemporary History of the Corporate Accountability Movement* Business and Society Paper No.13 (Geneva: UNRISD, 2004) at 10.

<sup>163</sup> N. Hertz, *The Silent Takeover* (London : Heinemann, 2001).

<sup>164</sup> Note the irony that 40% of all the world's media are controlled by five TNCs. See J. Bendell, above n164, A. Florini, *The Coming Democracy : New Rules for Running a New World* (Washington, DC : Island Press, 2003). On how corporations use the media to filter information, see N. Chomsky and E. Herman, *Manufacturing Consent: The Political Economy of Mass Media* (Vintage, London 2004).

<sup>165</sup> Global brands are so recognizable that they are increasingly the target of hatred by the disaffected. When the US retaliated against France for banning hormone-laden beef, the French Farmers Confederation gained media attention by 'strategically dismantling' a McDonalds. In 1999, there was a famous spate of glass window smashing of the Starbucks shop in Seattle during the WTO protests. See J. Cohen, 'Socially Responsible Business' in D. Murrase and C. Jones (eds) *A Future For Everyone* (Rutledge: New York and London, 2004) at 4.



managing corporations in a post 9/11 world is a reminder that security issues can threaten economies in new ways which corporations must heed. The responsibilities of the corporation have been informed by such changes.

### 3.6 Overview - Historical CSR Interactions

The historical brush stroke shows how cyclical some of the CSR issues have been. The 'dark satanic mills'<sup>166</sup> of the UK in the 19<sup>th</sup> century have their contemporary counterpart in the sweatshops of today's poorest countries. The fraud and dishonesty can make parallels to the fall of Enron and World.com as well as the East Asian economic crisis in the mid-1990s. What can be learnt is that there is no black or white question, good or against evil answer to CSR. The IR had to be faced without the advantage of precedent, particularly on how best to ameliorate factory conditions.<sup>167</sup> Yet, remarkable progress was made during the IR with regards to social responsibility issues. Similarly, as new ways to control the corporation are grappled with, some very familiar questions feature. Where Marx observed how capitalists cannot help being cruel to employees,<sup>168</sup> Bakan makes similar observations for the modern corporation:

The people who run corporations are, for the most part, good people, moral people. They are mothers and fathers, lovers and friends, and upstanding citizens in their communities, and they often have good and sometimes idealistic intentions. Many of them want to make the world a better place and believe their jobs provide them the opportunity to do so. Despite their personal qualities and ambitions, however, their duty as corporate executives is clear: they must always put their corporation's best interests first and not act out of concern for anyone or anything else.<sup>169</sup>

Although some views tend to equate the current understanding of CSR with philanthropy, it is clear that CSR as it currently stands is beyond philanthropy and one that involves the very strategic nerve of corporate decision making. Major developments have occurred from the time of the IR through a series of legal and political institutional set-up. Framing the historical understanding is the recognition of the tension in regulating corporate activity. Increasingly, the governance mechanism comes to question

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<sup>166</sup> W. Blake, 'Jerusalem' (1804) in *The Complete Prose and Poetry* (London: The Nonsuch Press, 1989).

<sup>167</sup> Fraser, above n52 at 14.

<sup>168</sup> Marx, above text accompanying n137.

<sup>169</sup> J. Bakan, *The Corporation* (London: Constable, 2004) at 50.



as broader interactions between the CSR actors are faced.<sup>170</sup> Contemporary CSR can be increasingly seen as re-orientation of governance roles in society.

The role of the state increasingly appears to create baseline standards and provide the impetus towards CSR engagement, not so much to function as ground level implementer of social responsibilities. This insight is a call to further tap on the capability of corporate involvement in CSR initiatives as well as NGO influences. From the historical overview, corporations have been quite capable of carrying out this task. Further, NGOs have become more organized, moving from the interstices of the debate in the early IR years to be a central feature in the web of actors. What is clear is that CSR as a notion evolved according to dictates of time and issues. This understanding frames the current regime of interaction between the CSR actors. The emerging cartography of early CSR has provided some insights into how the contemporary debate is shaping.

### **3.7 Conclusion**

This chapter recovers the complexity of CSR interaction and reinstates its analytical basis by giving it a historical content. It has provided an insight into the significance of the corporation as an institution, how it originated and how it has changed, as well as how it might be reformed. CSR initiatives can then be seen not as a drastic overhaul of the corporate make-up but recognition of the changing role of the corporation in society. Breaking down the legal genetic code finally paved the way for a more coherent conceptual analysis. Particularly apparent are the changes that have been undergone by the corporate form and how such an understanding can be used to deconstruct some of the curious hangovers from history.

In essence, the company bears the imprint of the various historical contexts as well as legal and political assumptions. Nevertheless, the malleability of the corporate form and its ability to innovate across time bears a positive note. This clarity provides the basis to refute the limitations to the language of CSR and how the corporate institution actually operates in society. Institutionalization itself appears dependant on the CSR actors. By studying the interaction between the CSR actors closely, this chapter drew attention to

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<sup>170</sup> See R.A.W. Rhodes, *New Governance: Governing without Government* (1996) 44 *Political Studies* 4. Rhodes describes this trend as the 'hollowing out of government'.



the fact that the corporation is a political space as much as an economic one. The corporation can sustain a wider constituency than shareholders and corporate responsibilities must be extended to this end. By identifying the political and legal construct in the corporate form, it was shown that the shareholder profit maximization premise can be seen as a historical misconception, or more accurately, a legal and political conceptualization.

The bigger problem lies with the raging debate about the legitimacy of social responsibility initiatives themselves. From here, it becomes necessary to look at the theoretical foundations of the corporation that should be subscribed. Without an underlying normative identification, it will not be possible to clarify what kind relationship should the corporation have with society and how the notion of social responsibility is going to be institutionalized. In the next chapter, it will be shown that what the internal CSR narrative really grapples with is the underlying political assumptions about the corporation and governance generally. In this respect, it is necessary to explore strands of thought within neo-liberal philosophy that either dismiss CSR entirely as being dangerous or endorse CSR by promoting various myths. The next chapter intends to identify CSR's place within the normative foundations of the corporation.



## CHAPTER 4 Normative Foundations of the Socially Responsible Corporation

### 4.0 Introduction

It was observed in Chapter 3 that some of the legal and analytical assumptions that inform the corporation today are anachronistic in that they are products of colonization, class systems and individualism. This chapter takes on a normative approach in order to achieve its aim of rebuilding the corporation with narratives of CSR. It is only once the normative aspect of CSR is identified can the structure and the scope of responsibility be created. The recurring questions that occur in legal theory are intertwined with the historical account dwelt with previously. The underlying theme that is being questioned in this part is if there are any theoretical impediments that prevent the institutionalization of the socially responsible corporation. Certainly, 'different theories concerning the origin and purpose of companies influence the company'.<sup>1</sup> This in turn shapes the relationship that the corporation has with all its constituents. Formulating a corporate structure that encompasses CSR without such 'enquiry invites incoherence'.<sup>2</sup> An analysis of the normative foundations will enable identification of the kind of corporation that is best to serve the community within which it operates.

There is a need to find a way of disentangling the different philosophical and political perspectives from which the corporation has been constructed.<sup>3</sup> According to Farrar, these are troublesome questions of legal and political philosophy as well as economics as they represent a kind of intellectual no-man's land.<sup>4</sup> The chapter first looks at the influences of economics rooted in neo-liberal hegemony on the corporation. Neo-liberalism has within its folds empowered the law and economics theory. The implication of this movement on CSR is immense and largely problematic. It has resulted in CSR

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<sup>1</sup> See J. Dine, *Governance of Corporate Groups* (Cambridge University Press: Cambridge, 2000) at 1. W. T. Allen, *Contracts and Community in Corporate Law* (1992) *Geo Wash. L. Rev* 1395 comments: 'In such fields [as corporate law], legal problems may seem less pregnant with potentialities and answers may seem, and thankfully sometimes are, less controversial. It is easy in such fields to lose sight of--indeed it may sometimes be difficult to ever catch a first glimpse of--the contestable philosophical or political presuppositions that lie at their foundations, buried beneath the legal superstructure. Corporation law is such a field'.

<sup>2</sup> Dine, *ibid* at 1.

<sup>3</sup> S. Bottomley, *Taking Corporations Seriously: Some Considerations for Corporate Regulation* [1990] 19 *Fed L. Rev* 203 at 204.

<sup>4</sup> J. Farrar, *Frankenstein Incorporated or Fools Parliament? Revisiting the Concept of Corporation in Corporate Governance* (1998) 10 *Bond L. Rev.* 142.



narratives that are trapped within liberal-utilitarian language which focus on recipient rights. The problem with these arguments is that they are consequentialist and impact on the understanding of CSR. Following this overview, the analysis will move on to rebuild the corporation by looking at other normative foundations that are cognizant of the reality of the complexity of the corporate institution, particularly informed by the realist understanding. It is after this that the discussion can move on to the capability of the corporation to sustain the notion of social responsibility.

#### 4.1 The Corporation through an Economics Prism

In proposing a fundamental shift in thinking and outlining the normative foundation of CSR, one primary issue is of concern. This is the nature of the corporation's direct and indirect relationship with the various CSR actors, whether it is one that is a mutually beneficial relationship or one where the corporation feeds off in parasitic mode. Legal theorists of the corporation concern themselves with this dilemma based on doctrine and morality. Economics views of the corporation however are presented through the lens of efficiency. In economics, it is liberalism which emphasizes the collective results of individual actions that leads to analysis of 'markets, market failure and institutions'.<sup>5</sup> Building on this tradition, the law and economics movement conceives the corporation as a 'nexus of contracts'.<sup>6</sup> Its defining moment can be traced back to Coase's paper in 1937.<sup>7</sup> In this paper, Coase attempted to explain the corporation's reliance on intra-firm transactions rather than market transactions according to transaction cost savings. This theory of the corporation essentially eclipsed all previous corporate theories.<sup>8</sup>

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<sup>5</sup> A. Gamble, 'Two Faces of Neo-Liberalism' in R. Robinson (ed), *The Neo-Liberal Revolution* (Hampshire and New York: Palgrave Macmillan, 2006) at 20.

<sup>6</sup> F. Easerbrook and D. Fischel, *The Economic Structure of Corporate Law* (London : Harvard University Press, 1991). On the influence of Law and Economics, see E.M. Fink, *Post Realism or the Jurisprudential Logic of Late Capitalism* (2004) 55 *Hastings L.J.* 931: 'Law and Economics does not limit its analysis to areas of law that are most obviously economic in nature, such as antitrust, bankruptcy or taxation. Rather, like other forms of "economic imperialism," Law and Economics extends its reach into criminal law, torts, family law, constitutional law, environmental law, jurisprudence, and the legal process, to name but a few. For traditional legal scholars, who often assume that the application of market logic outside the formal economic realm is limited or inappropriate, the imperialism of Law and Economics is often especially troubling'.

<sup>7</sup> R. H. Coase, *The Nature of The Firm* (1937) *Economica* 386.

<sup>8</sup> See W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History* (1989) 41 *Stan. L. Rev* 1471 at 1477-82.



The corporation, under the law and economics prism, is seen simply as a legal fiction. As a fiction, it consists of a nexus or web of explicit and implicit contracts. The contract sets out the rights and obligations among the various stakeholders and makes-up the corporation.<sup>9</sup> The role of the state disappears and the corporation itself is reduced to an agglomeration of contracts. This ‘contractarian’ idea is a splinter movement of law and economics.<sup>10</sup> Contractarians regard the corporation as a legal fiction created by the bargains struck between consenting individuals. The contractarian model basically means that corporate constituencies are assumed to be best able to determine their mutual rights and obligations by way of voluntary arrangement.<sup>11</sup>

The new economic theory has two variants, one strong, the other weak. The strong variant has antecedents in neoclassical economics; the weak variant has closer ties to institutional economics.<sup>12</sup> The institutional variant has its antecedent in Coase’s paper. The neoclassical variant can be traced back to Alchian and Demsetz in 1972, followed by Jensen and Meckling in 1976. Both variants share similarities for many common purposes. Both view the corporation as a contract and explain its structural features as the cost saving devices of transacting parties. They also share a ‘non-interventionist political perspective’. Since the corporation is a contract and since private actors have a better capacity at making contracts, there is little constructive role to be played by regulatory intervention.<sup>13</sup>

The timing and trajectory of law and economics popularity coincides with a ‘fundamental social transformation on a global scale’.<sup>14</sup> This view explains the emergence of the law and economics movement as part of socio-legal change. Critical legal scholars locate law

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<sup>9</sup> See for example, Easterbrook and Fischel, above n6.

<sup>10</sup> The leading legal academic proponents of the contractarian view have been Easterbrook and Fischel. It is said that Easterbrook and Fischel played a role in ‘putting legal flesh on the rather skeletal, market-based, neo-classical economic accounts of the corporation’, P. Ireland, *Property and Contract in Contemporary Corporate Theory* (2003) 3 JLS 453 at 5.

<sup>11</sup> For a concise overview, see H. N. Butler, *The Contractual Theory of the Corporation* (1989) 11 Geo. Mason L. Rev. 100, W. Bratton, *The ‘Nexus of Contracts’ Corporation: A Critical Appraisal* (1989) 74 Cornell L. Rev. 407.

<sup>12</sup> Bratton, above n8 at 1477.

<sup>13</sup> Bratton, above n8 at 1482. Contractarians differ among themselves as to the appropriate level of legal regulation. Some, like Easterbrook and Fischel, would tolerate a relatively substantial body of mandatory rules in order to counteract market failure. For discussion of this point, see W. Bratton, *The Economic Structure of the Post-Contractual Corporation* (1992) 87 Northwestern University L. Rev. 180 at 191-97. Others, in contrast, appear to be opposed to any sort of regulation that interferes with private ordering through contract. See, e.g., L. E. Ribstein, *The Mandatory Nature of the ALI Code* (1993) 61 Geo. Wash. L. Rev. 984.

<sup>14</sup> Fink, above n6 at 943.



and economics as a 'constitutive element in a restructuring regime of capital accumulation and social regulation'.<sup>15</sup> Such an understanding fosters law and economics as a legal movement that propels neo-liberal hegemonic influences. It thus identifies with the socio-economic relationships that contribute towards capitalism.<sup>16</sup> To elaborate, neo-liberal discourse postulates the 'free market' ideal as a model not only for political economy but for social life in general. Law and economics 'grows out of, and helps to form, this hegemonic discourse to advance economics discourse as the basis for framing and addressing social issues'.<sup>17</sup>

Law and economics, as a torch bearer of neo-liberal hegemony, is useful to explain the ability of the corporation to generate solutions, even CSR related ones. Nevertheless, because it reduces the corporation to a series of contracts, CSR becomes a peripheral contractual inclusion, if ever. The corporation does not exist as part of the community within this conception. Neither can it balance any notion of responsibility apart from those enumerated in contractual terms. Characterized as a standard form of contract, the corporate entity, which in reality has a complex social and economic structure is reduced to a single mode institution.<sup>18</sup> This substantially undermines the historical evolution of the corporation which was explored in Chapter 3. Ireland points out that the nexus-of-contract corporation is a curious return to contract which underlined the early understanding of the corporation as an association of partnership. To accommodate this notion within the complex modern corporation is quite anomalous. He summarizes that:

...the recent attempts to reduce the corporations to nexus-of-contracts is that they run directly counter to the course and flow of history, one of the most striking features of the development in Britain in the nineteenth century of the first comprehensive body of company law having been its gradual move *away* from the principles of agency and contract underlying the law of partnership from which it sprang... They try to ignore the effects and significance of the emergence of the share as an autonomous form of property, the transformation of most shareholders into pure rentiers, and the legal constitution of the company as a separate property owning person. They seek instead to treat the modern joint stock corporation as though it is still, in essence, a large partnership whose constitutive relations can be analysed through the old partnership prisms of agency and contract.<sup>19</sup> (emphasize in original)

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<sup>15</sup> Fink, above n6 at 944.

<sup>16</sup> Fink, above n6.

<sup>17</sup> Fink, above n6 at 946-7. See also M. Horwitz, *Law and Economics: Science or Politics?* (1980) 8 Hofstra L. Rev. 905, 6

<sup>18</sup> Bratton, above n8 at 1471.

<sup>19</sup> P. Ireland, *Property and Contract in Contemporary Corporate Theory* (2003) 23 Legal Studies 453 at 457.



Cooter explains the reason behind this regress is because ‘the economic analysis of law has X-ray vision, not peripheral vision’.<sup>20</sup> He goes on to elaborate:

The meat of economics lacks some essential nutriments to nourish social science. Specifically, economics takes ‘preference as given’ which means that it does not attempt to explain how people acquire their goals. ..Economists typically assume that a person pursues his or her self-interest as he or she perceives it...A person acquires values by internalizing them. Internalized values are essential to morality and law. Economics offers no account of how internalization occurs. In other words, economics offers no account of how a person becomes the self in which he or she is interested.<sup>21</sup>

Although there have been attempts to use contractarian insights to move beyond the shareholder profit maximization doctrine, results have been a compromise. Blair and Stout for example emphasize the role of directors as mediators of stakeholder interests. They however provide no concrete solution on how the competing stakeholder rights are to be distributed.<sup>22</sup> The contractarian approach is argued to have failed to provide ‘logical conclusions and definite proposals for reform’.<sup>23</sup> The movement nevertheless continues to be fueled by contemporary neo-liberal ideology. In the next section, the chapter will examine how the underlying neo-liberal influences have distorted assumptions of CSR. Understanding neo-liberal influences is important because it explains not just the impoverishment of CSR and the idea of the corporation generally but also explains the logic and impetus behind contractarianism.<sup>24</sup>

#### **4.1.1 Neo Liberalism and Its Influences**

It is neo-liberalism that popularly informs the corporate form and underlies the contractarian slant taken by CSR. The roots of neo-liberalism itself can be traced back to the reinvention of economic liberalism both as a form of political economy and political ideology.<sup>25</sup> Neo-liberal doctrine has become dominant since the late 1970s. The doctrine is principally a political project of embedding market values and structures within not

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<sup>20</sup> R. Cooter, *Law and Unified Social Theory* (1995) 22 *Journal of Law and Society* 50.

<sup>21</sup> Cooter, *Ibid* at 51.

<sup>22</sup> M. Blair and L. Stout, *A Team Production Theory of Corporate Law* (1999) 85 *Virginia Law Rev.* 247.

<sup>23</sup> I. Lynch Fannon, *Working Within Two Kinds of Capitalism* (Oxford-Portland Oregon: Hart,2003) at 89.

<sup>24</sup> It should be noted that contractarianism as a general approach to political theory may have quite different normative implications from those of its current corporate law variant. In the hands of Rawls, for example, contractarianism can yield arguments that resonate strongly with rights-based views of corporate law communitarians, D. Millon, *Theories of The Corporation* (1990) *Duke L.J.*201.

<sup>25</sup> Gamble, above n5 at 20.



only economic but also social and political life. Its objective is a reshaping of power relations, holding that socially or politically imposed restrictions on the market are coercive and accordingly unjust.<sup>26</sup> Neo-liberalism has thus come to be associated with the changing character of contemporary capitalism. The implications of neo-liberalism can be said to be deep and fairly damaging for CSR narratives. Law and economics, as a subset of the neo-liberal form has thus impacted CSR.

Within the broad neo-liberal camp, there have always been differences over how far this process should extend and by what means it should be achieved.<sup>27</sup> From the start, there have been at least two main strands of neo-liberalism, echoing the dominant thoughts of classical liberalism in the 19<sup>th</sup> century. There is a laissez faire strand and a social market strand. The laissez faire strand argues that it is for the markets to operate with as few impediments as possible. The social market strand, on the other hand, argues that the full potential of the free market can only be achieved if the state provides institutional support. There remains however some basic ideas by which all strands of neo-liberalism can be recognised and this can primarily be seen in the relationship of the state to the market. In order for the market to have primacy, all neo-liberals recognize the role of the state in addressing the obstacles and resistance to the institutions of the market. The state also has the task of ensuring that non-market institutions that help shape the market institutions are in place. Thus, the necessity for the ‘market to be free and the state to be strong’ is a hallmark of neo-liberal thinking.<sup>28</sup>

The general claim that neo-liberals make with regards to CSR is that it is not for the corporation to pursue social ends. Primarily, responsibility tends to be weakened by strands within this school of thought. It has created an excessive concentration on individualism, regardless of their impact on society.<sup>29</sup> The corporation, existing within the neo-liberal environment has become a neo-liberal corporation:

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<sup>26</sup> G. Rodan, ‘Neo- Liberalism and Transparency: Political Versus Economic Liberalism’ in R. Robinson (ed), *The Neo-Liberal Revolution* (Hampshire and New York: Palgrave Macmillan, 2006) at 197.

<sup>27</sup> Gamble, above n5.

<sup>28</sup> Gamble, above n5 at 21-3: ‘The presumption is always in favour of recreating the best conditions for markets to flourish, which means removing as many restrictions on competition as possible and empowering market agents by reducing the burdens of taxation’.

<sup>29</sup> This idea focuses on the individual as an autonomous being and is based on a particular vision of human liberty as freedom from external, uncontested to restraint, see R. Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974) at 32-3 and F.A. Hayek, ‘The recognition of property is clearly the first step in the delimitation of the private sphere which protects us against coercion and it has long been recognized that a people averse to the institution of private property is without the first element of freedom’ in *The Constitution of Liberty* (London: Rutledge and Kegan Paul) at 140.



...given its large economic nature, it has also been at the forefront of liberal perversion: the idea that we are responsible only for ourselves, that we are to get what we can and to keep it from others. The consequence of this for modern corporate behaviour and to be fair, for our expectations of modern corporate behaviour as well is **irresponsibility**...This situation ultimately permits the corporations to externalize many of the costs of its profit maximization on groups who are affected by the corporation but powerless to change its behaviour (emphasis added).<sup>30</sup>

In light of the underlying influential hold neo-liberalism has on the corporate structure, a specific look at some of the deep set arguments now becomes necessary before going on to critique some of the prevailing fallacies. From here, the discussion will move on later to look at certain strands of neo-liberalism which tend to promote CSR but nevertheless generate various myths.

#### **4.1.2 Morality of the Free Market**

By drawing out general strands in neo-liberal thought, a canvas which dismisses CSR will emerge. This canvas will serve as space to forward criticisms of the misconceptions that have been perpetuated. Friedman's neo-liberal argument against CSR is used as a starting point. The corporation, according to him, is the private property of the shareholders and the sole purpose of its existence is to maximize profit.<sup>31</sup> His famous attack of CSR was based on both economics and morality. Friedman's position is that the only duty of business is to increase its profits, whilst conforming to rules as established by law and custom. Friedman's premise is the following. A free society is one that strives for 'competitive capitalism' and where the role of the state is limited to facilitating market activity. In the free market mechanism, no individual can coerce another. Any notion of CSR will then undermine 'the very foundation of our free society'.<sup>32</sup>

The Friedman argument in short, is that corporations have a legitimate right to pursue and maximize shareholder returns. The only constraint is to act within the law, in particular to avoid deceit, fraud and coercion. The legitimate pursuit of profit meets

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<sup>30</sup> L. Mitchell, *Corporate Irresponsibility* (New Haven and London: Yale University Press, 2001) at 42.

<sup>31</sup> 'The social responsibility of business is to increase its profits' in M. Friedman, *The Social Responsibility of Business is to Increase Profits*, in T. Beauchamp and N. Bowie (eds) *Ethical Theory and Business* (London: Prentice Hall, 1988), M. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 133-5.

<sup>32</sup> Friedman, *Ibid* at 4, 133.



shareholder obligations and ultimately benefits society. This is because if directors do have a social responsibility other than making maximum profits for shareholders, how is such responsibility undertaken? Can private individuals decide what the social interest or greater societal good is? The argument that the corporation should confine itself to commercial roles is what Cannon calls the 'specific competence' argument.<sup>33</sup> Wealth and profit creation is one area in which the corporate institution has a special proficiency.

The collapse of the Marxist regimes in Central and Eastern Europe and the early success of many 'private' enterprises in Anglo American regimes further highlight the inability of the state or non-profit bodies to compete with the corporation as wealth creators. The economist Henderson extends Friedman's critique. According to Henderson, CSR is based on a number of misconceptions which leads to detrimental understanding of the market economy. The corporation has no basis for legitimacy in this area because it has no democratic mandate, historic role or any other sanction. Any choices made to back one type of cause or another will end up reflecting the interests, prejudices or aims of current corporate leaders.<sup>34</sup> The chief argument is that it is the responsibility of the state to regulate the corporation, and that the corporation's role is to follow the law. Corporate managers should not be expected to make decisions outside their proper sphere of competence.<sup>35</sup> In short, the assumption on which the neo-liberal theory largely holds is that profit maximization leads in general to the maximization of social wealth. The role of corporate law is to provide a set of rules conducive to profit maximization. If the pursuit of that goal leads to socially undesirable results, the appropriate response is not to modify the profit objective, but to strengthen the regulatory framework within which profit maximization is carried on.

With that background to the neo-liberal position on CSR, it is now necessary to scrutinize and critique the general arguments in turn. The first claim is that benefiting shareholders increases society's utility. There is no need to worry about non-shareholder interests, since looking after shareholders will inevitably help other stakeholders as well. At one level this claim holds true. A company that does not make money fails the very purpose of its inception. Once the argument gets beyond that, however, the claim

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<sup>33</sup> T. Cannon, *Corporate Responsibility* (London: Pitman, 1992) at 37.

<sup>34</sup> D. Henderson, *Misguided Virtue: False Notions of Corporate Social Responsibility* (London: The Institute of Economic Affairs, 2001).

<sup>35</sup> Henderson, *Ibid* at 150.



becomes more tenuous. Its vigorous assertion involves 'the subordination of productive sectors to financial sectors' and with 'a drive to shift wealth and power and security away from the bulk of the working population'.<sup>36</sup> A corporation that makes money for shareholders does not necessarily create wealth for others or for society. Equating maximization of share value as being equivalent to maximizing the total social value created by the corporation seems to be based on a fundamentally distorted premise.<sup>37</sup> Indeed, as Ireland points out, statistics show that shareholdership has increased in developed countries while poverty continues to plague developing countries. As this situation continues, the shareholder elite looks 'even smaller, even more exclusive, and even richer'.<sup>38</sup> The shareholder primacy has not produced a situation in which everyone is better off. It has, rather, contributed to ever greater levels of inequality, both internationally and nationally. This is particularly stark in places like Britain and the US where neo-liberalism and the Anglo-American model of corporate governance have been so enthusiastically embraced.<sup>39</sup> What the Friedman school of thought does not make clear is how the 'trickle-down' to society is achieved.

The second claim is that there is no need to make provisions for social responsibilities because stakeholders can maintain their interest through contract. Such a claim fails to recognize weaknesses of contractual claims. In the case of CSR, this is even more remote as there is no 'contract' with society to speak of. Society doesn't sit and negotiate with the corporation in its decision making process. Korten says this:

...by maintaining that the only obligation of the individual is to honour contracts and the property rights of others, the 'moral' philosophy of market liberalism effectively releases those who have property from an obligation to those who do not. It ignores the reality that contracts between the weak and powerful are seldom equal and that the institution of the contract, like the institution of poverty, tends to reinforce and even increase inequality in unequal societies. It legitimates and strengthens systems that institutionalize poverty while maintaining that poverty is a consequence of indolence and inherent character defects of the poor. <sup>40</sup>

To reiterate, the basic problem in contractual claims is that often, they are decided by parties who are not on equal footing. Ireland explains that neo-liberal views which see

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<sup>36</sup> See P. Gowan, *The Global Gamble* (London: Verso, 1999) at 8, 18.

<sup>37</sup> See M. Blair, 'Shareholder Value, Corporate Governance, and Corporate Performance' in P. Cornelius and B. Kogut (eds), *Corporate Governance and Capital Flows in a Global Economy* (Oxford: OUP, 2003).

<sup>38</sup> P. Ireland, *The Myth of Shareholder Ownership* (1999) 62 Mod. L. Rev 32 at 78.

<sup>39</sup> Ibid at 81.

<sup>40</sup> D. Korten, *When Corporations Rule the World* (London: Earthscan, 1995) at 83.



the market as a free contractual exchange are misplaced because markets are coercive.<sup>41</sup> He argues that contractual limitations are the products not of direct physical compulsion, but also due to a wide range of background constraints, particularly those that are those arising out of property rights. This gives property holders the 'crucial right to exclude and withhold', enabling them to 'determine whether the use of their property by others is lawful and to impose terms on those others as the price of making it so'.<sup>42</sup> Markets thus become 'structures of mutual coercion' in which every party is constrained and coerced by other parties.<sup>43</sup>

The third claim that has arisen out of neo-liberal arguments is that the corporation is an economic institution and it has no place being involved in social issues. This claim marks a severance of the critical link between the limits to exploitable resources or the cumulative effects of the corporation on the natural and social environment.<sup>44</sup> Essentially, the corporation causes social harm or to borrow a neo-classic economic term, externalities. Yet, they are structured in such a way that it is possible to go on acting this way without being accountable. Further, in its present form, the corporation operates in communities that are deeply divided by inequalities in wealth, health, knowledge, influence and life chances. Corporations have assumed certain public functions, such as educating children, imprisoning criminals and distributing welfare benefits like housing.<sup>45</sup> The neo-liberal 'economics only' claim seems less convincing as a result, a departure from the reality of corporate activity.

In short, it is argued that the neo-liberal arguments, which subscribe to the doctrine of individualism, have been adopted in an exaggerated form. This has led to detrimental results both for communities and individuals.<sup>46</sup> Such incongruity becomes more stark

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<sup>41</sup> P. Ireland, *Property and Contract in Contemporary Theory* (2003) 23 *Legal Studies* 453.

<sup>42</sup> Ireland, *Ibid* at 489.

<sup>43</sup> Ireland, *Ibid* at 490. See also R. L. Hale 'Economic Theory and the Statesman' in R.G. Tugwell, *The Trend of Economics* (New York: Knopf, 1924) at 2 15.

<sup>44</sup> Critically Locke writing in 1689, long before concerns of resource depletion arose noted that a fisherman adds economic value by catching fish, but that he should not over-fish but recognize that fish is a common good and should therefore leave enough for others. See P. Laslett (ed), *Two treatises of Government, John Locke ; a critical edition* (Cambridge : Cambridge University Press, 1967) .

<sup>45</sup> C. Wade, *For Profit Corporations that Perform Public Functions: Politics, Profit and Poverty* (1999) 51 *Rutgers L. Rev* 323.

<sup>46</sup> Selznick outlines why individualism needs to be accompanied by a much more nuanced understanding: 'We are asked to take as given and intuitively clear, what it means to be a separate individual, and what follows from that meaning. In fact, however, there are kinds and degrees of separateness; and separateness is more important for some purposes than for others. Nor does it follow from the simple fact of distinctiveness that no sacrifice can be asked for the benefit of others, who may be dependent and needy as well as distinct. Some forms of coercion are more harmful than others; some are more readily borne; others



because Friedman himself has always shown that the corporation must follow the law as well as societal norms. It is submitted that the discussion on CSR has been overly preoccupied with whether a corporation may properly devote its resources to societal interests. The problem can be traced back to neo-liberalism usage of distorted foundational assumptions to dismiss CSR. The misconception spawned by this school of thought brandishes the idea that CSR is a dangerous pursuit. The above analysis questioned some of the main points made by neo-liberals.

However, the problem doesn't end here. There are strands of neo-liberalism, particularly the 'social market' strand that can be used to support CSR. When CSR is couched within the other end of these strands of individualist thinking, various myths which claim to achieve CSR emerge. As a result, there is then a kind of neo-liberal tug-of-war between the two distinct views. One, as observed above, is the view which dismisses CSR entirely as an illegitimate corporate aspiration. And at the other end, which will be discussed below, are views which endorse CSR with a neo-liberal lens and consequently, perpetuate questionable conceptions of CSR. The neo-liberal agendas on both ends are deeply problematic as it comprehensively weakens the notion of the responsible corporation entirely. Now that the above discussion has looked at those neo-liberal arguments that have dismissed CSR entirely, the next part will peruse arguments at the other end of the tug-of-war. These are neo-liberal arguments which support CSR and have as a result spawned CSR myths.

#### **4.2 The Neo-Liberal Myths and CSR**

The above analysis shows the influence of neo-liberal thoughts in creating false warnings about the dangers of CSR. Now, the analysis turns to another task. It faces those claims that actually support CSR and argue for its institutionalization. The problem is that these distinct claims are structured within the neo-liberal school of thought and as a result, have created various confusing myths about CSR. Because CSR language is threaded into neo-liberal discourse, these myths have become very persuasive.<sup>47</sup> These myths are by no means exhaustive but they reflect a snapshot of the problems which ail CSR. The following discussion will attempt to show how current popular understanding of CSR is

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cause much suffering and are indeed offensive to personal integrity', P. Selznick, *The Moral Commonwealth* (Berkeley: University of California Press, 1992) at 49.

<sup>47</sup> For an overview of the political ascendancy of neo-liberalism, see Gamble, above n5.



peppered by neo-liberal influences. This will be done by looking at three general myths that have arisen and the implications thereof. The myths are presented as general snippets and are certainly not exhaustive. The aim is to capture the futility of the neo-liberal influenced corporation to construct social responsibilities. Further, the neo-liberal myths undermine the dynamics of the hard and soft nexus of CSR. It will be argued in turn that neo-liberal myths forward the idea of CSR as being a profitable venture, that CSR works as a transformative public relations tool and that the ethical consumer will lead CSR. At each turn, the issues and problems that arise out of these insights will be highlighted.

#### **4.2.1 Myth 1: Morality and Profits**

One of the biggest neo-liberal myths is that CSR should be embraced because it is profitable to do so. At its crudest level, the proposition states that being good is good for financial performance. It suggests that social and environmental involvement can deliver financial benefits through reputation enhancement. The win-win proposition is evocative. The corporation is said to be able to produce social and environmental dividends through its successful long-term pursuit of profit. This suggests a necessary convergence of financial success with societal good.<sup>48</sup> A subset of the 'morality and profit argument' is that the market can deliver both short term financial returns and long-term social benefits. One assumption behind the voluntary initiatives in the CSR regime is that corporate outcomes and social objectives can become more or less aligned. The rarely expressed reasoning behind this goes back to the basic assumptions of neo-liberal individualism. It goes along these lines. People are rational actors who are motivated to maximize their self-interest. Since wealth, stable societies and healthy environments are all individual's self-interests, individuals will ultimately invest, consume and build corporations in both profitable and socially responsible ways. In other words, the market will ultimately balance itself.<sup>49</sup>

While there are pockets of success stories where business drivers can be aligned with social objectives, such stories are few and far between. Consequently, investments in

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<sup>48</sup> S. Zadek, *The Civil Corporation: The New Economy of Corporate Citizenship* (London: Earthscan, 2004) at 51.

<sup>49</sup> D. Doane, *The Myth of CSR* (2005) Stanford Social Innovation Review at 28. See also J. Bakan, *The Corporation* (London: Constable, 2004) at 42-6.



CSR related causes become a luxury and are often placed on the chopping block when the going gets rough. For example, BP was involved in a series of health and safety offences including an explosion in its Texas City oil refinery in 2005 and oil leaks in its Alaskan pipeline in 2006 while Lord Browne, the CEO of BP at that time, had established himself as a leading voice in CSR.<sup>50</sup> Often the unintended consequences of neo-liberal influenced behaviour lead to other secondary negative impacts. Many human rights advocates resist any argument that a corporate human rights agenda is 'good business' because that argument commodifies basic principles of human dignity and thus surrenders the moral high ground.<sup>51</sup> Ultimately, this line of argument can become a double-edged sword because it reduces human dignity into monetary terms. This is particularly so when it becomes more profitable for example to just chop the trees, displace indigenous people and use child labour instead.<sup>52</sup>

#### **4.2.2 Myth 2: Public Relations Rhetoric or The Spotlight Phenomenon**

This point expands on the first. The myth is that competitive pressure amongst corporations will actually lead to more corporations competing to embrace CSR. It explains why corporations are keen to promote soft CSR. They naturally want to be

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<sup>50</sup> A. Clark, *BP Hit by Record Fines in American Courts* (The Guardian, 25 October 2007).

<sup>51</sup> R.G. Steinhardt, 'The New Lex Mercatoria' in P. Alston (ed), *Non-State Actors and Human Rights* (Oxford: OUP, 2005) at 178-9.

<sup>52</sup> A tragic example is the US company General Motors' decision in the early 1970s not to alter the design of its Chevrolet Malibu to reduce the risk that the fuel tank would explode in a collision, on the basis of an estimate that General Motors' legal liability from fatalities would represent an average of \$2.40 per vehicle whereas eliminating the defect would cost \$8.59 per vehicle. Another example is the Bhopal disaster. Reports provided that senior managers at Union Carbide and at Union Carbide's Indian affiliate, Union Carbide India Limited, were apprised of the poor maintenance conditions and general disrepair of the company's Bhopal facility. It may well be that failure to correct these problems resulted only from miscommunication and the kinds of confusion that can occur in a large international organization. But Union Carbide's failure to invest heavily in the Bhopal plant can also be seen as the outcome of a chain of business reasoning predicated on the shareholder model. To begin with, the chances of an accident were relatively slight and these had to be weighed against the major outlays needed to bring the Indian facility up to United States' standards. Because the Bhopal plant had been losing money for several years and had no prospects of turning around, it would have been hard for any senior manager concerned with quarterly results to justify such costs. Of course, it might be argued that even the slight risk of massive injury attendant upon an accident, and the consequent liability costs, could justify such expenditures under some application of the business judgment rule. But a series of specific considerations undermine this line of reasoning. For one thing, there was substantial likelihood from Union Carbide's perspective that liability could be confined to its Indian affiliate. Sheltered behind international legal boundaries and the rule of limited liability, Union Carbide's American and Indian shareholders might well be financially better off if managers gambled against safety. Furthermore, even if the almost unimaginable worst case scenario became reality--the two thousand deaths and thousands of injuries that actually occurred--the very low economic value of Indian lives made reduced attention to safety a reasonable gamble from Union Carbide's perspective. See R.M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance* (1993) 50 Wash. & Lee L. Rev. 1409.



aligned as such because they become good public relations exercises. There will be a competitive 'race to the top' amongst corporations. They increasingly capitalize on partnering with NGOs and produce glossy annual CSR reports. It is instructive that many CSR programs are run by the public relations department of companies with staff who have little knowledge of what CSR actually entails. To illustrate:

Corporations have...set out to persuade the public that the very *raison d'être* of commerce has changed, and to co-opt the environment debate. Companies are no longer insidious faceless corporations interested in profit at any cost, they were now caring corporations concerned about communities, consumers, children. They were committed to pollution prevention, to people, to the planet. There was only one problem with this strategy –they were lying'<sup>53</sup>

This 'greenwash' began with the environmental movement and has moved on to more sophisticated form within CSR rhetoric.<sup>54</sup> A number of leading companies have adopted 'good corporate citizenship' as in effect their brand image, a kind of 'halo branding'. If Nike's branding focused on the 'cool customer', Shell's focus is on the ethical corporation, and of course by extension, the ethical customer and investor. Moral is the new 'cool'.<sup>55</sup> The public relations led CSR initiatives bring in the problem of 'creative compliance':

[T]he culture of creative compliance is essentially negative. It is based on an attitude of 'why not'? If a practice is not expressly and specifically defined as illegal why should it not be used and claimed as legal? If a particular type of transaction is expressly outlawed why should it not be refashioned in form if not in substance and claimed to be different.<sup>56</sup>

The overall effect of the public relations rhetoric tends to create a façade of CSR involvement while it remains unclear if the internal workings of the corporation have been actually structured along such lines.

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<sup>53</sup> A. Rowell, *Green Backlash* (London: Routledge, 1996).

<sup>54</sup> 'Greenwash' is defined in the Oxford dictionary as 'disinformation disseminated by an organisation so as to present an environmentally responsible image'.

<sup>55</sup> D. McBarnett, 'The New Corporate Accountability' in W. Cragg and C. Koggel (ed) *Contemporary Moral Issues* (Toronto: McGraw Hill Ryerson, 2003) at 12.

<sup>56</sup> D. McBarnett, 'After Enron: Corporate governance, Creative Compliance and the uses of Corporate Social Responsibility' in J. O'Brien (ed) *Governing the Corporation* (John Wiley: London 2005) at 10, D. McBarnett, *After Enron Will 'Whiter than White Crime' Still Wash* (2006) 46 *Brit J. Criminology* 1091 at 2.



### 4.2.3 Myth 3: Consumer Sovereignty

The third myth largely dwells on the ethical consumer who is believed to be able to drive change. The theory of consumer sovereignty holds that consumers, through their actions in the market, oblige corporations to produce the goods they require in the largest quantities at the lowest possible price which at the same time, is ethically sourced. As well as making claims about the efficiency of supplies and demands, the theory subscribes to the idea that consumer needs drives the market. The attempt to influence moral norms in the realm of public opinion is often part of what is meant by the 'marketplace of ideas'.<sup>57</sup> The argument is to simply let the marketplace decide what is right.

Corporate behaviour is thus believed to be no more than a reflection of the popular will, expressed not through the ballot box but via individual purchase decisions.<sup>58</sup> There should be care to note that inherent in this finding of efficiency is the acknowledgement of the existence of power in the hands of consumers. The power argument perpetuates the notion that consumers are aware of their purchasing decisions. This may be true to some level, especially through media and NGO attention. Yet, the reality is that there is a general lack of awareness. The ignorance is applicable to most sections of society. Even when well-informed, for most consumers ethical buying is a relative thing.<sup>59</sup>

Although there is a small market that is proactively rewarding ethical business, this is not yet enough to outweigh the price advantage. The majority consumers still gravitate to the cheaper products and not the fair trade, organic or locally produced ones. This boils down inevitably to the essential commercial driver, dollars and cents. Further, consumer interests tends to be topical and dependant on popular culture. So, going down the supermarket supply chain, Kiko the dolphin is an easier target to save from mass fishing

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<sup>57</sup> The concept of the marketplace of ideas finds its classic expression in John Stuart Mill's *On Liberty*. Mill argues that the most effective way to achieve truth is to allow competing ideas and theories to struggle in the court of public opinion. Allowing that struggle is also seen as the best way to avoid error, see N. Bowie and T. Dunfee, *Confronting Morality in Markets* (2002) 38 *Journal of Business Ethics* 381–393.

<sup>58</sup> Parkinson points out that the analogy between voting and market behaviour is weak, not least because of the unequal distribution of market 'votes' that inequality in purchasing power represents. J. Parkinson, *Corporate Power and Responsibility* (Oxford: Clarendon Press, 1996) at 12 .

<sup>59</sup> Ethical consumerism data shows that despite significant growth over the past five years, ethical products have yet to make a serious impression on total market share. Sales of Fair Trade goods have grown from £22 million to £92 million yet still account for less than four per cent market share, albeit from a base of one per cent in 1999, *Ethical Consumer Report* (Co-Operative Bank, 2004).



than something more mundane like the exploitation of labour in the leather tanneries of India which sustains some of the biggest fashion houses in Europe. The responsiveness of the consumer 'electorate' is at best relative.

### **4.3 Unpacking the Neo Liberal Influence**

At its extreme, the laissez faire strand of neo-liberalism argues that it is meaningless to suppose that the corporation can be under any obligations to operate in a socially responsible manner. It undermines the ability of the state to be involved in shaping the reality of the corporation. CSR becomes an inefficient task within the application of the doctrine. The social market strand on the other hand appears to be more promising because it tends to promote CSR. Unpacking the myths however exposed the subtext that arises when CSR is influenced by this slant of thought.

Admittedly, understanding CSR along such lines has some analytical purchase, demonstrated for example in corporations that have increasingly responded to media pressure and consumers who drive the market for fair trade products and the like. Yet, if placed under close scrutiny, the simple identifications give rise to a rather crude divergence between the reality of corporate existence and impoverishment of the CSR concept. It obscures questions about the role of the corporation in society and generally, is so tenuous that it opens itself up to serious criticism. As a dominant paradigm, it also crucially dismisses the hard and soft nexus thesis which was built in Chapter 2. It was observed that building on hard and soft CSR is the key to moving forward in evolving CSR narratives. Overall, it fails to recognise the complexity of CSR narratives and hampers the need for a meaningful notion of CSR.

On a more optimistic note, the larger picture of neo-liberal influences can be seen as a generational development of CSR. According to Zadek, each generation of development can be seen as framing the discourse.<sup>60</sup> The first generation asks whether the corporation can be responsible in ways that does not detract from the commercial value of the business. He calls this a route to 'pain alleviation'. The pain alleviation mode reflective of first generation CSR can be said to be informed by neo-liberalism. CSR development is however not a stagnant process. It is evolutionary and can be said to be a maturing

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<sup>60</sup> Zadek, above n48.



process. Zadek proposes that second generation development of CSR will raise the question of whether the responsible corporation will prosper in the future. At this juncture, the question will revolve around the challenge of whether CSR could be an integral part of long term business strategy. From here, the third generation question can be said to emerge. It asks if CSR is likely to be significant in addressing growing levels of poverty, exclusion and environmental degradation.<sup>61</sup> A sense of evolution in CSR thinking appears.

Another view could be that the developments suggested by Zadek are actually occurring simultaneously. The pain alleviation is still apparent but corporations are also considering how to incorporate CSR into overall corporate strategy. This awareness can be seen in the mushrooming of CSR consultancies and assurance standards. At the same time, corporations are also beginning to think of 'public policy' issues like poverty and social exclusion. Attempts to generate income at the 'bottom of the pyramid' can be seen as an example along these lines.<sup>62</sup> In this manner, CSR becomes more integrated within the corporate structure and neo-liberal impacts can slowly be undermined. The hurdle of course is to overcome the limitations posed by neo-liberal influences. There is a need to develop new concepts to measure the effectiveness of corporate decision making.

Now that the general dangers and myths resulting from neo-liberalism have been highlighted, the chapter turns to review other normative foundations. As suggested above, the contractarian movement is best understood as an aspect of the neo-liberal hegemonic project to restructure economic and social relations.<sup>63</sup> What is now needed is to move to a larger theoretical canvas towards a renewed understanding of the corporation. The normative framework needs to capture an understanding that accurately reflects the power asymmetries between the corporation and its constituents.

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<sup>61</sup> Ibid at 73-6.

<sup>62</sup> C.K. Prahalad, *Fortune at the Bottom of the Pyramid* (Upper Saddle River, NJ : Wharton School Publishing, 2005).

<sup>63</sup> Fink, above n6.



#### **4.4 Beyond the Contractarian Corporation: The Corporation as a Social Institution**

There are other theoretical bases that inform the corporation which have become overshadowed under the overwhelming popularity of the contractarian position. In all, corporate theory is not a 'steadily advancing body of knowledge but a long-standing site of ideological struggle'.<sup>64</sup> From this perspective, the current wrangles within corporate theory are simply the latest chapter in the continuing tension placed in the search for a coherent normative foundation of the corporation.

##### **4.4.1 Corporate Concession Theory**

One line of conception presents the corporation as reification or a construction of the minds of the persons connected with the corporation. In this sense, the corporation is a legal fiction or artificial entity.<sup>65</sup> The concession understanding views the corporation as a legal person rather than a natural one. It ties the corporate conception with the sovereignty of the state. It has its origins in the fact that as a creature of the state, the corporation is supervised and regulated by the state. The theory justifies the state's regulation of environment, employees and various consumer interests. It legitimates the state's intervention in corporate law to introduce social responsibility because as a governmental concession, the corporation is seen to owe duties back to the government.<sup>66</sup>

The concession theory is useful to CSR arguments to the extent that it justifies regulatory sanctions on the corporation.<sup>67</sup> Nevertheless, it is no longer plausible to accept the sovereign provenance of the corporation. Incorporation by simple registration means the charter identity of the corporation is outdated. The concession theory's real lack of utility goes back to the fact that the corporation is thought of as a fiction, which then has no social and political implications.

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<sup>64</sup> P. Ireland, 'Defending the Rentier : Corporate Theory and the Reprivitisation of the Public Company' in J. Parkinson, et al (eds) *The Political Economy of the Company* (Oxford-Portland: Hart Publishing, 2000) at 144.

<sup>65</sup> Bratton, above n8 at 1474-75.

<sup>66</sup> Bratton, above n8 at 1497.

<sup>67</sup> It has been utilized to this end by a few writers in the US especially R. Nader, *Consumer and Corporate Accountability* (New York : Harcourt Brace Jovanovich, 1973).



#### 4.4.2 Corporate Aggregate Theory

Another set of theoretical assumptions look at the corporation as an aggregate of separate individuals and transactions in and around it. This is the 'entity or aggregate' discussion. Aggregate theory therefore shares commonalities with the contractarian idea.<sup>68</sup> The law is not central to the formation of the corporation rather the corporation is an aggregate of the individuals who had contracted for its formation.<sup>69</sup> This theory of the corporation is said to have contributed to the legitimation of newly emergent big business in the early years of the 20<sup>th</sup> century.<sup>70</sup> Aggregate theory can be traced back to the work of 19<sup>th</sup> century German and French legal theorists. It drew on Roman law theory surrounding the Roman Societas which had legal personality. These bodies were formed together by individuals who agreed to associate with each other for a common purpose. From this, aggregate theory emphasized the real persons behind the corporation.<sup>71</sup>

The logical outcome of the theoretical contractual base is to limit the social responsibility of the company. It visualizes an entity remote from regulatory interference because 'any denial of the right to use the free enterprise tool' tends to interfere with this concept of the corporation'.<sup>72</sup> 19<sup>th</sup> century aggregate theorists tended to oppose large, oligarchic corporations.<sup>73</sup> The rise of the Berle-Means corporation with dispersed ownership claims posed problems for the aggregate theory to identify the individuals in contract with the corporation.<sup>74</sup> Nevertheless, aggregate theory is still useful to explain the provenance of institutionalism which underlines how the corporation relates to society. A weak form of aggregate theory can therefore be said to be an important aspect towards understanding the interaction between CSR actors.

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<sup>68</sup> Millon, above n24.

<sup>69</sup> Bottomley, above n3 at 205.

<sup>70</sup> M. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory* (1985) 88 West Virg. L. Rev. 173 at 176 .

<sup>71</sup> A. Dignam and J. Lowry, *Company Law* (Oxford: OUP, 2006) at 354-5, P. Ewick, *In the Belly of the Beast: Rethinking Rights, Persons and Organizations* (1998) 13 Law and Social Inquiry 175 at 179

<sup>72</sup> D. Sugarman and G.R. Rubin, 'Towards a New History of Law and Material Society in England 1750-1914' in D. Sugarman and G.R. Rubin (eds) *Law Economy & Society Essays in the History of English Law 1750-1914* (Oxford: Professional Books Limited: 1984) at 12-13.

<sup>73</sup> Horwitz, above n71.

<sup>74</sup> Millon, above n24 at 207, A. Dignam and J. Lowry, above n74.



#### 4.4.3 Corporate Realist Theory

Turning now to corporate realist theory. The realist theory is also labelled as organizational or natural entity theory.<sup>75</sup> The re-conceptualisation of the relation between the corporation and the state reflected a gradual rejection of the idea that the corporation is artificial in nature. With this understanding, the favoured explanation was emphasised on the corporation's origin in the natural activities of individuals.<sup>76</sup> The realist understanding, adopted by German realists, suggests that the company or any group of individuals acting together for a common purpose creates a 'living organism, or a real person, capable of willing and acting through the people who are its organs just as a natural person wills and acts through their brain, mouth and hands'.<sup>77</sup> Its conception of the company as a real person or living organism submits that the managers can be treated as the brain of the organism formulating the policy of the company and directing its implementation.

The fact that the shareholders within large corporations are increasingly becoming passive investors is consistent with the projection of the realist theory. It underlines the notion that control as well as directors discretion can be separated from ownership.<sup>78</sup> Corporate realism therefore appears to be a more coherent understanding that legitimizes the change in the nature of corporations to the manager dominated model. It consolidates the weak ownership claims of shareholders which the historical account developed earlier:

To the philosophical realist, to call a corporation a network of contracts is to overlook an essential part of the empirical reality of social interactions 'within' corporations. It implies that the circumstances that any participant in the enterprise may confront at any moment are fully accounted for by reference to one or more earlier negotiated (or implicit) bargains he or she made. This, to realists, is a palpably impoverished way to interpret much of what goes on within corporations.<sup>79</sup>

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<sup>75</sup> H. Collins, 'Organizational Regulation and the Limits of Contract' in J. McCahery et al (eds), *Corporate Control and Accountability* (Clarendon Press: Oxford, 1994) at 91.

<sup>76</sup> Millon, above n24 at 201.

<sup>77</sup> M. Stokes, 'Company Law and Legal Theory' in W. Twining (ed) *Legal Theory and Common Law* (Blackwell: Oxford, 1986) at 163.

<sup>78</sup> '[Shareholders] could be viewed as the organ within the living organism whose task was to supply the basic necessity of capital without any need to accord them a fuller role within the enterprise', Stokes, *Ibid.*

<sup>79</sup> Allen, above n1 at 1401.



Corporations are seen by realists as 'collective entities' that have distinct identities that affect its constituents. From here, it is possible to construct the 'history of such an institution, the culture and values it comes to embody and the institutional goals it formally and informally moves toward'.<sup>80</sup> From here, institutionalization can be seen as a learning process to 'create and sustain an evolving capacity to learn to recall, to plan and to coordinate action'.<sup>81</sup> Through a realist perspective then, corporations can be, indeed inevitably are, more than contracts.

Overall, such a view provides the baseline analysis for the socially responsible corporation. Realist theory was utilized perhaps most famously by Dodd to sustain a framework for CSR. In an influential article, Dodd endorsed the idea that the corporation was a real person.<sup>82</sup> Dodd's reinterpretation of the theory began from the fact that the corporation is seen an entity distinct from its constituents. As managers worked for the corporation, any claims of obligation to shareholders were at best, secondary and indirect.<sup>83</sup> As a result, shareholders had diminished capability to insist on pure wealth maximization based solely on the trusteeship principle. The theory as interpreted by Dodd undermined the primacy of shareholder interests.<sup>84</sup>

Berle and Means who adapted an aggregate approach were directly opposed to Dodd's view. Berle and Means solution to the dispersed shareholdership of large corporations was that management acted as trustee for the shareholder. In the Berle-Means sense, the legitimacy of management's exercise of power was to ensure that 'under all the circumstances the result fairly protects the interests of the shareholders'.<sup>85</sup> As trustees, the corporate manager's powers were therefore subject to this limitation as they only had mandate to act for the beneficiary, this being the shareholder.<sup>86</sup> The foundation of this shareholder-centred, privatized conception of the corporation was a complete disregard for the realist idea on which Dodd built his CSR argument.

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<sup>80</sup> Allen, above n1 at 1402.

<sup>81</sup> Allen, above n1 and Parkinson, above n59.

<sup>82</sup> M. Dodd, *For Whom are Corporate Managers Trustees?* (1932) 45 Harv.L.Rev.1145.

<sup>83</sup>Dodd, Ibid.

<sup>84</sup> See Millon, above n24.

<sup>85</sup> A.A. Berle and G. C. Means *The Modern Corporation and Private Property* (New York: Macmillan: 1932) at 275.

<sup>86</sup> Ibid.



Today, Dodd's ideas have been revived by communitarians who urge the state to impose additional requirements upon corporations, such as trust which requires them to consider the community.<sup>87</sup> Communitarians do this in part by relying on the entity theory of the corporation. Communitarians following the entity notion argue that a corporation is a depository of various objectives, not just as an investment port. Although it has a primary economic foundation, as the various objectives are institutionalized, the corporation expands to serve social and political objectives. These objectives cannot be formally enshrined within contractual provisions.

Communitarian scepticism about efficiency, contracts and markets is not a uniform project however. Just as contractarian perspectives can run a whole spectrum, communitarians have broad differences. For example, legal intervention may be favoured in some instances but not others. Further, corporate law communitarians like communitarians generally start from a negative critique. Communitarians generally criticise liberalism and corporate communitarians in particular criticise the contractual provenance of the corporation. As a result, the positive framework is not a coherent whole.<sup>88</sup> The communitarian corporate law reform offers no ready made solution nor is it an easy project.<sup>89</sup>

Nevertheless, what underlies the communitarian perspective is the inability of contract to wholly conceptualize the corporation. At many levels, corporate law communitarians share the contractarian commitment to 'individual autonomy and choice as foundational moral value'.<sup>90</sup> However, they further insist that 'meaningful choice requires a social framework' that cannot itself be constructed entirely out of private transactions.<sup>91</sup> Most importantly, communitarian insights enable an articulation on why the corporation should include the community interests in its decision making. The underlying commitment to this argument is the broad social effects of corporate activity. As a result, communitarians view the corporation as being beyond a series of contracts. It is a

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<sup>87</sup> See generally Lynch Fannon, above n23.

<sup>88</sup> To date, much communitarian law reform scholarship has focused on a 'multifiduciary' model, according to which management's duty is redefined to embrace non-shareholder as well as shareholder interests. D. Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law* (1993) 50 Wash & Lee L. Rev 1373, L. E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, (1992) 70 Tex. L. Rev. 579, J. Parkinson, above n59.

<sup>89</sup> Allen, above n1.

<sup>90</sup> A. Wolf, *The Modern Corporation: Private Agent or Public Actor?* (1993) 50 Washington & Lee Law Review 1673 at 1692.

<sup>91</sup> Wolf, *Ibid.*



powerful institution whose conduct has substantial public implications. In short, identifying the complexity of the corporation has been a good starting point towards clarifying the reality of the corporate institution. This theory then provides a normative world view that is most consistent with the historical changes that have accompanied the corporation.

#### **4.5 Opening the Bounded Corporation**

To understand the corporation as being a real part of the community within which it operates is the first step in acknowledging that corporate activity impacts a wider constituency than shareholders. At the same time, the corporate institution absorbs the values and changes in the community. This mutually defining relationship institutionalizes interdependence between the corporation and community. What the communitarian understanding achieves is to open the bounded corporation to the community within which it operates. The corporation has been bounded thus far by historical incident, legislative choices, political assumptions and economic influences. Having been so bound, it has been seen as an exclusive, membership-only institution that serves its shareholders. Functioning in such a climate, the corporation has grown into an aberrant institution, unable to grasp the changes that are occurring to its institutional form and outside that. It seemed trapped in a perennial Jekyll and Hyde persona as a result.<sup>92</sup>

Building on responsibilities enables social relationships in society to be changed and reconstructed. Institutions can be re-built, within which 'individual and collective identities will in turn be reconstructed'.<sup>93</sup> Relating the corporation into community is institutionalized by promoting the density of interactions that occur.<sup>94</sup> For the regulatory design to expand the corporate role in community, institutionalization of responsibility is still supported by aggregate theory which as elaborated earlier, is based on a weak form of contractarianism. Nevertheless, while the contractarian model seeks rules that

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<sup>92</sup> Bakan labels the corporation as a 'psychopath', see Bakan, above n49 at 56-7.

<sup>93</sup> W.M. Sullivan, 'Institutions and Democracy', in A. Etzioni (ed) *New Communitarian Thinking* (Virginia: University Press of Virginia, 1995) at 176.

<sup>94</sup> E. Frazer, *The Problem of Communitarian Politics* (Oxford: OUP, 1999) at 217, D. Cornell, *Beyond Tragedy and Complacency* (1987) Northwestern University L. Rev 693 and S. Benhabib, 'Liberal Dialogue versus a Critical Theory of Discursive Legitimation' in N. Rosenblim (ed) *Liberalism and the Moral Life* (Cambridge Harvard University Press 1989).



are clear *ex ante* in order to facilitate contractual transactions, the communitarian idea of law can tolerate ambiguity in rules. Instead of seeking for an elusive clarity, rules under this model may sensibly require individuals to act 'reasonably' or may void 'unconscionable' contracts.<sup>95</sup> Within such a conception, the hard and soft nexus can be nurtured and expanded to truly reflect evolving CSR narratives. In sum, it is the allocation of responsibilities that should be the starting point in arguing for CSR. Some means of designing and enforcing effective allocation of responsibility is required if any ascription of rights is to have practical import.<sup>96</sup> In fact, this conception is not a drastic overhaul of the corporate form but merely confirmation of its historical origins and current complexity as an institution. From this moral claim, it is possible to reconstitute or reimagine the corporation. And it is here that the notion of corporate capability comes to play.

#### **4.6 The Capability of the Corporation**

The normative analysis above shows that the corporation is complex and cannot be seen as distinct from its socio-political environment. It is a real institution whose activities affect the communities within which it operates. It was observed that the view of the corporation as having only one aim appears simplistic. To be sure, the corporation has to worry about shareholders. However, as complex institutions of considerable power, their specific capabilities and constitutive aims are typically diverse and multiple. With this in mind and as the discussion now looks to reimagine the corporation, the key issue is institutionalizing responsibility. The corporation, as noted in Chapter 3, can institutionalize good and bad things and can be judged for contribution to responsibility or irresponsibility. However, this clarity of motivation does not matter when the question that is being faced is what the corporation can do and cannot do, the capabilities that they can and cannot develop.<sup>97</sup> If these thoughts are plausible, the corporation can develop a range of capabilities to contribute both towards achieving responsibility or at the same time, be a perpetrator of irresponsibility.<sup>98</sup>

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<sup>95</sup> Allen, above n1.

<sup>96</sup> O'Neill, 'Agents of Justice' in T. Pogge, ed. *Global Justice* (Oxford: Blackwell, 2001) at 191-4.

<sup>97</sup> O'Neill, *Ibid* at 200-01.

<sup>98</sup> O'Neill, *Ibid* at 201.



The problem with institutionalization lies in how responsibilities are allocated. This task is seen from a recipient's perspective, focusing on recipients and rights rather than on actions and obligations. This can be illustrated through the example of universal rights as embodied in the Universal Declaration of Human Rights 1948 (UDHR). Nations, peoples, states, societies and countries are variously named as institutions against whom individuals may have rights. O'Neill points out that couched in this manner, institutions seem to be treated homogeneously. The Declaration makes no elaboration about any difference between these varying types of institutions or about their capacities and limitations. Neither is there 'systematic allocation of obligations of different sort to institutions of specific types'.<sup>99</sup> It is not clear which call of responsibility falls on which individuals or institutions. As such, it 'proclaims what is to be received, what entitlements everyone is to have; but it says very little about which individuals or institutions must do what if these rights are to be secured'.<sup>100</sup> CSR has similarly been premised by looking at recipient or stakeholder rights. This in effect is a structural impediment in realizing responsibility. It is in the search to institutionalize responsibility that the notion of capability comes to the fore.

The notion of capability was introduced by Sen into development economics.<sup>101</sup> It can also be helpful in discussing the powers of states, and of other institution.<sup>102</sup> Although capabilities as explained by Sen and Nussbaum has been used as a rights securing mechanism,<sup>103</sup> it is here developed to evaluate responsibilities. An individual or institution, considered in the abstract, 'may have various capacities or abilities to act'. For example, 'a person may have the capacity to work as an agricultural labourer or an ability to organize family resources to last from harvest to harvest; a development agency may have the capacity to distribute resources to the needy in a given area'. However when a 'social and economic structure provides no work for agricultural labourers or no

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<sup>99</sup> O'Neill, *Ibid* 190-1.

<sup>100</sup> O'Neill, *Ibid*.

<sup>101</sup> 'The capability approach to a person [or institution's] advantage is concerned with evaluating it in terms of his or her actual ability to achieve various valuable functionings as a part of living' in A. Sen and M. Nussbaum (eds) *The Quality of Life* (Oxford: Clarendon Press, 1993) at 30.

<sup>102</sup> Sen's work goes deeper by linking between capabilities and their actualization in an agents functionings and attempts to identify which functionings, hence which capabilities are valuable, A. Sen, 'Capability and Well Being' in Sen and Nussbaum, *Ibid*.

<sup>103</sup> M. Nussbaum, *Women and Human Development The Capabilities Approach* (Cambridge: Cambridge University Press, 2000).



resources to be given to families to subsist on an agency to distribute, these capacities lie barren'.<sup>104</sup>

When the focus moves to the capabilities of the corporation, the corporation can be seen to have a capacity to choose from a range of choices and options.<sup>105</sup> For example, corporations have been criticized for using their considerable capability to get away with irresponsibilities like dumping hazardous waste and using child labour. Yet, as observed above with regards to voluntary CSR initiatives, there have been cases where corporations have insisted on decent environmental standards or employment conditions. Sen argues that it is the specific capabilities of individuals and institutions in specific situations rather than their abstract capacities or their aggregate power that are relevant to determine which obligations of justice they can hold and discharge.<sup>106</sup> Focusing on capabilities consolidates the realist understanding of the corporation. This is because not only can the corporation be said to have a direct impact on the community due to its actions but it is also capable of directly getting involved in resolving those issues.

The value of focusing on capabilities is that it foregrounds an explicit concern with the action and with the results that institutions can achieve in actual circumstances. So, it provides a seriously realistic starting point for normative reasoning, including claims for corporate responsibilities.<sup>107</sup> In the end, it is 'obligations rather than rights that are the active aspect of justice: a proclamation of rights will be indeterminate and ineffective unless obligations to respect and secure those rights are assigned to specific, identifiable individuals and institutions which are able to discharge those obligations.'<sup>108</sup> The recipient focused structure has essentially forestalled the ability to look at various institutions, particularly the corporation, as a robust and realistic institution of responsibility.

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<sup>104</sup> O'Neill, above n96 at 201.

<sup>105</sup> O'Neill, above n96.

<sup>106</sup> A. Sen, *Development as Freedom* (Oxford: OUP, 1999) at 18-19, 38-9, 72-6 and 288., M. Green, 'Institutional Responsibility for Moral Problems' in A. Kuper (ed) *Global Responsibilities Who Must Deliver Human Rights* (New York and London: Routledge, 2005) at 125.

<sup>107</sup> O'Neill, above n96.

<sup>108</sup> O'Neill, above n96 at 193. O'Neill points out that early philosophers used obligations as a starting point. Locke, Rousseau and Kant whom contemporary rights-based advocates treat as their intellectual ancestors, begun not with rights but with natural law or duty. See O'Neill, *Towards Justice and Virtue A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University Press) at 141.



## 4.7 Conclusion

This chapter has attempted to provide the theoretical justifications to sustain the notion of the responsible corporation. Indeed, CSR can be read into the normative foundations of the corporation. However, responsibility in the corporation is particularly influenced by neo-liberal, contractarian theory. It was observed that the contractarian understanding fails its promises by stopping at the stage of recipient or stakeholder rights. This in effect is a structural impediment in realizing responsibility. The point is to identify the theoretical framework which is consistent with the role of the corporation in the community as well as taking into consideration its historical genesis. In this case, it is the realist understanding of the corporation. Such an understanding further shows that the neo-liberal misconceptions that accompany current understanding in CSR can be attributed to the individual, esoteric questions have been posed without looking at the larger picture of the corporation. Nevertheless, the theoretical assumptions are much more complex as weak forms of contractarianism have been useful to explain institutional understanding of the corporation. A combination of theoretical bases can thus be said to inform the characteristic of the corporation.

With these considerations in place, it is now possible to institutionalize a framework for responsibility by looking at corporate capabilities. Reimagining the corporation begins by looking at the corporation as a real entity and from there, how it is capable of being responsible. The capability approach is able to chart forward new directions in corporate conduct. It underlines the fact that although corporate decision making has become increasingly complex and dynamic, the corporation has significant resources that can be utilized for the community.

What is shown at this juncture is a moral claim of the normative foundations of the socially responsible corporation. Institutionalization of this foundation is still dependant on a structure to enable CSR. The next chapter moves the discussion back to standard setting engagement. It aims to configure the balance of powers amongst the CSR actors to cultivate an environment to enable capabilities to be instituted. Underlying the discussion is a tension, due to a dialectical misunderstanding of authority and the public-private compartmentalization of authority. It is after this analysis can the later chapters on external CSR narratives be developed with clarity.



## **CHAPTER 5 Mapping Accountability**

### **5.0 Introduction**

Chapter 4 underlined the normative foundations of CSR and explored the capability of the corporation as a responsible institution. As a real and complex institution, it has the capability to behave in a socially responsible manner. Nevertheless, as was observed, this capability will remain unearthed if it is not institutionalized. Regulatory technique must consider this normative foundation and the fact that CSR standard setting can only be sustained through an interaction with the CSR actors. At this juncture, it becomes important to map how corporations can be made accountable. It is crucial to scrutinize accountability because CSR standard setting is steeped in legitimacy questions. This is mainly contributed by the fact that standards are conceived by a fusion of public and private actors while hovering between state boundaries and beyond. In such an investigation, the concentration of power in the hands of the corporation as well as the other CSR actors is of particular concern.

The first part of the chapter will look at the notion of accountability and what is meant by it. Accountability is seen in this thesis as a process through which responsibility can be structured as well as discharged. The point of this chapter is not so much to answer the question specifically of what is meant by responsibility but to think of the scope or more specifically, the context within which responsibility arises that can enable narratives of CSR. The chapter will go on to show that the primary hindrance in realizing the necessary narratives is due to the public-private distinction that informs institutional make-up. When the distinction is rationalized, the suitable processes can be placed with more clarity. Towards this end, the rule of law will be explored to see if it can accommodate the changing nature of authority, particularly in an area like standard setting which requires interdependence among actors. The chapter concludes by suggesting that disintegrating the public-private distinction is a key point in mapping accountability.



## 5.1 Mapping Accountability

Mapping accountability impacts the design and location of CSR standard setting. It can function as a 'tool of analyses' between the CSR actors, depending on its specificity.<sup>1</sup> This is because it has an evaluative dimension, in that it makes it possible to comment on the effectiveness of the conduct of various actors in standards activities. In this sense, it can function as a 'guiding policy' in instituting capabilities.<sup>2</sup> As observed in the previous chapters, CSR standard setting evolves through the interdependence between the corporation and community. In order to map accountability, the relationships of power that inform corporate conduct within this interdependence must be looked at. Corporate decision-making should be structured along the circumstances in which 'power may be legitimately held'.<sup>3</sup> Corporate decision-making is subject to the influences of various institutions and actors. They can be diffused or organized and range from governments, unions, customers, other corporations and various other constituents. Within the bounds of these controls however, there is a 'core of real business discretion'.<sup>4</sup> In drawing a map of accountability, the concern is to harness this core discretion in decision making.

The meaning of accountability as a term remains evasive.<sup>5</sup> Nevertheless, a working understanding of accountability can be seen through the practical functions of the concept. It attempts to ensure that those wielding 'power on behalf of others are answerable for their conduct'.<sup>6</sup> When relationships of power interact, they both 'create and restrict material changes in the organization of authority'.<sup>7</sup> The very function of accountability implies the 'distribution of authority in complex political and organizational settings' through a shared sense of expectations and justifications.<sup>8</sup> The challenges of effective accountability include where to assign and locate responsibility for decision-making, devising a system for 'answerability and enforcement' as well as how to

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<sup>1</sup> P. Newell and S. Bellour, *Mapping Accountability: Origins, Contexts and Implications for Development* (IDS Working Paper No. 168, 2002) at 1.

<sup>2</sup> A.C.L. Davies, *Accountability* (Oxford: OUP, 2001) at 87.

<sup>3</sup> J. Parkinson, *Corporate Power and Responsibility* (Oxford: Clarendon Press, 1996) at 19.

<sup>4</sup> Parkinson, *Ibid.*

<sup>5</sup> A. Schedler, 'Conceptualizing Accountability' in A. Schedler, et al (eds) *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder and London: Lynne Rienner Publishers, 1999) at 13.-15. Schedler explains: Accountability is '[o]ften used interchangeably with the similar concepts of responsiveness, responsibility and representation....tends to be linked to a variety of other terms in its practical usage, such as surveillance, monitoring, oversight, control, checks, restraint, public exposure and punishment'.

<sup>6</sup> Newell and Bellour, above n1 at 1.

<sup>7</sup> Newell and Bellour, above n1.

<sup>8</sup> P. Day and R. Klein, *Accountabilities: Five Public Services* (London: Tavistock, 1987) at 5, 9.



‘prioritise multiple accountabilities’.<sup>9</sup> For example, a minister can be made accountable for decisions which were the responsibility of officers in his or her ministry.<sup>10</sup>

In building these mechanisms of assigning and locating responsibilities, a particular ‘map of accountability’ (MA) is created. The mapping can be seen as a political process, informed further by economic and social factors. In light of this, MAs tend to be historically contingent. Often, they validate some form of power and devalue others.<sup>11</sup> This linkage has important implications for harnessing standard setting. Current MAs tend to manifest in competing conducts among the various CSR actors. Indeed, an integral feature of the relationship of the CSR actors is the co-existence of competing notions of accountability. It is important to see how demands for accountability pull in different directions in order to devise processes that address the competing demands. In many contexts, the MAs are used as a tool to legitimize the policies and actions of particular institutions.<sup>12</sup> This is particularly evident in CSR narratives where actors have different aims and sometimes, stave each other in the attempt to establish hegemony.

Some caveats about accountability. When badly designed, it can result in focus on wrong indicators and box-ticking to the detriment of the goal that was being intended. Further, weak designs can be abused particularly through loopholes, human glitches and procedural limitations. Accountability can also be very costly, requiring resources in the form of more officers, data gathering and infrastructure provisions. Costs requirements means that a balance must be made between the advantages of additional accountability and the question of who bears the costs. This is why developing a MA is important towards unravelling particular processes that can institutionalize legitimate standard setting initiatives. It will work as a road map, providing directions to charter the interaction between the CSR actors. As this chapter progresses, the process that is being aimed for will become increasingly clear. Accountability is not so much a mechanism of control as it is a process of learning. Being accountable is about being open with various constituents, ‘engaging with them in an ongoing dialogue and learning from the

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<sup>9</sup> Day and Klein, *Ibid* at 2. See also Newell and Bellour, above n1 at 5: ‘Mechanisms of accountability can take a diverse range of forms from formal top-down processes of elections, hearings and consultations to bottom-up strategies such as citizen juries, popular protest or participatory budgeting’.

<sup>10</sup> H. Barnett, *Constitutional and Administrative Law* (Cavendish Publishing: London, 2004) at 4-5.

<sup>11</sup> Newell and Bellour, above n1.

<sup>12</sup> The Gramscian subtext informs the power play that occurs in devising maps of accountability, see A. Q. Hoare and G. Nowell Smith (ed and trans), *Selections from Prison Notebooks* (London: Lawrence and Wishart, 1971).



interaction'.<sup>13</sup> Such a process can 'generate ownership of decisions and projects and enhance the sustainability of activities'.<sup>14</sup> Ultimately, it is a narrative that intends to switch on the capability of the corporation as an institution of responsibility and achieve synergy in standard setting initiatives.

### 5.1.1 The Paradox of Power

Accountability struggles with the implications of power between different actors. For example, the particular success of an agenda by an NGO movement can potentially threaten or undermine the progress of another. Bendell argues that the success of a particular NGO group in getting its objectives can have the effect of marginalizing other equally important agendas.<sup>15</sup> This threat reflects one of the potential pitfalls of getting networks of power to work together. Bendell further says that if agendas on a specific issue by an NGO are 'less threatening to established centres of power', they will 'receive less resistance and gain more support from those centres of power'.<sup>16</sup> NGOs have generally tried to move their relationship from being protesting watchdogs to partnership in an attempt to bridge competing interests. Thus, although radical Greenpeace at Brent Spar style protests still exist, many NGOs try to engage in forms of partnerships with corporations. This does however mean that their funding, skills, networks and reputation are related to their affiliates. Such initiatives have given the rise of GONGOs, BONGOs and DONGOs (NGOs organized by governments, businesses and donors).<sup>17</sup>

The scenario reflects the essential 'paradox of power' faced in CSR engagement. Basically, collaboration with powerful actors is driven by the need to attain standard setting goals. However, at times such collaboration creates tensions that can undermine the larger goals of the issue at hand.<sup>18</sup> To avoid becoming reduced to agents or voices of the various other actors, NGOs are moving away from 'paternalistic advocacy' to more

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<sup>13</sup> M. Blagescu, L. de Las Casas and R. Lloyd, *Pathways to Accountability: The GAP Framework* (London: One World Trust, 2005) at 11.

<sup>14</sup> Blagescu, de Las Casas and Lloyd, *Ibid.*

<sup>15</sup> J. Bendell, *Barricades and Boardroom: A Contemporary History of the Corporate Accountability Movement* Business and Society Paper No.13 (Geneva: UNRISD, 2004).

<sup>16</sup> Bendell, *Ibid* at 50.

<sup>17</sup> Bendell, *Ibid*

<sup>18</sup> A. Florini, 'Lessons Learned', in A. Florini (ed.), *The Third Force: The Rise of Transnational Civil Society* (Washington, DC : Carnegie Endowment for Peace, 2001) at 237.



participatory work, particularly through networking with each other.<sup>19</sup> The CORE coalition for example, is an illustration of a coalition of over 130 charities and campaigning organisations. It was set up in 2001 and has been seen as one of the backbone crusaders in the success of the wider provisions for director's duties in the Companies Act 2006.<sup>20</sup> Coalition of such types is also useful to draw a more coherent NGO voice in developing countries, often the site of corporate malpractice. In Indonesia, the Electricity Governance Initiative brought together a consortium of NGOs and research institutions, which produced a joint assessment of decision-making in the Indonesian electricity sector. The consortium is now using the results to engage with the authorities and policy-makers on where and how to improve accountability.<sup>21</sup>

The challenge then is to 'accept but then manage the paradoxes of power'.<sup>22</sup> Underlying this is also the sense that the corporation, while often presented as a power hungry institution may actually be limited in many ways. This scenario is particularly relevant for small and medium sized corporations. First, is the view is that corporations are 'foot soldiers of capitalism, not its generals.'<sup>23</sup> This is because corporations themselves are not a homogenous whole. Regulatory scholars tend to divide them into four types. Those who know the law and are willing to follow it (Group A) those who don't know the law but would like to be law abiding (Group B), those who know the law and don't want to follow it (Group C) and those who don't know the law and don't wish to be law abiding (Group D). For CSR proponents, it seems that it is precisely Groups A and B that provide the greatest support. Surely in building legitimacy, CSR standards must be more ambitious than seeking to ensure that Group A and B corporations continue to be involved in standard setting while ignoring the Group C and D corporations.<sup>24</sup> Also, there are corporations that know of the law and often try to go 'beyond the law'. Again, there is a need to effectively tap on this capability while considering the other group types.

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<sup>19</sup> D. Eade, *Development and Advocacy : Selected Essays from Development in Practice* (Oxfam: Oxford, 2002).

<sup>20</sup> See <http://www.corporate-responsibility.org/>

<sup>21</sup> *Electricity Governance Initiative: Case of Indonesia*, available at <http://electricitygovernance.wri.org/>. The Electricity Governance Initiative has also been launched in other developing countries including India, Philippines and Thailand.

<sup>22</sup> Bendell, above n15 at 52.

<sup>23</sup> Bendell, above n15

<sup>24</sup> T. Mcinerney, *Putting Regulation Before Responsibility: The Limits of Voluntary Corporate Social Responsibility* (2005) GWU Law School Public Law Research Paper No. 123 available at SSRN: <http://ssrn.com/abstract=658081>, R. Baldwin and M. Cave, *Understanding Regulation: Theory Strategy and Practice* (Oxford ; New York: Oxford University Press, 1999) at 101-2, I. Ayers and J Braithwaite, *Responsive Regulation* (New York Oxford: OUP, 1992) at 19.



What provides credibility to investors for example may not break through the distrust of NGOs and trade unions. Similarly, whilst citizens may distrust the corporations' willingness to engage in solving social and environmental challenges, as customers they may have complete trust in the safety of their products and services. They follow different logics and interact over different exchange mechanisms. The global economy is driven by a 'monetary logic', NGOs are held together by the idea of 'solidarity' while governments and international institutions are steered by the logic of 'gaining and maintaining administrative power'.<sup>25</sup> Ottoway says that despite claims of increased pluralistic accountability between state and non-state actors,

...it is doubtful that close cooperation between essentially unrepresentative organizations - international organizations, NGOs and large transnational corporations - will do much to ensure better protection for, and better representation of, the interests of populations affected by global policies.<sup>26</sup>

Thus, in the absence of agreed upon measures, accountability can be exercised in a discretionary or discriminatory way, where different standards are set for different actors.

Next, accountability 'gaps' are created when shifts of authority occur between actors. It is suggested that one of the reasons for gaps to emerge in MAs is the crude categorisation that have been placed on non-state actors generally. MAs still work along the public-private dichotomy. Accountability processes tend to be structured as formal and hierarchical, whereas in reality, public-private institutional actors function through a fusion of horizontal and fluid networks.<sup>27</sup> The challenge is multiplied when the actors share roles in the delivery of certain services. Changes in the interaction between 'public' and 'private' actors at national, regional and international level have become very widespread. What has occurred is a re-negotiation of relations between the state and market.<sup>28</sup> This has caused a transformation in the interaction between the CSR actors. Indeed 'private' participation in public decision making has increased and become more

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<sup>25</sup> Mcinerney, *Ibid.*

<sup>26</sup> M. Ottoway, *Corporatism Goes Global: International Organizations, NGO networks and Transnational Business* (2001) 7 *Global Governance* 1.

<sup>27</sup> J. Freeman, *The Private Role in Public Governance* (2000) 75 *N.Y.U. L. Rev.* 543

<sup>28</sup> P. Newell, *From Responsibility to Citizenship? Corporate Accountability for Development* (2002) IDS Working Paper No.32. at 91.



important than ever. The need to look at accountability becomes more acute in this situation.

This reality must be considered in an MA for CSR actors. Otherwise, gaps in accountability will remain. It is suggested that in devising an MA to enable standard setting, two major factors need scrutiny. The first is to structure responsibility through a conceptual analysis. This notion sees responsibility in terms of a characteristic of decision-making processes rather than as involving compliance with a particular set of substantive and behavioural norms.<sup>29</sup> The second looks to locate authority. The discussion below will explore both parts in turn. Underlying the discussion is an exploration of how responsibility is to be discharged. The case for social responsibility advocated here is not to institutionalize any specific moral code but to set in place mechanisms or processes that can tap into corporate capability through an interaction between the CSR actors.

## **5.2 Structuring Responsibility**

In order to understand 'responsibility' as an analytical concept, there is a need to delve into its basic norms and then try to see how it can 'fit'<sup>30</sup> with the corporate institution. The approach here is to view responsibility as a subset of accountability particularly because of the nature of corporate power. A corporation is seen to be accountable to another only if it has responsibility for doing something.<sup>31</sup> To elaborate, when a corporation is asked to follow rules or achieve certain goals, it should be held responsible when it fails to do so. Responsibility then can be said to define the scope of conduct in order for the corporation to be made accountable to particular rights-holders. Responsibility itself goes to either the performance of a particular task or for the supervision of people and systems through which the task is performed.<sup>32</sup> Kuper distils the nexus between responsibility and accountability: '[r]esponsibility becomes the middle term that allows us to delineate justifiable and feasible rights-claims and to identify and hold to account [the institutions] who should deliver on those rights'.<sup>33</sup>

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<sup>29</sup> Parkinson, above n3 at 364.

<sup>30</sup> Davies, above n2 at 80-6.

<sup>31</sup> Day and Klein, above n8 at 5.

<sup>32</sup> See Davies, above n2 at 75.

<sup>33</sup> A. Kuper, 'Introduction' in A. Kuper (ed) *Global Responsibilities* (New York and London: Routledge, 2005) at xxii.



Responsibility as a notion embodies two main norms, negative and positive. The distinction between positive and negative responsibilities is said to be a distinction between that which is owed to others in the form of doing something and what is owed to others by way of non-interference. Positive responsibilities invoke 'some positive act' to benefit another while negative responsibilities are ones that oblige a person to 'refrain from some act'.<sup>34</sup> In short, positive responsibilities are responsibilities to help or do something. Negative responsibilities on the other hand are responsibilities not to harm.<sup>35</sup> Negative responsibilities have a stronger call of obligation in law. This can be seen in the basic non-maleficence dictum, which is the duty not to harm others that constitutes the common thread linking criminal and civil law.<sup>36</sup> There appears to be two sides of the claim that negative responsibilities are stricter. First, when the two kinds of responsibilities are pitted against each other, it is not seen as permissible to harm one person (a negative act) in order to prevent other persons to suffer from such harm (a positive act). Secondly, negative responsibilities are thought to outweigh the pursuit of personal interests more often than positive ones.<sup>37</sup> As such, positive responsibilities are thought to be borne only in very clearly defined and exceptional cases.<sup>38</sup>

In order to understand the interaction between positive and negative responsibilities better, it is useful to look at the idea of responsibilities along with rights, both of which have positive and negative facets. The linkage can be seen in the relationship between particular rights with certain directly corresponding responsibilities.<sup>39</sup> Exclusively negative responsibilities can be said to be those that refrain from violating the right in question. Such a 'minimalist' account is usually politically liberal in origin. This places

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<sup>34</sup> J.W. Salmond, *Jurisprudence* (London: Sweet and Maxwell, 1966, 11<sup>th</sup> ed) at 283, P. Foot, *Virtue and Vices* (Oxford: Blackwell, 1978) at 27.

<sup>35</sup> R.E. Goodin, *Protecting the Vulnerable A Reanalysis of Our Social Responsibilities* (Chicago and London: University of Chicago Press, 1985) at 18 : 'There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant'.

<sup>36</sup> Goodin, *Ibid.*

<sup>37</sup> *Ibid.* Scheffler illustrates: 'I may not be permitted to harm an innocent person in order to advance my career aims, for to do so would violate my duty not to harm. Yet I may be permitted to advance my career aims in other ways, even if by so doing I will miss out on an opportunity to prevent a comparably serious harm from befalling a comparably innocent person', see S. Scheffler, *Boundaries and Allegiances* (Oxford: OUP, 2002) at 36.

<sup>38</sup> D. Millon, *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law* (1993) 50 Wash. Lee Law Rev. 1373 at 8.

<sup>39</sup> T. Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002), W. Hohfeld, *Fundamental Legal Conceptions, As Applied in Judicial Reasoning and Other Legal Essays* (New Haven: Yale University Press, 1919).



certain positive rights, namely economic, social and cultural rights as aspirational and as having no appointed institution for their realization. For the minimalist, rights require only self-restraint.<sup>40</sup> 'Maximalist' accounts on the other hand are those which consider all human rights as entailing both negative and positive responsibilities.<sup>41</sup> Existing rights instruments are formulated along minimalist lines. This basically means that it requires only restraint or negative responsibilities in order to realize rights.<sup>42</sup> As Hart describes, forbearance 'from the use of coercion or restraint' is the basic norm against which the concept of rights are formulated.<sup>43</sup> Negative responsibilities are thus seen as more important, often bearing the imprimatur of hard law. Positive responsibilities tend to be couched as soft law.

The limitations of responsibility couched in the negative in CSR standards need scrutiny. Stone for example labels the nature of negative laws as 'harm based' rules.<sup>44</sup> The rules are harm based in that the law is to stay its hand unless and until the corporation engages in the unwanted conduct. Such rules:

target the [corporation] as an impenetrable atom, leaving its participants free, so far as the 'outside world' is concerned, to reach whatever internal arrangements they may bargain for as regards how best to avoid the law's judgments, and how to allocate the burdens of those judgments, and how to allocate the burdens of those judgments it fails to escape.<sup>45</sup>

Without a clear sense of positive and negative responsibilities, the corporation is free to devise whatever method it so chooses to achieve the target set. Often, this leads to adopting particular standards without any form of institutionalization or in worst cases, leads to chronic non-compliance.<sup>46</sup>

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<sup>40</sup> Pogge, *ibid* at 64-65. An example can be seen in those rights outlined in article 22-7 of the Universal Declaration of Human Rights. Note that although Pogge vouches for a minimalist account of duties, his argument is much more nuanced as it is based on an 'institutional understanding' presupposing social conditions within which rights can be met: '...since citizens are collectively responsible for their society's organization and its resulting human rights record, human rights ultimately make demands upon...citizens. Persons share responsibility for official disrespect of human rights within any coercive institutional order they are involved in upholding'.

<sup>41</sup> See for example, H. Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton, NJ: Princeton University Press, 1980).

<sup>42</sup> One exception is the Constitution of the Republic of South Africa 1996 which embraces both positive and negative rights.

<sup>43</sup> H.L.A. Hart, *Are There Any Natural Rights?* (1955) 64 *Philosophical Review* 175.

<sup>44</sup> C. Stone, 'Economic and Social Policy Inside the Enterprise' in K. Hopt and G. Teubner (eds), *Corporate Governance and Directors Liabilities* (de Gruyter, Berlin: 1987) at 126.

<sup>45</sup> *Ibid*.

<sup>46</sup> D. McBarnett, *Law, Policy and Legal Avoidance* (1988) *Journal of Law and Society* 113.



The effect of recognizing positive and negative responsibilities is this. It recognizes the limited way CSR standard setting is currently structured. Often, hard and soft CSR tend to be couched in negative terms. The corporation is asked not to engage in the various activities which are listed in a particular code. Within hard CSR regimes in particular, there are in place laws constraining corporate involvement ranging from the environment, tort, product liability to labour legislation. Stipulated in negative terms, these CSR standards tend to specify the lowest denominator for compliance. The rules inadvertently operate at a 'minimal' level which then can be said to act as a refrain. In short, corporate decision making in this sense merely ensures that the minimum requirements that are set out are not violated.

Without awareness of both positive and negative responsibilities, CSR standard setting will be tepid and incoherent. This is because standard setting becomes concerned with underlining only the more prominent examples of misconduct. As a result, repercussions are felt because standard setting will tend to play 'catch up'. Articulated this way, standards tend to function in a reactive manner, acting as an *ex post* mechanism. This doesn't address the reality that corporate activity and the fact that its impacts are constantly changing. For example, when rules are couched negatively, the effects of corporate activity can only be addressed long after transgressions have occurred. Ultimately, CSR engagement is only truly meaningful when hard and soft CSR are integrated with positive and negative responsibilities. Otherwise, CSR narratives will continue to be saddled by benign standards as the interplay between nexus becomes stagnant.

Recognition of positive responsibilities can be seen in progressive instruments like the Companies Act 2006 where S172 requires directors to 'have regard' to corporate constituencies. Assurance systems like the Global Reporting Initiative (GRI)<sup>47</sup> and the AA1000 assurance standard (AA1000 AS)<sup>48</sup> are also progressive in the attempt to couch responsibilities more completely with combinations of negative and positive responsibilities. When standard setting is laid out this way, it provides the base from which actors regularly arrive at a more mutually satisfactory and meaningful range of

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<sup>47</sup> The GRI is a reporting framework that attempts to develop a global CSR report initiative through integrated indicators, see <http://www.globalreporting.org/Home>.

<sup>48</sup> The AA1000AS is a CSR audit system that is increasingly popular with MNCs, see *Assurance Standard* (London: Accountability, 2003).



responsibilities which in turn become part of the corporate strategic soul. This is the case for positive responsibility of the corporation:

...demands for responsibility need not be confined to the avoidance of obvious forms of social harm, such as might result from pollution, dangerous products but embrace all exercise of social decision making power by the corporation for example, in relation to plant closure or policy on research and development and the various other manifestations of corporate discretion.<sup>49</sup>

Recognizing positive and negative responsibility is to relate the role played by the corporation in society. By relating various institutional activities, links are created with the kind of relationship that generates responsibilities as a matter of course. Through this linking of corporate activities with its interaction in society, the responsibility of the corporation bears a more realistic 'fit'. It helps open the bounded corporation to society, both informing each other and benefiting in the process. Structuring responsibility therefore implicates institutional shaping. How deeply standards have been internalized depends on an understanding of responsibility. The more nuanced the understandings and judgments, the more distinctive the formation of responsibility. In this way, the scope of responsibility weaves the corporation's interaction with society.

To reiterate, responsibility is understood to carry with it both positive and negative implications. Such an understanding shows how the relationship between the CSR actors can be structured. While the scope of responsibility is explained, legal and political analyses remain constrained by public and private dichotomy. In truth, locating 'authority' is a struggle as it involves tearing down some long entrenched institutional understanding of how the various actors function. Further, CSR standards are emerging as autonomous networks of rule making. The interplay between the actors can reveal a deeper understanding of what it means to make the corporation responsible socially. The practices that emerge are not the natural outgrowths of autonomous actors. Instead, each one is a component that can beneficially inform the other which in turn influences the map of accountability. It is to this that the narrative now looks to.

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<sup>49</sup> Parkinson, above n3 at 25.



### 5.3 Governance in Brackets

Locating authority becomes an important task because of the implicit assumption made about authority in standard setting. The mapping of accountability is influenced by such an assumption. Further, regulation tends to be derived from the imprimatur of government, which then assumes that government is ‘unilaterally, hierarchically, authoritatively’ in charge.<sup>50</sup> The reason behind this assumption can be traced to the analytical inadequacies that tend to focus on the ‘public’ nature of authority.<sup>51</sup> The reality of the extensive corporate and NGO role in various regulatory frameworks shatters that notion however and replaces it as a set of ‘negotiated relationships’.<sup>52</sup> The multiple and plural sources of governance tends to obscure the extent to which society is being reconfigured by a ‘privitization of public power’ as well as the creation of an entirely new ‘private’ realm, with a distinctively ‘public’ presence which has its own, unique structure of power and domination.<sup>53</sup> An examination of the practical combination of public and private authority will be the next step in informing the MA.

Identifying the fluidity of the public and private interaction will materialize a clearer picture of ‘authority’. Tracing the involvement will highlight the misconception that the CSR actors are independent of each other. The reliance is great and the overlap in decision making is so fluid that maintaining institutional distinctions become increasingly difficult. It is observed that the blending of public and private has always occurred to some degree or another. As explored in Chapter 3, it is a hard pressed task to find a halcyon era when services were clearly only by the government. Further, governments themselves rely on each other to develop standards.<sup>54</sup> What is becoming more apparent is that with a greater density of interactions between the CSR actors, consistent forms of transnational networks are becoming more entrenched. Underlying the emergence of these networks is the interdependence between the actors involved.

Such networks of authority are also increasingly apparent in fields as diverse as policing terrorism, banking and financial regulation, telecommunications, intellectual property and trade. Increasingly, these consequences cannot be addressed effectively by isolated

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<sup>50</sup> Freeman, above n27 at 672.

<sup>51</sup> C. Cutler, *Private Power and Global Authority* (Cambridge: Cambridge University Press, 2003) at 4.

<sup>52</sup> Freeman, above n27 at 672-3.

<sup>53</sup> Cutler, above n51.

<sup>54</sup> M. Zurn, *Global Governance and Legitimacy Problems* (2005) Government and Opposition 260 at 2.



national regulatory and administrative measures. The nature of the various transnational networks appears to be varied. Some are fairly informal intergovernmental networks of cooperation.<sup>55</sup> Others have permanency of structure and regulatory implications.<sup>56</sup> The increasing proliferating network of CSR actors gives rise to standards that emerge in brackets. These brackets are an uncomfortable explanation for the emerging standards which cannot be easily grounded within traditional compartments of analysis. In this general landscape, CSR standard setting appears as being neither private nor public, intersecting between national and global bases while steering between legal parameters and market requirements.

An example of bracketed standards like this can be seen in NGO involvement in CSR which has brought forth a proliferation of monitoring of systems. Such involvement in regulation has been called a response to the weakening of national governments and the strengthening of corporations.<sup>57</sup> O'Rourke calls the shift from state regulation to non-state actor involvement as 'outsourced regulation'.<sup>58</sup> Nevertheless, O'Rourke misses a key point by seeing regulation as being either wholly private or wholly governmental. Reality presents these brackets as a much more interlinked, fluid network between the actors. Indeed, it is becoming increasingly difficult to distinguish the state's own expertise from non-state actors since they are so well-integrated into standard setting processes. Further, the surrender of standard setting to non-state actors is not necessarily indicative of retreat by the state. Such activities instead can be said to signal 'transformation' of the states role towards a position that is more focused on co-ordination as well as recognition of the fusion of public-private resources.<sup>59</sup>

Changes in the interaction between the state and the corporation has also precipitated the need to create new accountability mechanisms. Government's express usage of corporate power is generally through privatization and contracting out which includes

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<sup>55</sup> An increasing number of public agencies other than ministries, such as central bankers and securities regulators, establish links with their counterparts in other countries and thus form transgovernmental networks that take decisions on issues of common concern. See A. Slaughter, 'Governing the Global Economy Through Government Networks', in M. Byers (ed.), *The Role of Law in International Politics*, (Oxford: Oxford University Press, 2000).

<sup>56</sup> See generally, J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

<sup>57</sup> S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996).

<sup>58</sup> D. O'Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labour Standards and Monitoring* (2003) 31 *Policy Studies Journal* 1.

<sup>59</sup> H. Schepel, *The Governance of Private Constitution* (Oxford and Portland: Hart Publishing, 2005) at 20.



giving over to the market the provision of services once provided by government.<sup>60</sup> This has necessitated new modes of accountability, seen for example in housing,<sup>61</sup> mental health facilities<sup>62</sup> and social services.<sup>63</sup> Synergies between the state and corporations become what Likosky labels as the ‘compound corporation’.<sup>64</sup> The compound corporation describes the intermingling of public and private elements within a single corporation. Such corporations ‘alchemically mix’ public and private facets to strengthen their power.<sup>65</sup> Compound corporations have existed in various forms throughout history, flourishing since the slave trade as well as the colonial period.<sup>66</sup>

As observed in Chapter 3, the reason for the increased interdependence in today’s regime of mixed services can be said to be because of governments’ deepening reliance on the corporation for the performance of public functions. So government often seeks to use techniques and talents that only the corporation can provide.<sup>67</sup> The changes can be particularly seen in administrative law which now tends to include discussions on the need to legitimate new blends of public and private power used for public interest. This diversifies the traditional administrative law position which is to legitimate exercises of power by public authority.<sup>68</sup> Further, corporations create opportunities to directly influence policy making. Thus, coincident with the rise of corporate power are notable trends toward new blends in public and private power.<sup>69</sup> Indeed, it is crucial to note that corporate involvement is much wider than the acknowledged ‘contracting out’ or ‘privatization’ situations. Contribution to regulation ranges from ‘merely’ advisory to the

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<sup>60</sup> ‘The word ‘privatization’ can be used to suggest a host of arrangements. These include, among other things: (1) the complete or partial sell-off (through asset or share sales) of major public enterprises; (2) the deregulation of a particular industry; (3) the commercialization of a government department; (4) the removal of subsidies to producers; and (5) the assumption by private operators of what were formerly exclusively public services, through, for example, contracting out’, J. Freeman, *Extending Public Law Norms through Privatization* (2003) 116 Harv. L. Rev. 1285. See also T. Prosser, *Regulating Public Enterprises* (2001) Public Law 505.

<sup>61</sup> *Poplar Housing & Regeneration Community Association Ltd v Dohnaghue* [2002] Q.B.48.

<sup>62</sup> *R. v North and East Devon Health Authority Ex p. Coughlan* [2001] Q.B. 213.

<sup>63</sup> *R. (on the application of Heather) v Leonard Cheshire Foundation* [2002] 2 All E.R. 936.

<sup>64</sup> M. Likosky, *Compound Corporations: The Public Law Foundations of Lex Mercatoria* (2003) 3 Non State Actors and International Law 251.

<sup>65</sup> *Ibid* at 253. See also G. Teubner, ‘Legal Pluralism in the World Society’ in G. Teubner (ed) *Global Law Without a State* (Dartmouth: Aldershot, 1997) 3-30.

<sup>66</sup> The East India company is an example, see J. Sullivan, *The Future of Corporate Globalization : from the Extended Order to the Global Village* (Westport, Conn. : Quorum Books, 2000).

<sup>67</sup> E. Mason, ‘Introduction’ in E. Mason (ed), *The Corporation in Modern Society* (Atheneum, New York, 1980) at16.

<sup>68</sup> M. Taggart (ed), *The Province of Administrative Law* (Hart Publishing: Oxford, 1997) at 95.

<sup>69</sup> A. Aman, *The Globalizing State: A Future Oriented Perspective on The Public-Private Distinction, Federalism and Democracy* (1998) 31 Vand. J. Transnat’l L. 769 at 802.



full fledged assumption of policy-making authority with state regulatory bodies.<sup>70</sup> The reality is that the corporation continually makes decisions which impinge on even the most traditionally 'public' areas, for example, military activities.<sup>71</sup>

Thus, despite the analytical disassociation of the state and the non-state actors, in practice the actors are often intermingling in activities. It can then be said that new 'blends' in public and private power have emerged rapidly.<sup>72</sup> The blending of both types of powers means that both public and private authorities are used interchangeably, depending on the particular activity or function of the corporation. The interaction is best identified as 'mixed administration' in which private and public actors share responsibility for both regulation and service provision.<sup>73</sup> Of course the synergies between the CSR actors might be desirable in certain circumstances, but not others. Nevertheless, given that power does not change when transferred from public to private, control does depend on the nature of the power, not the identity of the power holder.<sup>74</sup>

The issue then is not so much state failure or power encroachment by non-state actors but the interaction between sources of authority that have not been given due consideration in law. This is what gives rise to 'governance' networks. CSR narratives are built around these networks. This is apparent because of the increasing reliance of the actors on each other in CSR engagement. Governance includes what traditionally is thought of as 'government' like states, legislatures, government agencies and courts but also all the other sites where efforts to exercise authority are undertaken. It is a highly complex phenomenon in terms of participating actors, modes of operation and institutional forms.<sup>75</sup> It can mean different things in different contexts, but the concept

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<sup>70</sup> Policy making also happens at the international level. For example, government trade representatives have been known to ask corporations what they want and negotiate accordingly. See generally, Braithwaite and Drahos, above n56.

<sup>71</sup> L. Dickinson, *Government for Hire? Privatizing Foreign Affairs and the Problem Accountability in International Law* (2005) 47 Wm. & Mary L. Rev. 135: 'Not only are there approximately 20,000 private military contractors in Iraq, but the Abu Ghraib prison scandal revealed that even such sensitive tasks as military interrogations have been privatized. Moreover, according to a military report, over one-third of the private interrogators at Abu Ghraib lacked formal military training as interrogators. As one of these interrogators revealed, 'cooks and truck drivers' were hired because the private company in charge of providing interrogation services was 'under so much pressure to fill slots quickly. It is not surprising then that many reported incidents of abuse at Abu Ghraib have now been tied to these private contractors'. See also C. Walker and D. Whyte, *Contracting out War? Private Military Companies, Law and Regulation in the UK* (2005) 54 ICLQ 651.

<sup>72</sup> Aman, above n69.

<sup>73</sup> M. Aronson, 'Responses to Privatization and Outsourcing' in M. Taggart (ed) *The Province of Administrative Law* (Hart: Oxford-Portland, 1997) at 47.

<sup>74</sup> *R v The Panel on Takeovers and Mergers ex p Datafin & Anor* (1987) 1 QB 815.



appears to relate to decision making by a group of actors towards addressing a common problem.<sup>76</sup> Often it is used broadly to any and all calculated efforts to steer or direct the conduct of oneself as well as others. It also refers to the overall effect that emerges in socio political systems as a result of these interacting efforts. The idea is especially resonant with the increasing decentralization of states to a network of state and non-state institutions.<sup>77</sup>

In CSR narratives, with the disjunction of governance from government, the core of standard setting rests on horizontal forms of interaction between actors. The actors are sufficiently independent of each other and yet also interdependent. The interpenetration in standard setting activity gives rise to legitimacy concerns. This is because de facto authority is assumed by various non-state actors. The state, as de jure authority, often takes the role of steering or coordinating the networks. This governance scheme faces criticism that comes about due to the absence of mechanisms ensuring that decision-makers are democratically accountable to the various actors affected by their decisions. Further, as Freeman argues, the vast involvement of private actors is a matter that undermines the features of decision making demanded of public actors.<sup>78</sup> Nevertheless, 'private' actors, even when classified as such, wield power and have such coercive effect that it is the implication of their activity, not the classification of their 'privateness' that matter. The location and structure of legitimate authority is neither obvious nor self-evident. Examining the involvement of the various CSR actors in standard setting has shown that without really deconstructing the public-private divide, the engagement will be riddled with incoherence. The aim in the next part is to show CSR as a governance balance between the actors and how the rule of law can be restructured towards recognizing the reality of the interaction.

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<sup>75</sup> J.N. Rosenau, 'Governance in a New Global Order' in A. McGrew and D. Held (eds) *Governing Globalization: Power, Authority and Global Governance* (Cambridge: Polity Press, 2002) at 71.

<sup>76</sup> See Commission on Global Governance, *Our Global Neighbourhood: The Report of the Commission on Global Governance* (1995) : 'Governance is the sum of the many ways individuals and institutions...manage their common affairs'.

<sup>77</sup> S. Wood, 'Codes, Problematizations, Authorizations and the Public/Private Divide in W. Cragg (ed) (2005) at 246, M.Foucault, 'Governmentality' in G. Burchell, C. Gordon, and P. Miller, *The Foucault Effect* (Chicago: University of Chicago Press, 1991), R.A.W. Rhodes, *The Hollowing Out of the State* (1994) 65 *Political Quarterly* 138., J.N. Rosenau, 'Governance, Order, and Change in World Politics in J.N. Rosenau and E.-O. Czempiel (eds.) *Governance without Government: Order and Change in World Politics* (Cambridge/New York: Cambridge University Press, 1992) at 1.

<sup>78</sup> J. Freeman, 'The Real Democracy Problem in Administrative Law' in D. Dyzenhaus (ed), *Recrafting the Rule of Law* (Hart: Oxford-Portland, 1999) at 335.



## 5.4 The Rule of Law and Governance

As observed, governance networks created by CSR standard setting invoke legitimacy concerns. The source of the concern goes back to the rule of law. Adherence to the ideal of the rule of law is the philosophy behind this control of power. It is a doctrine that is traced back to Dicey and embodies the idea of government under the law and accountable to law.<sup>79</sup> The promulgation of rule-making originating elsewhere than the state is said to basically violate the rule of law.<sup>80</sup> At the level of the sovereign state, the constitution underlines the principles that arise from the rule of law.<sup>81</sup> The democratic foundations for the exercise of power are the sine qua non of legitimacy. The broader explanation is based on how concentration of power is justified in the state. In this case, there is in place a system of checks and balances which prevent power from being used arbitrarily. So, the power vested in the state is justified by a system of democratic government and the assurance that the state's power is subject to constraints which prevent it from being used arbitrarily.<sup>82</sup> The doctrine demands that powers be granted legitimately and that their exercise is 'according to law'.<sup>83</sup> 'According to law' means both according to the legal rules and something over and above purely formal legality and imputes the concepts of legitimacy and constitutionality. Legitimacy in turn implies rightness and morality of law.<sup>84</sup>

It is the legitimacy of the law that comes in question when standard setting initiatives by non-state actors have public policy implications. These standards are not accounted for in constitutional terms and when it transcends the boundaries of the sovereign state,

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<sup>79</sup>The rule of law enjoins the faithful conformance with laws and prescribed procedures on the part of the administrative bodies. According to Dicey it includes (i) the absolute supremacy or predominance of the law as opposed to arbitrary exercise of power, (ii) equality before the law and that every man is subject to the ordinary law of the land (iii) the principles of the constitution pertaining to personal liberties were a result of judicial decisions determining the rights of persons brought before the ordinary courts. See AV Dicey, *An Introduction to the Study of the Law of the Constitution* (London : ELBS, 1968). Many analysis on the workings of rule of law has been advanced. See for example W.B. Harvey, *The Rule of Law in Historical Perspective* (1961) 59 Mich. L. Rev 487-500, J. Raz, *The Rule of Law and It's Virtue* (1977) 93 LQR 195-211, P. Craig, *Dicey: Unitary, Self-Connecting Democracy and Public Law* (1990) 106 LQR 105, H.W. Arthurs *Rethinking Administrative Law: A Slightly Dicey Business*, (1979), Osgoode Hall LJ 1 and B. J Hibbitts, *The Politics of Principles, AV Dicey and Rule of Law* (1994) Anglo-Am.L.R. 1.

<sup>80</sup> G. Frug, *The Ideology of Bureaucracy in American Law* (1984) Harv L. Rev. 1277 at fn 277.

<sup>81</sup> The essence of the rule of law is that of the sovereignty or supremacy of law over man. For the citizen, the rule of law is both 'prescriptive'-dictating the conduct required by law-and 'protective' of citizens-demanding that government acts according to law, see Barnett, above n10 at 69.

<sup>82</sup> M. Stokes, 'Company Law and Legal Theory' in W. Twining (ed) *Legal Theory and Common Law* (Blackwell: Oxford, 1986) at 163.

<sup>83</sup> Barnett, above n10 at 94.

<sup>84</sup> Barnett, above n10.



they have no real anchor. In other words, at the transnational level, there is no overarching normative structure that ties actors together. International law, as it is currently structured, tries to address this legitimacy problem by embracing the notion of dualism. Dualism considers international law and internal law of states as wholly separate legal systems, the former creating obligations only among sovereign nations and the latter allowing each state to determine the means and form by which it carries out its obligations.<sup>85</sup> The technique of dualism however becomes more fragile when the centre of decision making becomes more blurred.<sup>86</sup> Dualism is even more questionable when public and private powers intermingle as exemplified in CSR standard setting initiatives. As a result, some writers like Dahl maintain that international governance institutions are unable to support direct 'democratic deliberation and decision'.<sup>87</sup> Such governance networks lack what 'fully developed institutions for direct electoral or accountability as sovereign state systems provide.'<sup>88</sup> This situation reflects the political limitations of the rule of law.

Indeed, the problems with the rule of law as it is currently conceived can be traced back to liberalism. The liberal rule of law is tenuous because it contains within it the dialectical tension between law's role in 'constituting and empowering the state and its role as a regulator and critic of state action'.<sup>89</sup> Law presupposes the centrality of the state in the activity of governing and is thus dependant on the demarcation between the governing and the governed. As demands on the regulatory machinery is greater with participation of non-state actors, the capacity of the state to respond to these demands decreases. This in turn leads to an 'erosion of the coherence, authority and effectiveness'<sup>90</sup> of the law. These competing roles question Dicey's articulation of the objectivity of the rule of law. It highlights that perhaps there is no objective content to law, its content is indeterminate and a function of the ideological uses to which it is put.<sup>91</sup> The notion of the rule of law then appears dependent upon the political foundations of the state. As it stands, rather than becoming a tool for ensuring accountability and

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<sup>85</sup> H. Koh, *Why Do Nations Obey International Law* (1997) 106 Yale L.J. 2599, *Bringing International Law Home* (1998) 35 Hous. L. Rev. 623.

<sup>86</sup> P. Nanz and J. Steffek, *Global Governance, Participation and the Public Sphere* (2004) *Government and Opposition* 314 at 317-8.

<sup>87</sup> R. Dahl, 'Can International Organizations Be Democratic? A Skeptic's View', in I. Shapiro and C. Hacker-Cordon (eds) *Democracy's Edges* (Cambridge: Cambridge University Press, 1999) at 19.

<sup>88</sup> A. Moravcsik, *Is there a Democracy Deficit in World Politics* (2004) *Government and Opposition* 336-7.

<sup>89</sup> D. Kennedy, *A New Stream of International Law Scholarship* (1988) *Wisconsin International Law and Policy Journal* 1.

<sup>90</sup> Schepel, above n59 at 29.

<sup>91</sup> Cutler, above n51 at 86.



political participation, the rule of law has become a mechanism for legitimating policies of the state based on representative institutions.

The question then is if all 'privately' generated norms or standards need to be locked back to national constitutions first in order to be recognised? In sum, what happens when standards transcend recognized political boundaries? The rule of law, if it has to have contemporary meaning must be able to recognize the emerging governance networks including CSR standard setting. Otherwise, it risks incoherence with the changing reality. In order to accommodate this reality, the idea here is to reform the rule of law to encapsulate all sites of power and not to dismiss it merely because it fails the Diceyan understanding of public. This reform can only be done by deconstructing the public-private distinction. The key aim is to evaluate how standard setting initiatives are constrained by traditional public-private compartmentalization. Why is the public-private divide so demarcated and how can it be deconstructed is where the discussion now moves on to.

## 5.5 Deconstructing Public-Private Divide

Walzer associates the public-private distinction with the liberal practice of the 'art of separation' whereby the 'political community is separated from the sphere of economic competition and free enterprise'.<sup>92</sup> It will be observed that the disassociation between the public and private is not reflective of an organic, natural or inevitable separation but an analytical construct that evolved with the political idea of the state.<sup>93</sup> Indeed, the public-private divide has its roots in liberalism.<sup>94</sup> Horwitz states that the 19<sup>th</sup> century emergence of the market as a central institution gave birth to the primacy of the public-private distinction in legal discourse. One of the central goals of 19<sup>th</sup> century legal thought was to create a clear separation between 'constitutional, criminal and regulatory law which was categorised as public law' and the 'private laws of tort, contracts, property as well as commercial law.'<sup>95</sup> Presenting itself as a neutral and objective system, the liberal origins of the distinction shrouds the underlying political compartmentalization.

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<sup>92</sup> M. Walzer, *Liberalism and the Art of Separation* (1984) Political Theory 317-9.

<sup>93</sup> Cutler, above n51 at 57.

<sup>94</sup> See P. Cane, 'Public law and Private Law: A Study of the Analysis and Use of a Legal Concept' in J. Eklaar and J. Bell (eds), *Oxford Essays in Jurisprudence Third Series* (Clarendon Press: Oxford, 1987) at 57.

<sup>95</sup> M. Horwitz, *The History of the Public-Private Distinction* (1979-80) Pennsylvania L. Rev. 1424. He elaborates: 'The ideas of a distinctly public realm began to crystallize with the emergence of the nation state



Dewey explains the state's role in maintaining this 'public' fiction. He sees the state as a series or grouping of 'publics'. Once the public is formed it tends to prevent the emerging new publics:

The new public which is generated remains long inchoate, unorganized, because it cannot use inherited political agencies. The latter, if elaborate and well institutionalized, obstruct the organization of new public. They prevent that development of new forms of the state which might grow up rapidly were social life more fluid, less precipitated into set political and legal moulds. To form itself, the public has to break existing political forms.<sup>96</sup>

Seen in the abstract, it is easier to conceive what is private and what is public, but the reality is that actual actors and activities rarely satisfy the notions of what it takes to be one or the other.<sup>97</sup> The challenge to the public-private divide comes from social and political theorists as well as critical legal theories<sup>98</sup> and feminist critiques.<sup>99</sup> These challenges question the normative dualism often associated with the dichotomy of the need to control exercise of state power as opposed to private. The range of criticisms start to give a flavour of the frailty of the divide.

In fact, the public-private misconceptions miss the pluralist insights that there are multiple sites of political and economic power within society.<sup>100</sup> Klare says that the reason for this lies in the peculiarity of legal discourse. It tends to constrain political imagination and to induce belief that all social arrangements and institutions are just

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and theories of sovereignty in the 16<sup>th</sup> and 17<sup>th</sup> centuries. On the other hand, in reaction to the restrained power to make law, there developed a countervailing effort to stake out distinctly private sphere free from the encroaching power of the state'.

<sup>96</sup> J. Dewey, *The Public and Its Problems, The Later Works 1925-53* (Carbondale: Southern Illinois University Press, 1984) at 235.

<sup>97</sup> C.D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?* (1982) *Pennsylvania L. Rev.* 1443-5.

<sup>98</sup> Critical Legal Studies builds on legal realism and attempts to expose the incoherence of the public-private divide, revealing that a purely private realm exists only as a legal construct. The realist point that the private realm is already deeply structured and regulated by the authority of the state, See D. Kennedy, *The Structure of Blackstone's Commentaries* (1979) 209 at 217, K.E. Klare, *The Public/Private Distinction in Labour Law* (1982) 130 *Univ. of Pennsylvania L. Rev.* 1443-45. Note that while the public-private distinction has come under some attack in domestic law, the international dimension has escaped attack. Paul suggests that the distinction may be because legal realists were interested in creating a more powerful, centralized administrative state bureaucracy; they were not interested in attacking the nascent institutions of international law. See J. Paul, *The Isolation of Private International Law* (1988) *Wisconsin L.J.* 7(1) 149 at 153.

<sup>99</sup> See R. West, *Jurisprudence and Gender* (1988) 55 *U of Chicago LR*, H. Charlesworth and C. Chinkin, *The Gender of Jus Cogens* (1993) *Human Rights Quarterly* 63, J. Conaghan, *Tort Law and Feminist Critique* (2003) 56 *Current Legal Problems* 175.

<sup>100</sup> P. Craig, *Theory, Pure Theory and Values in Public Law* (2005) *PL* 440.



and rational.<sup>101</sup> In seemingly ‘private’ arrangements, collective and even coercive action can be accomplished through contract as exemplified in clubs, unions, associations and the like.<sup>102</sup> Cox argues that the distinction between the polity and economy, between the state and civil society is less relevant considering the current political economy.<sup>103</sup> The state and civil society are so interpenetrated that the concepts have become almost purely analytical and are only very vaguely and imprecisely indicative of distinct spheres of activity.<sup>104</sup> The public-private distinction perpetuates law’s hierarchy of rules ‘where the higher rules legitimate the lower ones’. Normative phenomena outside of this hierarchy of rules which cannot be traced back to the constitution are sometimes not even seen as law, ‘just facts’. Standard setting by non-state actors tends therefore to be subjugated under the ‘hierarchical frame of the national constitution that represents the historical unity of law and state’.<sup>105</sup>

Cutler evaluates how the public-private distinction operates at multiple levels. It operates legally, as a ‘separation of academic subjects and as a separation of legal doctrines’. It also operates materially, as the ‘determinant of political identity and subjectivity in state and international affairs’, and symbolically, as a ‘powerful ideological justification for liberal inspired theories of law and political economy’.<sup>106</sup> In short, the public-private distinction is an historically specific construct that needs to be revised to accommodate changing material, ideological and institutional conditions. This fact was not unknown to earlier jurists. For example, Maitland had noted that the company and the state are two species within a single genus that of more or less permanently organised groups of individual actors, group units to which actions, intentions, praise and blame can be attributed.<sup>107</sup> In fact, the common law has recognized in the past the special duties should be imposed on ‘common callings’ and owners of monopolies whose modern equivalent may be now the privatized utilities.<sup>108</sup>

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<sup>101</sup> K. Klare, above n98.

<sup>102</sup> A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1996).

<sup>103</sup> R. Cox, ‘Social Forces, States and World Orders: Beyond International Relations Theory’ in R. Cox and T. Sinclair, *Approaches to World Order* (Cambridge University Press: Cambridge, 1996) at 85-123.

<sup>104</sup> Cox, *Ibid.*

<sup>105</sup> G. Teubner, *The King’s Many Bodies: The Self-Deconstruction of Law’s Hierarchy*, (1997) 31 *Law & Society Review* 763 at 770.

<sup>106</sup> Cutler, above n51 at 32-3.

<sup>107</sup> F.W. Maitland, Introduction to Von Gierke, O, *Political Theories of the Middle Age* (1938) at ix.

<sup>108</sup> P. Craig, *Constitutions, Property and Regulation* [1991] PL 538.



Frazer suggests once the unitary model of public is abandoned, the concerns and voices of various constituents become more prominent. Dispersed networks can accommodate the various constituent's desire for their own space and voice. Frazer shares concern with liberal theorists that the abrupt reformulation of the public-private divide may lead to corrosion of fundamental liberties. When the public and private is conceived as a unified front, forming 'anonymous, distinct structures', there are implications to the existing political make up.<sup>109</sup> This is because political structure may homogenize and repress difference. Heterogeneity, otherness and difference cannot find expressions in this set up. However Frazer goes on to argue that such reduction is only material when there is lack of awareness of the utility of integrating authorities on both sides of the divide.<sup>110</sup> Santos cogently argues in similar terms that '[w]e live in a time of porous legality or legal porosity, of multiple networks of legal orders' which causes 'constant transitions and trespassing'. Law and political structures must correspond to rationalize this intersection.<sup>111</sup> Indeed, to 'equate law with the state impoverishes both sociological and legal analysis'.<sup>112</sup> When there is failure to see the place of rule-making in 'private' institutions, the experience of governance is truncated.

According to Schepel, the imperative for law is no longer either the 'submission of the market to the public interest' or the 'liberation of market forces from the dysfunctional bureaucratic stranglehold of state regulation'. Rather the imperative is to look for ways of 'co-ordinating public and private rulemaking in such a way as to preserve both social autonomy and the public interest'.<sup>113</sup> Having so far reviewed various perspectives on the notion of accountability, the narrative must now not be reduced to merely transplanting familiar accountability mechanisms from the public to the private. Such an approach implies a 'one-size-fits-all' MA. It might not only fail to generate public law standards, but might also undermine the benefits of relying on standards generated by non-state actors. The traditional, hierarchical model of accountability becomes more symbolic and less functional with each step away from the electorate. It might be more productive then to think of standard setting as a 'deeply contextual process', and to imagine it more broadly in terms of measures that spring not exclusively from top-down oversight by

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<sup>109</sup> E. Frazer, *The Problems of Communitarian Politics* (Oxford: OUP, 1999) at 234-6.

<sup>110</sup> Frazer, *Ibid.*

<sup>111</sup> B. Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London and New York: Routledge, 1995) at 473.

<sup>112</sup> P. Selznick, *The Moral Commonwealth* (Berkeley: University of California Press, 1992) at 300-1.

<sup>113</sup> Schepel, above n59 at 32.



legislature or public officials but from multiple sites of public and private authority.<sup>114</sup> It is a process that must harness the various actors to be responsive to each other.

Based on these thoughts, it is argued that rather than extending the limits of legal categories by privatizing public law or publicising private law, the relevant focus should be to 'rethink the limits of the concept of law itself'.<sup>115</sup> Governance requires not a collapse and separation of political and the economic but ways of linking these spheres of life while maintaining their social autonomy. The point is not so much breaking down the distinction as 'linking or relating the networks or governance' through law.<sup>116</sup> This linkage has already been developed. It has been shown that relationship between the CSR actors is better structured through degrees of combination of hard and soft laws as well as positive and negative responsibilities. The public and private standard setting are both about the control, exercise and management of power. What is similar and requires scrutiny is the exercise of those powers as well as the implication of the intermingling regardless of the institution. In short, the crucial point is the recognition of the negotiated relationships between the actors.

One of the distinct advantages of this approach is that it casts the effort to institutionalize CSR standard setting in a more realistic light. There is a tendency to view the involvement of non-state actors in standard setting as creating a legitimacy crisis, 'that they are menacing outsiders whose influence threatens to derail legitimate 'public' pursuit'.<sup>117</sup> And yet, as observed above, non-state actors are also regulatory resources capable of contributing to the efficacy and coherence of standard setting. A focus on interdependence reorients regulation toward facilitating the effectiveness of public-private regulatory regimes.<sup>118</sup> Further, such an argument constitutes a reinterpretation of state failure in CSR standard setting. An understanding of the mutually constitutive nature of the relationship must underline the MA in order that it addresses the realities of governance.

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<sup>114</sup> Freeman, above n27 at 672.

<sup>115</sup> Schepel, above n59 at 32-3.

<sup>116</sup> Schepel, above n59 at 35.

<sup>117</sup> Freeman, above n27 at 548-9.

<sup>118</sup> D. Osborne and T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York : Plume, 1993).



## 5.6 Conclusion

This chapter explored how the boundaries of CSR are in a constant process of redefinition. By mapping accountability in the interaction between the CSR actors, it was seen how power is diffused between the various actors and the implications of this. From here, the chapter moved to take a more constructive turn, looking to anchor standard setting initiatives in CSR based on an integrated notion of responsibility. This task criticized the tendency to utilize only negative responsibility in CSR standard setting. The implications of this were shown to impact standards and hampered pluralized responses to standards. The discussion then looked at the compartmentalization of authority as problematic and as failing to reflect the reality of changing governance. Once the public-private distinction is disintegrated, it can be recognized that the CSR actors are a collective and diffuse network of standard setting.

The next chapter aims to develop the interaction between the CSR actors by looking at the basis from which standards are generated and how they can function better through a common procedural language. The institutional foundations developed in these two chapters will provide the basis to develop a critical evaluation of standards.



## CHAPTER 6 CSR Standards in the Administrative Space

*One may also observe in one's travels to distant countries the feelings of recognition and affiliation that link every human being to every other human being.*

Aristotle, 'Nicomachean Ethics' in D. Ross, *Aristotle Nichomachean Ethics The Worlds Classics* (Oxford: OUP, 1980)

### 6.0 Introduction

In the previous chapter, the relationship among the CSR actors was developed. Mapping accountability involved underlining the dynamics of responsibility and the integrated way positive and negative responsibilities can be seen. It was then shown that public-private networks of authority are much more fused than believed and the rule of law should be extended to recognize this. This chapter furthers the external CSR narrative by extending the regulatory lens that was developed in Chapter 5. By doing this, it provides a look at the impact and effectiveness of standards through the adaptation of deliberative models of governance. Among others, CSR standards can involve a mixture of certifications, codes, reports and management systems. In each case, standards emerge through collisions and intermingling between the actors, generating 'conversations' between them.<sup>1</sup> Without some kind institutional base, these conversations or deliberations can often be a muddled, chaotic and complicated series of clashes.

The chapter begins by looking at how deliberation generates standards which at best, can be said to be messy. This is because CSR standards are so diverse and encompass so many areas that it is difficult to understand them as a coherent source of authority. Nevertheless, deliberation theory is useful to explain the notion of meta-regulation which is how the actors use standards to develop the capability of other actors. From here, the chapter moves to look at procedures of good decision making as an institutional base. It will examine how CSR actors attempt to make sense of the chaotic deliberation by resorting to develop a mutual language. This mutual language is seen to be borrowed from domestic administrative law. The tools of administrative law will be shown to be a useful place to import principles of good decision making in the governance structure. In doing this, the chapter makes a case for CSR standard setting as a legitimate site of

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<sup>1</sup> J. Black, *Regulatory Conversations* (2002) 29 *Journal of Law and Society* 163.



rulemaking. Accountability in CSR narratives emerges through such a linkage. This chapter will close by showing how the procedural base can act as a guiding tool, in that it will be able to optimise the interaction between the CSR actors. Lastly, it will be argued that when good decision making procedures are institutionalized, evaluation of standards become robust and as a result, can potentially lead to convergence in standards.

## 6.1 Designing Deliberation

Deconstructing the public-private divide extends the rule of law into a more fluid and organic relationship with the CSR actors and embraces standards from both sides of the hard and soft CSR. Concomitant with this is the shift in understanding of governance is the 'decentring' of regulation which impacts the map of accountability. Black calls this a move in the locus of the activity of 'regulating' from the state to other, multiple locations.<sup>2</sup> Traditional accounts of regulation are based on a legal requirement which compels the corporation to alter behaviour towards a 'public regarding aim'. The corporation will comply and if it fails, some sanction will follow. The behaviour of the corporation is assumed to be fixed at this point.<sup>3</sup> What is lacking in the traditional understanding of regulation is how CSR actors other than the state, particularly NGOs and corporations themselves play a regulating role. This idea of regulation does not capture the reality of governance that was explored in Chapter 5, which is a reflection on how the various CSR actors generate standards and are able to create systems and process towards achieving the aim.

In the earlier chapters, a communitarian framework was sought in order to relate the corporation into society and open the bounded corporation. Now, by looking to integrate the open corporation with the other CSR actors, this chapter turns to deliberative governance, particularly the notion of meta-regulation. The point is to show that while opening the corporation leads to invoking its capabilities, an underlying commitment to deliberation must prevail in order for the corporation to benefit from the interaction with the other CSR actors.

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<sup>2</sup> J. Black, *Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a Post Regulatory World* (2001) 54 *Current Legal Problems* 103.

<sup>3</sup> C. Parker, *The Open Corporation: Evaluation of Corporate Self-Regulation of Responsibility* (Brisbane, IIPE Biennial Conference, 2002).



Deliberation can be viewed as a form of social interaction, a particular way of thinking: reflective, open to a wide range of arguments while being cognizant of different views. Walzer sees it as a rational process that involves 'weighing the available data, considering alternative possibilities, arguing about relevance and worthiness'. From here, it becomes possible to choose the best outcome.<sup>4</sup> Deliberation is often seen as the appropriate antidote to 'group selfishness' because clashes among interests may be 'transformed by deliberation into a question of what is good for the community and acceptable in it'.<sup>5</sup> So, with regards to CSR, arguments between the competing interests of the CSR actors that prevail must not be those of the most powerful but the most convincing or what is known as the 'force of the better argument'. This is because claims must not be imposed but justified in terms of 'justice, necessity, wisdom'.<sup>6</sup> In this sense, not only is deliberation expected to clarify a particular actors preferences but to help acquire information on others' preferences, needs and interests in situations of interdependence. It is then seen to lead to the acquisition of a stronger sense of community, which is all the more important considering the tendency of community experiences to be fragmented.<sup>7</sup>

To illustrate, it is necessary to look at the general problems of devising systems of 'collective accountability' which is relevant in an area like CSR where the actors have competing interests. As observed in Chapter 5, this brings about the problem of 'blame avoidance' and the difficulties of assigning responsibilities for failure.<sup>8</sup> In this situation, the challenge in designing a regulatory framework is all about 'responding to the complexity by repairing linkages which have snapped or frayed' as well as 'inventing new ones where they do not exist' which ultimately creates new 'dialogue'.<sup>9</sup> The design should work as a comprehensive whole in recognition of the interdependence between the CSR actors and the linkages between them. Each CSR actor has internal regulatory mechanisms according to its scope and need which the other actor can influence. It is this regulation of the internal regulation that will properly be able to switch on the

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<sup>4</sup> M. Walzer, 'Deliberation, and What Else?' in S. Macedo (ed.) *Deliberative Politics. Essays on Democracy and Disagreement* (Oxford-New York: Oxford University Press, 1999) at 58-69.

<sup>5</sup> J. March and J. Olsen, *Democratic Governance* (New York: The Free Press, 1995) at 84.

<sup>6</sup> I.M. Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000) at 115.

<sup>7</sup> S. Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy' in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (New Jersey: Princeton: Princeton University Press, 1996) at 67.

<sup>8</sup> On the politics of 'blame avoidance' see, T. Benner, W. H. Reinicke and J. M. Witte, *Multisectoral Networks in Global Governance: Towards a Pluralistic System of Accountability* (2004) Government and Opposition 191 at 99.

<sup>9</sup> S. Picciotto, *The Retreat of the State: Challenges to Law and Lawyers* (Paper presented at the WG Hart Legal Workshop, London, 27-9 June 2006).



capability of the corporation. The aim is to ultimately use a regulatory lens to uncover a vocabulary that is broadly based on a consultative process.

The ability of each CSR actor to harness the internal regulation of the other through deliberation is called meta-regulation.<sup>10</sup> The term meta-regulation is used as a descriptive or explanatory term within the literature on new modes of governance to consider the way in which the state's role in governance and regulation is changing and even splitting.<sup>11</sup> For Gunnigham and Grabosky, the notion of meta-regulation is premised on the idea of meta-monitoring. They looked at how government monitored the self monitoring of individual actors.<sup>12</sup> CSR actors can thus be said to be meta-regulating each other but leave enough spaces for responsive processes to be embedded. By playing such roles, the CSR actors provide a check and balance between themselves.

Parker calls such activity the 'regulation of self regulation'.<sup>13</sup> It is a promising line of inquiry that seeks to bridge the concerns of competing accountability. As a subset of the deliberative mode of inquiry, meta-regulation emphasizes the role of mutual justification through reasoned dialogue as the basis for democratic legitimacy. It also tries to show that deliberation need not be tied to territorial boundaries or existing political structures to the extent that traditional representative democratic models are.<sup>14</sup> In this regard, the notion of deliberation may better suit the blurred divisions between the hard-soft, state-international, public-private as well as negative-positive responsibility settings that make up CSR standards.

To reiterate, under the rubric of deliberative responsive regulation, CSR actors are said to meta-regulate each other.<sup>15</sup> Here, it is suggested that each CSR actor meta-regulates the other towards creating a linked legitimacy between them, creating individual

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<sup>10</sup> C. Parker, *The Open Corporation: Effective Self Regulation and Democracy* (Cambridge University Press: Cambridge, 2002).

<sup>11</sup> B. Morgan, *The Economisation of Politics: Meta Regulation as a Form of Non Judicial Legality* (2003) 12 *Social and Legal Studies* 489, C. Scott, *Speaking Softly Without Big Sticks Meta Regulation and Public Sector Audit* (2003) *Law and Policy* 203-219, J. Jordana and D. Levi-Faur, *The Politics of Regulation in the Age of Governance* (Cheltenham: Edward Elgar 2004) at 1.

<sup>12</sup> N. Gunningham and P. Grabosky, *Smart Regulation Designing Environmental Policy* (OUP: Oxford, 1999) at 4-11. Note that the authors confined their analysis to the specific area of environmental regulation.

<sup>13</sup> Parker, above n3 at 2.

<sup>14</sup> N. Craik, *Deliberation and Legitimacy in Transnational Environmental Governance: The Case of Environmental Impact Assessment* (IILJ Working Paper 2006/10, Global Administrative Law Series).

<sup>15</sup> M. Cooke, *Five Arguments for Deliberative Democracy* (2000) *Political Studies* 947 at 8: Deliberation is seen as 'an unconstrained exchange of arguments that involves practical reasoning and always potentially leads to a transformation of preferences'.



responsiveness and ultimately, tapping on the capability of the corporation to be socially responsible. Once the magnitude of the regulatory lens is underlined, the emerging narrative of external CSR becomes apparent. Apart from information and learning from each other, deliberation's importance can be seen in that it breaks down any compartmentalization in the process that it takes to make standards, implement and enforce them. An extreme example on this point can be seen in the notion of 'administrative evil' as explored by Arendt. When tasks are so rigidly segmented and compartmentalized, actors can fail to see their responsibility in the final outcome of the collective action.<sup>16</sup> In essence, meta-regulation manages the tensions between the social, economic and technical goals of CSR standard setting. It shows that what is needed then are interpretative terms and standards for all the actors involved. It captures a desire to think responsively about regulation, such that rather than regulating social and individual action directly, the process of regulation itself becomes regulated.<sup>17</sup>

In this regard, the deliberative governance approach is seen to be different from Luhmann's autopoiesis and Teubner's reflexiveness. Luhmann and Teubner characterize complex societies as consisting of several forms of differentiated 'systems'. Teubner's reflexive law emerges as it does from his application of Luhmann's development of autopoiesis theory within the social domain. Teubner's theory offers the apparent advantage in that it explicitly models science and law as discrete communicative systems.<sup>18</sup> It thus allows an examination of how each system reconstructs the other and thus seems to offer scope for a more adequately complex account both of the differences between the generation of knowledge and the generation of norms as well as the constructive misunderstandings that must inevitably arise when the two systems communicate. While the theory attempts to show interdependence between systems through reflexivity, the systems are nevertheless characterized by 'legitimate indifference' for each other's norms and claims because of their self-referential operation.<sup>19</sup> The implication produced by operating in a self-referential manner is that different systems can disregard the social consequences of their acts.

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<sup>16</sup> H. Arendt, *Eichmann in Jerusalem: Report on the Banality of Evil* (New York: Viking Press: 1963) at 120.

<sup>17</sup> Parker, above n3 at 118.

<sup>18</sup> Y. Papadopoulos, *Cooperative Forms of Governance: Problems of Democratic Accountability in Complex Environments* (2003) *European Journal of Political Research* 473, J. Penner, D. Schiff and R. Nobles, *Introduction to Jurisprudence and Legal Theory* (London: Butterworths, 2002).

<sup>19</sup> Penner, Schiff and Nobles, *Ibid.*



It is difficult to see CSR standard setting engagement between the actors as 'normatively closed and cognitively open'. This is even more confusing in a complex society where it is difficult to see social systems as normatively closed in that people occupy multiple roles in multiple systems. In addition, many systems are seen as reluctant to accept each others interference in their activities, in that they tend to be considered as a 'noise' or an 'irritation' in systemic words because each lack appropriate knowledge.<sup>20</sup> Systems theories work on maintaining differences instead of trying to locate mutually constitutive relationships. This appears to be based on the necessity to organize differentiation and at the same time to institutionalize heterogeneity.<sup>21</sup> This means that mutual learning is dependant on what can actually be thrown out, not by pushing, compelling and shaping each other.

Viewed through systems theory, there is a problem with working towards mutually satisfying standards. Different CSR actors cannot be aligned because they are said to be merely 'irritated' with each other. Further, each actor is seen as a self-constituting, self-regulating system. This does not capture the interpenetration between the actors and the breakdown of the public-private compartments in standard setting initiatives. There is a possibility of mutual indifference between systems which means that systems or in this case, the CSR actors, never impact each other. The reality of how CSR actors operate and interact is far messier as has been observed.

In fact, interaction impacts the deliberative quality in CSR standard setting. As has been discussed in the preceding chapters, an increasing number of imaginative approaches to standard setting have emerged through public-private synergy. In the sense that meta-regulation is premised on the understanding of the synergy between the actors, the concept resonates in important respects, at the level of theory, with some of the work of Habermas. This is particularly with reference to his notion of deliberative democracy which is related to the quest for legitimate policy making. Habermas' notion can be used to show that there is space for plural governance whereby the various CSR actors co-ordinate their activities to form a mutual 'lifeworld'.<sup>22</sup> Meta-regulation shows that there

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<sup>20</sup> Penner, Schiff and Noble, above n18 at 911-2.

<sup>21</sup> Y. Papadopoulos, *Towards Some Research Question on the Merits of Deliberative Policy Making* (Empirical Approaches to Deliberative Politics Conference, Florence, 2004) available at <http://www.unil.ch/webdav/site/iepi/users/epibiri1/public/papadopoulos3.pdf>.

<sup>22</sup> The lifeworld is seen by Habermas as the background to communicative action, forming both the horizon for speech situations and the source of interpretations, see J. Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996) at 22-3.



is value in harnessing the energies and expertise of multiple actors, instruments, institutions and processes. A key value of meta-regulation is not just the ability to bring to bear current standard setting capabilities into a co-ordinating framework but also harnessing the legitimacy of networked interactions.

### 6.1.1 Possibilities and Problems

As meta-regulation is structured as a communication between the actors, it can be seen as a deliberative account, as opposed to a hierarchical theory where the ultimate guardians are part of the state.<sup>23</sup> In a deliberative account, various CSR actors can be recognized as regulators, not just the state. CSR actors can be organized where every actor is holding the other accountable.<sup>24</sup> Meta-regulation thus fits into a broader literature on governance, emerging as a responsive ‘conversation’ which CSR actors generate when they collide and intermingle.<sup>25</sup> These conversations represent the quest to build linkages while understanding that different corporate actors need to have in place different systems and processes towards realizing its social responsibility commitments. Meta-regulation points to a better understanding of how standards and actors emerge and interact.

Meta-regulation as a deliberative mechanism gets corporations to implement processes. It recognizes that standard setting initiatives may not know exactly what the ‘right’ processes and even the right results will look like in each institution. The corporation involved in the situation is best placed to work out the details in its own circumstances, with impetus from the meta-regulative framework.<sup>26</sup> Meta-regulation recognizes that corporations are diverse in size, interests, range and geographic location. This means that meta-regulation not only moves away from the traditional regulatory design but also experiments with more indirect or facilitative techniques for engendering responsibility. Homogenized or one-size-fits all CSR standards may not work in an across the board manner. Further, it becomes possible to treat corporations that show different levels of inner commitment in different ways.<sup>27</sup> Each corporation, while normatively capable of

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<sup>23</sup> J. Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford, UK: Oxford University Press, 2002) at 11-6.

<sup>24</sup> Benner, Reinicke and Witte above n8.

<sup>25</sup> Black, above n1.

<sup>26</sup> C. Coglianese and D. Lazer, *Management Based Regulation: Prescribing Private Management to Achieved Public Goals* (2003) 37 *Law and Society Review* 691.

<sup>27</sup> Gunnigham and Grabosky, above n12 at 373,90.



being socially responsible, needs to be given a kind of process in place to be responsive on its own terms. Deliberation between the actors may be the better way to generate standards that are cognizant of the differences and also the tap on the capability of the corporation.

This neat overview of deliberation doesn't however capture the reality of interaction, particularly how standard setting evolves. Deliberation is often criticized as being more successful where the level of politicization of decisions is low, which means that when interests compete, its intended effect becomes diluted.<sup>28</sup> It has also been shown that deliberation's contribution to consensus-building is higher when concrete decisions are not at stake and confirms that the initial level of polarization should not be too high. When 'border' decisions must be made, often deliberative governance ends up offering package deals on a give and take basis to allow for exchange of concessions between participants.<sup>29</sup> Further, deliberation is often more effective when taking place at the preparatory and implementation stage as opposed to the decisional phases of the policy cycle. In a sense, this fails to reach the core of the decision that is being sought. Further, for Habermas, deliberative action is legitimized only through the channels of legislature in order for it to be recognized as political power.<sup>30</sup> Reliance on legislature seriously limits the meta regulative feature of standard setting and can prove to be a *cul de sac* in developing the nexus between hard and soft laws.

In short, deliberation does not always promise to provide a common meeting point. Actors sometimes tend to talk against each other. Deliberation in such an instance can very well lead to confusion or uneasy compromise. It was observed that meta-regulation often stops short in 'hard' cases because of clashes in interests and as a result, comes to a stand still. In CSR standard setting, the messiness is reflected in 'code mania'. Joining the CSR bandwagon means that most corporations want to be certified or known as being socially responsible. Demand from the corporate actors and competing interests between NGOs coupled with lack of expertise from the government leads to proliferation or excess of standards. In other words, what can only be called 'code mania'. Code mania makes demands of time and resources as well as results in inertia towards CSR

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<sup>28</sup> Papadopoulos, above n21 at 8-9.

<sup>29</sup> Ibid.

<sup>30</sup> Habermas, above n22 at 168-9, 183-4.



engagement.<sup>31</sup> CSR becomes a questionable activity in this instance and rightly criticised as being a futile exercise. For example, the buying director of a Scandinavian retail chain revealed in 2001 that one of his key suppliers had 60 audits in one year, variously for quality, environment and social concerns, not to mention financial auditing.<sup>32</sup>

What has been shown so far is how standards emerge from deliberation. The conversations between the CSR actors generate a series of CSR standards. These standards are however messy and problematic. At this stage, it is also clear that deliberation does not resolve the problem of code-mania. There are implications to the legitimacy of CSR engagement as a result, particularly because the proliferation of standards makes it hard for any credible evaluation of those standards to be made. Nevertheless, such limitations can be seen to be overcome through procedure. It will next be examined how procedure links legitimacy to deliberation by creating a common bridge between standards.

## **6.2 Administrative Law as a Bridge to Code mania**

The problems with deliberation were highlighted. The compromises, arcane technicality, multiplicity and divergence all colour CSR narratives as it currently stands. Nevertheless, deliberation is useful to inform how standard setting evolves. The implications of deliberation generally can be seen to structure the interaction between the CSR actors. It taps on the capability of the corporation as well as the expertise of NGOs and the state in meta-regulating each other towards social responsibility aims. Secondly, deliberation forces the actors to devise common tools and procedures. Just as domestic policymakers have devised rules and procedures to bolster the legitimacy of administrative bodies, it is suggested that CSR actors have the ability to employ the tools of administrative law for their purposes.

In this manner, deliberation can be seen to provide the impetus to generate a common language between the actors which provides currency for standard setting. From here, administrative law tools are seen to have the ability to develop a coherent vocabulary between the actors. Thus, the procedural rigour of administrative law is seen to be a

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<sup>31</sup> M. Macintosh, R. Thomas, D. Leipziger, G. Coleman, *Living Corporate Citizenship* (London: FT Prentice Hall, 2003) at 91.

<sup>32</sup> *Ibid.*



critical tool for refining CSR standard setting and its evaluation. The difference here is that the actors involved are a combination of state and non-state actors who structure deliberation through a common language of administration. Instead of neatly separated levels of regulation, the CSR actors form a variegated 'global administrative space'.<sup>33</sup> What is emerging is that the procedural rules that inform CSR standard setting, which will be studied in greater detail below, cannot emerge from nowhere. They can be traced back to the maturity of deliberation. The more mature deliberation is, the more sophisticated the procedural mechanisms that come into play.

Understanding CSR standard setting as administration allows for the possibility in convergence of standards. It also supplies a critical distance on 'democratic deficits' that are leveled against the CSR actors.<sup>34</sup> Indeed, a vast range of activities that are already being performed by international institutions and groups can be said to be administrative in character. Many economic and social arrangements are organized through specific decisions and rulemaking. A landscape of regulatory administration which is organized and shaped by 'principles of an administrative law character'<sup>35</sup> emerges. Some of the densest regulatory regimes can be seen in the OECD networks and committees, the administration and the committees of the World Trade Organization (WTO), the committees of the G-7/G-8, the International Monetary Fund (IMF), the Basle Committee and the World Bank which all have in place administrative structures and systems. Such structures can be said to operate in the global administrative space.<sup>36</sup>

### **6.2.1 A Procedural Base towards Convergence in Standards**

At the domestic level, administrative law mechanisms ensure accountability. They have a long history and tradition at the domestic level without an apparent counterpart at the international or global level. Craig explains that at its most basic level, administrative law articulates the nature of democratic society and the vision of the political theory which that the community espouses.<sup>37</sup> Administrative law structures the behaviour for

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<sup>33</sup> B. Kingsbury, N. Krisch and R. Stewart, *The Emergence of Global Administrative Law* (2005) Law and Contemporary Problems 15 at 18-20.

<sup>34</sup> *Ibid* at 27.

<sup>35</sup> *Ibid* at 18-9.

<sup>36</sup> *Ibid*.

<sup>37</sup> P. Craig, *Administrative Law* (London: Thomson Sweet & Maxwell, 2006) at 4-20.



government authorities and specifically about institutions inside administration and those outside.<sup>38</sup> This is done by both protecting individuals against unauthorized or arbitrary exercises of official power and also promoting administrative responsiveness to broader public interests through a series of tools. Administrative law tools and procedures include requirements for notice, consultation, and open procedures that allow directly affected actors and a broader public to participate including requirements of reasoned decision in accordance with basic principles of administrative fairness and rationality as well as review mechanisms, often of a judicial nature.<sup>39</sup> Administrative law thus can both check and steer the exercise of government power.

In an appropriately modified form, these procedural tools may perform a similar function in the decision making process of non-state administrative structures. Just as domestic policymakers and administrative law scholars have devised rules and procedures to bolster the legitimacy of government bodies, CSR actors have already begun to deploy the principles of administrative law to create a common language that also remedies the democratic deficit and legitimacy concerns. Kingsbury, Krisch and Stewart suggest that a 'global administrative law' is not only possible but is already in the process of being created.<sup>40</sup> While suggesting that the normative-prescriptive base for global administrative law is an evolving one, it is clear that the utilization increases accountability. In this landscape, CSR standard setting can be said to be one of the components fuelling the development of what is known as global administrative law.

In other words, the tools of administrative law, which have been used to legitimate regulatory decision making in the domestic context are beginning to be deployed more systematically to underpin CSR narratives which transcend geographical borders and often hover in a political lacuna. As such, in the realm of CSR narratives, where the democratic underpinnings become more tenuous, the legitimacy enhancing potential of procedural safeguards takes on special significance. Although administrative law tools cannot completely compensate for the absence of an electoral connection that legitimizes authority, a refined system of procedures can promote decision making based on the rule of law. If properly developed and implemented, administrative procedures promote

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<sup>38</sup> M. Shapiro, *Administrative Law Unbounded: Reflections of Government* (2001) 8 Ind. J. Global Legal Stud. 369.

<sup>39</sup> Craig, above n37.

<sup>40</sup> Kingsbury, Krisch and Stewart, above n33.



careful rulemaking, efficiency and fair treatment between CSR actors. Administrative tools include checks and balances, structured deliberation, rationality, clarity, stability, neutrality, fairness, reasonableness, efficiency and proportionality.<sup>41</sup> Procedural rigour plays a special role in legitimizing governance and the exercise of power. This means that CSR standard setting need not necessarily entail losing such safeguards.

In fact, it is suggested that in standard setting activity, state and non-state actors tackle similar issues of inclusiveness, political preference, economic calculation and scientific evaluation that are characteristic of rule-making in administrative law.<sup>42</sup> Further, there are many instances where global rules and standards effectively determine the content of state level regulation. This situation significantly influences state actors in ways that may enhance the success of domestic constitutional and administrative checks. Some international bodies such as the Clean Development Mechanism under the Kyoto Protocol now directly create and implement rights of individuals.<sup>43</sup> Other international bodies, especially regulatory networks such as the Basle Committee of central bankers or the OECD, are composed of domestic administrative officials whose duties now necessitate acting in global concert. Reflection on these illustrations immediately indicates that the extraordinarily varied landscape of global administration results not 'simply from the highly varied regulatory subject areas and correlative functional differentiations among institutions', but also from the 'multi-layered character of the administration of global governance'.<sup>44</sup>

In a very real sense, administrative law is one long exercise in 'inventing mechanism of control, accountability and legitimacy' that provide a substitute for political mandates in legislation.<sup>45</sup> An underlying sense of artificiality can be said to emerge from administrative laws range of controls at the domestic level. Yet, broad delegations of regulatory power to government authorities are accepted as a necessary complexity of decision making and facilitated by the administrative process.<sup>46</sup> When good governance procedures generated by administrative law are employed, the decisions that emerge will enjoy a degree of inherent legitimacy. Thus, where non-state actors lack the sanction of

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<sup>41</sup> Craig, above n37.

<sup>42</sup> H. Schepel, *The Governance of Private Constitution* (Oxford and Portland: Hart Publishing, 2005) at 408.

<sup>43</sup> Kingsbury, Krisch and Stewart, above n33 at 19.

<sup>44</sup> Kingsbury, Krisch and Stewart, above n33 at 18-9.

<sup>45</sup> Schepel, above n42 at 408-9.

<sup>46</sup> Schepel, above n42.



sovereign authority, the ‘power-directing and efficacy-enhancing role of administrative law takes on even greater significance’.<sup>47</sup> Specifically, standard setting that reflects principles of good governance lodged in a regime of administrative law can substitute, in part, for the lack of elections, facilitate access to expertise, delimit the exercise of power and advance accountability’.<sup>48</sup> In developing the logic for procedural legitimacy as a foundation for good governance, it is suggested that a thoughtfully structured standard setting process will clarify underlying issues, bring facts to bear and promote careful analysis of options towards convergence in standards.

However, even though CSR standard setting impacts public policy, it remains largely unexamined as a form of procedure. In fact, international rule making itself is generally a phenomenon that is hardly seen as a form of procedure. Procedural integration is often seen as less important than the proliferation of substantive standards. Therefore, efforts to look at the global administrative space as a coherent body of standards are still nascent.<sup>49</sup> The idea of analyzing transnational governance as administration, that is as being subject to distinctive administrative law principles, had scrutiny from the late 19th century social reformers and institution builders, influenced by the rise of international regulatory institutions and ‘international unions’ dealing with such matters as postal services, navigation, and telecommunications. Such networks were seen vested with significant powers of secondary rulemaking that did not require national ratification to be legally effective.<sup>50</sup> Although current networks of governance appear to have similar institutional framework, these approaches are said to have since faded away, especially decimated by standard international law texts.<sup>51</sup>

In fact, much of CSR standard setting can be understood and analyzed as procedure. One of the reasons why administrative law tools haven’t received much attention could be because of the predominantly ‘private’ generation of standards in CSR and other areas of global governance. This is opposed to the ‘public’ nature of administrative tools which sit within constitutional boundaries. With the attempt to create linkages necessitated by

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<sup>47</sup> D. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law* (2006) Yale L. J. 121.

<sup>48</sup> *Ibid* at 121-2.

<sup>49</sup> D. Zaring, *Informal Procedure, Hard and Soft in International Administration* (2005) *Chicago Journal of International Law* 547.

<sup>50</sup> P. Reinsch, *International Administrative Law and National Sovereignty* (1909) 3 *AJIL* 1

<sup>51</sup> Kingsbury, Krisch and Stewart, above n33 at 19-20.



CSR standard setting impulses, administrative tools can function as a bridge. By extending administrative law tools thus, what emerges is a series of procedural standards that can be transplanted into a variety of regimes and therefore giving rise to a global connectedness. To reiterate, procedural framework along such lines can provide a coherent connection between the deployment of a set of administrative law derived tools and the potential to enhance the legitimacy of policymaking at the global scale. This is opposed to the structured, hierarchical provenance of traditional administrative law. It is suggested that the intermingling of public and private, hard and soft law, positive and negative responsibility is brought together through common procedure. In sum, when administrative law tools are consciously used to develop the foundation of this collective accountability, a structured approach towards convergence can be created. This in turn leads to the discourse between the CSR actors to be more coherent and systematic. Standards can then be streamlined and 'best practices' can emerge.

Zurn notes that there is a descriptive side to legitimacy, which looks at societal acceptance of decisions made in political terms. From a descriptive perspective, the validity of decisions must at least appear to be built on a 'political community' based on trust and solidarity. With CSR standards however, societal acceptance is taut. Although the standards are working in the same direction after the platform for deliberation is invoked, it doesn't mean that there is coherence or unity as to standards. It is this that makes descriptive legitimacy suspect. The descriptive perspective can only be developed through a procedural base because of the messiness of deliberation. More importantly, casting a regulatory lens on standard setting means not just looking at how the myriad standards evolve through deliberation. It must also provide a means evaluating the processes for monitoring the standards and mechanisms for convergence. The procedural base of good governance provides impetus towards such an end.

The core conclusion is this. Even if CSR standard setting is limited and hampered by divergent traditions, cultures, science and political preferences, developing a baseline set of administrative law tools and practices will strengthen the legitimacy of such engagement. In fact, the growing commonality of administrative law type principles and practices can be said to be building a unity between otherwise disparate CSR actors with competing interests. The tools of good governance provide the structural linkage to work towards the possibility of convergence in CSR standard setting. Unless there is some



form of procedural basis to bridge the relationship, convergence in CSR standards will be a difficult, almost impossible task. In short, employing the tools of administrative law encompasses the principles and practices along with supporting social understandings that promote accountability in CSR standard setting.

### **6.3 Conclusion**

This chapter casts a regulatory view on CSR standard setting which at the level of theory, can be said to be developed through deliberation between the CSR actors. Deliberation is not however a systematic, sensible whole. It is messy and full of clashes between the actors, giving rise to multitude of standards which often overlap or worst still, conflict. Further, deliberation is more successful under circumstances of mutual gain. The problems of deliberation reflect the state of CSR narratives today. The various standards are laudable attempts at creating some sense of social responsibility but are impounded by questions of legitimacy. From here, the procedures for good governance were explored to see how it can improve standard setting. The linkage between hard and soft CSR, positive and negative responsibility as well as public and private authority is provided by deliberation and procedure which ultimately is seen to create a framework of legitimacy. The adoption of a more robust regime of administrative procedures in CSR engagement would directly contribute to their capacity for good governance particularly by providing the means towards convergence of the proliferating standards.

The utility of CSR standards can only be truly understood through a robust evaluation of standards. Informed by the procedural base here, the next chapter explores CSR assurance systems as a means of evaluating CSR standards. The aim is to use evaluation as a framework to drive the best standards and ultimately, work towards convergence in standard setting.



## CHAPTER 7 Evaluating Standards: AA1000AS and the GRI Guidelines

### 7.0 Introduction

In this chapter, convergence in CSR standard setting will be explored by scrutinizing assurance tools that can be used to evaluate standards. In practice, CSR actors lack techniques to evaluate the quality and performance of standards.<sup>1</sup> There is as yet no single framework of generally accepted standards and tools for managing corporate responsibility. Globally, it is believed that there are over 300 CSR standards which span principles, audit, certifications and others.<sup>2</sup> This leaves corporations with a number of dilemmas. The great discrepancy in quality of practice and outcomes produced by the experimentation can threaten the credibility of CSR engagement itself. Evaluation of standards is however more difficult than recognized. It must be remembered that CSR standards tend to be anchored within state borders and beyond, hovers between public-private and grapples with hard and soft law. As observed throughout this thesis, standards vary so considerably in their usage, purpose and scope that it is difficult to interpret them intelligently, to compare and to be assured of their significance and reliability.

In sum, there is a need clearly to establish what constitutes quality CSR engagement. In Chapters 5 and 6, the notion of deliberation was explored as generating the content to standards. The environment of code mania was hinted at, which in turn places credible evaluation of standards at the epicentre of CSR engagement. It was further shown that an administrative regime provides the procedural legitimacy that can begin to work towards convergence in standards. This chapter then looks to see how such integration of CSR narratives can be institutionalized. Informed by the theoretical arguments, this chapter will scrutinize CSR assurance schemes, particularly the AA1000 assurance standard (AA1000 AS) and the Global Reporting Initiative Sustainability Reporting Guidelines (GRI Guidelines).<sup>3</sup> The chapter first elaborates the procedural framework

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<sup>1</sup> C. Parker, *The Open Corporation: Evaluation of Corporate Self-Regulation of Responsibility* (Brisbane: IPE Biennial Conference, 4-7 October 2002)

<sup>2</sup> There is no authoritative number, see E. Ligteringen and S. Zadek, *The Future of Corporate Responsibility Codes, Standards and Frameworks* (London: Accountability, 2005) at 1.

<sup>3</sup> The AA1000 Assurance Standard, provided by the Institute for Social and Ethical Accountability (AccountAbility) and Global Reporting Initiative Sustainability Reporting Guidelines (GRI Guidelines) are



developed previously and makes the case for its applicability in CSR standards. It begins with a background on the emerging field of CSR reporting and growing concerns of the credibility of the process undertaken to ensure that standards are effective and achieve what they do, instead of being an annual scorecard by the corporation. Next, it focuses on two specific assurance schemes, the AA1000AS and the GRI Guidelines. From here, the chapter moves on to look at how procedural tools refine the assurance systems and suggests that it provides the key towards convergence in CSR standard setting. The chapter closes by looking at the implications of convergence.

### **7.1 Choosing and Using CSR Standards**

In the shifting need for responsibility, corporations focusing on their relationship with society are looking for guidance. Standards like codes of conduct and management systems offer some guide for companies on how to proceed. While chapter 2 explored in detail the significant increase in the number and range of CSR standards, it is noted that such initiatives are only useful if they bring about actual change in corporate behaviour and practice. For example, codes of conduct may be able to help corporations create social value for themselves and for the communities of which they are a part if they are successful in creating opportunities for learning as well as through the development of new kinds of relationships with constituents.<sup>4</sup> In this situation, evaluation of standards not only become important but also supplies the credibility urgently needed in CSR engagement.

Of course in an ideal world, universally supported standards will be employed. Such standards will be relevant across institutions, certification types and sectors.<sup>5</sup> Yet, in an environment of emerging narratives, much is based on trial, error and learning from that process. Standards are in reality scattered and diverse, reflecting the state of discourse that CSR is currently in. As they stand, standards appear to be principle based and are therefore outcome oriented. While a particular outcome can be seen to be something for the corporation to aim at, they provide no guidance as to institutionalization. While the

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seen to be two of the most coherent assurance systems in place currently and will be explored at length below.

<sup>4</sup> S. Zadek, P. Raynard, M. Forstater, J. Oelschlaegel, *The Future of Sustainability Assurance* (Certified Accountants Educational Trust: London, 2004) at 7.

<sup>5</sup> J. Hassell, *A Review of Existing Certification Impact Evaluation Methodologies* (London: ISEAL, 2005).



outcome is important, the true magnitude of change in a corporation can only be properly evaluated by looking at the internal management processes. The various standards are isolated, aggravated by the fact that there are limited studies available that assesses the impact of standards over a wide range of areas and geographic locations.<sup>6</sup>

Also, standards must have certain underlying features. They need to tap on the regulatory capability of each CSR actor, particularly the corporation. At the same time, they must address the economically driven needs of the corporation, especially long term relationships with constituents by encompassing characteristics that include dependability and uniformity.<sup>7</sup> Practically, standards should not be too cost and time consuming or too technical. While the various standards do attempt to address the magnitude of CSR issues, not all achieve such high requirements. In a context where CSR standards are having an incremental growth, the question is not so much how to stop the proliferation of standards but how to ensure that standards are having the social and environmental impacts they claim. It is argued that when standards begin to converge, the best practices will survive and the others won't. This is why convergence becomes a very important part of the narrative.

In this context, the template of good administrative principles explored at length in Chapter 6 will be deployed to evaluate CSR standard setting. The notion of good governance premised on tools of administrative law was developed to assess decision making procedures. As the theoretical framework suggests, the regime of administrative law becomes useful to be transplanted into governance beyond nation states as it has the potential to addresses issues of legitimacy. The template is particularly crucial for the integration of standards as it can check the problems of individual tools. What happens in standard setting as was observed in Chapter 2 is that different standards are employed for different areas. Leading corporations that have incorporated the concept of corporate responsibility into their management processes typically use a number of tools. Each will incorporate their own set of complementary standards into their systems, based on their own practical and strategic needs, relevant areas of operation and stakeholder

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<sup>6</sup> C. Dankers, *Environmental and Social Standards Certification, Labelling for Cash Corps* (FAO, Rome 2003) at 157.

<sup>7</sup> J Abbot, S. Roberts and N. Robins, *Who Benefits? A Social Assessment of Environmentally Driven Trade* (London: IIED, 1999) at 52-3, S. Zadek, *The State of Sustainable Assurance* (London: Accountability 2003) at 2-3.



concerns. So, for labour standards the Fair Labour Association certification can be utilised, sustainable forestry certification by the Forest Stewards Council (FSC), sustainable banana certification by Rainforest Alliance, so on and so forth. Different standards appear to be needed for different areas and it is difficult to see how the standards measure or interact with each other.

While it is accepted that the difference is necessitated by the diversity in areas and industries, such scattered initiatives in no way convey the whole picture of an emerging narrative. The diversity issue is aggravated when corporate actors in a particular industry are compared. A Food and Agricultural Organization (FAO) study reveals that there are no systematic studies available that assess the impact of certification programmes over a wide range farms, crops and locations.<sup>8</sup> This is particularly acute in industry specific situations, for example where Shell and BP are both involved in the oil and gas industry but employ different ways to evaluate their CSR engagements. Shell has endorsed the International Standard for Assurance Engagements, Global Reporting Initiative, World Business Council for Sustainable Development /World Resources Institute Greenhouse Gas Protocol Initiative (WBCSD/WRI GHG) among others.<sup>9</sup> BP on the other hand also adopts WBCSD/WRI GHG but apart from that utilizes the AA1000 Assurance Standard among others.<sup>10</sup> In such a situation, it will not really be possible to compare the performance and changes in both corporations meaningfully.

The following is a snapshot of the range of tools used by companies from different sectors and geographical regions that help drive their performance in line with the goals of CSR:

**BASF**  
European Chemical Industry Council  
Environmental and Safety Data  
Recommendations, GRI Sustainability  
Reporting Guidelines,  
Responsible Care, UN Global Compact

**BHP**  
GRI Sustainability Reporting Guidelines,  
Minerals Council of Australia Code for

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<sup>8</sup> Dankers, above n6 at 157.

<sup>9</sup> *Meeting the Energy Challenge*, the Shell Sustainability Report 2006.

<sup>10</sup> BP Sustainability Report 2006.



Environmental Management, UN Global Compact

**BP**

AA1000 Assurance Standard, Standard, GRI Sustainability Reporting Guidelines, ISO14001, UN Global Compact, WBCSD/WRI GHG protocol

**Nike**

AA1000 Framework, Fair Labour Association code of conduct, GRI Sustainability Reporting Guidelines, The Next Step, UN Global Compact

**Shell**

GRI Sustainability Reporting Guidelines, International Standard for Assurance Engagements, UN Global Compact, WBCSD/WRI GHG protocol,

**Tata**

GRI Sustainability Reporting Guidelines, ISO14001, SA8000, UN Global Compact

Box 7a

Source: modified from E. Ligteringen and S. Zadek, *The Future of Corporate Responsibility Codes, Standards and Frameworks* (London: Accountability, 2005) at 2.

Box 7a shows that corporations are incorporating their own set of tools by aligning themselves with various initiatives (please see Appendix I for terminology guidance). The discourse generated between different sets of CSR actors has developed the variety of standards. Robust forms of discourse is disseminated through standards that meta-regulate the conduct of the various CSR actors. But as observed above, the messiness of discourse leads to information overload. So to illustrate, taking standards that are limited to be industry specific (Chemical Care), garment industry (Social Accountability International, SAI) and supply chain specific (Ethical Trade Initiative, ETI) or geography specific. When all these standards are adapted by a single corporation, the impact to the entire CSR engagement cannot really be seen.

There already are intermittent moves towards convergence in standards. Some standards overlap and can be said to point towards an emerging convergence around a global architecture of de facto standards. For example, the International Social and Environmental Accreditation and Labeling Alliance (ISEAL) is a formal collaboration of



leading international voluntary standard-setting and conformity assessment organizations working on social and environmental issues.<sup>11</sup> Members work in the areas of organic agriculture, sustainable forest management, fair trade and sustainable fisheries, among others. ISEAL has merged different standards by various NGO members under one umbrella. Participating ISEAL members work to improve consistency in approaches on key social standard-setting issues such as discrimination, forestry and child labour. This background facilitated the development of the ISEAL Code of Good Practice for Setting Social and Environmental Standards.<sup>12</sup> The ISEAL Code of Good Practice seeks to improve the effectiveness of CSR certification by developing global best practices in standards and conformity assessment between members.

If concerted effort is to be made towards convergence, such approaches can only be successful if it is sustained through a long period of time and adapted widely. This is because the standards themselves are evolving and the improvement is crucial towards CSR engagement. At this juncture, any hope of making comparisons between initiatives is limited. The diversity as such makes the CSR narratives fragmented. In order to address this, there must be a need to integrate the communication of different standards to show their impact towards CSR engagement as a whole. It is suggested that the best way towards this is through CSR assurance schemes which will be explored in greater length below. Assurance provides a big picture of what has been achieved and what not. From here, the narrative can look at the possibility of convergence. Convergence holds the key towards unearthing the scale of CSR narratives. It will in effect stabilize the field and accelerate best practices. The tipping point will come when convergence will enable the mainstreaming of CSR engagement in corporations.

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<sup>11</sup> ISEAL Code of Good Practice for Setting Social and Environmental Standards, available at [http://www.isealalliance.org/documents/pdf/PO05\\_PD4\\_Jano6.pdf](http://www.isealalliance.org/documents/pdf/PO05_PD4_Jano6.pdf)

<sup>12</sup> The normative documents from which this Code draws are ISO/IEC Guide 59 Code of good practice for standardization, and the WTO Technical Barriers to Trade (TBT) Agreement Annex 3 Code of good practice for the preparation, adoption and application of standards, Ibid.



## 7.2 Evaluating Standards through Assurance

As observed above, the messiness of discourse leads to information overload. The aim is for the standards to converge and provide for some kind of uniformity to CSR assurance in order to supply credibility. One way to evaluate such progressive integration is through assurance systems. In suggesting that standards can converge, the argument is that although standards are diverse, they overlap and draw on similar principles and processes. So at some point there can be some convergence of procedures which allow for adaptation of more uniform standards. In order for such situations to occur, evaluation of standards become of extreme importance as a port of call in integrating the diverse standards into a coherent unit.

The term 'assurance' covers the broad area that is often called auditing, verification and validation. Assurance is described as an 'evaluation, against a specified set of principles and standards, of the quality specified public reports and the systems, processes and competencies that deliver the associated information and underpin the reporting institution's performance'.<sup>13</sup> It includes the 'communication of the results of this evaluation to give the subject matter credibility for its users'.<sup>14</sup> The Fédération des Experts Comptables Européens (FEE) considers assurance as the 'provision of confidence or certainty by an independent assurance provider to a party or group of persons in relation to certain subject matters'.<sup>15</sup> Various institutions (audit firms, NGOs, quality assurance consultants) and individuals (opinion leaders) provide assurance.<sup>16</sup> It is emphasized that assurance often is assumed to apply only to a company's published reports, but it applies equally to the assurance of the company's underlying systems and processes, as well as its products, services and governance.<sup>17</sup> Assurance can be

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<sup>13</sup> Zadek, Raynard, Forstater, Oelschlaegel, above n3 at 7.

<sup>14</sup> Ibid.

<sup>15</sup> FEE, Benefits of Sustainability Assurance (Brussels: FEE, 2003).

<sup>16</sup> See also Zadek, Raynard, Forstater, Oelschlaegel, above n3 at 46:

Assurance providers of sustainability reports and processes are an eclectic grouping and reflect the diversity of subject matter and approaches to assurance. They also reflect the different appetites of stakeholders. Broadly they can be divided between:

(a) professional audit firms (eg PwC, Deloitte, KPMG, Ernst & Young)

(b) quality assurance firms (eg Bureau Veritas, Lloyds Register, SGS)

(c) specific CSR assurance consultancies (eg Just Assurance, The Reassurance Network, Verité, Solstice)

(d) civil society assurers (eg Rainforest Alliance, WWF, RSPCA, COVERCO)

(e) opinion and NGO leaders/advisory

<sup>17</sup> Ibid.



considered to be a familiar concept as it is commonly used in financial reports and systems. There are therefore some well-established methodologies of internal controls and quality assurance systems. The range of principles and standards that can be used to govern the assurance process in CSR engagement is however different from traditional financial assurance schemes and is still at a developmental stage. Its purpose as an evaluation scheme is however increasingly becoming important. Box 7b reflects the emerging architecture of CSR evaluation:

**Box 7b (for terminology of terms, see Appendix I)**

<b><i>Evaluation Method</i></b>	<b><i>Description</i></b>	<b><i>Example</i></b>
<b>Frameworks</b> (i.e. what to do)	Provide substantive guidance on what constitutes good or acceptable levels of performance.	Responsible Care ISEAL FEE Guidelines
<b>Process Guidelines</b> (i.e. how to measure and communicate it)	Enable measurement, assurance and communication of performance	ISAE 3000 EMAS
<b>Management Systems</b> (i.e. how to integrate it)	Provide integrated or issue specific management frameworks to guide the ongoing management of environmental and social impacts	AA1000 Assurance Standard GRI Guidelines ISO 14001 ISO 26000 (wef 2008) Social Accountability SA8000 Sigma Guidelines

Source: modified from E. Ligteringen and S. Zadek, *The Future of Corporate Responsibility Codes, Standards and Frameworks* (London: Accountability, 2005) at 3.



The above shows standard evaluation instruments can work in three distinct ways.<sup>18</sup> First, by prescribing what an institution should or should not do. This includes normative frameworks that provide a basis of responsibility, expectations and principles against which to assess performance. Examples here include Responsible Care and FEE Guidelines. This is a limited method of evaluation as it tends to be outcome based, just like the standard that is being evaluated. Secondly, process based instruments outline guidance on how to measure and communicate standards. They can be seen as providing detailed and practical guidelines on how to manage performance in relation to issues and responsibilities including EMAS and GRI. Finally, as management systems they describe what should be accounted for, processing and reporting standards for assurance. These instruments do not set normative goals but rather set a framework for assurance of substantive issues and standards. Examples here include the AA1000 series, the ISO series and Sigma Guidelines. The second and third models are more progressive evaluation schemes.

One key feature of any evaluation scheme must be its ability to point out the issues and problems that are ailing the CSR engagement of any institution. In this instance, recognizing overlaps in many aspects of CSR standards is a starting point. As progressive systems, assurance systems like the GRI Guidelines and AA1000AS have engaged in harmonisation of assurance as a first step in working towards credible standard setting. Through the integration of separate standards in one document, these assurance systems meta-regulate the actors involved in realizing the impact brought about by the various standards, the ability to meet the necessary requirements as well as the modifications that may be needed in such an instance. Structured by an extensive process of reciprocal borrowing between the public and private actors at various levels, procedures emanating from assurance systems have the promise of providing a convergence in CSR narratives. The aim for convergence is underscored by a high degree of experimentation and learning:

Our evolving understanding of sustainability and the development of new solutions is the most fundamental adaptive change process we face. Whatever the solutions we collectively adopt, they will undoubtedly require change in our values, beliefs, knowledge, consumption patterns, business models, and

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<sup>18</sup> For explanation of terminology, see Appendix I.



investment strategies. There are no experts at this moment to simply prescribe what these changes should be. Indeed, any attempt to do so prematurely will inevitably generate significant collateral costs. Rather, we must collectively discover the required changes, negotiate them, amend, and renew them. And we must create the institutional infrastructure to mediate how to report on the inevitable stream of issues that will confront business in the coming decades.<sup>19</sup>

Of course, there is no point in assuring if there is no proper CSR engagement in place or if the system that is audited or certified is flawed.<sup>20</sup> As the field of CSR assurance is an evolving one, it is impossible to achieve a comprehensive coverage of a new field with poorly-defined boundaries.<sup>21</sup> Financial reporting on the other hand has a long regulatory history, the lessons of which show an evolutionary process of development driven by professionalization, regulation and occasional financial scandals illustrated by the likes of Enron and Parmalat. Non financial reporting has had a shorter history, coming to the forefront with environmental impacts which became a mainstream concern during the 1980s. In its earlier form, assurance along these lines was promoted as 'sustainability' or 'triple bottom line' reporting.<sup>22</sup> Concerns over the environmental impact of corporate production processes during this time could not be assuaged by reports from the corporations themselves. As in the financial sphere, there was an increased need for information to be assured by an independent third party. Some of the early attempts along these lines include the US Toxics Release Inventory (TRI) Act in 1987, the Chemical Manufacturers Association's Responsible Care Initiative (1988) and the Coalition of Environmentally Responsible Economies (CERES) Principles (1989) following the Valdez oil spill.<sup>23</sup>

During the 1990s, there was a steady increase in the number of reports which corporations began to display accounting for their environmental and social performance, whether as part of their environmental, health and safety (EHS) management, in stand-alone environmental reports, or incorporated into financial statements.<sup>24</sup> Companies such as The Body Shop International and Ben & Jerry's were pioneers, followed swiftly by the 'blue chips' such as BT, BP and Shell which began to

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<sup>19</sup> E. Ligteringen, *Will the Real Experts Please Stand Up? The Adaptability Nature of Sustainability Reporting* (Amsterdam: GRI, 2006) at 51.

<sup>20</sup> Parker, above n1 at 14.

<sup>21</sup> Zadek, Raynard, Forstater, Oelschlaegel above n3 at 45.

<sup>22</sup> Ibid at 21.

<sup>23</sup> SustainAbility, *Trust Us* (London: SustainAbility/UNEP, 2002).

<sup>24</sup> FEE (Fédération des Experts Comptables Européens) (Discussion Paper Providing Assurance of Environmental Reports: Brussels, 1999), J. Bebbington, R. Gray, C. Hibbitt and E. Kirk, *Full Cost Accounting: An Agenda for Action* (London: CAET, 2002).



publish social reports.<sup>25</sup> Social and environmental reporting changed from being a 'short, glowing commentary on a company's philanthropy', embedded in the mid-pages of corporate annual reports into stand-alone CSR reports. External assurance became an essential part of the process.<sup>26</sup> KPMG estimates that almost half of the Global Fortune 250 now produces some form of CSR report.<sup>27</sup> Although some of these merely cover basic health and safety reports, there are increasingly more sophisticated and comprehensive social and economic reports as well as those with more extensive environmental aspects.<sup>28</sup> Similarly, the Global Reporting Initiative (GRI) estimates that some 4,000 current social or environmental reports now exist.<sup>29</sup> Some assurances are specialized, covering specific aspects of CSR performance. For example, they may be limited specifically to supplier performance or health and safety. Others are generalized assurance models, with the GRI Guidelines and AA1000AS being seen as offering the most comprehensive array of CSR themes and metrics.<sup>30</sup>

Nevertheless, assurance is also full of criticism and limitations. A Christian Aid study says that while more corporations now publish environmental and sometimes social reports, the quality of reporting varies widely.<sup>31</sup> Another commentator says this:

Auditing is one of the most widely used (and abused) ideas in the area of safety management today. It covers anything from a ten-minute exercise ticking boxes on a questionnaire, done by an administrative assistant whose boss is too busy to do it, to a three-week inquiry by a team of six high-powered managers from company sites or headquarters in other parts of the world.<sup>32</sup>

At the end of the day, the quality of reporting is dependant on the robustness of the assurance that is undertaken. If the assurance fails to engage in the CSR initiatives of the corporation and is a mere score card of achievements, then it is of no use in the institutionalization of CSR.

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<sup>25</sup> Zadek, Raynard, Forstater, Oelschlaegel, above n3 at 21.

<sup>26</sup> Zadek, Ibid.

<sup>27</sup> KPMG International Survey of Corporate Responsibility Reporting 2005 available at [http://www.kpmg.nl/Docs/Corporate\\_Site/Publicaties/International\\_Survey\\_Corporate\\_Responsibility\\_2005.pdf](http://www.kpmg.nl/Docs/Corporate_Site/Publicaties/International_Survey_Corporate_Responsibility_2005.pdf)

<sup>28</sup> Zadek, Raynard, Forstater, Oelschlaegel, above n3.

<sup>29</sup> <http://www.globalreporting.org/Home>

<sup>30</sup> Zadek, Raynard, Forstater, Oelschlaegel, above n3 at 7.

<sup>31</sup> Christian Aid, *Behind the Mask : The Real Face of Corporate Social Responsibility* (London: Christian Aid, 2004) at 11.

<sup>32</sup> A. Hopkins, *Managing Major Hazards* (St. Leonards, N.S.W., Australia: Allen & Unwin, 1999) at 70.



Further, profound concerns exist as to how to avoid the practice of CSR assurance being 'infected by the same, manifest, inadequacies of financial assurance'.<sup>33</sup> A few years ago, it was conventional wisdom to say, CSR assurance has a long way to go in catching up with the rigour and robustness of financial assurance. Now with the credibility of financial assurance having received a serious battering, distrust in assurance practices is even higher than ever.<sup>34</sup> Indeed, assurance can easily become an internally-directed tool for ensuring legal compliance, in essence a site for data dumping. Despite the increase in CSR reporting, scepticism about claims of CSR therefore remains high. Increasingly, corporations appear concerned as to whether CSR reporting is delivering in terms of building reputation, whilst stakeholders are asking whether corporate reporting is simply 'corporate-spin'.<sup>35</sup> For example, one study finds that the information contained in CSR reports are rarely used by stakeholders as they tend to be overly detailed, buried in the annual report or glossed over with a few glowing commentaries.<sup>36</sup> So, even where social responsibility reporting is widely adopted, the assurance schemes adapted by corporate reports vary so considerably that stakeholders find them difficult to interpret intelligently, to compare and to be confident of their significance and reliability. Such a scenario appears very far from any hope of convergence.

### **7.3 Institutionalizing CSR Assurance**

In his review of the 'audit society', Power argues that stakeholders tend to rely on auditors to provide 'cold comfort' certificates that verify companies' compliance process reviews. These audits are frequently 'not designed to support public debate or to connect the audit process to wider representative organs or to further machinery of regulatory escalation'.<sup>37</sup> The audit or assurance process, instead of being a basis for rational public deliberation, becomes a dead end in the map of accountability. In terms of improving performance, health and safety reporting or CSR reporting as it is now known, can also fall short of a corporation's own needs. Of the limited research into the impacts of CSR reporting, one study has concluded that there is little evidence that CSR reporting makes

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<sup>33</sup> Institute of Social and Ethical Accountability, *The State of Sustainability Assurance* (London: Accountability, 2003) at p8.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid at 4.

<sup>36</sup> E. Bonfiglioli, P. Monaghan, C. Rubbens and S. Zadek, *Impacts of Reporting* (Brussels: CSR Europe and AccountAbility, 2002).

<sup>37</sup> See M. Power, *The Audit Society: Rituals of Verification* (Oxford University Press, Oxford, 1997) at 69-78.



a difference to corporate decision making, practices and outcomes.<sup>38</sup> Therefore, even though CSR reporting is becoming more common, it is still seen as a fringe activity and remains dislocated from business decisions or basic business models. Much in the same way that traditional philanthropy was and still is seen as a voluntary add on, CSR reporting fits this mode of corporate thinking and remains disconnected from the overall management of the corporation.<sup>39</sup>

It is admitted that current assurance practice is still on a steep learning curve. Nevertheless, the key question here is not whether assurance of CSR reports is worthwhile but what combination of agreed methods and procedures can lead to convergence of standards and thus effectively delivering legitimacy. Utilizing the theoretical framework of internal and external CSR narratives, it will be pointed out that CSR assurance has the ability to drive the role of corporation in society. Assurance is a familiar concept to the corporation and there is potential for this tool to be used in evaluating CSR standards. Further, CSR assurance makes demands of the corporation in ways that financial assurance does not. This background must be remembered in looking at assurance systems.

Assurance at its best is not to merely be a check on what management has already done. It is a test that creates an 'incentive for management to make sure it has put in place an appropriate system'.<sup>40</sup> In essence, assurance must meta-regulate the standards that are employed in CSR engagement. Just as a financial report communicates information that can be seen as transparent, reliable and comparable, so can CSR assurance systems aim for such an ideal. The nature of CSR assurance, informed as it is by the theoretical framework developed in the previous chapters must however move further. A critical assurance is an opportunity to point out design and implementation flaws and make suggestions on how to improve standards. It can create a space for external opinions and expertise to have an impact on how the standards are actually designed and implemented.<sup>41</sup> Of course this is more likely to be the case where there is some sort of obligation as part of the process for management to address the flaws that the auditor

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<sup>38</sup> Bonfiglioli, et al, above n36.

<sup>39</sup> Zadek, et al, above n3 at 23.

<sup>40</sup> Parker, above n1 at 14.

<sup>41</sup> Parker, above n1.



notes in the design and implementation. Nevertheless, by codifying such concerns and observations in such a public report, management must be compelled to show some form of acknowledgement at the level of CSR standard institutionalization. Further, seemingly soft CSR measures like this always can come with a hard implication, for example when it becomes a basis for legal action.

Such an understanding emphasizes that CSR assurance is different than financial assurance. In a robust CSR assurance, unlike financial auditing, there is a need to engage with stakeholders. Even if the assurance providers tend to be professional audit providers, they need to engage with NGOs, sector experts and at times, the government or government led institutions in order to ascertain credibility of their assurance. This engagement is not just for a more balanced or independent overview but is also of underlying importance because of the dynamics of CSR standards. The diversity and magnitude of CSR concerns is reflected in the range of standards adapted. It becomes difficult and sometimes impossible for a single assurance provider to understand and evaluate each standard without some kind of stakeholder consultation. Informed by the deliberative framework of standard setting, stakeholder engagement becomes the most valuable way to produce reporting guidance that is universally applicable and appropriately responds to stakeholder needs. In fact, progressive assurance systems like the AA1000AS have specific stakeholder engagement methodology in order to ensure some kind of uniformity to such discourse.<sup>42</sup> While the GRI Guidelines does not have stakeholder engagement provisions by itself, the indicators are developed through structured, on-going dialogue between representatives of various CSR actors. The importance of engaging the various actors is reflected in the nature of accredited monitors of the Fair Labor Association (FLA), where it is stated that:

In those instances where accredited external monitors themselves are not leading local human rights, labor rights, religious or other similar institutions, [they shall] consult regularly with human rights, labor, religious or other leading local

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<sup>42</sup> The Accountability AA1000AS stakeholder engagement schema is an evolving one. The framework is comprised of three stages, each of which has a number of elements. The three stages – Thinking & Planning, Preparing & Engaging and Responding & Measuring – link the stakeholder engagement framework to the overall AA1000 Series. The elements provide a step-by-step process for designing and implementing a quality stakeholder engagement process and stakeholder mapping. The sequence and the relative importance of the stages and their elements may differ depending on the reason for and context of the engagement, see Institute of Social and Ethical AccountAbility, *Stakeholder Engagement Standard Exposure Draft* (London: Accountability, 2006).



institutions that are likely to have the trust of workers and knowledge of local conditions.<sup>43</sup> Of course, there are some assurance systems that are limited by their wholesale transposition of financial or quality models of assurance, which may not be able to capture fully the subject matter that makes up a picture of sustainability. The International Standard on Assurance Engagements (ISAE 3000) system for example is only applicable to professional auditors and does not provide any engagement provisions for non-audit type organisations, such as NGOs, to fit into the assurance process.<sup>44</sup> All members of the International Federation of Accountants (IFAC) are encouraged to use the ISAE 3000 standard for non-financial assurance. For similar reason, various 'off the peg' management systems like British Standards BS7750, EMAS and ISO14001 have the limitations borne by ISAE 3000. These management systems are better seen as total quality management (TQM) management tools rather than offering specific CSR assurance.

In this vein, some assurance schemes that are sector specific are also limited as they prune the scope of CSR assurance. For example, there has been an explosion in assurance related to sourcing around factory and labour standards in developing countries with such as the Responsible Care, SA8000, the FLA, the Global Alliance for Workers and Communities (GWAC) and the Ethical Trading Initiative (ETI). Other areas with strong demand for assurance have included human rights auditing, greenhouse gas emissions, carbon trading and sustainable forestry. These various assurance schemes are seen to be divergent when viewed collectively. Individually they can work well and have been successfully implemented by corporations at various levels of CSR awareness but it is suggested here that these assurance could prove to be more robust if used in conjunction with wider assurance schemes or better still, merged into archetypical ones. Also, environmental initiatives are often seen as different from social and economic which hampers a more integrated picture of CSR engagement.

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<sup>43</sup> Fair Labor Association, *Monitoring Guidance and Compliance Benchmarks* (2005) available at <http://www.fairlabor.org/compliance>.

<sup>44</sup> As of January 2005, the International Auditing and Assurance Standards Board (IAASB) of the International Federation of Accountants (IFAC) published The Framework and Standard (ISAE3000) for Assurance Engagements. The ISAE 3000 provided by the International Audit and Assurance Standards Board (IAASB), part of the International Federation of Accountants (IFAC). The ISAE3000 establishes basic principles and essential procedures for undertaking assurance engagements. All professional accounting networks have used it since 2005, see Institute of Social and Ethical AccountAbility, above n42.



Ultimately, information on performance of standards should be placed in context. The underlying question of CSR reporting is how the corporation is currently involved in CSR engagement as well as its aims to contribute in the future towards the improvement or deterioration of CSR conditions, developments and trends at all levels.<sup>45</sup> Reporting only on trends in individual standards will fail to respond to this underlying question. Reports should therefore seek to present performance in relation to the broader narrative of CSR. This is because the actors need to be able to discern what impact, if any, it has on the values or goals it is supposed to promote. For example, with regards to the environmental quality of the local area, what could be specified includes total emissions, number of regulatory incidents and their outcomes, number of worker injuries, worker health, customer complaints and satisfaction, so on and so forth. At present, the content of such issues tends to appear in non-financial terms (such as kilograms or tons) or as qualitative policy descriptions. It is suggested that they should be more context specific, say with regards to performance indicators related to worker health and safety support assessment, there must be information to include the risk of costly accidents or workers' compensation demands.<sup>46</sup>

It is envisaged that there is a possibility for these systems to merge smaller or isolated assurance schemes with more progressive ones. In this case, there can be adaptation of various principles, codes of conduct, certification schemes and membership of institutions like the Global Compact. The actors will not know that the standards are actually working to identify problems and to improve them. It was observed that standard setting can be reduced to token gesture in a corporation which brings forth a proliferation of paper stamping with no real change. CSR actors cannot thus be merely fed with the 'cold comfort' of seeing standards in place.<sup>47</sup> A robust assurance scheme has the ability to bring in the discourse that is necessary in CSR institutionalization. Deliberation based engagement is perhaps best reflected in two of the most progressive assurance schemes, the GRI Sustainability Reporting Guidelines (GRI Guidelines) and the AccountAbility AA1000 Assurance Standard (AA1000AS). Both assurance schemes are actively working together in various ways to make their evaluation tools more compatible. The various CSR actors will then to be able to evaluate among others, to

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<sup>45</sup> See GRI Sustainability Reporting Guidelines (Amsterdam, Ver. 3.0, 2000-6).

<sup>46</sup> A. Slater and S. Gilbert, *The Evolution of Business Reporting: Make Room for Sustainability Disclosure* (2004) Environmental Quality Management 41 at 2.

<sup>47</sup> Parker, above n1 at 17.



what extent have hard and soft CSR been utilized, how far have the standards been intertwined in application and breaches, if any, that can be identified and corrected. Assurance holds the key to moving away from a limited focus on public reporting to providing information for learning and innovation based on engagement with the various actors and examination of management systems. Thus, assurance systems have the potential to provide a move from compartmentalization of standards. The point now is to show that the deliberation brought about by CSR standards can be merged through administrative standards. Although diverse, they overlap, they draw on similar principles and can be improved based on this understanding. So at some point there can be some convergence of standards. The advantages of combined standards are numerous. For example, they save time and money, and rather than preparing for multiple audits, companies need prepare for only one. Combined and integrated assurance can be said to eventually lead to dovetailed or integrated management systems, thereby streamlining these processes.<sup>48</sup> In short, an integrated approach to assurance offers ways to evaluate the credibility of CSR engagement.

Put broadly, assurance systems provide a base methodology, the framework from which corporations evaluate, communicate and manage their CSR policies which are often reflected in dispersed standards. It is a systematic and integrated approach to CSR engagement. The demand for an overall approach to CSR assurance is based on the desire to coordinate the multiple information streams and approaches to standards, as a way to simplify and improve management and reporting as well as maximizing benefits. The move from aggregated standards into a more integrated approach is driven by the meta-regulative capability of a robust assurance system. In the following section, a scrutiny of two progressive assurance systems, the AA1000AS and GRI Guidelines will be undertaken. By providing an overview of these two assurance schemes, improvements can be targeted by generating procedures of good decision making. Building on the theoretical work in Chapter 6, it will be suggested that good decision making forms the backbone of improved assurance systems which then promises the ability to point towards convergence in standards. The main argument is that convergence in standards can only be achieved through the rigours of good decision making which is supplied by administrative tools. Conflicts and trade offs appear inevitable but the point is how the

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<sup>48</sup> Slater and Gilbert, above n46 at 47-8.



narrative is maturing. The existing pool of standards could be conceived as a rich foundation upon which the assurance systems could advance with combined strengths.

### **7.3.1 The Accountability AA1000 Assurance Standard**

The AA1000 assurance standard (AA1000 AS) was launched in 2003 by the Institute of Social and Ethical Accountability (AccountAbility).<sup>49</sup> The Institute is a not-for-profit professional membership organisation, built through a coalition of businesses, non-governmental organisations (NGOs), business schools and service providers. The AA1000AS is a generally applicable standard for assessing, attesting to and strengthening the credibility and quality of sustainability reporting and the underlying process. It draws and builds on ‘mainstream financial, environmental and quality related assurance’, and integrates key learning with the emerging practice of ‘sustainability management’ as well as ‘associated reporting and assurance practices’.<sup>50</sup> The AA1000AS is specifically designed for assuring ‘the quality of an organisation’s sustainability reporting and the processes, systems and competencies which underlie the full range of organisational performance’.

The assurance standard itself was developed through a series of deliberations, and was ‘the result of the result of an extensive, two-year, worldwide consultation involving hundreds of organisations from the professions, the investment community, nongovernmental organisations (NGOs), labour and business’.<sup>51</sup> The assurance standard is not declared as a last say on CSR assurance but more realistically promoted as an ‘organizing framework for assurance which gives room for improvement and learning’ as the ‘[t]he nature of learning in the standards field means that the process of providing guidance is ongoing.’ The leaning curve is seen to be dependant on continual engagement ‘with AA1000 Assurance Standard users and stakeholders’.<sup>52</sup> Premised on responsiveness that places emphasis on driving future performance, the aim of the AA1000AS appears to be building performance not compliance.<sup>53</sup>

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<sup>49</sup> Institute of Social and Ethical AccountAbility, *User Note Principles of Materiality, Completeness and Responsiveness as they Relate to the AA1000 Assurance Standard* (London: AccountAbility, 2007).

<sup>50</sup> Institute of Social and Ethical AccountAbility, *Assurance Standard* (London: AccountAbility, 2003) 1 at 4-5.

<sup>51</sup> Institute of Social and Ethical AccountAbility, above n49 at 4.

<sup>52</sup> Ibid.

<sup>53</sup> J. Iansen-Rogers and J. Oelschlaegel, *Assurance Standard Briefing* (London: AccountAbility, 2005) at 14-15.



The key principles common in all the AA1000AS series is materiality,<sup>54</sup> completeness<sup>55</sup> and responsiveness.<sup>56</sup> Through these common principles, the AA1000AS guides corporations in establishing systematic accountability processes in the generation of strategies, policies and programs. The AA1000AS's key characteristics are reflected in the level of discourse that is engaged in. The assurance requires the full range of 'sustainability performance'. This is done by examining the completeness of knowledge and the internalization of an institution's understanding of its own footprint and associated constituent views. With regards to materiality, the focus is on the materiality of subject matter to stakeholders and the accuracy of disclosed information. Such a process enables assessment of the institutions responsiveness to stakeholders. The ongoing evaluation will also consider policies and adherence to mandatory regulations. This integrated approach is seen to be able to further drive the use of both hard and soft CSR. The key attribute of the AA1000AS is that it is designed to be wide enough to be applicable to different types and sizes of organizations and assurance providers from diverse geographical, cultural and social backgrounds. The assurance is believed to provide a forward looking approach that indicates how prepared an institution is to carry out stated policies and goals, as well as meet future standards and expectations. Such an approach can be said to be particularly good to tap on the capability of the corporation.

At the same time, the assurance schemes supports and integrates approaches to assurance using multiple providers, systems and processes, including specific compatibility with the GRI Guidelines. With the ground work laid out like this, the AA1000 can be said to attempt to allow for the creation of associated indicators, targets and communication systems which effectively guide corporate decisions-making and directions. It is designed to complement and enhance the use of specialist assurance

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<sup>54</sup> The materiality principle requires knowing stakeholders and the organizations material concerns. The Assurance Provider states whether the Reporting Organizations has included in the Report the information about its Sustainability Performance required by its stakeholders for them to be able to make informed judgments, decisions and actions. Information is material if its omission or misrepresentation in the report could influence the decisions and actions of the reporting organizations stakeholders (Principle 14).

<sup>55</sup> The completeness principle requires understanding stakeholder concerns, that is, views and need and performance expectations and perceptions associated with their material issues. It requires that the assurance provider evaluate the extent to which the corporation can identify and understand material aspects of its sustainability performance (Principle 17).

<sup>56</sup> The responsiveness principle requires coherent response to stakeholders and the organizations material concerns. The principle requires that the corporation evaluate whether the corporation has responded to stakeholder concerns, policies and relevant standards, and adequately communicated these responses in its report (Principle 18).



standards and guidelines for the purposes of CSR reporting in very different areas that a corporation may be involved.<sup>57</sup>

In embracing such an approach which is meta-regulative in nature, the AA1000AS recognises and advocates the need for experimentation and innovation in embedding social issues in corporate strategies and operations. It furthermore recognises that any useful standard at this stage must stimulate innovation above an 'agreed quality floor', rather than encouraging the development of a more rigid compliance-oriented culture.<sup>58</sup> The design is intended to encourage innovation around key quality principles, which at this stage it considers a more effective approach in taking forward CSR narratives.

### 7.3.2 The GRI Guidelines

The Global Reporting Initiative Sustainability Reporting Guidelines (GRI Guidelines) incorporates the active participation from business, accountancy, investment, environmental, human rights and labour organisations from around the world. Started in 1997, the GRI became independent in 2002, and is an official collaborating centre of the United Nations Environmental Program (UNEP) and works in cooperation with UN Secretary-General's Global Compact.<sup>59</sup> All elements of the Reporting Framework are provided as a free public good and are intended for use by organizations of any size and sector anywhere in the world.<sup>60</sup> Emerging from this multi-stakeholder working group process is a Reporting Framework that is a direct reflection of the experience, learning, and opinions of those practitioners engaged in sustainability reporting either as assurance providers or users of reports. The use of the GRI Guidelines is said to present 'an opportunity to better understand and capture the intellectual capital and practice that is generated around the needs, uses, and practicalities of sustainability reporting'.<sup>61</sup> The GRI's vision is that reporting on economic, environmental and social performance by all institutions becomes as routine and comparable as financial reporting. The GRI accomplishes this vision by developing, continually improving, and building capacity

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<sup>57</sup> Institute of Social and Ethical AccountAbility, above n42.

<sup>58</sup> Ibid.

<sup>59</sup> See <http://www.globalreporting.org/Home>

<sup>60</sup> GRI, *Everything You Need to Know about the G3 Guidelines – Past, Present and Future* (Amsterdam: GRI) at 2.

<sup>61</sup> Ibid.



around the use of its Sustainability Reporting Framework.<sup>62</sup> From 2003-5, more than 850 institutions adapted the Guideline in some form.<sup>63</sup>

The GRI Guidelines began to take shape in the late 1990's, and were released for the first time in 2000 (known as 'G1'). A second version, acclaimed for its significant technical advancement, was released at the World Summit for Sustainable Development in 2002. Known as the 2002 Guidelines (or 'G2'), they steadily became the global de facto standard for sustainability reporting, and have been used by many hundreds of organizations worldwide. In 2006, the GRI released its third generation of Guidelines ('G3'). The G3 represents the outcome of nearly three years' research, consensus seeking and collaboration with thousands of stakeholders worldwide. The result is Guidelines that are more user-friendly and have a higher degree of technical sophistication and applicability.<sup>64</sup> All iterations of the Guidelines, G1, G2 and G3 have each positioned reporting principles as the underlying basis of reporting guidance. In various forms, reporting principles have always contained guidance on how to select, present, and determine the quality of report content. However, the G3 makes this message clearer and one of its strongest innovations is the promotion of reporting principles that form the basis of all reporting guidance and processes. Each principle is presented with a short definition, a longer explanation on its usefulness when applied, and a series of self-tests that help the practitioner apply the principle.<sup>65</sup>

The 2002 Guidelines offered two options for institutions to self declare (and, if desired, have checked) the extent of their use of the Guidelines: 'with reference to' and 'in accordance'. Under the enhanced G3 version, a system of 4 reporting levels have been developed to reflect the extent that the GRI Reporting Framework has been applied. The so-called, 'application levels' are self-declared and will assist report preparers and users to envision different approaches or phases for developing their reporting practices over time. At the same time, it also wants to enable report preparers to better express their reasons for particular issues.

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<sup>62</sup> See <http://www.globalreporting.org/Home>

<sup>63</sup> GRI, above n60 at 3.

<sup>64</sup> GRI at 1.

<sup>65</sup> GRI at 17.



The application levels intend to demonstrate a pathway for incremental reporting, and allow assurance providers to expand their use of the Reporting Framework over time.<sup>66</sup> In advancing this goal, GRI believes that it is important to promote the full use of existing international voluntary initiatives to promote corporate responsibility. Here, it is noteworthy that three initiatives, the UN Global Compact, the OECD Guidelines for Multinational Enterprises (the MNE Guidelines) and the GRI share common elements. They are all global in scope, cover economic social and environmental performance and involve a multi-stakeholder process. Attempts are being made to have these instruments integrate better in the GRI reporting.<sup>67</sup>

Enhancement of the elements of meta-regulation can be seen in G3. The main elements of the Guidelines are in part 1, divided into 3 main areas: reporting principles, reporting guidance and standard disclosures (including performance indicators). These are all of equal weight and importance.<sup>68</sup> There are three parts to the G3 Guidelines, Principles and Guidance; Standard Disclosures; and Guidance on how to apply the Guidelines. The G3 document begins with part 1, a filter of principles and guidance. These helps assurance providers determine what issues to report on; how to ensure the quality of reported information; and how to set the report boundary. Part 2, the standard disclosures section, starts with organizational profile containing strategy and analysis of sustainability, including risks and opportunities; followed by disclosures on the management of key issues; and finally, results-oriented performance indicators. This approach helps reporting institutions contextualize their performance within macro sustainability issues and still disclose specific management approaches. The document concludes with part 3, considerations for guidelines use and report compilation. This contains guidance on issues such as frequency and medium of reporting and continuous improvement. Overall, this is a more logical structure, combined with the new guidance on processes like boundary setting and issue identification. The meta-regulative nature makes it easier for assurance providers to use and will also help align to organizational planning and management processes.

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<sup>66</sup> GRI at 23.

<sup>67</sup> GRI at 26.

<sup>68</sup> See <http://www.globalreporting.org/ReportingFramework/AboutG3>.



#### **7.4 Assurance in the Administrative Space**

As mentioned above, there has been a move for the two progressive assurance systems to be merged. Both have the ability to be used alongside the other and in effect, balance each other. Both the AA1000AS and the GRI Guidelines steer corporations towards the kind of standards they want to adopt and the quality of the information that is going to be disseminated which in essence affects the level of discourse that they need to engage with. Both assurance schemes have some considerable virtues and can be considered one of the most sophisticated and advanced schemes. They integrate codes, principles and systems. There is a genuine coincidence of corporate interests and indicators. The question is how they can be further improved, informed by administrative tools that were explored earlier. Some procedural tools of good decision making are already realized pronouncedly while others are nascent.

Checks and balances form the marrow of administrative law. In CSR engagement, power is devolved to the corporation without scrutiny. Such oversight is rarely capable of overcoming the gap in quality of standards. A system of checks and balances in CSR engagement will have the ability not just to evaluate the CSR standards but when done correctly, provide a balanced overview of what is being achieved by ensuring that the various actors achieve their capabilities. As the assurance provider is not the only actor involved, a whole range of ground-level standard setting actors need to be consulted and this institutes a kind of check and balance between the actors. By working on building cooperation through a check and balance between actors, CSR reports can supply important information towards realizing the institutionalization of standards.

Checks and balance are therefore important to move CSR assurance from the prevalent desk-based assurance to a more robust assurance scheme. Currently even AA1000AS or the GRI Guidelines show that assurance is often based on the company's internal paperwork, supplemented perhaps by a few interviews with head office management staff. The assurance provider will not necessarily conduct systematic fieldwork to find out what actually happens where it counts. Instead they will rely on the policies that have been committed on paper by management and information that is already collected by the company. Such a method limits checks and balances in the assurance scheme. The robustness of checks and balance is dependant on the ability of the assurance provider to



tap on the various actors. What would make a difference here would be the scope of competence of accessing institutions. The quality of checks and balance is however highly dependant on assurance providers like auditors.

Professional audit firms have been identified as key providers of assurance now and in the future, including but not limited to the 'Big 4'.<sup>69</sup> Their ability to bring together multi-disciplinary teams, with international capacity and formal systems to manage liability issues is recognised as a key strength. However, some concern is expressed about their tendency to be internally focused and their limited concept of risk in terms of direct short-term financial consequences, which is implicit in the transposition of financial assurance models to CSR.<sup>70</sup> In a study of an assurance provider, Pricewaterhouse Coopers (PWC) which assured labour conditions in several factories, O'Rourke found that the assurance process was greatly undermined because of the sheer reliability that was placed on management to provide answers rather than to properly engage with stakeholder in the assurance process.<sup>71</sup> The effect of ignoring the check and balance requirement is this:

Monitoring can be an important component of efforts to enforce labor laws and codes of conduct around the world. Proper monitoring can identify problems in contractor factories, measure and evaluate performance, and help to chart strategies for improving conditions. However, flawed monitoring can also do more harm than good. It can divert attention from the real issues in a factory, provide a falsely positive impression of factory performance, certify that a company is "sweat-free" based on very limited evidence, and actually disempower the very workers it is meant to help.<sup>72</sup>

In a similar vein, another assurance provider, Ernst & Young (EY) which provided assurance for Nike explain that 'the procedures we have performed were those that [Nike] specifically instructed us to perform. Accordingly, we make no comment as to the sufficiency of these procedures for your purposes'.<sup>73</sup> As this statement makes clear, EY did not perform an 'independent' assurance, but rather simply followed Nike's instructions.<sup>74</sup> Currently auditing firms are the most popular choice of assurance

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<sup>69</sup> The big 4 auditing firms are seen as Pricewaterhouse Coopers (PWC), Ernst & Young (EY), Deloitte Touche Tohmatsu (Deloitte) and KPMG.

<sup>70</sup> See Zadek, Raynard, Forstater, Oelschlaegel, above n4 at 87.

<sup>71</sup> D. O'Rourke, *Monitoring the Monitors: A Critique of PriceWaterhouseCoopers (PWC) Labor Monitoring* (white paper, 2000) at 7, available at <http://nature.berkeley.edu/orourke/pub.html>

<sup>72</sup> Ibid at 7.

<sup>73</sup> Ibid at 6.

<sup>74</sup> Ibid.



provider and there is some discomfort as to this. O'Rourke's finding suggests that there were serious problems in EY and PWC reporting, particularly because of over reliance of information from management. This does not mean that audit firms should do away with this task. Corporations are comfortable with such assurance providers and unless there is concerted international approach, looking for different professional assurance providers might not be feasible. There are also concerns in terms of liability and confidentiality issues. So, the key is to improve the assurance service provider through checks and balances.<sup>75</sup>

It must be remembered that standard setting requires 'heated discomfort'.<sup>76</sup> The basic assumption of the traditional audit seems to be that everything will be in accord with the appropriate standards and that aberrations will be just that, aberrations. Thus, for open evaluation of CSR standards to be effectively conducted, the assurance provider must be involved in the check and balance requirement. This is done by assuming that at every stage of evaluation, that there will be problems, things that have been missed, things that can be improved, and things that should be changed because circumstances have changed in a corporation.<sup>77</sup> The CSR report should always be a platform for discussion and implementation of changes to the company's standard setting. It should not be a formality that everyone assumes will simply verify that the appropriate standards are in place. This does not mean it must be aggressively adversarial. It does however mean that the assurance provider should go out of its way to look for problem and to include the views of stakeholders and others who are likely to be critical of the system. The key is for the ground level standard setting institutions to be involved in the assurance. So, for use of sustainable paper, the assurance provider should engage with the Forest Stewardship Council (FSC) just like Responsible Care should be consulted for chemical related promises. For example, the assurance provider KPMG shows how in using the AA1000AS they ask critical questions:

If the client claims "we have plans to reduce our Sulphur Dioxide (SO<sub>2</sub>) emissions by 10% over the next 3 years" we would look for evidence that this is already incorporated in proposed changes in the business or in production technology. However for a claim (usually shown in a graph) that "Our SO<sub>2</sub> emissions have gone down by 10% this year" we must undertake a range of

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<sup>75</sup> Ibid.

<sup>76</sup> Parker, above n1 at 16.

<sup>77</sup> Ibid.



detailed data analysis procedures at corporate level to check the completeness and accuracy of the “total” numbers as well as checking the reliability of the reported data at a sample of sites. As with the example above the number of sites increases substantially if the client is seeking “reasonable” assurance on the performance data and the internal review process for the SO<sub>2</sub> data is weak. Finally, we review the text which accompanies the data to ensure that the explanations given for the reduction reflect the evidence we have collected.<sup>78</sup>

Informed by the AA1000AS, the methodology is robust. Yet, for the system to be better, KPMG should make referrals to Responsible Care to verify the quality of the information provided in the first place.<sup>79</sup> This provides a check and balance because Chemical Care can then ensure the quality of KPMG’s assurance with regards to chemical emission. Checks and balance as such play an important role in ensuring credible that assurance is performed.

Another important administrative principle is transparency. Because assurance is really verifying what is in essence ‘delegated decision making’, publication provides a check against the inappropriate and unaccountable exercise of authority. By building understanding, published decisions also advance predictability and reduce future costs. It thereby promotes clarity, stability and compliance. Further, requiring that decisions be documented creates incentives for decision makers to observe fairness, due process, and legality. Information can serve to ‘lessen irrational fears and ideologically driven mistrust among various groups.’<sup>80</sup> On transparency records, most GRI and AA1000AS compliant corporations have scored well as most information is online and can be subject to scrutiny. With transparency comes certainty, another important tool from administrative law geared towards good governance. These administrative tools are an important step for all CSR actors in understanding the level of commitment to standards.

Further, a common framework would respond to the need for transparency. It would need to be universal in its application yet specific enough to help guide an individual corporation. The assurance scheme should be applicable within corporate sectors with

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<sup>78</sup> KPMG Sustainability, *An Approach to Assurance Engagements Using AA1000AS* in User Note, above n49.

<sup>79</sup> Responsible Care is the chemical industry’s initiative to address safe and environmentally sound management of chemicals. It is a global commitment to the responsible management of chemicals through their entire life cycle and to social responsibility, see <http://www.ccpa.ca/ResponsibleCare/>.

<sup>80</sup> P.Kleindorfer and E.Orts, *Informational Regulation of Environmental Risks* (Working Paper, The Wharton School, University of Pennsylvania 1997) available at <http://knowledge.wharton.upenn.edu/papers/288.pdf>



different backgrounds which encounter different CSR challenges but are concerned with the accessibility of their conformity assessment systems. Transparency also demands for efficiency, stability and neutrality in standards. Currently even within GRI and AA assurance, transparency in this sense is still lax because primary reliance is placed on management. One way of overcoming this is to run parallel systems to see how the standard setting initiative of a corporation stacks up with others in the industry. KPMG claims to run parallel systems to see whether the aim is achieved:

For the purpose of certainty, the assurance provider reviews the client's process, we collect evidence from interviews with top management as well as documentary evidence. All the notes from the interviews and the documents have to be kept in our project file so we ask for a copy of everything that is relevant. Examples would include copies of minutes of Board meetings, stakeholder meetings and internal CR management meetings, documents relating to stakeholder and issue identification including CR risk analyses, as well as management system certificates. At the same time, we run a parallel internal process as a way to test the robustness of the client processes. It is necessary for us, as assurance providers, to obtain a level of comfort that the client process has produced the correct results. We check the client's systems by running a parallel process ourselves to identify potential material issues. This is based on Account- Ability's 5-part materiality test with inputs...<sup>81</sup>

KPMG's approach is based on a standard 'materiality' which is useful to generate certainty across assurance systems.

Another important tool of administrative law is the demand of fairness. This points out that assurance systems must be based on inclusivity. Inclusiveness is a necessary attribute of democratic deliberation.<sup>82</sup> Some actors may be excluded due to their inability to be heard, underdevelopment, poverty, so on and so forth. Stakeholder exclusion is particularly rampant in developing countries. Assurance systems must ensure that they can reach out by incorporating local requirements when necessary. Such flexibility is reflected in both AA1000AS and the GRI Guidelines but both systems still have a long way to go in developing the capability of ground standard setting actors. The AA1000AS and the GRI Guidelines need to work on information sharing targeted more strongly with developing countries, particularly by linking with local NGOs and governments. Further, more activities that encourage information sharing and confidence building

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<sup>81</sup> KPMG Sustainability, above n78.

<sup>82</sup> I.M.Young, 'Communication and the Other: Beyond Deliberative Democracy' in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (New Jersey: Princeton: Princeton University Press, 1996) at 120.



elements such as peer reviews, training of each other's accreditation auditors and carrying out joint accreditation audits should be extended.<sup>83</sup> Inclusivity is also availed in the time frame given to enable stakeholders to have a timeline for change in standards and ability to comment. With clear timelines, justification for assurance must be clear. Finally, this ties back to the point on transparency where audit reports ought to be as public as possible so that stakeholders can form their own opinion about the value of standards.

While international frameworks are in place to ensure credible and effective certification and accreditation, a key challenge is the lack of capacity and adequate institutional framework in many developing countries to carry out conformity assessment according to internationally recognised criteria. Without local inspection and certification capacity, the costs of importing international assessment functions are significant. The element of reasonableness applies because although there is a kind of expectation of meeting certain standards, considerations of resources and time must be included. For example, a local corporation based in a developing country will not have the resources an MNC will have. The element of fairness demands means that such corporations must be given the benefit of information sharing. The assurance systems must recognize that there are real constraints to the ability of disadvantaged groups, especially developing country representatives and small and medium-sized enterprises to effectively participate. So, inclusiveness requires regard to be had for such groups, particularly harnessed through procedure. By providing flexibility, different corporations with different resources can aim to achieve CSR engagement subject to limitation of resources, personnel and expertise. In this manner, the small and medium enterprises can also involve themselves in CSR on an incremental basis which serves to enhance their capability.

Further, the elements of proportionality and reasonableness can be invoked with regards to the ability to spread CSR engagement to the entire structure of the corporation, its subsidiaries, supply chain and investment decisions. This is not being ignored by such processes as the GRI Guidelines, which has grappled with the issue of boundaries.<sup>84</sup> The Guidelines explain: 'Organisations using the guidelines may have complex internal structures, multiple subsidiaries, joint ventures, and/or foreign operations. Particular

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<sup>83</sup> See ISEAL, *Lessons from Implementing the ISEAL Code of Good Practice* (London: ISEAL, 2004).

<sup>84</sup> GRI, above n60.



care should be taken to match the scope of the report with the economic, environmental, and social footprint. Any differences should be explained.<sup>85</sup> Nevertheless, the demands of proportionality make it crucial that assurance systems have a clearer picture of how standards are being integrated across the corporate chain. Deloitte used this series of engagements to inform the level of completeness in Vodafone's CSR engagement in 2006:<sup>86</sup>

In 2005, our assurance provider made recommendations to improve our reporting on employment and network rollout. They also recommended extending CR to partner networks, affiliates and franchised retailers. We have improved our performance measures and included additional employee data. Our progress in reporting network rollout issues has been slower but we have made a significant commitment to establish new measures next year. Partner networks and affiliates are increasingly being included in our CR activities by attending workshops and participating in sharing of good practice. To date we have not extended our CR work to franchised retailers globally.<sup>87</sup>

Such a position of exclusion of certain networks and affiliates remains unexplained and no attempt has been made at bridging the exclusion. So, reasonableness and proportionality dictates that there must be some attempt to do something on this end, subject to certain limitations. For example, Vodafone must explain why their CSR standard setting was not extended to retailers.

## 7.5 Improving CSR Assurance

From the above analysis, it can be seen that good decision making based on a procedural framework provides the impetus towards more robust assurance schemes. At this stage, it is not feasible to do a comprehensive empirical study of the AA1000AS which is about three years and G3 of the GRI Guidelines which was just launched less than one year ago. Some have praised the scheme. Some have criticised it. The jury is out on this one. Nevertheless, the procedural base is seen to promote the legitimacy of credible CSR engagement. It maintains that standard setting criteria must ensure that a standard reflects the priorities of interested parties, addresses all material issues and it is effective in achieving its stated social and environmental objectives. Legitimacy is thus seen to be determined by the suitability of the processes through which these standards are

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<sup>85</sup> GRI, above n60 at 45.

<sup>86</sup> Institute of Social and Ethical AccountAbility, above n49.

<sup>87</sup> *Deloitte and Vodafone Group: Reporting on the subjects that matter – Assurance delivered in accordance to both AA1000AS and ISAE 3000* in Institute of Social and Ethical AccountAbility, above n49.



developed, adopted and implemented. Unless these questions are addressed through procedural integration and the answers lead to a better understanding of the similarities and differences between the standards, the future may be one where there remains a profusion of competing standards which ultimately undermines the credibility of CSR engagement.

Of course there are limitations to what assurance can do especially as it is often an annual affair of evaluation of standards. Furthermore, while there are islands of 'auditability' where clear and recognised standards and rigorous measurement metrics make accuracy possible, other areas remain contested and difficult to measure with any kind of accuracy. There are practical challenges such as the availability of data, the cost of gathering it, the confidentiality of information, privacy or other legal concerns, the reliability of available information as well as other factors which may result in a legitimate decision not to disclose certain information. So, where material information is omitted, it becomes necessary for the report to clearly indicate this and the reasons why.<sup>88</sup>

The values of administrative principles informing CSR assurance is very important as it can point towards convergence in standards. This is because if assurance systems are informed thus, they can effectively evaluate standards and bring out the best in standards. Further, administrative tools that underline CSR assurance schemes have the ability to build the capability of the corporation through a real sense of learning. While the central idea that animates the assurance process is that standard setting should be made in light of a comprehensive understanding of their impacts, assurance promotes an information rich and participatory environment for convergence.

Moreover, notwithstanding their evaluative mandate, assurance commitments do not impose substantive obligations. Rather the process is self-regulatory and reflexive; requiring decision-makers to account for and respond to the views of affected persons, and justify their decisions in light of their adherence to both right process and prevailing substantive CSR norms. Assurance schemes when fitted with a good procedural base, requires decision-makers to engage affected persons in a principled and justificatory dialogue. It can therefore be viewed as a mechanism to enhance accountability through

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<sup>88</sup> *GRI Sustainability Reporting Guidelines*, above n45 at 38.



deliberative practices. With an underlying sense of responsiveness, the limitation of individual standards can be addressed. Core to this positive transition will be to seek productive convergence between the various CSR standards.

The future may lie in a new paradigm for business reporting that combines financial statements with a range of other, non-financial disclosures. Some aspects of CSR reporting will fit easily into the existing framework of financial statements and accounts. However, some information may never translate into a valuation precise enough for financial statements, yet will remain material for investors.<sup>89</sup> Yet, even CSR data that defy traditional assurance methods can still be relevant to corporations and stakeholders. Many facts and trends translate into intangibles or risks and opportunities that define business prospects. For example, comparing the eco-efficiency of two corporations can give an indication of their relative ability to innovate efficient processes and technologies. Understanding a corporation's biodiversity impacts can suggest how the level of customer loyalty may change in the future.<sup>90</sup> Over time, the ability to translate CSR standards into financial outcomes will likely improve. But, as is the case in financial reporting, there will always be information that cannot be converted into a single figure. This does not necessarily diminish the importance of the information, but rather suggests the need for applying it differently. What can happen then is that CSR assurance when combined with financial reports can drive financial reports because it provides a clearer picture of the corporation. The social aspect of the corporation is as integral as its economic base and this realization must be institutionalized in assurance schemes as a starting point.

## **7.6 Conclusion**

The GRI and AA1000AS integrate the deliberation based standards by looking to create a common, procedural language. Underlined by a procedural framework, the assurance scheme provides an overview of how standards have been embedded, what works and what does not. The benefits of robust assurance systems is that they have the ability to offer real value in evaluating the level of CSR engagement. It is an evolving process, dependant on new developments in the field and influenced by changes in narratives of

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<sup>89</sup> Slater and Gilbert, above n46 at 44.

<sup>90</sup> Ibid.



standards. The schemes can be seen as the best option in the current environment of learning and development as it has the potential to continuously improve when held together by a strong procedural base. It holds the key for evaluating standards effectively and points the direction towards convergence in standards.



## **CHAPTER 8 Conclusion**

### **8.0 Introduction**

CSR standard setting is in transition. Standards are generated through discourse which often has no systematic centre. As an emerging narrative, CSR standards are a source of confusion and criticism. This has resulted in their varying usage and popularity. At the same time, standards have the ability to bring about change and empowerment. They hold the possibility of harnessing the unbridled concentration of power in the hands of the corporation towards some level of community interest.

This thesis challenged the assumptions made about regulating standards itself by suggesting that CSR must be seen through two narratives, internal and external. In developing narratives of CSR, the thesis went into detail about the types of standards generated by such engagement, analyzing some of its successes and failures. Doing so provided the opportunity to identify the real problems underlying the narratives. Both internal and external narratives are necessary to understand the magnitude of CSR standards. When these narratives merge, they provide the base structure from which the standards can properly develop. In building the institutional support for CSR standards, what has been shown is that not only are standards a site of regulatory cooperation but also to identify the direction in which this cooperation might be going. This was done by illustrating the benefits of a procedural foundation and ultimately, a look at possible convergence by bringing the actors together through a regulatory lens.

In this concluding chapter, an overview of the themes and ideas that were developed will be presented by regrouping them into four concepts: bridging the divide, the bounded corporation, brackets and borrowing.

### **8.1 Bridging the Divide**

Before delving into the evolving internal and external CSR narratives, the regulatory divide needed to be bridged. This dichotomy in standard setting has fuelled the notion that CSR standards are entirely based on soft law. It was observed that CSR is seen popularly as being 'beyond the law', a purely voluntary initiative on the part of the



corporation, something arising from corporate benevolence and akin to philanthropy. Law is largely believed to have no place in CSR initiatives. Such a misconception limits the ability to build a sensible narrative, much less merge the internal and external narratives. If the corporation is to reach out to society, the regulatory framework must first be clarified. This is why unpacking hard and soft CSR is the key step to unlocking the possibilities held by the regulatory lens.

There are varying levels of interaction between hard and soft CSR, as some standards can harden subsequently while others can soften for ease of application. What more, some standards are supple. It may be difficult to place them firmly in either one category. By showing that there is a distinct nexus between the degrees of standards, what has been shown is that both hard and soft laws play a very important role in shaping and moulding CSR narratives. CSR standard setting maps the law as does the law map CSR. This background also shows how the corporation can play a key role in developing the combination of standards. It dismantles a homogenous understanding of CSR and forces a re-think of how standards need to respond to the pluralized requirements of community.

With hard and soft CSR, standard setting becomes more dynamic as it provides a baseline from which CSR can be understood. There is much confusion about the scope and conceptual requirements of CSR. This integration then provides the impetus from which CSR narratives can be built. Thus, an understanding of the implications of the hard and soft nexus definitely impacts the choices made in regulatory design. Further, as a crucial step in understanding how standards operate, it informs critical evaluation. The disconnect between the intentions of CSR and what is actually being achieved can only properly be resolved by critically evaluating standard setting initiatives.

## **8.2 The Bounded Corporation**

In order to develop internal CSR narratives, the bounded corporation needed to be opened. This is seen as the underlying aim of internal CSR narratives. The corporation is bounded by institutional roots, political limitations and legal parameters. The normative-theoretical evaluation of the corporation provided the central source from which the corporate form can be dissected. Lack of historical insight in CSR discourse



has in effect resulted in a lack of engagement with broader questions about the role of the corporation in the community. The historical excursion importantly showed the choices that went into developing the corporation including political, legislative and economic idiosyncrasies.

One of the biggest obstacles to building a notion of responsibility is the perspective that corporations are seen to be in no position to decide on what are good standards as they are purely economic institutions. This is particularly due to the influences of contractarianism, which sees the corporation as inevitably nothing more than a series of contracts. The overwhelming influence of this school of thought significantly undermines the role of the corporation in the community. Nevertheless, reality is much more complex. Elements of contractarianism must be accepted in order to properly understand how the corporation operates, particularly its institutional relationship with the other CSR actors and the community. However, contractarianism is particularly problematic in the sense that it denies the historical evolution of the corporation. The underlying conclusion to be drawn based on the historical outline is that the corporation is a real institution, capable of absorbing values from the community within which it operates and provides something back as a community member. The bounded corporation is thus opened.

When corporations are normatively identified as social and economic institutions, calibrating the appropriate standard will not only create the underlying framework of responsibility but also harness corporate power as a beneficial and useful resource. This is thus not a drastic overhaul of the corporate make-up but recognition of the changing role of the corporation in community. The internal narrative reveals the capability of the corporation in realizing its social responsibilities. It is an institution that is capable of delivering a social role as much as an economic one.

### **8.3 Brackets**

With the normative foundations in place, external narratives begin by recasting the assumptions made in CSR literature to incorporate the role of the various actors. This places the burden of CSR institutionalization not just on corporations but various other institutional actors. The reason for this is because CSR is not a concept that applies to corporations alone. It requires transformation across the whole of society. Engaging in



CSR is as much the task of governments and NGOs as it is for corporations.<sup>1</sup> Seeing CSR as a matter of governance is to suggest that the various actors play different roles as drivers of standards. The challenge is not just to dismantle the corporation but the structures surrounding it which develops its hegemony. The underlying aim therefore is to get the network of actors to function as a cohesive whole.

External narratives are however hampered by brackets which need to be resolved. First, responsibility itself is seen as either being wholly positive or negative. CSR standards are often thought to be enforcing negative standards, which is a responsibility not to do something. Various regulatory provisions require corporations to be responsible for the outcome relating to the primary and secondary areas of their involvement with society. Such provisions entail compliance with a range of social responsibilities, including employee welfare, environment, health and safety regulations. It is argued that this order creates negative duties of CSR, which are responsibilities that impose adherence to minimum regulatory requirements. If the notion of responsibility is to make any sense, both the positive and negative sides need to be incorporated within standard setting initiatives. A combination of positive and negative responsibilities provides the structure with which corporations can institutionalize CSR.

Secondly, the scope of responsibilities is overwhelmed by the 'private' façade boasted by the corporation. As the corporation is seen as a private institution, it provides a kind of immunity as to how it is made accountable. What aggravates this situation is the increased infiltration of corporate power into various areas which are traditionally considered 'public', without the relevant accountability mechanisms.<sup>2</sup> With such qualifications or brackets, the corporation is almost free to act as it deems fit in the public domain, in effect becoming an 'autonomous body politic in a legal order of decentralized power'.<sup>3</sup>

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<sup>1</sup> M. McIntosh, R. Thomas, D. Leipziger, G. Coleman, *Living Corporate Citizenship* (London: FT Prentice Hall, 2003) at 20.

<sup>2</sup> Although the corporation wields significant power, the precise measurement of this power remains elusive: See B. Roach, 'A Primer on Multinational Corporations' in A. Chandler and B. Mazlish (ed) *Leviathan-Multinational Corporations and the New Global History* (Cambridge University Press: Cambridge, 2005) at 32. He says this: 'One of the problems is that no universally accepted metric exists to measure corporate power easily and reliably'. Options for assessing corporate power is considered in R.R. Grant, *Measuring Corporate Power: Assessing the Options* (1997) 31 *Journal of Economic Issues* 453.

<sup>3</sup> E.V. Rostow, 'To Whom and For What Ends is Corporate Management Responsible?' in E.S. Mason (ed) *The Corporation in Modern Society* (New York: Atheneum: 1980) at 51.



The public-private bracket owes its origins to liberalism and the need in the 18<sup>th</sup> century to demarcate private property. Various critics, particularly critical legal scholars and feminists have questioned this dichotomy which is seen as artificial and having no sensible meaning in a complex world of intermingling authorities. Legal analysis nevertheless still limits regulation as being wholly public or wholly private. Such an understanding undermines the governance idea behind CSR. In order to deconstruct this divide which essentially hampers the ability of the various authorities to create standards, there is a need to look at the rule of law. Standard setting challenges the limitations of the rule of law because standards hover in the legal brackets.

The rule of law must be expanded to reflect the plurality of governance networks today, where government is still an important actor, but often not the sole actor. Otherwise, the public-private divide will continue to cause incoherence in areas where a fusion of actors is necessary. Only thus can an integrated notion of responsibility, which takes into consideration both positive and negative responsibilities be institutionalized with clarity.

#### **8.4 Borrowing**

The notion of borrowing explores the crux of external narratives which attempts to explain how a procedural base needs to be borrowed into standard setting initiatives in order to provide underlying support. It was observed that standards emerge through discourse between the CSR actors. This discourse is messy and contradictory as the actors try to pursue their individual agendas but at the same time, attempt to influence one another. The actors at this juncture can be said to meta-regulate one another. Nevertheless, meta-regulation can be chaotic, as the language transmitted by the various actors lead them to talk past one another instead of to each other.<sup>4</sup> This is because there is no central base from which the discourse is structured. It also reflects the state of CSR standard setting as it stands today. The state of code mania explains some of the resistance that has been hurled towards such engagement. Nevertheless, discourse provides the impetus to create a common language as the actors are compelled to engage with each other.

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<sup>4</sup> P. Utting, *Rethinking Business Regulation: From Self-Regulation to Social Control*, UNRISD Publications Business and Society Paper No.15 (Geneva: UNRISD, 2005) at 13.



It is at this juncture that borrowing is needed. The tools of administrative law provide a framework from which the chaos of 'code mania' can be structured. By borrowing the tools of administrative law, a framework to organize decision making emerges. Although the standards are diverse and provide different conversation signals, they can be united through a common decision making process. The importance of borrowing is seen in the ability to provide an evaluative framework for standard setting through a unified decision making process. It serves to support cooperation and interaction between actors within the context of norms and institutions they have created, makes standards understandable, creates stable expectations and provides a 'thick' acceptance of norms. It is suggested that a coherent procedural base can lead to convergence in standards. A study of two assurance systems was undertaken in Chapter 7 to test how the procedural base will inform discourse. Both the AA1000AS and the GRI Guidelines were chosen for being comprehensive assurance tools. This procedural framework can be seen to supply structure to the decision making process.

No doubt, the procedural salve suggested here is an imperfect one. It is not to deny that with procedure, the strategic bargaining that underlines discourse will stop. It will continue but procedure puts in place some kind of framework where all action must be justified, much like administrative discretion. Cataloguing the various attributes of good governance clarifies how the decision making process can enhance legitimacy and promote effective and efficient standard setting. The point is that there ought to be some kind of integration in the quality of reported information before it can be of any use for those who are seeking to evaluate CSR standards. Stakeholders must be able to make informed comparisons as to how different standards perform and whether they achieve the underlying aims. Ultimately, a procedural base is seen as holding the possibility of convergence of the proliferating standards.



## 8.5 Reimagining the Corporation

The story of CSR is an evolving one. At heart, CSR involves not so much reconceptualizing the corporation as recognizing its changing form and purpose. The corporate institution needs to be seen as being part of the community within which it operates, not as a loathed Leviathan. Through CSR standard setting, the institutional actors can be seen as working towards a 'shared understanding' which finds value in the 'norms and history within communities'.<sup>5</sup> In tracing the paths that form such interactions, internal and external narratives grapple with the scope and magnitude of 'responsibility' that should be embraced by the corporation. By pointing to the direction that responsibility may take, the narratives organize the multitude of standards and provide sustaining institutional support. They nurture the future possibilities supplied by standard setting initiatives, building on the capability of the corporation. The evolving CSR standards therefore reflect the attempt to weave a story to reimagine the corporation as an institution of responsibility.

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<sup>5</sup> M. Walzer, *Politics and Passion* (Connecticut: Yale University Press, 2006) at 20.



## APPENDIX I

EMAS, the Eco-Management and Audit Scheme

<http://www.emas.org.uk/aboutemas/mainframe.htm>

Ethical Trade Initiative (ETI), [www.ethicaltrade.org](http://www.ethicaltrade.org)

European Chemical Industry Council (Cefic), <http://www.cefic.be/>

Fair Labor Association Certification (FLA), <http://www.fairlabor.org/>

FEE Guidelines, The European Federation of Accountants Fédération des Experts Comptables Européens, (FEE), <http://www.fee.be/>

Forest Stewardship Council (FSC), <http://www.fsc.org/en/>

<http://www.ifac.org/IAASB/ProjectHistory.php?ProjID=0008>

International Standard for Assurance Engagements (ISAEs)

<http://www.ifac.org/Guidance/>

ISAE 3000 (Revised), International Auditing and Assurance Standards Board

ISO14001 Environmental Management, <http://www.iso14000-iso14001-environmental-management.com/>

ISO26000 (with effect from 2010) [www.iso.org/sr](http://www.iso.org/sr)

Minerals Council of Australia Code for Environmental Management, <http://www.minerals.org.au/environment/code>

Responsible Care, [www.responsiblecare.org/](http://www.responsiblecare.org/)

SA8000, Social Accountability International (SAI)'s <http://www.sa-intl.org/>

Sigma Guidelines, [www.projectsigma.co.uk/](http://www.projectsigma.co.uk/)

The International Social and Environmental Accreditation and Labelling Alliance, (ISEAL) <http://www.isealalliance.org/>

UN Global Compact, [www.unglobalcompact.org/](http://www.unglobalcompact.org/)

World Business Council for Sustainable Development / World Resources Institute

Greenhouse Gas Protocol (WBCSD/WRI GHG protocol), <http://www.ghgprotocol.org/>



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