REFLEXIVE LAW AND THE CSR DEBATE

Reflexive Law: Does it have any relevance to the Corporate Social Responsibility (CSR) debate?

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A ABSTRACT

While conceding that CSR has the potential to address the fallouts from corporate capitalism, this paper argues that rather than the suspicion of law and regulation that has tended to shape the debate and the voluntarism that has dominated the discourse, a proper understanding of the role of law could remove most of the fuzziness that has clouded the CSR debate. The paper posits that approaching CSR from the dynamic perspective of reflexive law theory could breach the gap between CSR and law in a constructive way by recognising and appropriating the potentials of other norm generating subsystems.

B INTRODUCTION

This paper posits that approaching the concept of CSR from the dynamic perspective of reflexive law theory could breach the gap between CSR and law in a constructive way by recognising and appropriating the potentials of other norm generating subsystems apart from law. Also the approach would recognise and appropriate the potentials of the global civil society, international institutions and the business community; refine the construction of the role of business in the society; define key concepts and from this understanding develop a better framework for optimising the potentials of CSR. To illustrate this idea the paper draws examples from the use of Memorandum of Understanding as CSR strategy in Nigeria and The Extractive Industries Transparency Initiative.

C WHY REFLEXIVE LAW?

Many commentators on the voluntarism/mandatory regulation debates have pitched CSR voluntary strategies against the traditional models of regulation, which is a state centred process of mediation through law, legislative, and administrative actions. The reason for this posture can be linked with two dominant theories of law: the positivist theory of law which stresses the unity of state and law and the critical theory which tends to reduce law into power politics.[2]

However as many research works have demonstrated both lines of approach reveal drawbacks that have dogged the development of CSR. The regulatory approach is faced with three major problems that have been described as the 'regulatory trilemma'. This has been explained in simple terms that: "law may be irrelevant to the other sub-systems and of no effect ('mutual indifference'), through creeping legalism may damage the other

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[2] Teubner, Global Law Without a State 3-38

subsystems which is to be regulated through inhibiting its capacity for self-reproduction; the self-reproductive capacity of the legal sub-system may be damaged through an 'oversocialization of law'.[3] The regulatory problems become more complex in underdeveloped economies. According to Graham and Woods, more serious gaps exists in developing countries where governments have less capacity to regulate compared to the developed world.[4] These countries have demonstrated limited capacity to control and sometimes unwillingness to control the effects of economic activities within their borders on social objectives such as human rights, labour rights and environmental sustainability.[5]

On the other hand the voluntary self-regulatory approach also faces the problems of openness, accountability, transparency and fairness while also involving significant transaction cost and the problem of free-riding.[6] The dominant approach to CSR today is the various self-regulatory standards adopted to breach the gap in global economic governance. According to Graham and Woods, "'self-regulation' can be used to describe a variety of attempts by corporations to establish rule based constraints on behaviour without the direct coercive intervention of states or other external actors."[7] Prominent among these are company codes, trade association codes, multi-stakeholder codes, model codes, and government-backed voluntary codes. While the numbers of self-regulatory codes have proliferated over the years it is not all companies that follow the rule they set for themselves.[8]

According to Graham and Woods 'self regulation requires specific conditions of transparency, monitoring and enforcement to be effective' Furthermore research has shown that while markets do provide incentives to adopt codes, many MNC's do not formally evaluate risks for which they sought to mitigate or undertake scheme to control.[9] An important point raised by Graham and Woods is what ensures that the information companies provided pursuant to a reporting standard (where adopted) are accurate and reliable?[10] Despite the limitations of independent third party monitoring, not many companies would subject their environmental and social reporting to independent monitoring. It has been observed that in 2002, only 36 of the FTSE 250 subjected their report to third party monitoring.[11] The incentive to be suspicious is ever present: 'if one company were to publish extensive information on their compliance (or inability to comply) but rival companies did not, the most transparent company would likely suffer as rivals, regulators and NGOs used the disclosures to their own advantage'.[12] Reflexive theory offers a sound theoretical alternative to the two divides most especially in view

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[3] Scott, 8
[4] *ibid* 868
[5] Graham and Woods, 868
[6] Henderson, 30
[7] *ibid* 869
[8] Graham and Woosd, 870-871
[9] *ibid* 871
[10] *ibid* 875
[11] *ibid*
[12] *ibid* 877

of the interplay between CSR and law that continues to shape the way law is made and interpreted.[13]

Reflexive law theory transforms the concerns of post structuralist and modern sociological systems theory into salient questions for sociology and theory of law.[14] The challenge it poses is the rethinking of the understanding of the legal and social order emphasizing a shift from methodological individualism in the 'academic analysis of law and other social phenomenal' to a study of the communicative processes, which constitute legal and social systems.[15] It shifts focus away from the over reliance on command and control methods. The theory focuses on procedural norms ('auxiliary legislation') as opposed to substantive formalized rules. The procedural norms concentrate on the development of regulatory mechanisms, which is aimed at achieving intended outcome by aggregating individual self-regulatory decisions.[16] It thus mobilizes the self-referential capacities of institutions to enable them to best shape their response to complex problems.[17] The law thus avoids the need to directly regulate complex social areas but focuses on controlling the structure and processes of self-regulation appropriately.[18] Regulation and compliance is thus delegated to the level of individual corporations.

The theory recognizes that the social context of law consists of 'independent function systems'. They are autopoetic systems, which are functionally closed.[19] By this approach, law will seek to find ways of working with the subsystems 'seeking for example the alignment of regulatory norms set by legislators, legal norms generated as a response by the legal subsystem, and activities over which control is sought.'[20] Reflexive law thus allows regulation to take advantage of the benefits of soft law: lower contracting costs, lower sovereignty costs, better adaptation to conditions of uncertainty and those requiring compromise.[21] Examples include narrow procedural processes, e.g. the requirement that firms have compliance officers; legal rules, e.g. senior members being liable for the misconduct of junior members;[22] and setting minimum standards for contents of codes of conduct. An important aspect of reflexive law is the realisation that formal state law is

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[13] Examples are: Ghana, which requires by law for logging companies to obtain a Social Responsibility Agreement with customary owners of land where they operate. Taiwan which in 1998 introduced a Government Procurement Act which provides that product bearing a state run eco label ' Green Mark' should be given priority in government procurement and also given a 10 per cent price advantage. Similarly the UK has legislation that requires pension fund managers to report on the environmental or social policies that they apply to their investments. In the EU all appliances are required to be labelled with an energy efficiency label. The enactment of Constituency Statutes in the United States in the eighties and the nineties and the interpretation of the Alien Torts Act in the United States since the eighties could also be said to be influenced by the social responsibility movement. Similar developments have occurred in South Africa and Australia.
[14] Rogowski and Wilthagen, 1-19
[15] Rogowski and Wilthagen, 4
[16] Davies, 6
[17] *ibid*, 7
[18] *ibid*
[19] Rogowski and Wilthagen, 6
[20] Scott, 9
[21] Snyder, 624-640
[22] Davies, 6

not the only significant form of norm. State law, though much more formalized, is conceived as one among many competing normative systems.

Following from this is the ability of the concept to accommodate the concept of a 'global law without a state',[23] which would accord legitimacy to transnational global norm.[24] Norms are developed by communicative processes between subsystems. In this regard MNCs, the civil society and international institutions (as opposed to communities and geographical groups) are all subsystems, which facilitate discourses and communication. The result would be quasi-contractual norms to solve regulatory problems. The challenge is how to ensure perturbation within the system in a consistent and coherent manner.

D REFLEXIVE LAW THEORY, THE COMPANY AND THE DEFINITION OF CSR

Finding a definitional construct for CSR has been a major challenge across disciplines. The inability has led to a proliferation of definitions and multifarious methods of measuring CSR leading to the inability to compare CSR strategy and performance across borders and industries. It has been observed that companies, consultants, lawyers, non-governmental organizations (NGOs) and other interest groups have separate definitions for the concept.[25] Quite apart from different definitional constructs, it has also been observed that institutions and individuals do change their definition of the concept over time. Blowfield and Frynas cited the example of the World Business Council for Sustainable Development (WBCSD), which defined the concept in 1998 as 'the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large'.[26] In 2002 WBCSD changed its definition to 'the commitment of business to contribute to sustainable economic development, working with employees, families, the local community and society at large to improve their quality of life'.[27] It is posited that subjecting the definitional construct to relativism would stultify the growth of CSR. The reflexive law approach would treat the corporate form as a subsystem in itself, which interacts with its environment to sustain itself.[28] This is possible because as Bastias pointed out, conceptions are borne out of perception and not physical nature.[29] The corporation is thus more than the people who invest, work with it or engage with it in any other manner. It has a life of its own. Just as we can ascribe moral responsibility to an autonomous state so we can to the company from this perspective. This is what Teubner described as the autopoetic nature

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[23] Calliess, 9
[24] Caliess define transnational law as 'a third-level autonomous legal system beyond municipal and public international law, created and developed by the law-making forces of an emerging global civil society, founded on general principles of law as well as societal usages, administered by private dispute resolution service providers, and codified (if at all) by private norm formulating agencies'(4).
[25] Economist Intelligence Unit, 11
[26] Blowfield and Frynas 499
[27] *ibid*
[28] Bastias, 1
[29] *ibid* 2

of the company.[30] According to him the company is an entity with its own interest intermediating with other interests such as management, shareholders, unions, and public interest. From this approach we can propose a comprehensive definition of CSR as a communication process between subsystems in the development of transparent normative framework for business response to uncertainties and risk emanating from social and environmental impacts of business.

E APPLYING THE THEORY TO PRACTICE

1 The Case of the Oil Industry and the Communities in the Niger Delta Area of Nigeria: CSR through Memorandum of Understanding for Development Aid

The Niger Delta Area of Nigeria produces more than 99% of Nigeria's oil revenue estimated to be $600 billion in the last 45 years.[31] Today, 11 Oil companies operate 159 oil fields and 1,481 oil wells in the region. As news in the recent past has shown, conflicts between communities in the area and oil companies are rife. Disastrous ecological degradation, environmental pollution, critical neglect in infrastructure development are the usual triggers of these conflicts. These communities not only hold the government responsible for their woes but also (and critically) the oil companies that they can physically see on the land they passionately believe to be theirs. The conflict, which is increasingly turning violent, has led to instability and disruption of the operations of corporations. Most of the corporations have tried to address the issue through memorandum of understanding (MOU) for development aid signed with local communities to address many of these issues. However, the strategy seems to be backfiring. More conflicts have arisen out of the frequent lamentation that companies do not keep to their commitments and the allegations that most of the funds allocated for such aid is lost between the companies' community liaison officers, local leaders and contractors. Reflexive law theory would recognise the potentials of MOU as a communicative process. It would encourage the law to assist the process and optimise its potentials by steering it towards further development of itself. For example, by encouraging the development of independent mediation or arbitration process that can be employed when agreements are in dispute. Such a procedure would facilitate a reflexive development of norms surrounding this practice.

2 An Emerging Possibility: Extractive Industries Transparency Initiative (EITI); the Nigerian state and Multinational Corporations; The Department of International Development (DFID) led initiative

The Extractive Industries Transparency Initiative (EITI) and how it is being implemented in Nigeria holds out the potential of a contemporary demonstration of the reflexive law theory. The initiative is aimed at creating accountability and transparency in the management of oil, gas and mining resources in resource rich countries. The EITI principle, which forms the

[30] Teubner, 21-52
[31] Wurthmann

cornerstone of the initiative, was formulated by a coalition of states and civil society in London in 2003. The source book of the initiative has guidelines for states, for companies and highlights the role of civil society in the process. It leaves participants the freedom of engaging in a communicative process to develop frameworks for implementation at local levels. However it defines key terms, which might be sticking point in the implementation process for example the term 'stakeholder' in the context of the initiative.[32] It however concedes the complexity of stakeholder identification and encourages states on their part to undertake formal stakeholder assessment. Furthermore it allows for perturbation within the process by encouraging feedback and modification as a result of experience on a constant basis.

The Nigerian government in implementing the initiative on its part (after consultation with identified stakeholders) passed the Nigerian Extractive Industry Transparency Initiative Bill, 2004. While not directly imposing significant additional regulatory obligation on companies, the law set out broad expectations from companies in the extractive industry in the supply of information. Many companies operating in this area in the country have signed up to the initiative and are devising ways of meeting the requirement of the initiative guided in some measure by the state law.[33] There are other ways by which state action can further enhance the initiative.

For example in Azerbaijan, another country implementing the EITI, the Government's state commission responsible for overseeing the implementation of EITI, local NGOs and companies operating in the country signed a memorandum providing guidance on responsibilities of each stakeholder groups and on dispute resolution.[34] What is thus seen in operation here is a combination of norms developed at international level facilitating innovation at state level and encouraging internal self-regulation by companies to meet stated objectives.[35]

F THE UN, THE GLOBAL COMPACT AND CSR

The UN and other international institutions have before and after the Global Compact[36] grappled with the reconciliation of business objectives with societal expectations. Reference is made to various attempts to reconcile multinational corporations business objectives with societal expectations:

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[32] EITI Source Book, 5
[33] van der Veer, 1-3
[34] PYWP Nigeria, 10
[35] A parallel can be drawn with the EU Working Time Directive(Directive 93/104/EC now enacted in Ireland as the Organization of Working Time Act, 1997) which has been described as an example of 'reflexive harmonization' (Barnard, Deakin and Hobbs). It must be borne in mind however that the Directive originated from a rigorous legislative exercise. According to Barnard et al, an important aspect of the Directive 'was the flexibility which it appeared to offer to employers and unions to craft local level solutions to deal with trade-offs involved in negotiating working time settlements' (Barnard, Deakin and Hobbs). The directive gives states wide options in the implementation process while also allowing for the possibility of using existing self regulatory mechanisms in meeting up to the EU standard.
[36] The Global Compact is a voluntary initiative promoted by the United Nations. See http://www.unglobalcompact.org/ last visited 12/12/06.

(i) The International Labour Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises (1977);
(ii) The United Nations Centre on Transnational Corporations (1974-1993);
(iii) The OECD Guidelines for Multinational Enterprises (1976) (2000);and
(iv) the recent Norms on Responsibility of Multinational Corporations and other Business Enterprises with regard to Human Rights (the Norms) (2003).

Of particular interest is the Norms, which referred to the Global Compact as one of its source documents. The Norms was an attempt by the United Nations to create binding obligation on business but recent developments have shown that it has failed.[37] It is observed that if the Global Compact had been more effective the UN would have found it unnecessary to attempt a more binding instrument as the Norms purported to be. One of the major limitations of the Global Compact is that it is a completely voluntary initiative. This would explain, for example, the slow response of big business in the United States to the compact.[38] The Compact presently encourages participating companies to participate in the Global Reporting Initiative sometimes called the triple bottom line or sustainability reporting but does not make it mandatory.[39]

The lack of an objective and independent monitoring process, it has been argued, makes it susceptible to being used merely as a public relations instrument by corporations under the prestigious covering of the UN, knowing fully well that they will not be called to account.[40] The question then is how can reflexive law theory optimise the advantages of the Global Compact while at the same time eliminating its shortcomings in the advancement of the CSR agenda? Writers on the Global Compact have noted the norm shaping potentials of the initiative. While emphasizing that the Compact is an attempt to retrieve the moral purpose of business, William argued that 'the Global Compact today is far from a force that might shape significant changes in the moral values of the global community'.[41] He however posited that the Compact is 'starting somewhere'. According to him the Compact as envisioned by its authors is 'an incremental process of learning and improvement, rooted in local networks, sharing the same universal values, that is now only at the starting gate'. He underscored the most important contribution of the Compact, which is that it brings to the fore the idea that there is a moral purpose of business within the UN discourse.[42]

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[37] The recent caustic criticism of the Norms by John Ruggie, the special representative appointed by the Secretary General to review the document and its implementation process seemed to have put the final nail in the document's coffin. See J Ruggie 'Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary–General on the issue of human rights and Transnational Corporations and other businesses' (Commission on Human Rights, E/CN.4/2006/97).
[38] William, 755
[39] *ibid*
[40] *ibid*
[41] *ibid*
[42] *ibid*

The Compact thus provides a viable communicative process between companies, governments, labour, civil society, the UN and its agencies. The rapports between these institutions, which are social subsystems, are already coalescing, at least in respect of the broad principles. A further step forward as demonstrated by the cited examples is to facilitate the incorporation of mechanisms that would advance the self-referential capacity of the system at local levels especially in conflict areas whether between participating stakeholders or other stakeholders. One approach is to follow the emerging EITI/NEITI approach, which is facilitating a complimentary partnership between law and self-regulation.

The Global Compact should also monitor self-regulatory practices such as the use of MOUs in Nigeria so as to encourage relevant stakeholders to fill in the lacunae in the process. The same can be done in respect of company codes of conduct. While the Compact is focused on companies, it should not neglect the potentials of other subsystems. The NGO's role as emerging global civil society apart from participating in the communicative process is also to promote the self-referential capacity of the system by working to support the suggested approach. The Example of the role of NGOs in Azerbaijan's example is instructive. While company managers, rather than being wary of state legislations, should work with regulatory authorities in fashioning flexible procedural laws setting out broad objectives, benchmarks and mediation processes.

This approach has important implications for major participants in the CSR agenda. Recognising the corporation as a 'being, which interacts with its environment to sustain itself' would give legitimacy to corporate decisions to engage in CSR.[43] Furthermore the recognition of the global civil society as a subsystem would give credence for the accordance of, for example, international status to the group. The recognition of international institutions as norm generating units is also legitimatised.

G CONCLUSION

This short exposition has demonstrated the important role the law (reflexive law theory) could play in taking CSR to the next level. The approach would harmonise the advantages of laws and self-regulation in order to avoid the disadvantages of both approaches. The result for CSR would be a coherent understanding of the concept, recognition of relevant norm generating institutions within the CSR discourse, the clarification of key terms and the facilitation of perturbation within the system.

[43] Bastias, 1.

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