

THE UNIVERSITY OF HULL

Re-defining corporate social responsibility as a legitimizing force for
corporate power: To what extent can law and a law-jobs perspective
contribute to corporate social responsibility?

being a Thesis submitted for the Degree of Doctor of Philosophy
in the University of Hull

by

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Responsibility for any errors or inadequacies that may remain in this thesis is entirely mine.

LIST OF ABBREVIATIONS

ATS	Alien Torts Statutes (US)
BP	British Petroleum
CMR	California Management Review
CSR	Corporate Social Responsibility
DFID	Department for International Development (UK)
EC	European Commission
ECC	Essentially contested concepts
EITI	Extractive Industries Transparency Initiative
EJIR	European Journal of International Law
FRC	Financial Reporting Council
ILO	International Labour Organisation
IMF	International Monetary Fund
MNC	Multinational Corporations
NGO	Non-governmental organisation
OECD	Organisation for Economic Corporation and Development
OPEC	Organisation of Petroleum Exporting Countries
SEC	Securities Exchange Commission
SPDC	Shell Petroleum Development Corporation
TNC	Transnational corporations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNRISD	United Nations Research Institute for Social Development
WB	World Bank
WBSCD	World Business Council for Sustainable Development
WTO	World Trade Organisation

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- Bowoto v. Chevron Corp.*, No. 09-15641, 2010 WL 3516437 (9th Cir. Sept. 10, 2010)
- Case concerning military and para-military activities in and against Nicaragua (Nicaragua v US) Merits* (1986) ICJ Reps 14
- Doe VIII v. Exxon Mobil Corp.*, No. 09-7125 (D.C. Cir. 2011)
- Exxon Shipping Company et al v Baker et al* 554 US_ (2008)
- Kiobel v Royal Dutch Petroleum* No.06-4800-cv, 06-4876-cv, 2010WL 3611392 (2d Cir. Sept. 17, 2010)
- Lubbe v Cape Plc* [2000] UKHL 41
- Nike Inc. V Kasky* 539 U.S. 654 (2003)
- R (on the application of Green peace Ltd.) v Inspectorate of Pollution and Anor* (No.2) (1994) 4 All E R 329
- Re Southard Ltd and Co. Ltd* (1979) 3 All ER 556, (1979) 1 WLR 1198
- Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India*, 634 F.Supp. 842, 844 (SDNY, 1986), aff'd, 809 Fed. Rptr. 2d 195 (2nd Cir., 1987)
- Rolls-Royce PLC v Unite the Union* [2009] EWCA Civ 387
- Salomon v. Salomon* (1897) 1897 AC 22 (HL) (United Kingdom)
- Santa Clara County v. Southern Pacific Railroad Company* 118 US 394 (1886)
- Sosa v. Alvarez-Machain* 542 U.S. 692 (2004)
- SEC v Medical Committee for Human Rights* (1972) 404 U.S. 403
- Spiliada Maritime Corporation –v- Cansulex Ltd* [1987] AC 460
- The Case concerning the Barcelona Traction Light and Power Co. Belgium v Spain* (1970) ICJ Rep. 4
- Trustees of Dartmouth College v. Woodward* (1819) (17 US) 4 Wheat 518 at 636
- Wiwa v Shell Petroleum Development Co.* 226 F. 3rd 88 (2d Cir. 2000)

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Denmark:

Financial Services Act 2008 s.99a

United Kingdom:

Companies Act 2006 s. 170-177, 417

United States:

Alien Tort Statutes 28 USC § 1350 (1994)

Revised Model Business Corp. Act s. 6.22, 2.02(b) (2)(v) (1994)

Delaware Code Annotated Title 8 s.102 (b) (6) (1992)

Uniform Commercial Code

Nigeria:

Petroleum Act 1969 Chapter 350 Laws of the Federation of Nigeria

Nigerian Extractive Industry Transparency Initiative Act 2007

Mexico:

Constitution Article 27

Mauritius:

Finance Act 2009 Sub-part AD- s. 50k & 1

International materials:

The Convention for the protection of the marine environment of the north-east Atlantic (OSPAR convention) in force March 1998 (1998) 32 ILM 1072

Draft UN Code of Conduct for Transnational Corporations 23 ILM 626 (1984)

Section 1(a)

Norms on the Responsibilities of Transnational Corporations and other Business

Enterprise with regard to Human rights UN Doc. E/CN.4/Sub.2/2003/12/Rev.2

CHAPTER ONE

INTRODUCTION

*'The modern super-corporations ...wields immense, virtually unchecked power, some say they are 'private governments', whose decisions affect the lives of us all. The philosophy of our times, I think requires that such enterprises be held to a higher standard than that of the 'morals of the market place' which exalts a single-minded myopic determination to maximise profits'*¹

1.1 Introduction

In the late twentieth and early twenty-first century, a catalogue of high-profile disasters and controversies has drawn attention to the changing nature of relationship between large corporations and society. The list would include, the Shell Brent Spar incident², the Shell crisis in Nigeria³, the Bhopal chemical spill⁴, the Exxon Valdez Oil spill⁵, the use of slave labour in Burma and the controversial working conditions

¹ Justice Douglas dissenting, *SEC v Medical Committee for Human Rights* (1972) 404 U.S. 403, 409-410; also cited in Lord Wedderburn 'Legal Development of Corporate Responsibility: For Whom will Corporate Managers be Trustees' in K J Hopt and G Teubner, *Corporate Governance and Directors Liabilities: Legal, Economic and Sociological Analyses of Corporate Social Responsibility* (De Gruyter, Berlin 1984) 3-54

² In 1995 Greenpeace controversially stopped the dumping of the Brent Spar (North Sea) oil storage facility in the ocean. See G Jordan, *Shell, Greenpeace and the Brent Spar* (Palgrave, Basingstoke 2001)

³ Shell's alleged complicity in the deaths of Ogoni human rights activists in 1995 and other human rights violations. See D Wheeler H Fabig R Boele, 'Paradoxes and Dilemmas for stakeholder responsive firms in the extractive sector: lessons from the case of Shell and the Ogoni' (2002) 39(3) *Journal of Business Ethics* 297-318 and B Manby, *Shell in Nigeria: Corporate Social Responsibility and the Ogoni Crisis* (Carnegie Council case study series, Case Study # 20 2000)

⁴ In 1984 this was a chemical leak from a storage facility in Bhopal, India that resulted in the death of thousands. See RAG Monks and N Minow, *Corporate Governance* (3rd ed. Blackwell, Oxford 2004) 18-19

⁵ In 1989 an oil tanker accident resulting in one of the largest oil spills. This occurred in a region of Alaska which is a habitat for different sea creatures and fishes. The livelihood of the local fishing population was also adversely affected see M Baker Companies in crisis: what not to do when it all goes wrong Exxon Mobil and Exxon Valdez <<http://www.mallenbaker.net/csr/crisis03.html>> accessed 17 September 2011

in Asian factories⁶, the baby milk scandals⁷, the conflicts between indigenous peoples, mining communities and mining companies in South American countries, West Papua and other areas⁸, the pharmaceutical industry and the anti-retroviral drugs crisis⁹, the Enron collapse¹⁰, the banking crisis of 2008¹¹ and the BP- Gulf of Mexico oil spill¹², to mention but a few. These incidents and crisis have thrown open questions of the impact of corporations especially multinational corporations on various aspects and actors within society. Freeland observes that:

‘the Gulf oil spill and the financial crisis have taught us, rather brutally, that the heart of the relationship between business and society doesn’t lie with the charitable deeds companies do in their off-hours but whether they are doing their day jobs in ways that help – or hurt the rest of us.’¹³

Therefore this changing nature of the relationship between large corporations and society in this period has become the driving force for demands that corporations become ‘socially responsible’. These demands have come from several sectors of society including non-governmental organisations, local communities and academics

⁶ A Ramasastry, ‘Corporate Complicity: From Nuremburg to Rangoon, an examination of forced labour cases and their impact on the liability of MNC’ (2002) 20 Berkeley Journal of International Law 91-137

⁷ Nestle as the largest artificial baby milk producer had been implicated in allegations of scandalous marketing practices especially in developing countries. The Business and Human Rights websites details various baby food and baby milk controversies: <<http://www.business-humanrights.org/Categories/Sectors/Agriculturefoodbeveragetobaccofishing/Babyfoodbabymilk>> accessed 17 September 2011

⁸ N Yakovleva, *CSR in the mining industries* (Ashgate, Hampshire 2005); T E Downing and others *Indigenous peoples and mining encounters: strategies and tactics* April 2002 Report no. 57 (MMSD) (IIED/WBCSD, 2002)

⁹ World Bank Development Report 2006 *Equity and Development* (Washington, IBRD/WB/OUP, 2005) 215

¹⁰ The sudden collapse of a large energy corporation, Enron opened up questions on the ethical aspect of such corporations. Buhr & Grafstrom remark that ‘the collapse of ENRON in the autumn of 2001 marked a watershed in the discussion of CSR’ See H Buhr & M Grafstrom, ‘The making of meaning in the media, the case of CSR in the FT’ in F Den Hond and others, *Managing CSR in action: talking, doing and measuring* (Ashgate, Hampshire 2007) 15-32, 26

¹¹ S Decker C Sale, ‘An analysis of CSR, Trust and Reputation in the Banking Profession’ in S O Idowu W L Filho(eds.), *Professionals’ Perspectives of CSR* (Berlin, Springer-Verlag, 2009) 135-156

¹² C. Freeland ‘What’s BP’s social responsibility?’ 19 July 2010 Reuters online <<http://blogs.reuters.com/chrystia-freeland/2010/07/19/whats-bps-social-responsibility/>> accessed 17 September 2011

¹³ Ibid

amongst others.¹⁴ This is because of perceptions of a sustained shift towards private corporate interests through privatisation and the consequential involvement of these private corporate interests in many aspects of public societal life.¹⁵

Corporate Social Responsibility (CSR) has arisen as a concept that attempts to encapsulate these demands for social responsibility. It is therefore a concept which could have significant implications for corporations and society. Yet at heart of CSR is the debate about its meaning and contestations about the role and relevance of law. CSR definitions are therefore contested and this contestation has had the effect of limiting the efficacy of CSR as there is uncertainty as to what it means and its ultimate goal. In some sense, this contestation can be partially attributed to the fluidity inherent to CSR as it seeks to capture evolving and developing demands from society but it is necessary that at CSR's conceptual core, it addresses a central theme. In addition several definitions purport to exclude law by the use of terms such as 'beyond the law', 'voluntary' and 'beyond legal requirements'.¹⁶

This suggests that legal inquiry into CSR is an anomaly but it is impossible to propose that CSR occurs outside the law or is illegal. When one examines the relationship between corporations and society then law is a fundamental aspect of such relationship. Nevertheless the law's relevance to contemporary concepts is contested because the law is seen as inflexible and mandatory. This is not reflective

¹⁴ M Haigh M T Jones, 'The Drivers of CSR: a critical review' (2006) 5(2) *The Business Review* 245-251; J Moon D Vogel 'CSR, Government and Civil Society' in A Crane and others *Oxford Handbook on CSR* (Oxford University Press (OUP), Oxford 2008) 303-326; G Eweje 'Multinational Oil company initiatives in Nigeria: The scepticism of stakeholders in host communities' (2007) 49(5/6) *International Journal of Law and Management* 218-235; W. Visser 'CSR in Developing Countries' in A Crane and others *Oxford Handbook on CSR* (OUP, Oxford 2008) 473-502

¹⁵ This shift is new and recreated rather than a direct transfer as Ruggie asserts that there has been no actual shift instead that firms have created new transnational world of transnational flows that did not previously exist. The crux issue on which there is consensus is the significant impact this is having on the lives of individuals in society. J G Ruggie, 'Reconstituting the Global Public Domain- Issues, Actors and Practices' 10(4) *European Journal of International Relations* 499-531, 503

¹⁶ See a good summary in S B Banerjee *Corporate Social Responsibility The good, the bad and the ugly* (Edward Elgar, Cheltenham 2007)16 -18

of contemporary perspectives of law as concepts such CSR can be seen as parallel to newer legal concepts that need to retain some flexibility in definition.

The objective of this thesis is to reveal that CSR has a central theme and that this permits the examination of legal perspectives. This central theme is proposed to be the legitimacy of corporate power and this permits the exploration of chosen legal perspectives with the potential to structure and influence the external use of power in the interactive relationship between corporation and society.

This introductory chapter will outline this hypothesis in more detail. Firstly it sets out the context and background to the thesis. Then it identifies the research questions that drive the thesis. In the next section, the chapter provides justification for the thesis. Furthermore it will point out the scope and limitations within the thesis. The penultimate section specifies the methodology of the thesis and the last section provides an overview of other chapters within the thesis.

1.2 Context of the thesis

This changing relationship between corporations and society which has been introduced in this chapter must be placed against the context of globalisation.¹⁷

Globalisation places emphasis on a world without borders, with the aim of achieving record levels of global 'interconnectedness'.¹⁸ The emphasis has been on persuading more states to pursue 'good',¹⁹ economic governance, 'based on the precepts of macroeconomic stability, liberalization of markets and privatization of economic activity.'²⁰ This represents a capitalist approach and has resulted in the expansion of markets and the private sector. The focus has been on the protection of foreign investment through principles such as the principle of national treatment. This principle creates the ability for corporations to be able to establish business in almost any state without hindrance, unless similar restrictions are imposed on a host country's corporations.²¹ Cutler points out that 'forces of globalisation and the

¹⁷ A G Scherer G Palazzo, 'Globalisation and Corporate social responsibility' in A Crane and others (eds.) *The Oxford Handbook of CSR* (New York, OUP, 2008) 413-431 Where they point out that with globalisation there should be a paradigm shift in the CSR debate as a different scenario applies. A global framework that is fragile and incomplete.

¹⁸ A good definition describes globalisation as 'the intensification of worldwide social relations, which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice-versa' A Giddens *The Consequences of Modernity* (Stanford University Press 1991) 64 There is a dialectic nature to globalisation that involves both simultaneous and contradictory effects. An indicative list on the topic includes: D Held and A McGrew(eds.), *The Global Transformations Reader* (2nd ed. Polity Press, Cambridge 2003); D. Held and A. McGrew, *Governing Globalization: Power, Authority and Global Governance* (Polity Press, Cambridge 2002); J A Scholte, *Globalization: A Critical Introduction* (2nd ed. Palgrave Macmillan, 2005); JH Dunning (ed.), *Government, Globalisation and International Business* (OUP, Oxford 1997); AM Taylor and JG Williamson (eds.), *Globalisation in Historical Perspective* (University of Chicago Press, Chicago 2003)

¹⁹ 'Good' refers to the successful adoption of market economy as an economic model.

²⁰ UNDP Human Development Report (HDR) 2003 *Millennium Development goals, a compact to end world poverty* (OUP, Oxford 2003) 16

²¹ *Corporate Social Responsibility and Development: Towards a New Agenda?* Report of the UNRISD Conference 17-18 November 2003, Geneva at 19

privatisation and deregulation of industries, sectors, commodities and services are transforming authority relations locally and globally'.²²

This trend of global integration and opening up of markets has been of immense benefit to multinational corporations (MNC).²³ MNC can be defined as large corporations which control operations or income-generating assets in more than one country.²⁴ This control and the resulting revenues for the corporate group has led to claims that they possess more economic power than certain states.²⁵ This has also meant that the private decisions of business regarding questions of investment can affect whole communities as well as states. This 'ability to affect' has resulted in countervailing demands for corporations to take on social responsibility. Lydenberg proposes the current dilemma as follows

'Assets and power around the world have shifted from governments to private sector on a tremendous scale, with this shift has come expectations of great benefits to society. But simultaneously business scandals, financial meltdowns, global environmental and health care crises and persistent poverty casts doubt on business ability to deliver on its promises in meaningful ways. It can be legitimately asked : are corporations really serving a public good, or are they robbing the public blind.'²⁶

This current contextual setting for CSR discourse must also be set against CSR literature which has much older discourse centred on crucial questions about the role of corporation in society. The historical academic origins of CSR as a concept can be traced to the early debates between Berle and Dodd in the 1930s on corporate powers

²² A C Cutler *Private Power and Global Authority- Transnational Merchant Law in the Global Political Economy* (Cambridge, Cambridge University Press 2003) 19-20

²³ Jones a leading business historian points out that multinationals became the leading driver of the integration of the global economy. See G Jones, *Multinationals and Global Capitalism-from the nineteenth to the twenty-first century* (Oxford, OUP 2005) at 38

²⁴ Ibid at 5

²⁵ The UNDP Human Development Report (HDR) 1999 *Globalisation with a human face* (OUP, Oxford 1999) 32

²⁶ S Lydenberg, *Corporations and the Public Interest: Guiding the Invisible Hand* (Berrett-Koehler Publishers, San Francisco 2005) 9

as powers in trust²⁷ and specifically the question of, ‘for whom are corporate managers’ trustees?’ This debate pointed to the potential change in the role of large business at that time. This was a time of public questioning about the contribution of capitalism and the limits of the profit-maximisation ideology in the face of the great depression.²⁸ Dodd pointed out during this debate in the 1930s’, that business corporations are an economic institution which have a social service as well as a profit-making function and therefore they are permitted and encouraged by law because of its service to community rather than because it is a source of profit for its owners.²⁹ However this is not a perspective which draws universal appeal as Berle’s original proposition draws on conventional notions of private ownership and freedom of contract and positions the director as an agent for his principal: the corporation and its members, urging firmly that ‘he is a fiduciary, who must loyally serve his principal’s interest.’³⁰

Nevertheless the dissatisfaction with the inability of global spread of capitalism to present an adequate social response to effects of misuse of corporate power continues to drive questions of social responsibility of corporations. This is reflected in Dean Donham’s telling statement reported in the Dodd article. He points out that ‘the only way to defend capitalism is through leadership that accepts social responsibility and meets the sound needs of the great majority of our people’.³¹ While his concern then was for the American people, it is now a global concern with the

²⁷ A A Berle Jr., ‘Corporate Powers as Powers in Trust’ (1931) 44 Harvard Law Review 1049-1074 ; E M Dodd, ‘For whom are corporate managers trustees?’ (1932) 45 Harvard Law Review 1145-1163; A A Berle Jr., ‘For whom Corporate managers are Trustees: A Note’ (1932) 45 Harvard Law Review 1365- 1372

²⁸ B. Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, Cheltenham 2010) 89; W Bratton M Wachter ‘Shareholder’s Primacy’s Corporatist Origins Adolf Berle and the Modern Corporation’ University of Pennsylvania Institute for law and Economics research Paper No. 07-24; Georgetown Law and economics Research paper No.1021273 <<http://ssrn.com/abstract=1021273>> 17 September 2011

²⁹ Dodd (n 27) 1149

³⁰ Berle 1931 (n 27)

³¹ Dodd (n 27) 1155-1156

spread of global capitalism. The changing nature of the relationship hinges on increasing corporate power and its ability to significantly affect society. The disasters and incidents also draw attention to the inter-linkages that exist in modern society, inter-linkages fostered by globalisation. While some writers argue that corporate power is rather perceived than real and that measurement of revenues of MNC against gross domestic product of states are inadequate³², it is rather difficult to deny that states are at worst, unable and at best, unwilling to strictly regulate the large multinational corporations.³³This leaves a vacuum in the responsibility of corporations for its impact or negative effect on society.

After the landmark debate of the 1930s' Bowen in 1953 in his book, '*Social Responsibilities of the Businessman*' began a more popular starting point in CSR history³⁴ He pointed out that by social responsibilities of the businessman, he referred to 'the obligations of businessmen to pursue those policies, to make those decisions or to follow those lines of action which are desirable in terms of the objectives and values of our society.'³⁵This begins the shift of emphasis to 'what' business can do. This also partially explains how CSR has now come to symbolise an all-encompassing term for *all* questions of the nature of the relationship between corporations and society as business points out various lines of action of their own accord which they propose are desirable for society. Yet through this also CSR has provided fertile ground for debates on the nature of the relationship between

³² J Tullberg "Illusions of Corporate Power: Revisiting the Relative Power of Corporations and Governments." (2004) 52 *Journal of Business Ethics* 325-333, 325

³³ This is exemplified more recently in the failure of the UN Human Rights Commission in 2004 to pass the Norms on the Responsibilities of Transnational Corporations and other Business Enterprise with regard to Human rights (The Draft Norms). This would have been a unique instrument because it would have extended international regulation to non-state actors and framed the responsibilities in mandatory terms with mechanisms for implementation and enforcement. E/CN.4/SUB.2/2003/12 (2003) See also A De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar, UK 2011) 34-37

³⁴ H R Bowen, *Social responsibilities of a Businessman* (Harper & Row, New York 1953)

³⁵ *Ibid* at 44

corporations and society and all issues that have arisen from this.³⁶ This relationship between corporations and society is a multifaceted one, with several dimensions and the potential to change over time.

The relative nature of the relationships within CSR has also resulted in other attempts to define CSR so as to satisfy the various objectives of a particular viewpoint within distinct fields in society such as management studies, economics, political science or law. Along these lines, Windsor defines CSR as ‘any concept concerning how managers should handle public policy and social issues’³⁷ while Werther Jr. and Chandler contend that the significance of CSR is directly related to the value of the firm’s global brand³⁸, therefore making it a remarkable marketing issue. Marrewijk indicates that CSR has been adapted to management studies, marketing, reporting, accounting, each aligning CSR to its specific situations and challenges.³⁹

The popularity of CSR is also driven to a large extent by the changes in the dynamics of societal relations, through globalisation of markets, globalisation of communications technology through mobile communication and the internet and global exchange of knowledge, information and ideology.⁴⁰ In spite of this flexibility within CSR, it has resulted in a situation where CSR is quickly becoming all things to all men. While the flexibility within CSR is necessary because it addresses

³⁶ This is also because there were no direct channels of communication between corporations and its contextual society except through the state, its laws and regulation.

³⁷ D Windsor, ‘Corporate Social Responsibility – three key approaches’ (2006) 43(1) *Journal of Management Studies* 93-114, 93

³⁸ W B Werther Jr D Chandler ‘Strategic CSR as a global brand insurance’ (2005) 48(4) *Business Horizons* 317 -324

³⁹ M V Marrewijk ‘Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion’ (2003) 44 *Journal of Business Ethics* 95-105,96

⁴⁰ M McIntosh and others *Living Corporate Citizenship* (Pearson Education Ltd Great Britain, 2003) 15

the relationship between two dynamic groups (society and corporation), the lack of a fundamental definition or central theme hampers progress.

Progress in this sense refers to the difficulty in identifying and achieving purposes that triggered CSR in the first place. MNC who make claims of adopting CSR practice are however accused of abuses of human rights, environmental rights, labour rights or complicity in corruption.⁴¹ In one sense it has been identified that the lack of a definition and the 'subsequent diversity and overlap in terminology, definitions and conceptual models hampers academic debate and on-going research.'⁴² In another sense this prolonged battle to find expression for several viewpoints and issues within one concept has resulted in a contested concept with doubtful practical value. Yet CSR may not be amenable to a 'fixed universal definition'⁴³ as it has been asserted that the notion of what is socially responsible is driven by contemporary needs and concerns which cannot be pinned down in precise unchanging terms.⁴⁴

What is important is to identify a central theme within CSR. This is because CSR attempts to grapple with many important and crucial issues in today's society. Frederick points to the some ideas seeking recognition through the CSR doctrine. They include questions about the corporate managers' role in society, the challenge

⁴¹ C Villiers, 'Corporate law, corporate power and corporate social responsibility' in N Boeger, R Murray and C Villiers (eds.), *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham 2008) 85- 112, 86 N Klien, *No Logo* (Knopf, Toronto 2000) D Korten, *When Corporations rule the world* (Berret-Koehler Publishers Inc., San Francisco, 2000) J Bakan, *The Pathological Pursuit of Profit and Power* (Constable, London 2005) N Hertz, *The Silent Takeover: Global Capitalism and the Death of Democracy* (Arrow books, UK 2001) Lydenberg (n 26) Even in terms of proactive use of MNC capacity in the area of development, the utility of CSR is doubtful: see J. G. Frynas, 'The false developmental promise of CSR: evidence of multinational oil companies' 81(3) *International Affairs* 581-598

⁴² Marrewijk (n 39)

⁴³ M Kerr, R Janda and C Pitts *Corporate Social Responsibility –A Legal Analysis* (LexisNexis, Canada, 2009) 5

⁴⁴ *Ibid*

of balancing competing claims to corporate resources and philanthropy.⁴⁵ In addition to this are calls for social justice represented in appeals for a human face to global markets⁴⁶ and the re-examination of the business role in the face of sustainable development as well as the problems of ‘financial scandals, human rights violations, environmental side-effects, collaboration with repressive regimes...’⁴⁷

It is in view of the fundamental nature of the issues which CSR is attempting to grapple with, that it is important to establish a core meaning or exemplar around which these debates centre. As Horrigan points out:

‘deep divisions amongst CSR advocates and critics combined with multiple competing theories and models of corporate social responsibility and governance, sometimes distract attention away from the remarkable degree of common ground that exist on most sides of the CSR debate.’⁴⁸

On contextual examination it can be deduced that the central theme emerging is that of demands for the legitimacy of this enhanced corporate power and impact. Legitimacy as a concept can be defined in a number of ways⁴⁹, but a crucial element is the accountability of the exercise of corporate power based on accepted normative standards.

⁴⁵ W C Frederick, *Corporation, Be Good! The Story of Corporate Social Responsibility* (Dog Ear Publishing, Indianapolis 2006)

⁴⁶ Famous phrase from Kofi Annan’s World Economic Forum, Davos Speech 1999 cited in M. McIntosh and others, *Living Corporate Citizenship* (Financial Times (FT)/Prentice Hall, London 2003) 131

⁴⁷ G Palazzo A G Scherer, ‘Corporate Legitimacy as Deliberation: A Communicative Framework’ (2006) 66 *Journal of Business Ethics* 71-88, 71

⁴⁸ B. Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, Cheltenham 2010) 7

⁴⁹ Debates about legitimacy abound in Politics, constitutional law and International law, often linked to other debates about constitutions, democracy, governance and authority. For example: see: M C Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20(3) *The Academy of Management Review* 571-610, 574; R H Fallon, ‘Legitimacy and the Constitution’ (2005) 118(6) *HLR* 1787-1853. With regard to the corporation, legitimacy debates are often found in the debates about corporate governance: see: P Ireland, ‘Company Law and the Myth of Shareholder ownership’ 62(1) *The Modern Law Review (MLR)* 32-57; E W Orts, ‘The Complexity and Legitimacy of Corporate Law’ (1993) 50 *Washington and Lee Law Review* 1565-1623

Fallon points out that legitimacy can be measured against three kinds of standards: legal, sociological and moral.⁵⁰ Legal legitimacy focuses on the legality of action. Such legality is adjudged both from procedural sense and a substantive sense. Therefore its focus is on conformity to a law that has been properly made. For example government actions can be viewed as legally legitimate when they conform to a constitution properly made.⁵¹ Sociological legitimacy focuses on popular consent.⁵² Weber as the foremost proponent focused on the active belief of citizens. He stated that ‘every system of authority, attempts to establish or to cultivate the belief in its legitimacy’.⁵³ And moral legitimacy addresses legitimacy through moral justification; justification based on norms or accepted external social standards such as human rights, democratic principles and so on.⁵⁴ While these are regarded as different concepts of legitimacy they are inter-connected.⁵⁵

The inter-connected nature of these aspects of legitimacy can be seen in the work of Beetham. He points out that ‘a given power relationship is not legitimate because people believe in its legitimacy, but because it can be justified in terms of their beliefs’⁵⁶ and these beliefs are often based on normative standards. In his view legitimacy will depend on conformity with the rule of law, the justification of those rules by reference to congruent beliefs of the state and its citizenry and the evidence of consent by citizenry. Within this context Beetham demonstrates the necessity for legitimacy to include justification and accountability. In line with this inter-connectedness, Jones defines legitimacy as referring to ‘a system of widely accepted

⁵⁰ R Fallon ‘Legitimacy and the Constitution’ (2005) 118 HLR 1787-1835, He analyses debates about the legitimacy of the constitution.

⁵¹ Ibid at 1806

⁵² Fallon (n 50)

⁵³ M Weber, *Economy and Society* (Vol.2, 1st pub. 1968, University of California Press 1978) 213

⁵⁴ J Doak D O’Mahony ‘In search of Legitimacy...’ (2011) 31(2) *Legal Studies* 305-325, 307

⁵⁵ Fallon (n 50)

⁵⁶ D Beetham *The Legitimation of Power* (Palgrave, Hampshire, 1991) 11 For critique of his position: see R H T O’Kane ‘Against Legitimacy’ (1993) 41 *Political Studies* 471-487

rules and standards governing the way in which power is achieved and exercised'⁵⁷, Mitchell asserts that legitimacy refers to 'the belief among groups within the affected population, workers, consumers and managers themselves that the exercise of power is justified.'⁵⁸ and Suchman defines legitimacy as 'a generalised perception or assumption that actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs and definitions.'⁵⁹ The various authors outline belief and justification but also belief based on justification.

Therefore in this CSR context legitimacy not only refers to the cultivation of belief that corporate power and its uses are legitimate, (that is, through the use of public relation, marketing and the use of corporate policies on social responsibility) but more fundamentally it refers to rules, standards and processes that govern the exercise of corporate power in a way that affects society. This perspective asserts that legitimate power is limited power and the limitations may be largely conventional or legally defined.⁶⁰

This central theme of CSR is also important because of the insistence of some users of CSR on placing law outside the parameters of CSR or giving it a very limited role. The very nature of CSR as seeking legitimacy for corporate power and thereby re-examining questions of the corporation's role in society pushes to the fore the question of what role law can play. Law is an essential and important aspect of

⁵⁷ R H Jones, 'The Legitimacy of the Business Corporation' 1977 20(4) Business Horizons 5-9, 6. Jones was the Chairman and Chief Executive of the General Electric Company

⁵⁸ N. Mitchell 'Corporate Power, Legitimacy and Social Policy' (1986) 39(2) The Western Political Quarterly 197-212, 202

⁵⁹ M C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) The Academy of Management Review 571-610, 574

⁶⁰ Beetham (n 56), 35; This succinctly stated in this quote "*Who selected these men, if not to rule over us, at least to exercise vast authority and to whom are they responsible? The answer to the first question is quite clearly: they selected themselves. The answer to the second is at best nebulous. This in a nutshell constitutes the problem of legitimacy.*" L Rayman-Bacchus 'Reflecting in Corporate Legitimacy' (2006) 17 Critical Perspectives on Accounting 323-335, 324 citing E S Mason *The Corporation in Modern Society* (Harvard University Press, Cambridge 1959); B Sutton (ed.) *The Legitimate Corporation* (Basil Blackwell, Bodmin 1993)

legitimacy and it also frames and empowers corporations. Law is capable of being utilised as an instrument for societal organisation and expression. Law can be pluralistic embracing more contemporary global concepts such as CSR. The exploration of other conceptions of law applied to CSR will reveal more of the law's ability to drive progress towards CSR's legitimacy core.

Yet for the most part, the role of law within CSR is at worst contested⁶¹ and at best, minimal⁶², therefore it is important to explore law and legal theory to re-emphasise the role of law as expressive (regulatory) facilitative, and stimulative.⁶³ Law can be used as framework that governs the relationship between groups within society and makes it possible to create frameworks that may facilitate and stimulate the achievement of certain objectives. The contribution of law and legal perspectives within CSR has been limited by the lack of CSR definition and the obvious attempt to exclude the law from the purview of CSR through a plethora of definition that define CSR actions as actions beyond the law.⁶⁴

This limitation may also be self-imposed as the law has been slow to develop general jurisprudence applicable to concepts such as CSR driven by globalisation. This is why Kerr points out that although law may first appear uncomfortable within the CSR sphere, it increasingly has to deal with other flexible legal concepts which may not have fixed definitions.⁶⁵ Therefore in examining legal perspectives of CSR to

⁶¹ S B Banerjee *Corporate Social Responsibility The good, the bad and the ugly* (Edward Elgar, Cheltenham, 2007)16 -18

⁶² One of the best examples of definitions that include law is that of A B Carroll but this identifies law only in its traditional state law form as one of the factors relevant to CSR see A B Carroll 'Corporate Social Responsibility – Evolution of a Definitional Construct' (1999) 38(3) *Business and Society* 268-295

⁶³ G Teubner 'Corporate Fiduciary Duties and their beneficiaries: A Functional Approach to the Legal Institutionalisation of Corporate Responsibility in K J Hopt and G Teubner (eds.) *Corporate Governance and Directors Liabilities: Legal, Economic and Sociological Analyses of Corporate Social Responsibility* (De Gruyter, Berlin 1984)149-177, 165

⁶⁴ Banerjee (n 61)

⁶⁵ Kerr (n 43) This will include sustainable development, precautionary principle, corporate governance, 'best interests of the child'.

deal with CSR's central theme, it is important to examine the law itself from both a traditional perspective and an emerging non-traditional perspective.

Twinning suggests that one of the primary tasks of such analytical general jurisprudence arising from globalisation is the elucidation and construction of concepts that can be used to transcend legal traditions and cultures.⁶⁶ When applied to CSR this approach will not focus on prescribing substantive targets to be achieved by CSR in a specific manner rather it ensures that procedures and mechanisms are installed addressing vital jobs or functions focused towards the central CSR objective.⁶⁷ These mechanisms can then utilise a number of traditional and non-traditional law tools and also be responsive to the changing societal needs and claims.

It is in this vein that Krause suggests that:

‘There is reason to believe that the principle of social responsibility operates effectively mainly by providing for principles and mechanisms of social exchange or more generally of social regulation or guidance...in short social responsibility proves to be substantially a problem of principles and means i.e. mechanisms and institutions required to build up and to guide social interactions within society.’⁶⁸

The context reveals the lack of an accepted definition of CSR and contestations about the role of law. This reveals a gap which the thesis attempts to address. It intends to show that CSR has a central theme and that this central theme allows for legal perspectives to contribute to CSR. Consequently the purpose of the study is to indicate that chosen legal perspectives of CSR can contribute to the central theme of the CSR concept.

⁶⁶ W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP, Cambridge 2009) xix

⁶⁷ Problems visible in corporate law, International law and other substantive law analysis for several reasons.

⁶⁸ D Krause ‘Corporate Social responsibility: Interests and Goals’ in K J Hopt and G Teubner *Corporate Governance and Directors Liabilities: Legal, Economic and Sociological Analyses of Corporate Social Responsibility* (De Gruyter, Berlin, 1984) 95-121,96

1.3 Research Questions

The main research question which the thesis sets out to address is: redefining CSR as a legitimizing force for corporate power: to what extent can law and the law-jobs theory contribute to the concept of CSR? However in order to effectively examine this question, the thesis will focus on two sub-questions. Firstly can CSR be re-defined to reveal a central theme? Secondly what can chosen legal perspectives contribute to CSR's central theme?

1.3.1 CSR's central theme:

Expressions of how to tackle the question of CSR's definition has taken many forms within the literature.⁶⁹ Various definitions of CSR from subjective view-points abound.⁷⁰ Yet it is apparent that the drivers for CSR stem from the discontent with the status quo in the relationship between corporation and society.⁷¹ This contention

⁶⁹ For an overview of several approaches E Garriga and D Mélé, 'Corporate Social Responsibility theories: Mapping the territory' (2004) 53(1-2) *Journal of Business Ethics* 51-71

⁷⁰ For some CSR is synonymous with virtue. The Economist cites CSR as 'the tribute that capitalism everywhere pays to virtue.' 'The Good Company' *Economist* January 22, 2005, 3 and D Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Washington DC 2005) 3 ; These ties in with a philanthropic view of CSR which endorses the voluntary adoption of good business practice. It is in this sense that it appears to be the push for adoption of best practice or morally acceptable behaviour and advocates for a voluntary aspirational adoption of CSR beyond the law. This is a critique raised by C. Villiers, 'Corporate law, corporate power and corporate social responsibility' in N Boeger, R Murray and C Villiers (eds.), *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham 2008) 85- 112, 86; These practitioners define CSR as 'the continuing commitment by business to behave ethically and contribute to economic development, while improving the quality of life of the work force and their families as well as of the local community and society at large.' WBCSD 'CSR: Meeting changing expectations' (March 1999) cited in A Crane and others (eds.) *Readings and cases in a global context* Routledge-Cavendish ,Oxford 2008) 6; 'a concept whereby companies integrate social and environmental concerns in their business operations and their interaction with stakeholders on a voluntary basis' Commission of the European Communities, *Green paper: Promoting a European Framework for Corporate Social Responsibility* Brussels 18th July 2001 COM(2001) 366 Final

⁷¹ A situation where some of the corporations with strong CSR claims are nonetheless accused of committing abuses in areas of human rights, environment, labour rights, issues of corruption and other social issues. See Villiers (n 4) N Klien, *No Logo* (Knopf, Toronto 2000) D Korten, *When Corporations rule the world* (Berret-Koehler Publishers Inc., San Francisco, 2000) J Bakan, *The Pathological Pursuit of Profit and Power* (Constable, London 2005) N Hertz, *The Silent Takeover:*

over definitions of CSR and the consequential insistence of many users on the exclusion of law and binding principles has detracted from progress on the issue of CSR.⁷² Therefore the thesis in its initial analysis acknowledges this contested nature of CSR, by treating CSR as an essentially contested concept (ECC) and applies Gallie's ECC thesis⁷³ to derive an exemplar or central theme for CSR as a concept. Gallie proposed the foremost thesis on contested concepts. He points out that there are concepts 'the proper use of which inevitably involves endless disputes about their proper uses on the parts of their users.'⁷⁴ These concepts are referred to as ECC. Nevertheless they derive from an exemplar or central theme which allows an acknowledgement that contestation proceeds on the same subject. The necessity within CSR is to address the crucial challenges that prompted its emergence in the first instance and this thesis proposes that this can be done by re-connecting to its central discourse which is about power and its accountability and that this is an area where law has significant relevance.

This aim of this analysis is to establish that although CSR meaning is contested, there is a central theme which triggers the demands for social responsibility. The

Global Capitalism and the Death of Democracy (Arrow books, UK 2001) S Lydenberg, *Corporations and the Public interest: Guiding the Invisible Hand* (Berret-Koehler Publishers Inc., San Francisco 2005)

⁷² Campbell notes that ' assessing the legitimacy of CSR is seriously hampered by the tangle of overlapping and conflicting terminology within the literature and the many different understanding of the concept among practitioners' T Campbell, 'The normative grounding of corporate social responsibility: a human rights approach' in D McBarnet A Voiculescu & T Campbell (eds.) *The new corporate accountability: Corporate Social Responsibility and the law* (Cambridge University Press (CUP), Cambridge 2007)529-564, 534; Whitehouse also proposes that 'the apparent failure of CSR to fulfil its potential in remedying the adverse impact of corporate activity is due in part to the failure on the part of its advocates to establish a universally accepted definition of the term and the normative grounding necessary for effective regulation...' see L Whitehouse, 'Corporate Social Responsibility, Corporate Citizenship and the Global Compact: A new Approach to regulating corporate social power' (2003) 3 *Global Social Policy* 299-318,300

⁷³ Gallie proposed the foremost thesis for contested concepts common to the social sciences. He defined such concepts as a concept 'the proper use of which inevitably involves endless disputes about their proper uses on the parts of their users' See: W B Gallie, 'Essentially Contested Concepts' (1958) 56 *Proceedings of the Aristotelian Society* 167-198 reprinted in M. Black(ed.), *The Importance of Language* (Prentice-Hall, Englewood Cliffs 1962) 121- 146

⁷⁴ Ibid

analysis will suggest that this central theme can be found in the impact of corporate power and questions over the legitimacy of such power. The examination of power and its legitimacy as a central theme for CSR forms the basis to which the chosen legal analysis can then be applied. The approach is especially important as achieving desired socially responsible behaviour has been described as one of the greatest global challenges of the 21st century.⁷⁵ This is because it raises questions about the role of corporation in society at a time when corporate power has a significant impact on global issues.

⁷⁵ B. Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, Cheltenham 2010) 3 CSR is a concept but in line with such emerging concepts from the social sciences it is also a field of study and can be spoken of, in terms of value achievements as well. S B Banerjee *Corporate Social Responsibility the Good, the Bad and the Ugly* (Edward Elgar, England, 2007) Banerjee points to it as a field of study in management (p.5) and as a mini-industry in academia and the business world (p.1). Jones also agrees when he states that 'the field of corporate responsibility has come a long way in a few years. (in D Leipziger, *The Corporate responsibility code book* (Greenleaf Sheffield 2003) 13 This is also demonstrated when examining issues of achieving CSR objectives. See J Pelozo L Falkenberg, 'The Role of Collaboration in achieving CSR objectives' (2009) 51(3) California Management Review 95-114

1.3.2 To what extent can law and a law-jobs theory contribute to CSR?

For the second aspect, the thesis then proposes that this central theme of legitimacy of corporate power will serve as an ideal basis for re-examining law's role within CSR. This is because law not only frames the corporation and its powers internally but can also structure and influence its external use of power as well. The thesis in this aspect focuses on two key legal perspectives to examine how the law approaches concepts of this nature. It identifies that law can be approached from a traditional state law centralist perspective or from a more flexible pluralistic perspective. The thesis then exemplifies these contrasted approaches by examining the traditional corporate law perspective and the non-traditional, pluralistic law-jobs perspective.

By doing this it seeks to contrast traditional perspectives with non-traditional perspectives to reveal the potential and limitations of law to structure, influence and legitimise the external use of power in the interactive relationship between corporation and society under the CSR theme. The corporation is a creation of the law and its limitations as a corporation are set out in corporate laws. The corporate form is now common to most legal systems of the world.⁷⁶ There are long-standing debates about corporate law's tackling of issues of large corporations and their role in society.⁷⁷ Questions linked to debates on corporate theory and which influence its

⁷⁶ 'The comparative analysis of the domestic law of states belonging to different legal systems shows that individuals may combine their efforts by establishing entities enjoying rights and duties of their own and that such entities may have a separate legal personality' I Seidl-Hohenveldern, *Corporations in and under International law* (Grotius Publications Limited Cambridge 1987) 1

⁷⁷ 'A corporate enterprise does not exist simply as a self-serving and self-realizing institution for the unique benefits of its shareholders and workers but rather exists above all, to fulfil a broader role in society.' G Teubner 'Corporate Fiduciary Duties and their beneficiaries: A Functional Approach to the Legal Institutionalisation of Corporate Responsibility in K J Hopt and G Teubner (eds.) *Corporate Governance and Directors Liabilities: Legal, Economic and Sociological Analyses of Corporate Social Responsibility* (De Gruyter, Berlin 1984)149-177, 157

engagement with CSR. Corporate law covers the inward aspects of corporate power through governance of managers/ directors who run the company.⁷⁸ The pressure on corporate law is also to formulate an external facing aspect which deals with other affected constituencies.⁷⁹

This is not simply a case of identifying mechanisms for allocating decision-making to more constituencies as this is self-limiting because of the indefinite nature of affected constituencies that may arise in society but law can facilitate and stimulate procedures that allow for meaningful social relationship and utility between corporation and society. Teubner highlights this functional approach, when pointing out that in corporate law, ‘all three questions- the identification of beneficiaries, the available mechanisms, the role of law-led to the same need for identifying the social functions of CSR in a broader context.’⁸⁰ He makes the essential point that CSR serves as a ‘decentralised integrative device’⁸¹ and therefore it should draw on the stimulative role of law to design legal structures which strengthen reflexive mechanisms or responsive mechanism.⁸²

Therefore, these external aspects of law will not only necessarily be prescriptive or definitive substantive rules, rather it could also be functional: highlighting jobs/ roles which the law can stimulate.⁸³ Yet as corporate law has inherent limitations in its format, especially its attachment in most Anglo-American and commonwealth countries to fundamental objective of profit for the success of the company (shareholders) through strong adherence to utilitarian principles of corporate

⁷⁸ J E Parkinson, *Corporate Power and Responsibility: issues in the theory of company law* (Claredon Press, Oxford 1995)

⁷⁹ H Ward ‘Corporate Social Responsibility in Law and Policy’ in N Boeger, R Murray and C Villiers *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham, 2008) 8-38

⁸⁰ Teubner (n 77). Teubner stresses that ‘to be sure, this functional conception of CSR needs no a-priori-definition of the substantive goals to be achieved.’ (p.166)

⁸¹ Ibid at 162

⁸² Teubner (n 77) 165

⁸³ Teubner stresses that ‘to be sure, this functional conception of CSR needs no a-priori-definition of the substantive goals to be achieved.’ Teubner (n 77) at 166

personality and limited liability,⁸⁴ this may mean that external mechanisms will need to be developed outside of corporate law. Furthermore while several authors have also explored the utility of various ‘add-on’ areas of responsibility within International law, contract law, and competition law to CSR⁸⁵, they face similar limitations in applying prescriptive substantive laws within CSR because of the fluidity of the concept.

Therefore this thesis proposes that an effective way of analysing and capturing the potential role of law would be to re-examine a conceptual, theoretical approach that can then be applied in context. Each context could then build into this approach, its own choice of substantive rules. For that reason the thesis draws on an effective way of spelling out the relevant role of law in this (corporate- society) relationship highlighted through the legal theoretical perspective of law-jobs and applies this to CSR. This represents a non-traditional analytical view of law’s potential role in CSR. It also represents a shift from questions of ‘form’ to ‘role’.

This approach is drawn from Karl Llewellyn’s law-jobs theory.⁸⁶ This theory identifies law from a functional perspective and perceives roles for law around the doing of five law-jobs. These are the disposition of trouble cases; the preventative channelling and the re-orientation of conduct and expectations so as to avoid trouble; the allocation of authority and the arrangement of procedures which legitimise action as authoritative; the net organisation of the group or society as a whole so as to provide direction and incentive and the use of the juristic method.⁸⁷ Twining argues

⁸⁴ P Ireland, ‘Limited liability, shareholder rights and the problem of corporate irresponsibility’ (2010) 34 *Cambridge Journal of Economics* 837-856,838-839

⁸⁵ These include: J A Zerk, *Multinationals and Corporate Social Responsibility- Limitations and Opportunities in International Law* (CUP, Cambridge 2006); D McBarnet, A. Voiculescu and T Campbell (eds.), *The New Corporate Accountability- Corporate Social Responsibility and Law* (CUP, Cambridge 2007)

⁸⁶ K Llewellyn, ‘The Normative, the Legal and the Law Jobs: The Problem of the Juristic Method’ (1940) 49 *Yale Law Journal* 1355-1400

⁸⁷ *Ibid* at 1392 It must be noted that the juristic method is not a law-job per se but an advocated

for the possibility of transforming this law-jobs theory into a general jurisprudence.⁸⁸

This will have possible application to fluid contemporary concepts such as CSR arising in an era of increasing globalisation.

This perspective proposes the framing of the external aspect of law and CSR through the analysis of key issues such as dispute resolution, allocation of authority, orientation and channelling of conduct, net organisation and juristic method. The thesis suggests that such frameworks geared at the doing of the law-jobs between corporations and society will have the potential to increase accountability and legitimacy within CSR. Overall the thesis therefore explores the potential of law not yet utilised by corporate law to legitimise corporate power by framing jobs for law within CSR. The overarching aim of the thesis is to gain new insights into the relationship between CSR and law. The rest of the introductory chapter will outline the justification, the scope and limitations, methodology as well as the outline of further chapters.

method for the evaluation, reform and upkeep of the law-jobs. It therefore in essence goes to the doing of the law-jobs

⁸⁸ Twining 2009 (n 66)

1.4 Justification of the Thesis

The significance of this thesis is that it examines crucial unsettled areas within CSR literature and in so doing makes an original and novel contribution. Firstly it addresses CSR's meaning as a concept. This is one of the major problems with CSR which is encapsulated in Votaw's statement that 'CSR means something but not always the same thing to everybody'.⁸⁹ This means that establishing a central theme of CSR is a pre-cursor to any significant CSR analysis. Establishing such a core is also important because the CSR concept and achieving CSR objectives have been termed 'one of the greatest global challenges of the 21st century.'⁹⁰

This is because there is a fundamental reassessment of the way in which society relates to corporations taking place in the difficult context of unprecedented global relations.⁹¹ The complexity of analysis within CSR runs throughout the social sciences and occurs at International, cross-national, national and local levels. The practical drivers of the debate are real-world problems and critical incidents which fuel the questioning about the role of corporations in society.⁹² These questions come from various sectors of society: civil society, consumers, investors, government, and academia and occur at various levels: international, national and

⁸⁹ D Votaw, 'Genius becomes rare: A comment on the Doctrine of Social responsibility Pt.1' (1972) 15(2) California Management Review 25-31, 25

⁹⁰ Horrigan (n 75).ix

⁹¹ Ibid

⁹² I Vaaland and M Heide, 'Managing Corporate Social responsibility: Lessons from the oil industry' (2008) 13(2) Corporate Communications: An International Journal 212-225 .They point out that the role of critical incidents as crucial to corporation's response to CSR. Yet these incidents are symptomatic of corporation's power to affect and impact lives.

local.⁹³

The second important aspect of the thesis is demonstrating the relevance of legal perspectives because one of the common denominators of defining CSR has been to exclude or limit the relevance of law within such an important context.⁹⁴ Ward points out her frustration at the definitional insistence that CSR is only about voluntary action over and above legally defined minimum standards as she points out that this ‘consequent separation of ‘CSR’ and corporate accountability serves no one well’.⁹⁵ This is also ironic in view of the historical academic roots of CSR as found in a debate between two corporate law professors.⁹⁶

However the problem may also be that law has so far been slow to show its relevance to concepts emerging from the globalisation. A major reason for this has been the form of law emerging within such contemporary global concepts as CSR. CSR is predominated by emerging rules which often occur in loose and ‘soft’ forms and law at least in its traditional sense, is seen as defined precise and linked to the state. In light of this, Kerr and others point out that at first glance, CSR does not appear to fit comfortably within the traditional legal setting because of its constant state of evolution as it tries to remain responsive to contemporary needs and concerns.⁹⁷

Nonetheless law even in its most traditional form, still has an impact on CSR. For example: Ward remarks that company law will necessarily have a very basic impact on CSR as it is the law that frames and forms the corporation.⁹⁸ There are also a

⁹³ The complexity of analysis is seen as CSR’s capability to be discussed from any angle.

⁹⁴ Banerjee (n 61)

⁹⁵ H Ward ‘Corporate Social Responsibility in Law and Policy’ in N Boeger, R Murray and C Villiers *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham, 2008) 8-38

⁹⁶ Berle-Dodd debate (n 27)

⁹⁷ Kerr (n 43)

⁹⁸ N Boeger, R Murray and C Villiers (eds.), *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham 2008) 2 This was cited in the introduction.

significant range of traditional legal aspects which hold implications for CSR and this would include torts, contract, criminal international law, human rights, trade law, tax, accounting environmental law and so on.⁹⁹ Yet law itself embraces more than its traditional form especially when related to cosmopolitan concepts arising as a result of globalisation, the way in which law is defined captures its role. What is required is a conception of law which is responsive dynamic and manifests in pluralistic forms. This wider conception may allow for the framing of a legal framework more relevant to CSR in context. Therefore a key contention in this thesis is that the way in which law is defined will spell out its role and relevance to important concepts such as CSR. Twining proposes that:

‘A reasonably inclusive cosmopolitan discipline of law needs to encompass all levels of relations and of ordering relations, relations between these levels and all important forms of law including supra-state (e.g. international, regional) and non-state law (e.g. religious law, transnational law, chthonic i.e. tradition/custom) and various forms of ‘soft law’¹⁰⁰

This is one of the key areas which will be explored in seeking insights into CSR concept and its relationship with law. The possibility of extending the role of law with a view of law which projects the broader perspective of law as it governs social relations. Selznick points out that:

‘To extend the rule of law is to build firmly into the life of society, to make the master ideal of legality a true governor of official conduct. If this is to come about political and legal theory must lend a hand. It can do so by fashioning concepts and doctrines to bridge the gap between the new social realities and the received legal tradition.’¹⁰¹

So when exploring law’s role within CSR, some exploration and use of legal theory is relevant if the aim is to gain insights into newer concepts which may help achieve

⁹⁹ D McBarnet A Voiculescu & T Campbell (eds.) *The new corporate accountability: Corporate Social Responsibility and the law* (Cambridge University Press (CUP), Cambridge 2007) 2

¹⁰⁰ Twining 2009 (n 66) 362

¹⁰¹ P Selznick *Law, Society and Industrial Justice* (Russell Sage Foundation, 1969) 35

the objective. The chosen conception in this thesis is that of Llewellyn's law-jobs theory which defines law in given relationship from the view-point of its role or jobs. It identifies five jobs the law can do in group relationships. These jobs are dispute resolution and grievance handling, channelling and re-channelling of conduct, allocating authority, net organisation and the use of the juristic method.¹⁰² This theory is already applied in some analytical public law literature¹⁰³ but is not uniquely public law oriented. It can be applied to any legal analysis because it adopts a generalist perspective on the role of law for collective activity in societies. This may be why it has been referred to as 'one of the most comprehensive and rational considerations of the role of law.'¹⁰⁴

A perceived advantage of this type of analytical application is the ability to move beyond a traditional definition of law to a broader definition that takes cognisance of the changing terrain such as that necessitated by globalisation. Feintuck and Varney point out that 'law-jobs' move beyond a narrow technical definition of law into a broader, socially grounded model'¹⁰⁵ They also add that the kinds of powers and function envisaged by law-jobs can be found outside the scope of hard law encompassing practices identifying themselves as legal despite the absence of the trappings of formal legal form.¹⁰⁶

Another major advantage is the transferability of the law jobs because it emphasises the 'legal quality' on basis of role and not form, therefore diversity of regimes is still possible. McCoubrey highlights this perspective by pointing out that:

¹⁰² Llewellyn (n 86)

¹⁰³ For example I Harden N Lewis, *The Noble Lie: The British Constitution and the Rule of Law* (Routledge, 1988); M Feintuck M Varney *Media Regulation: Public Interest and the Law* (Edinburgh University Press, Edinburgh 2006) N D Lewis, *Law and Governance: the old meets new* (Routledge-Cavendish, 2001)

¹⁰⁴ D Longley, *Health Care Constitutions* (Cavendish Publishing 1996) 12

¹⁰⁵ Feintuck & Varney (n 103) 33

¹⁰⁶ *Ibid* at 34

‘...granted the diversity of municipal societies, such a functional criterion seems far more soundly based than a demand for institutional convergence with particular forms of Western Urban Industrial societies...’¹⁰⁷

There may be pitfalls in pursuing a somewhat functionalist approach because questions of function are relative¹⁰⁸ but law-jobs does not assert that only law can do these jobs or that law does them best. It just crucially identifies that law can do this in society and opens up room for analytical debate and re-evaluation. This is very necessary when examining the law and CSR relationship in the current global context.

Nevertheless some suggest that CSR itself is just corporate response and therefore corporations by design have dominated the discourse of CSR and by choice excluded law. This is the sense in which Shamir speaks of the ‘de-radicalisation of CSR’¹⁰⁹. He analyses various strategic moves of corporations towards shaping the meaning of social responsibility in ways that do not threaten entrenched commercial interests and in ways that invest the term with voluntary and self-regulatory meaning.¹¹⁰ However it is important that law as part of CSR is re-emphasised in a way that allows for space, structure, contestation and limitations. This is why in response, Rajagopal points out the inability to avoid the use of law in a counter position because it also provides ‘space for resistance’.¹¹¹

¹⁰⁷ H McCoubrey, ‘Natural Law, Religion and the Development of International Law’ in M W Janis C Evans (eds.) *Religion and International Law* (Kluwer /Martinus Nijhoff, Netherlands 1999) 177-190, 178

¹⁰⁸ For aspects of this debate, see: L Green, ‘The Functions of Law’ (1998) 12 *Cogito* 117-124 compare K M Ehrenberg, ‘Defending the possibility of a neutral functional theory of law.’ 29(1) *Oxford Journal of Legal Studies* 91-113

¹⁰⁹ R Shamir ‘Corporate Social Responsibility: A case of hegemony and counter-hegemony’ in B De Sousa Santos C A Rodriguez-Garavito (eds.), *Law and Globalisation from below – towards a cosmopolitan legality* (CUP, Cambridge 2005) 92-117,95

¹¹⁰ R Shamir ‘The De-Radicalization of Corporate Social Responsibility’ (2004) 30(3) *Critical Sociology* 669-689

¹¹¹ B Rajagopal ‘Limits of law in Counter-Hegemonic Globalisation: the Indian Supreme Court and the Narmada Valley Struggle’ in B De Sousa Santos C A Rodriguez-Garavito (eds.), *Law and*

He points out that ‘there is an increasing sensibility that law is a terrain of contestation between different actors including social movements and states and that a theory of law or adjudication that ignores this fact is inadequate.’¹¹² It is therefore important to project the conception of law that is capable of being used in counter – position. This conception must involve a broader pluralistic perspective.¹¹³ Therefore law remains essential in this contested arena of CSR, as on the one hand, it can frame and empower corporations and yet on the other hand, it is also important when seeking to constrain or render such power accountable or legitimate. These arguments provide reasons for a demand of CSR literature to examine such legal aspects of CSR. This is an area where there is still limited literature, although some notable CSR legal literature in books has arisen in the last five years.¹¹⁴ There are still insufficient books and articles that directly address the aspects of CSR and law highlighted in this thesis.

This suggested law-jobs framework is important because it will recognise the relevance, flexibility and dynamism which is now required of law. It will indicate the possibility of a universal CSR legal theoretical framework that can be adapted in

Globalisation from below – towards a cosmopolitan legality (CUP, Cambridge 2005) 183 -217, 183 He points out that popular struggles may see law as a force for status quo and domination ...yet it also provides space for resistance

¹¹² Ibid ;This echoes Santos study on counter-hegemonic social movements B D Santos, *Towards a new legal common sense: Law, Globalization and Emancipation* (Butterworths, London 2002)

¹¹³ Santos ibid demonstrates that several forms of law exist in transnationalised or globalised legal relations. In chapter five where he discusses the globalisation of legal relations, he depicts the contrary tensions that all work the legal field: lex mecatoria, law of regional integration, transnational factors causing changes in state law, migration laws, laws of groups within the state (indigenous peoples, grass-root movements, NGOs and so on), cosmopolitan law.

¹¹⁴ Some of the most notable views have emerged from D McBarnet, A Voiculescu and T Campbell (eds) *The New Corporate Accountability- Corporate Social Responsibility and Law* (CUP, Cambridge 2007); N Boeger, R Murray and C Villiers (eds) *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham 2008); J O’Brien (ed) *Governing the Corporation* (Wiley, England 2005); I Demirag (ed) *Corporate Social Responsibility, Accountability and Governance* (Greenleaf, Sheffield 2005); J A Zerk *Multinationals and Corporate Social Responsibility- Limitations and Opportunities in International Law* (CUP, Cambridge 2006); S Tully (ed) *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, Cheltenham, 2005; Kerr, Janda and Pitts (n 43), B Horrigan *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business*’ (Edward Elgar, Cheltenham-UK, 2010)

a localised context making it possible to give a tailored response. The thesis concludes on the basis of this suggestion. The aim is that insights gained through this analysis will leave room for further research. The desired outcome is that this analysis will give new insights into this fundamental area and that this will augment progress on the agenda of achieving greater social responsibility.

1.5 Scope of the Thesis

The research question is potentially a wide one so it is important that the scope of the thesis delimits its parameters and chooses specific examples to address. These key issues for scope include: corporations, CSR, legal perspectives, legal theory and the cut-off dates

Firstly when examining corporations in CSR within this thesis, the focus is on large corporations specifically multinational corporations (MNC).¹¹⁵ CSR analysis can be applied to corporations of all sizes but the demands for responsibility have been mainly directed at MNC because of their size, structure and globalised nature. Multinational corporations are the largest corporations and they account for seventy percent of the world's trade and trillions of dollars of foreign direct investment.¹¹⁶ In this vein, Hopkins points out that

‘because of the often immense size of transnational corporations, decisions about the location of their investments, production and technology not only influence the distribution of factor endowments- notably capital, skilled labour and knowledge – between countries in which they run activities, but they also assume a critical importance for their political and social consequences.’¹¹⁷

The multinational or transnational corporations have been described by the Draft UN Code of Conduct for Transnational Corporations as:

‘an enterprise comprising entities in two or more countries regardless of legal form and field of activities of these entities, which operates under a system of decision-making permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked by

¹¹⁵ In UN documents they are often referred to as Transnational corporations

¹¹⁶ M Hopkins, *The Planetary Bargain: Corporate Social Responsibility Matters* (Earthscan, London 2003) 3

¹¹⁷ Ibid

ownership or otherwise that one or more may be able to exercise significant influence over the activities of others and in particular share knowledge, resources and responsibility with others'¹¹⁸

The MNC is a unique business construct which is fairly modern in origin. However it shares common characteristics with earlier fore-runners, the chartered trading companies of the 16th-18th century.¹¹⁹ The factors common to most definition of MNCs are association and control. This implies that multinational corporations contain entities which are associated by ownership often evidenced through direct investment but in addition the main investing entity (that is, the parent corporation) should be able to exert a significant amount of influence or control on the management of the subsidiary corporation. Wilkins in her work on MNC confirms that such multinational corporations operations often involve cross-border control; potential for control or at least influence¹²⁰ The World Investment Report 2005 defines the parent MNC as an enterprise that controls the assets of other entities in countries other than the home country usually owing a certain percentage of equity capital stake.¹²¹

The uniqueness of MNC partially derives from their problematic nature in law. Although they are legal entities, they are not recognised in law as MNC rather in a strict legal sense; they are groups of corporations or companies. Muchlinski indicates

¹¹⁸ Section 1(a) Draft UN Code of Conduct for Transnational Corporations 23 ILM 626 (1984); G. Jones *Multinationals and Global Capitalism-from the nineteenth to the twenty-first century* (OUP, Oxford, 2005) 5 – ‘A multinational is a firm that controls operations or income-generating asset in more than one country’

¹¹⁹ P Hertner G Jones, *Multinationals: Theory and History* (Gower Publishing Company, England 1986) 1

¹²⁰ M Wilkins, ‘European and North American Multinationals 1870-1914: Comparisms and Contrasts’ in M Casson(ed.), *Multinational Corporations* (Edward Elgar, England 1990) 541

¹²¹ UNCTAD World Investment Report (WIR) 2005 *Transnational Corporations and the Internationalization of Research and Development* (United Nations, New York and Geneva, 2005) 297. See also J H Dunning *Multinational Enterprises and the global economy* (Addison-Wesley Publishing Ltd, England, 1993) 3 where he points out that there is no International consensus – he states that the OECD recommends 10% minimum. This is used by US, Canada and Australia while Germany and France use 20% and New Zealand 25%. However international usage as evidenced from data used by UNCTAD WIR 2005 at p. 297 shows that 10% is acceptable

the nature of this problem, when he points out that:

‘Indeed if one were to look at legal sources alone the multinational enterprises would not exist: all one would find is a series of national companies whose principal shareholder happens to be a foreign company and/or a network of interlocking contracts between entities of different nationalities. No hint of the complex systems of international managerial control, through which the operations of the multinational group are conducted, would be discovered.’¹²²

This is because corporations are often formed within a single legal system. Once formed and incorporated they gain separate legal personality, a legal feature common to most legal systems.¹²³ This allows for groups of corporations incorporated in different states linked together by ownership and control, to retain distinct personality under legal rules. This legal ‘invisibility’¹²⁴ has not prevented the corporations from exercising significant influence on society rather it may have aided the rise and influence of the MNC. This is because of the absence of an International legal framework for MNC. Cioffi points out that ‘given the absence of a global regulatory framework, the relation of corporate governance to globalisation must be sought at the level of the national political economy and the degree and nature of change viewed cross-nationally.’¹²⁵

This cross-national perspective is endorsed within the thesis because it is also the universality of the corporate vehicle that enables the existence of MNC. Seidl-Hohenveldern in his book ‘*Corporations in and under International law*’ states that ‘the comparative analysis of the domestic law of states belonging to different legal systems shows that individuals may combine their efforts by establishing entities

¹²² P T Muchlinski *Multinational Enterprises and the Law* (Blackwell Publishing, Oxford 1999) lv-lvi

¹²³ I Seidl-Hohenveldern, *Corporations in and under International law* (Grotius Publications Limited Cambridge 1987) 1

¹²⁴ Cutler (n 22) 196

¹²⁵ J W Cioffi, ‘Governing Globalisation: the State, Law and Structural Change in Corporate Governance’ (2000) 27(4) *Journal of Law and Society* 572-600, 573

enjoying rights and duties of their own and that such entities may have a separate legal personality.’¹²⁶ The notion of separate legal personality has become integral to laws around the world and therefore the relationship between MNC, CSR and law is a vital one for analysis.

A further choice must be made when giving specific examples from multinational corporations. This is because there are an estimated 63,000 multinational corporations with about 800, 000 subsidiaries and numerous linkages of suppliers and distributors across the global value chain.¹²⁷ Therefore within the thesis the choice has been made to give chosen examples of MNC taken from the oil industry. This choice of the oil MNC examples is influenced by the assertion that the large oil corporations have been judged as leaders in championing CSR.¹²⁸ Utting and Ives, CSR scholars point out that this engagement of large oil corporations with CSR can be judged by their adoption of codes of conduct, reporting practice and interactions with leading CSR institutions.¹²⁹

Therefore the focus is on these corporations as a valid example for ascertaining reactions to the conceptions of CSR in a useful format. This also serves the practical purpose of providing a focused group of MNC to draw examples from. This choice is also underscored by the significant nature of this industry. The UNCTAD World Investment Report (WIR) 2007 points out those minerals (especially oil) are essential for all economies. It stresses that this industry provides basic, essential raw

¹²⁶ Nevertheless there are several types of multinational corporations. Muchlinski (n 122) points to structures with contractual linkages, informal alliances, joint ventures and state-owned corporations. Yet the equity-based multi- corporation structure is still the most common. These may be composed in different ways. Some examples of which include the Anglo-American pyramid groups, the European trans-national mergers, and the Japanese Kereitsu

¹²⁷ J G Ruggie, ‘Reconstituting the Global Public Domain- Issues, Actors and Practices’ 10(4) *European Journal of International Relations* 499-531, 510

¹²⁸ P Utting K Ives ‘the Politics of Corporate Responsibility and the Oil Industry’ (2006) 2 (1) *St Anthony’s International Review (STAIR)* 11-34, 12

¹²⁹ *Ibid*

materials which are essential to all modern economies.¹³⁰ This is an industry which also best demonstrates some of the existing global inequalities. This is because the major producers are mainly from developing and transition economies and are net exporters while the major consumers are mainly from developed countries and rely heavily on imports.¹³¹ Therefore in this industry issues of ineffective management of social, environmental and other responsibilities are very vividly demonstrated. The capacity of these corporations juxtaposed with their responsibilities triggered significant CSR debate.¹³²

The second issue about the scope of the work is directed at the concept of CSR. From the onset the thesis will use Chapters two and three to outline in detail its concept of CSR. This will encompass a view of CSR that includes corporate accountability as essential and central to CSR. It adopts the use of the term ‘CSR’ rather than any of its complementary themes such as corporate accountability or corporate citizenship. It will however seek to show the nature of those related concepts as multiple interpretations of CSR. The thesis adopts an inter-disciplinary approach as a necessity to this initial examination of CSR to highlight the variety of perspectives and the level of contestation within CSR. The aim is however to discover the core or central theme in CSR from which the perspectives arise.

Thirdly the thesis concedes that it is not possible within the given scope to address all aspects of law that impinge upon corporations or CSR neither is it possible to address all legal theory. So the thesis in chapter four proposes its conception of the relationship between law and regulation and examines them as crucial aspects of legitimacy. This is a prelude to Chapter five and six which focus on key aspects of

¹³⁰ UNCTAD World Investment Report (WIR) 2007 *Transnational Corporation, Extractive Industries and Development* (United Nations, New York and Geneva, 2005) 83

¹³¹ *Ibid* at 85

¹³² See Frynas (n 41)

corporate law and legal theory respectively in order to further the arguments that CSR can be re-defined as legitimacy of corporate power with law playing a definitive role in achieving such legitimacy.¹³³ Therefore the thesis when examining legal perspectives relevant to CSR will focus on two main legal perspectives which are corporate law and legal theory. These aspects have been chosen because of their relevance to the central proposition of the thesis.

Within corporate law the main focus of analysis will be on issues of corporate theory, governance and fiduciary duties. This is because of the direct and foundational nature of corporate law to corporations and having direct relevance to CSR. The thesis examines the main corporate legal theories and corporate governance theories and models but it also adopts as its main exemplifying corporate law legislation the UK Companies Act 2006 because this is the result of one of the most recent and extensive reviews of corporate law.¹³⁴

In addition the focus on legal theory must be outlined because there is extensive general legal theory. Therefore the thesis does not examine all general theory of relevance because this is impractical for the given task. It sketches out and outlines legal theory in the 'law and society' field but it focuses on Llewellyn's law jobs as a chosen model that is capable of application to newer concepts arising from globalisation such as CSR. It has also been singled out by some notable legal scholars as a legal theoretical concept capable of being adapted to address phenomena arising out of globalisation and its implication for law.¹³⁵ The skeletal nature of the theory lends it a flexibility and utility to most current phenomenon arising out of inter-relationships in society.¹³⁶

¹³³ This is a normative task.

¹³⁴ Horrigan (n 48)

¹³⁵ Twining 2009 (n 66)

¹³⁶ Llewellyn (n 86)

Twining in this regards, points out that:

‘The law-jobs theory is a valuable and underused tool...it can easily accommodate notions of normative and legal pluralism, non-state law and different levels of global, transnational and local relations and so can provide a basis for dealing with issues raised by globalisation and interdependence.’¹³⁷

The choice of Llewellyn’s law-jobs theory therefore represents an attempt to adopt Selznick’s earlier suggestion of political and legal theory lending a hand to bridge the gap between the current social realities within CSR and the received legal tradition.¹³⁸ This theory stands out as the chosen proposition although there may also be other relevant theories.

A final scoping issue is to give a date limitation for this work therefore the thesis will examine literature and CSR-related events that pre-date December 2011. This is for practical reasons as CSR field is an active area with the potential for changes. This date will allow for the contextualisation of examples given in this thesis as valid in the time period.

The next section explains the methodology used within the thesis.

¹³⁷ Twining 2009 (n 66) 115; However Twining also points out that this inter-dependence is a relative matter. See also W Twining *Globalisation and Legal Scholarship* Montesquieu Lecture Tilburg University 2009

¹³⁸ Selznick (n 101)

1.6 Methodology

The legal methodology utilised within the thesis is analytical and qualitative therefore it is focused on literature, primary and secondary materials in the area of CSR, law, politics and sociology. This is because the thesis seeks to gain new insights into the concept of CSR and its relationship with law. The aim to re-define CSR in order to identify a core which then permits analysis of the potential of legal perspectives to contribute to that core. The research therefore involved the study and examination of primary sources and materials, relevant legal cases as well as extensive review of secondary sources such as books, book chapters, journal articles within the legal, socio-legal, political, economic and sociology field. This is then structured towards answering the question: ‘to what extent can law and a law-jobs perspective contribute to CSR?’

The thesis adopts an inter-disciplinary approach which is necessary because of the nature of CSR as a multi-disciplinary concept. CSR analysis draws from literature in law, business, political science, economics and philosophy. This position is supported by scholars who assert that ‘CSR can be studied, regulated and practiced from many different angles.’¹³⁹ This thesis will reflect this multi-disciplinary aspect whilst proposing a legal perspective. This is also important because the thesis analyses other multi-disciplinary concepts such as power and legitimacy

The methodological objective is to address the research questions rigorously and fully within the limitations set by the thesis. The original articles and books

¹³⁹ Horrigan (n 48)

proposing some of the theories used and tested within this work were studied in great detail. The choice of theories analysed was made after extensive research into the applicability of such theory to the thesis chosen subject matter.

The chosen theoretical perspectives are analysed comprehensively within the thesis include Gallie's theory on essentially contested concepts used as the key analytical tool to derive an exemplar or core for CSR.¹⁴⁰ Then Lukes seminal theory on 'power' is utilised in examining the notion of corporate power in order to examine the 'core' of CSR 'exemplar' revealed and re-defined as power.¹⁴¹ Next the thesis utilises the analysis of corporate legal theories to appreciate some constraints placed on corporate law itself that prevent full application to CSR. And then in suggesting and mapping out how an extension of legal theory to CSR may then manifest and contribute to the central research question the thesis proposes an extension of Llewellyn's law-jobs theory¹⁴² as holding huge potential for the extension of law to CSR in order to render corporate power legitimate and accountable in that sphere. These theoretical perspectives and analysis are mainly used to resolve dilemmas presented by the research question within the scope of the thesis.

The final section gives an overview of each chapter within the thesis

¹⁴⁰ Gallie (n 73)

¹⁴¹ S. Lukes *Power: A Radical View* (2nd ed.)(Palgrave Macmillan Great Britain 2005)

¹⁴² Llewellyn (n 86)

1.7 Overview of Chapters

The thesis is arranged over seven chapters with chapter one as the introduction. Chapter two will examine the meaning of CSR. This is because it is the crucial starting point for this thesis on CSR and it provides essential analysis through which a central theme or core of CSR is revealed. This chapter begins with the premise that CSR has been defined in a number of ways and with varied emphasis on various issues. The chapter offers up a historical overview of the development of CSR as well as an overview of current multiple interpretations of CSR that currently exist. Then the chapter uses the essentially contested concepts (ECC) theory set out by Gallie and applies this to CSR in order to discover an exemplar or a core which CSR analysis within the thesis will address. This core is proposed as the legitimacy of corporate power.

Chapter three follows on from this discovery of the central theme of CSR and examines corporate power in the context of this thesis. The aim of the analysis in this chapter is two-fold: firstly to reveal the meaning of power as a concept, in this context and secondly, to examine evidence of corporate power. The analysis illustrates the meaning of corporate power from the perspective of MNC and identifies crucial areas of capacity and influence. It then analyses some specific oil industry MNC examples to show the inter-related nature between power and the demands for CSR.

The fourth chapter continues by examining the second aspect of this core or central theme, which is the corresponding search for legitimacy of corporate power. It focuses on the notion of legitimacy and proposes law as a key aspect of legitimacy. Legitimacy in this sense involves accountability as a key aspect. As a result this chapter examines law and regulation as key aspects of legitimacy. The chapter analyses law in its wider pluralistic sense. It examines the inter-relationship between law and regulation. It proposes that law's role as legitimiser can be examined from two key perspectives, that is, the traditional or the non-traditional. From the traditional perspective, it can be based on state-centred laws within a legal system or in a non-traditional sense, it shifts focus from 'form' to a role-based perspective (as this allows for pluralistic forms of law towards identified roles) which would allow legal scholars to propose new roles and new law-tools for law when fulfilling the legitimacy role within CSR.

The next two chapters then explore these two legal perspectives further. The fifth chapter examines the issue of the legitimacy of corporate power from a traditional legal perspective. The chosen legal perspective is from traditional law central to the existence of the corporation and that is corporate law.¹⁴³ This is the law that frames and forms the corporation. It is also common to most legal systems of the world. It has become the main vehicle for enabling business enterprise. This chapter identifies that legitimacy of corporate power should be a core concern for corporate law. Yet corporate law manifests a utility and responsibility division within legitimacy and the focus on the utility aspect of legitimacy to the detriment of the responsibility

¹⁴³ This does not undermine the fact that several state laws have significant relevance for corporations.

aspect has left little room in corporate law for issues of legitimacy of corporate power.¹⁴⁴ This chapter begins by examining existing corporate law theories to discover what dominant perspectives influence and shape corporate law. Then it examines notion of corporate governance within corporate law which directly addresses the issue of legitimacy of corporate power. The focus of corporate governance on the internal perspectives of the corporation will be addressed as a limiting factor when addressing debates on constraints and limitations to the exercise of corporate power. It outlines the two main models of corporate governance in use globally and points to a potential convergence. It then uses the recent example of the UK reform to indicate the difficulties of trying to reconcile the ‘utility’ and ‘responsibility’ elements of the legitimacy debate within corporate law. The notion of directors running the company successfully while taking into account internal and external factors has not been fully worked out even in this reform legislation heralded as a best example.

This chapter highlights that there are significant limitations to the types of control and legitimating that may arise from such corporate law and governance theories because of the primarily internal focus. The focus of corporate law seems tilted to the internal utility question which centres on the success of the corporation and not the external question of legitimacy and accountability to society. It also displays the classic limitation of traditional law in being reactionary and limited in scope and jurisdiction. This also underlies the mismatch between MNC structure and state law in general.

¹⁴⁴ This view is expounded in more detail in J W Hurst *The Legitimacy of business in the Law of the United States 1780-1970* (University of Virginia Press Charlottesville 1970)

Yet there are novel ways of looking at law in global contexts emerging. This is what recommends a non-traditional pluralist law perspective for CSR. Therefore Chapter six proposes a move to such a non-traditional perspective within CSR. It proposes a more holistic way of addressing social responsibility through law that imbibes and addresses more aspects of the dynamic relationship between society and corporations existing within globalisation. This will come from a role-based perspective of law which addresses the role that law in its pluralistic forms can play within CSR.

The focus will be on re-interpreting Llewellyn's law-jobs as applicable to CSR. This allows for the contemplation of various forms of law and regulation (hard, soft, state-centred and private law) within CSR focused towards the doing of the law-jobs which are: dispute resolution and grievance handling, channelling and re-channelling of conduct, allocating authority, net organisation and the use of the juristic method. It will address the 'capacity' which law in the non-traditional sense affords corporate power not only to be restricted from doing wrong but also to stimulate doing right and to help with society's social agenda.

The aim here is to demonstrate that such a legal framework can be used to address the CSR relationship. It will permit the contextual flexibility necessary within CSR while addressing distinct jobs.¹⁴⁵ It gives new insights to the role of law as legitimacy of corporate power and suggests the foundational framework for a legal perspective for CSR which can be further analysed in future research in diverse contexts.

¹⁴⁵ It could be seen as neither endorsing universal substantive law which are open to criticisms of imposing the dominant or relativism which is open to criticism of inequality of treatment rather it proposes in line with Santos 'Cosmopolitanism' that there can be dialogue structured by procedural ideals which cultures and societies aspire to: for example: dispute resolution, channelling conduct, allocation of authority and net organisation.

Finally Chapter seven will form the conclusion. This chapter summarises the findings of the thesis from the above examination. It gives an overview of this exploration of CSR from the chosen legal perspectives and proposes that new insights can be gained by the extension of law-jobs theory to CSR. These insights might prompt one to examine the range of law tools applicable in context. In addition it could cause a re-evaluation of the centrality of law to the question of CSR, which is after all centred on the legitimacy of corporate power.

CHAPTER TWO

DEFINING CORPORATE SOCIAL RESPONSIBILITY

‘Corporate social responsibility means something, but not always the same thing to everybody. To some it conveys the idea of legal responsibility or liability; to others, it means social responsible behaviour in the ethical sense; to still others, the meaning transmitted is that of ‘responsible for’ in a causal mode; many simply equate it with a charitable contribution; some take it to mean socially conscious; many of those who embrace it most fervently see it as a mere synonym for legitimacy in the context of belonging or being proper or valid; a few see a sort of fiduciary duty imposing higher standards of behaviour on businessmen than on citizens at large’¹

2.1 Introduction

This chapter commences the analysis of identifying CSR’s central theme within the thesis by addressing the primary issue of what CSR means. It draws out the main issues and debates on CSR’s meanings. In other words, the nature of CSR as meaning ‘something’ but not always the same thing to different people as CSR has been defined in a variety of ways and with regard and focus given to diverse aspects of the concept.

In this sense, CSR can be seen as an essentially contested concept in the ‘Gallie’ sense, because it can be described as ‘a concept the proper use of which inevitably involves endless disputes about their proper uses on the parts of their users.’² Within

¹ D Votaw, ‘Genius becomes rare: A comment on the Doctrine of Social responsibility Pt.1’ (1972) 15(2) California Management Review 25-31, 25

² W B Gallie, ‘Essentially Contested Concepts’ (1958) 56 Proceedings of the Aristotelian Society 167-198 reprinted in M. Black(ed.), *The Importance of Language* (Prentice-Hall, Englewood Cliffs 1962) 121- 146, 121

CSR a significant amount of the contestation goes to the core of the concept and this is why there is no universally settled definition of CSR. However Gallie in expounding essentially contested concepts pointed out that even those concepts must have a common basis (an exemplar), if only to ensure that contestants refer to the same subject-matter.³ Gray supports this position by stating that ‘definitional contests have a point only if there is something not treated as contestable’.⁴ Therefore the aim in this chapter is to identify the common basis or central theme which unifies CSR issues.

Within CSR contestation about its meaning is having significant impact on the progress being made on the CSR agenda. This is because a fuzzy concept does not lend itself easily to defined agendas. Boeger and others point out that ‘where definitions are not settled, identifying aims and expectations also becomes difficult’.⁵ The identification of the central theme or exemplar will also justify the ability to put forward another perspective of CSR that will be of relevance and enhance or advance the debate. The identification of the central theme will therefore underscore the relevance of law and legal theory to CSR debates. In order to identify what CSR means and the complexity of approaches within CSR, the next section will examine the history of CSR movement and the competing ideologies that have sought to express themselves through CSR over the years. The following section analyses more specifically the problems of defining CSR and this include the various theories and approaches adopted to explain CSR action.

³ Ibid

⁴ J N Gray, ‘On the contestability of social and political concepts’ (1977) 5(3) *Political Theory* 331-348, 342

⁵ N Boeger, R Murray and C Villiers (eds.), *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham 2008) 1

However the problem of defining CSR is not exclusive as defining concepts in the social sciences are often subject to contest. It is for this reason that the fourth section, draws on the foremost theory on such contested concepts. This section proposes the extension of the essentially contested concept (ECC) theoretical framework to CSR, to enable the discovery of a common basis or ‘original exemplar’ which can be utilised by this work.

The seven criteria framework based upon Gallie’s ECC will form the analytical tool for contextualising the CSR debate and locating inherent conflicting positions. The fifth section will then outline the proposed central theme or exemplar of CSR and this will form the basis of our exploration of CSR within the thesis. Definitions of CSR cannot be incontrovertibly settled, as it is an essentially contested concept, however the chapter aims to indicate a central theme or exemplar that underpins CSR analysis and will also form the basis of analysis which is to follow within this thesis.

2.2 Historical Background of CSR

In CSR history there are two discernible historical strands. The earlier normative strand is first enunciated in the early 1930s' within the academic debates between Berle and Dodd in the Harvard Law Review on the role of corporate managers⁶ while the second strand of CSR is vocalised in the 1950s' writings in the field of management exemplified by Bowen's book on the Social Responsibilities of a Businessman.⁷ Notwithstanding this it is settled that CSR in its modern form originated in the United States of America in association with the advent of large corporations and related significant social impact most visibly felt in the years of the Great Depression. However CSR as a concept spread out to other countries alongside concerns with the spread of globalisation and the impact of large multinational corporations.⁸

The debate between Berle and Dodd dealt with the central question of responsibility and accountability for corporate power. Berle in 1931 in his essay 'Corporate Powers as Powers in Trust' proposed that corporate managers exercised powers held in trust on behalf of the shareholders. This assertion adopts a traditional legal position which endorsed accountability and governance within the corporation of

⁶ M Hopkins, *The Planetary Bargain: Corporate Social Responsibility Matters* (Earthscan, London 2003) 2; L Whitehouse, 'Corporate Social Responsibility, Corporate Citizenship and the Global Compact: A new Approach to regulating corporate social power' (2003) 3 *Global Social Policy* 299-318, 301; A A Berle Jr., 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* 1049-1074 ; E M Dodd, 'For whom are corporate managers trustees?' (1932) 45 *Harvard Law Review* 1145-1163; A A Berle Jr., 'For whom Corporate managers are Trustees: A Note' (1932) 45 *Harvard Law Review* 1365- 1372

⁷ E Garriga and D Mélé, 'Corporate Social Responsibility theories: Mapping the territory' (2004) 53(1-2) *Journal of Business Ethics* 51-71; H R Bowen, *Social responsibilities of a Businessman* (Harper & Row, New York 1953)

⁸ Hopkins (n 6) 2-3 Others argue that this has been an American concern since the late 19th century see H Wells 'The Cycles of Corporate Social responsibility' (2002) *University of Kansas Law Review* 77-140, 77. See also J Llewellyn 'Regulation: Government, Business and Self in the US' in S K May G Cheney J Roper *The Debate over Corporate Social Responsibility* (OUP, New York 2007) 177-189. Blowfield and Murray point out that Adam Smith was concerned about the limited liability nature of the corporation and the potential for that nature to breed irresponsibility. M Blowfield A Murray *Corporate Responsibility: A Critical Introduction* (OUP, Oxford 2008) 41 -50

managers and directors to shareholders.⁹ On the other hand, Dodd responded by re-examining the issue from an essentially different perspective, he emphasised that ‘business is permitted and encouraged by law because it is of service to the community rather than because it is a source of profit to its owners.’¹⁰ This was a perspective indicating the ultimate responsibility of the corporation to society. He also pointed out that business leaders and students of business were not only expressing a growing feeling that the business had responsibility to the community but also voluntarily assuming them.¹¹

The beginnings of CSR can be found in this fundamental debate about the responsibilities of the corporate manager or director beyond the sphere of shareholders interests and strict profit-making. The company or corporate form of business is now common to most legal systems. It has been asserted from comparative analysis of domestic legal systems that ‘individuals may combine their efforts by establishing entities enjoying rights and duties of their own and that such entities may have a separate legal personality’,¹² as a result the company or corporation emerges as different from its shareholders¹³ with managers or directors empowered by law to act on behalf of the company.¹⁴

Dodd in his response broadened the scope by examining the role of the corporation in society. He pointed out that substantial strides were being made in ‘the direction of a view of the business corporation as an economic institution which has a social

⁹ Berle 1931 (n 6)

¹⁰ Dodd (n 6)

¹¹ Ibid

¹² See the Case concerning *the Barcelona Traction Light and Power Co. Belgium v Spain* (1970) ICJ Rep. 4 *Salomon v. Salomon* (1897) 1897 AC 22 (HL) (United Kingdom) ; *Santa Clara County v. Southern Pacific Railroad Company* 118 US 394 (1886) (United States)

¹³ Shareholders acquire limited liability.

¹⁴ Often couched as ‘in the interests of the company’ or ‘members as a whole’ In England the Companies Act 2006 now allows for enlightened share-holder value—s.172 Companies Act 2006

service as well as a profit-making function'¹⁵. He asserted that business in the 1930s' in the US, were already contemplating and assuming some forms of social responsibility but more importantly affirmed that the law was a facilitator of such action and concluded that such action does not run counter to law, as the law will treat the directors as fiduciaries for the institution (not merely shareholders). This he felt should allow for flexibility and modifications of legal views on the role of the corporation in future.¹⁶ His work is an early indication of the fact that the voluntary assumption of social responsibilities is not an end in itself and can be facilitated by law. He suggests that the 'principal object of legal compulsion might then be to keep those who failed to catch the new spirit up to standards which their more enlightened competitors would desire to adopt voluntarily'.¹⁷

Berle in later research acceded to Dodd's position but did so from a different point of view.¹⁸ In his research with Means¹⁹, they analysed the internal position of the large corporations and found the managers/ directors devoid of control from the owners (shareholders). This was termed the separation of 'ownership from control' and on that basis Berle concluded that corporations could be called to account by society.²⁰ These debates nonetheless placed corporate theories, corporate governance and regulation at the heart of the CSR debate either as causation or consequence.

¹⁵ Dodd (n 6)

¹⁶ Dodd (n 6) 1163. This is evidenced in the modification of UK company law to allow for director's duty to promote the success of the company and to allow for that to include broader social and environmental considerations.

¹⁷ Dodd (n 6) 1153

¹⁸ Berle stated that 'the argument has been settled (at least for the time being) in favour of Professor Dodd's contention' A Berle cited in Lord Wedderburn of Charlton, 'The Legal Development of Corporate Mangers: For whom will Corporate Managers be Trustees? K J Hopt and G Teubner *Corporate Governance and Directors Liabilities: Legal, Economic and Sociological Analyses of Corporate Social Responsibility* (De Gruyter, Berlin, 1984) 3-54, 3

¹⁹ A A Berle G C Means *The Modern Corporation and Private Property* (with a new introduction by M. Weidenbaum & M. Jensen) (2nd ed. Transaction Publishers, New Brunswick (USA), originally published.1968, 1991)

²⁰ Berle & Means Ibid His position remained essentially a contractarian one, as distinct from a concessionary or communitarian perspective

Nevertheless law has remained slow to react to these primary debates and therefore the second and most prolific strand of CSR emanated from the practitioner businessman's point of view and this has dominated CSR literature and history. This second strand is a follow-up on some of the issues highlighted in Dodd's article with regard to the view that business executives were already expressing the notion of a social service function for large corporations.²¹ This assertion is also evidenced in journal articles written by business executives in the 1920s'.²²

However in the 1950's, there was an increase in the volume of writings that emerged on the issue of a social role for business. This emerged from within the field of management but also included a diverse range of authors including 'theologians, philosophers, economists, business leaders and historians'²³. This was because of an increasing consciousness of the growth of corporate power and its need for justification. Frederick writing in 1960 pointed out that:

'The collapse of laissez faire posed a giant intellectual conundrum for social theorists: How could a society with democratic traditions and democratic aspirations rationalise the growing amount of power accruing to businessmen? And how could that power be channelled into socially useful functions without driving the populace into some Orwellian nightmare of 1984 proportions?'²⁴

Various writers from the 1950s' had begun to address this task. Abrams the president of Standard Oil of Jersey (now Exxon) pointed out that business management in the United States is acquiring more and more the characteristics of a

²¹ Dodd cites Mr Young, a business executive, President Swope of the General Electric Company and Dean Donham of the Harvard Graduate School of Business Administration as business persons who had in different ways expressed this notion of a social service role for large business. Dodd (n 6)

²² Dean Donham most notably had written in the Harvard Business Review (HBR) of the necessity for responsibility of businessmen towards other groups in the community as early as 1927 & 1929 W B Donham 'Business Ethics – A General Survey'(1929) 7 HBR 385-394; 'The Social Significance of Business' (1927) 5 HBR 406-419

²³ S B Banerjee *Corporate Social Responsibility The good, the bad and the ugly* (Edward Elgar, Cheltenham, 2007) 7

²⁴ W C Frederick 'The growing problem of business responsibility' (1960) 2(4) California Management Review 54-61

profession and as such the new job for professional management 'is to conduct the affairs of the enterprise in its charge in such a way as to maintain an equitable and workable balance among the claims of various directly interested groups'.²⁵ He defines these various interested groups to include: 'the stockholders, employees, customers and the public at large'. His statement is very similar to the modern notion of 'stakeholders'.²⁶

Bowen, the foremost CSR writer of the time, pointed out in 1953 that 'social responsibility refers to the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society'²⁷. Bowen is largely credited in CSR literature as 'the father of CSR'²⁸. His book is acknowledged in most CSR literature as a poignant point in CSR history and is perhaps responsible for the business focus of CSR.²⁹ Yet Carroll points out that Bowen's work emerged from a belief that these large businesses were vital centres of power and decision-making and that their actions affected lives of citizens at many points.³⁰ This is a fundamental observation that underlies CSR as a concept.

Through the 1950's to the 1970's, the debate for the assumption of social obligations to society was significantly explored. Some of the notable debates can be found, in the writings of Johnson,³¹ Davis³² and Carroll³³. This represented a strengthening of

²⁵ F W Abrams, 'Management's Responsibilities in a Complex World' (1951) 29(3) HBR 29-34,29

²⁶ Abrams Ibid, 30; Although the modern notion of stakeholder theory is accredited to Freeman

²⁷ Bowen (n 7) 6

²⁸ A B Carroll 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) 38(3) *Business and Society* 268-295, 270

²⁹ That is, examining CSR from the perspective of the businessman.

³⁰ Carroll 1999 (n 28), 269

³¹ H L Johnson, 'Can the businessman apply Christianity?' (1957) 35(5) HBR 68-76

³² K Davis 'The case for and against the assumption of social responsibilities' (1973)16(2) *Academy of Management Journal* 312-322; K Davis and others *Business and Society: Concepts and Policy Issues* (4th ed. McGraw-Hill, New York 1980) 50-57

³³ A Carroll 'A three-dimensional conceptual model of corporate social performance' (1979) 4(4) *Academy of Management Review* 497- 505

this management perspective of CSR and a shift of focus from normative debates. Nonetheless, they address several relevant aspects of CSR that have emerged in current analysis.

Johnson in his 1957 article ‘Can the businessman apply Christianity?’ used an analogy from the Christian doctrine to analyse the nature of the businessman, highlighting man, the angel and man, the devil. Within his analysis two relevant points stand out: Firstly that

‘company executives may stress that their socially responsible philosophy works to the general benefit; yet basically such a philosophy may be a subtle device to maintain economic power in their own hands by extending their influence and decision-making power into so many non-business areas that they become benevolent dictators’³⁴

and secondly that ‘corporations may give funds to charitable or educational institutions and may argue for them as great humanitarian deeds, when in fact they are simply trying to buy community good will.’³⁵ These issues are still echoed by sceptics of CSR even in this era. Shamir in 2005 points to the continued fuzzy nature of the concept as in part precipitated by corporate power and business desire to dictate the agenda on this issue.³⁶

In 1973, Davis wrote an important article examining the case for and against the business assumption of social responsibilities. His focus was not wholly on the businessman but on the business as a whole. The first important element within his article is his definition of social responsibility as ‘the firm’s consideration of, and response to, issues beyond the narrow economic, technical and legal requirements of the firm.’ In giving this definition, he can be credited with the introduction of the

³⁴ Johnson (n 31)

³⁵ Johnson (n 31)

³⁶ R Shamir ‘Corporate Social Responsibility: A case of hegemony and counter-hegemony’ in B De Sousa Santos C A Rodriguez-Garavito (eds.), *Law and Globalisation from below – towards a cosmopolitan legality* (CUP, Cambridge 2005) 92-117,95

CSR as 'beyond the law' notion. He even specifically mentions that 'it is a firm's acceptance of a social obligation beyond the requirements of the law'³⁷. There are several problems with such narrow definition but it suffices to mention at this point that Carroll in 1979 improved upon Davis' definition and crucially pointed out that 'for a definition of social responsibility to fully address the entire range of obligations business has to society, it must embody the economic, legal, ethical and discretionary categories of business performance'³⁸. Therefore reinstating the role of law and allowing for the possibility of legal considerations as a substantial part of CSR.

Nonetheless the Davis article makes other substantial contributions to CSR history by including a concise summary of most of the contemporary arguments for and against social responsibility. In the first category, arguments for: he points several cogent points which include the following: Firstly the pursuit of long-run self-interest of the corporation which can best be understood as carrying out social activity compatible with and beneficial to the long term interest of the company.³⁹ In light of this several studies have attempted to examine whether CSR activities pay in the long term, but this is a question which has so far failed to elicit incontrovertible answers⁴⁰ Vogel in 2005 examines the evidence analysing the business case for CSR and finds this inconclusive.⁴¹

³⁷ Davis 1973 (n 32) 312

³⁸ Carroll 1979 (n 33) 499

³⁹ Such an enlightened self-interest model is more eloquently advocated in Jensen's article, where he proposes that maximisation of the long term value of the corporation, should be the objective and criteria for any trade-offs to be made among stakeholders or decisions about which CSR action the corporation should pursue. M Jensen 'Value Maximisation, Stakeholder theory and the Corporate Objective Function' (2002) *Business Ethics Quarterly* 12(2) 235-256

⁴⁰ PL Cochran RA Wood 'Corporate Social Responsibility and Financial Performance' (1984) 27 *Academy of Management Journal* 42-56; KE Aupperle AB Carroll JD Hartfield 'An empirical examination of the relationship between corporate social responsibility and profitability?' (1985) 28 *Academy of Management Journal* 446-463; J D Margolis J P Walsh 'Misery Loves Companies: Rethinking Social Initiatives by Business' (2003) 48 *Administrative Science Quarterly* 268-305

⁴¹ D Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility*

Davis also raises the possibility that CSR enhances the corporation's public image; this is closely associated with notions of corporate reputation and image. This follows up on the notion that the popularisation of CSR is closely associated to the bad image of certain large corporations brought to the attention of society through public campaigns and scandals; public campaigns by non-governmental organisations against large multinational corporations for human rights, environmental and labour rights violations in various parts of the world. A modern example would be the Brent Spar & Ogoni campaigns against Shell.⁴² Publicity of wrongful corporate actions and the threats to corporate reputation has been a potent force in the adoption of CSR;⁴³ however the vulnerability of corporations to reputational risk will differ from sector to sector. Therefore this may only result in limited social responsibility geared towards good public relations. It is also possible that CSR as response lasts only as long as such publicity focuses on it.

Next, Davis points out two original ideas on this issue of CSR's relevance to the viability of business; firstly that 'society gave business its charter to exist, and that charter could be amended or revoked at any time that business fails to live up to society's expectations',⁴⁴ an idea which ties in with the social contract theory⁴⁵ and the concession corporate theory⁴⁶ and secondly that 'if business wishes to retain its present social role and social power, it must respond to society's needs and give society what it wants',⁴⁷.

(Brookings Institution Washington DC 2005)

⁴² S Liversey 'Eco Identity as Discursive Struggle: Royal Dutch/Shell, Brent Spar and Nigeria' (2001) 38(1) *Journal of Business Communications* 58-91

⁴³ J V Mitchell *Companies in a World of Conflict* (London, Earthscan/RIIA, 1998)

⁴⁴ Davis 1973 (n 32) 314

⁴⁵ T Donaldson T Dunfee *Ties that Bind: A Social Contract Approach to Business Ethics* (Boston, Harvard Business School Press, 1999)

⁴⁶ K Iwai 'Persons, things and corporations, the corporate personality controversy and comparative corporate governance' (1999) 47 *American Journal of Comparative law* 538-632

⁴⁷ Davis 1973 (n 32) 314

This is referred to in CSR literature as Davis Iron law of responsibility asserting that, “in the long run those who do not use power in a manner which society considers responsible will tend to lose it.”⁴⁸ . This is another crucial observation on the centrality to CSR of notions of corporate power within the corporation and society relationship.

Within the article, he points to a further interesting argument which is that CSR can be used as a tool in avoidance of governmental regulation; as such regulation is costly to business and restricts its flexibility in decision-making. This argument has been termed, ‘rational’ or ‘strategic’ in CSR literature. Werther and Chandler suggest as a rational argument for CSR that it may be more cost-effective to address issues voluntarily rather than wait for the legally mandated requirements and react to them.⁴⁹

The CBI points out that ‘many companies prefer to be one step ahead of governmental legislation or intervention, to anticipate social pressures themselves and hence be able to develop their own policies in response to them’.⁵⁰ Such preemptive action may however be motivated by self-interest as the main objective may simply be to dictate the agenda on the relevant issue in a manner compatible or conducive to their business, economic or personal interests.

It is also important to add that the avoidance of litigation is also a possible motive for CSR practice as demonstrated by class action suits filed in the USA under the Aliens Torts Statutes. Aggrieved parties are often prepared to seek out available forum for redress even in foreign countries.

⁴⁸ This idea is further developed in Davis 1980 (n 32) 50-57

⁴⁹ W B Werther (JR) D Chandler *Strategic Corporate Social Responsibility* (California, Sage Publications, 2006) 17

⁵⁰ J Moon D Vogel ‘Corporate Social Responsibility, Government and Civil Society’ in A Crane and others (ed.) *The Oxford Handbook of CSR* (New York, OUP, 2008) 308

To appreciate the scale of this threat, analysts point out that

‘Firms such as Citibank, Coca-Cola, IBM, JC Penny, Levi-Strauss, Pfizer, Gap, Limited, Texaco and Unocal have all faced possible suits under this same law, which may extend to hundreds of other national and international firms.’⁵¹

In spite of the lack of complete success of these suits, these types of litigation still remain a powerful motive for CSR adoption. Where corporations or business set the agenda or as CBI argues define CSR, this may result in a lack of clarity over what CSR means and to whom. For CSR to fulfil this potential it must have objectives that are clearly identifiable and address the relevant issues in context but it cannot be fuzzy or woolly or restricted to public relations alone.

Davis in the article also highlights other issues in support of CSR including: socio-cultural norms reflecting that businessmen as individuals operate from a set of cultural norms derived from society; the possibility that CSR could be in stockholder interest indicating that such activities could open up new opportunities for profit; allowing business an attempt to deal with social issues where the government may have failed. This latter argument reflects the notion that people may be frustrated with the failure of other social institutions. This is an action that could be demonstrated by the privatisation of public utilities and the new sense of business provision of ‘public goods’. It acknowledges that business may have relevant resources: reflecting not only the notion of resources as money but also the management talent, functional expertise and capital resources. This is also the reasoning behind the adoption of business ideology and management strategy into public institutions, as demonstrated by the recommended use of best value strategy by local authorities in assessing contracting and other activity.⁵²

⁵¹Werther and Chandler (n 49) 12

⁵²Best value with the central principle that local authorities are to secure continuous improvement of functions having regard to a combination of ‘economy, efficiency and effectiveness’- M Elliot (ed.)

Davis also points to the argument that CSR may be capable of turning problems into profits as many social problems can be handled profitably according to traditional business concepts. This can be linked to the earlier business case for CSR argument. This is an argument echoed by Prahalad and Hammond in their notable article ‘Serving the World’s Poor, Profitably’⁵³ where they posit that:

‘by stimulating commerce and development at the bottom of the economic pyramid, MNCs could radically improve the lives of billions of people and help bring into being a more stable , less dangerous world’⁵⁴.

Notwithstanding this vision, there has also been literature citing the limitations of pursuing a strictly economic or profitable CSR and applying that to development.⁵⁵

It is also important to address CSR’s capability to deliver development in view of CSR’s nebulous nature and the inherent nature of development as a concept which must be dictated from the developing societies themselves.

Finally, Davis applies the adage that ‘prevention is better than curing’ as he points out the possibility that ‘if business delays dealing with a social problem now, it may find itself constantly occupied with putting out social fires so that it has no time to accomplish its primary goal of producing goods and services’⁵⁶. This is reminiscent of issues arising from the late adoption of CSR by oil industries in Nigeria as a delayed response to social and environmental issues of oil pollution and degradation of the delta region.⁵⁷

Beatson, Matthew and Elliot’s Administrative Law – Text and Materials (3rd ed. OUP, Oxford, 2005) 28

⁵³ (2002) 80(9) Harvard Business Review 48-57

⁵⁴ Ibid at 48

⁵⁵ J G Frynas *Beyond Corporate Social Responsibility: Oil Multinationals and Social Challenges* (CUP, Cambridge, 2009)

⁵⁶ Davis (n 32)

⁵⁷ B Manby *The price of Oil* (Human Rights Watch New York 1999)

On the other hand Davis in analysing the arguments against CSR, Davis firstly points to the traditional notion of profit maximisation as the main responsibility of the corporation. This is encapsulated by Friedman who states that:

‘In a free enterprise, private property system, a corporate executive is an employee of the owners of the business...and his responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible...’⁵⁸

He therefore observes that social involvement incur costs which may not necessarily make economic sense, ‘many social goals do not pay their own way in an economic sense’. This is similar to Vogel’s findings which point out an end result where several empirical studies ‘report a positive relationship between ethics (CSR) and profits, some find a negative relationship and still others find the relationship to be either neutral or mixed’.⁵⁹ This is also the sense in which some CSR advocates propose a shift from a simple economic bottom-line to a triple bottom line of people, planet and profits because this will permit more than an economic justification for socially responsible action by corporations.⁶⁰

Davis also adds that businessmen may lack the necessary skills in dealing with social problems and this could lead to the dilution of business primary purpose which may lead to business performing poorly both in its economic and its social roles.⁶¹

Furthermore he points out that business may already have enough power and therefore the adoption of social responsibility may threaten the pluralistic division of

⁵⁸ M Friedman *Capitalism and Freedom* (University of Chicago Press Chicago 1962) 12-16; M Friedman (1970) ‘The Social Responsibility of Business is to increase its profits’ *The New York Magazine*, 13 September 1970

⁵⁹ Vogel (n 41) 16-45

⁶⁰ J Elkington, *Cannibals with Forks: The Triple Bottom –Line of the 21st Century* (Capstone Publishing, Oxford,1997)

⁶¹ He points out a more localised argument that where US firms adopt CSR as against other firms it may create a disadvantage, which could lead to a weakened international balance of payments. This is no longer valid as CSR in one form or another is a global phenomenon both for developed and developing country business.

powers and reduce viability of our free society thus indicating a lack of accountability because accountability should always go with responsibility.

Davis suggests the possibility that ‘until society can develop mechanisms which would establish direct lines of social accountability from business to public, business should stand clear of social activities.’⁶² The fear is that this could become a subversive doctrine where business men become ‘benevolent paternalistic rulers’.

This was an issue earlier addressed by Levitt in 1958, when he pointed out

‘the frightening spectacle of a powerful economic functional group whose future and perception are shaped in a tight materialistic context of money and things that impose its narrow ideas about a broad spectrum of unrelated non-economic subjects on the mass of man and society’.⁶³

This underlies the integral nature of accountability to the CSR agenda. This is a fundamental observation that goes to the heart of CSR, the question of legitimacy and accountability. The Davis article is pivotal in CSR history as it highlights several significant debates within CSR.

Unwittingly it highlights the arguments that lend credence to the calls for development of the normative aspects of CSR and attempts to reconnect CSR with its first strand. In line with the first normative strand Lord Wedderburn in 1986 affirmed that the celebrated exchange between Professors Adolf Berle and E Merrick Dodd is central to the modern problem of corporate responsibility.⁶⁴ Nonetheless in his analysis he points out:

‘the need is for mechanisms both internal and external to the enterprise through which social responsibility can emerge-procedures which will inevitably modify the objective of maximising profits without attempting to replace it at a stroke by some other substantive formula.’⁶⁵

⁶² Davis 1979 (n 32) 320

⁶³ T Levitt ‘The Dangers of corporate social responsibility’ (1958) 36(5) HBR 41-50

⁶⁴ Lord Wedderburn (n 18).3

⁶⁵ Ibid at 44

In addition, Teubner in examining the lessons learnt in the intervening years from the Berle-Dodd debate points out that the central issue remained that 'a corporate enterprise does not exist simply as a self-serving and self-realising institution for the unique benefit of its shareholders and workers but rather exists above all to fulfil a broader role in society.'⁶⁶

Therefore the role of law in shaping the corporate enterprise is significant and important and this is why Parkinson in 1993 surmised the overall question in relation to law as follows:

'Identifying appropriate modes of control over management demands we first decide what the objectives of the company should be. The questions of means and ends form the subject matter of other disciplines...They are also part of the subject-matter of law. Whether one emphasises the role of state or of contract in corporate existence, companies are creations of law, their objectives are defined by law and the law is a major source of the practical constraints on management behaviour.'⁶⁷

The necessity for a more holistic approach towards CSR is strengthened by its linkage with globalisation. Although CSR history is traced to the USA in the 1930s'; it has become a more global concept. This is as a result of globalisation and its link to the spread of the capitalist ideology.⁶⁸This has also resulted in the growth and spread of multinational corporations.

⁶⁶ G Teubner 'Corporate Fiduciary Duties and their beneficiaries: A Functional Approach to the Legal Institutionalisation of Corporate Responsibility in K J Hopt and G Teubner (eds.) *Corporate Governance and Directors Liabilities: Legal, Economic and Sociological Analyses of Corporate Social Responsibility* (De Gruyter, Berlin 1984)149-177, 157

⁶⁷ J E Parkinson, *Corporate Power and Responsibility: issues in the theory of company law* (Clarendon Press, Oxford 1995) viii

⁶⁸ Dodd points out a comment by Dean Donham that '*the only way to defend capitalism is through leadership which accepts social responsibility.*' (Dodd n 6) 1155

Globalisation can be understood as involving stretched social relations, intensification of flows, increasing interpenetration and global infrastructure.⁶⁹ ‘Stretched social relations’ in the sense that the effect of action in one part of the world affects the others; ‘intensification of flows’ synonymous with the interconnectedness and interaction of a heightened nature ; ‘increasing interpenetration’ which involve a cross- cultural and economic effect, not only in the transfer of cultures and people but in the relocation of business production sites as distinct from its markets and finally ‘global infrastructure’ where ‘interconnections that cross nation state boundaries operate outside the systems of regulation and control of individual nations and are not only global in their operation but also in their institutional infrastructure.’⁷⁰

Therefore an examination of recent CSR literature reveals a variety of issues covering different geographic regions including CSR in developing countries, CSR in various continents and CSR in several industry sectors.⁷¹ Scherer and Palazzo point to the importance of large corporations in the global sphere, they state that:

‘The world’s biggest corporations have revenues that equal or exceed the gross domestic product of some developed states... (and this is further enhanced) by their mobility and capacity to shift resources to locations where they can be used more profitably and to choose among suppliers, applying a criteria of efficiency.’⁷²

⁶⁹ A Cochrane K Pain ‘A globalising society’ in D Held(ed.) *A Globalizing world, culture, economics, politics*(2nd ed. Routledge, London 2004) 5-45,15-17

⁷⁰ Ibid

⁷¹ An illustrative list includes: K Fukukawa J Moon ‘A Japanese model of Corporate Social Responsibility? A study of website reporting’ (2004)16 *Journal of Corporate Citizenship* 45-49; O DeSchutter ‘CSR European Style’ (2008) 14(2) *European Law Journal* 203-236;C C Baughn and others ‘Corporate social and environmental responsibility in Asian and other geographical regions’ (2007) 14(4) *CSR and Environmental Management* 189-205; U.E. Ite ‘Multinational corporation and CSR in developing countries: a case study of Nigeria’ (2004) 1(1) *CSR and Environmental Management* 1-11;S Fritsch The ‘UN Global Compact and the global governance of CSR: complex multilateralism for a more human globalisation’ (2008) 22(1) *Global Society* 1-28

⁷² A G Scherer G Palazzo ‘Globalisation and Corporate social responsibility’ in A Crane and others (eds.) *The Oxford Handbook of CSR* (OUP, New York 2008) 413-431, 418 see also A D Chandler B Mazlish *Leviathans: Multinational Corporations and the New Global History* (CUP, Cambridge 2005)

This has re-ignited core questions about the role of these corporations but on a global scale translating questions raised in the 1930s' to the global scale with the multiplier effect.

In the 70s' Davis landmark analysis in 1973 and Carroll's re-definition of CSR in 1979 stand-out as central analytical points but the 80s' and 90s' resulted in an explosion of writing on alternatives and complementary themes such as Corporate social performance, Corporate social responsiveness, Corporate citizenship, stakeholder theory and business ethics.⁷³ However Carroll observes that 'very few unique contributions to the concept of CSR occurred in the 1990s.'⁷⁴ It seems that in that time there was a micro-focus on highlighted aspects of CSR debates and the development of complementary themes.

By 2000 significant focus was being given to CSR research into the impact of globalisation and to complementary aspects such as corporate citizenship, corporate social performance, corporate accountability and business ethics. The normative debates also continued and several theories began to emerge. The overall picture emerges more clearly in the next section which examines the problems with definition analysing the various theoretical basis and more specifically its link with the complementary themes.

⁷³ These complementary themes will be analysed in the following section.

⁷⁴ A B Carroll 'A history of Corporate Social Responsibility: Concepts and Practices' in A Crane and others (eds.) *The Oxford Handbook of CSR* (OUP, New York 2008) 19- 46, 37

2.3 Multiple CSR Theories and Complementary Themes

There is no unified theory of CSR, rather there are several theories reflecting the complex and dynamic CSR landscape. As a general guide, theories may be descriptive or normative. They could be descriptive in the sense that they describe what CSR practice is or could be for corporations or normative in the sense that they examine the rationale for corporations to adopt CSR. Normative theories therefore examine answers to questions about why corporations should pursue CSR thereby signifying what such corporations ought or ought not to be doing.

Mele points out that ‘a good normative theory needs a good philosophical foundation which has to include a correct view of human nature, business and society and the relationship between business and society.’⁷⁵ The lack of a normative grounding for CSR is central to the inability to set clear and defined agendas for achievement in the CSR field. Campbell points out that this lack of grounding of CSR, ‘threatens the credibility of CSR programmes and impedes the articulation and implementation of CSR policies within business, government and civil society.’⁷⁶

The landscape of various theories and alternate themes makes it very difficult to identify the core issues within CSR. This is why the aim of the chapter is to address CSR as an essentially contested concept, in order to identify a common core from which contestation emerges. However this section will attempt to map out CSR

⁷⁵ D Mele ‘Corporate social responsibility theories’ in A Crane and others (ed.) *The Oxford Handbook of CSR* (New York, OUP, 2008) 47 -82, 76

⁷⁶ T Campbell, ‘The normative grounding of corporate social responsibility: a human rights approach’ in D McBarnet A Voiculescu & T Campbell (eds.) *The new corporate accountability: Corporate Social Responsibility and the law* (Cambridge University Press (CUP), Cambridge 2007)529-564, 530

theories and identify the role of complementary themes. The landscape of CSR theories is complex and tangled but certain authors have attempted to map out the theories involved. They include Windsor⁷⁷, Klonoski⁷⁸, Garriga and Mele⁷⁹ and more recently Mele⁸⁰.

Windsor addressed three key approaches to CSR: ethical responsibility theory, economic responsibility theory and corporate citizenship. These approaches stem from ethical duties, economic responsibilities and political positions respectively. The ethical approach proposes the social advantage of morally sensitive business practices and policy using a range of moral frameworks. The economic approach argues that no costly responsibility action should be undertaken voluntarily. Windsor points out that this perspective also has a moral core based in utilitarianism as a variant of consequentialism with an outcomes orientation. Finally Windsor sees the corporate citizenship approach, as political metaphor which falls between the earlier two approaches unsatisfactorily.

Klonoski for his part, distinguished between 'fundamentalism' where the corporation dealt strictly with profit-making within the law, theories implying moral responsibility and theories that focused on the social dimension of the corporation.⁸¹

However, one of the most accepted classifications is that offered by Garriga and Mele in their essay on mapping out the territory of CSR theories. Other scholars point out that this attempt to map CSR theories is successful and presents a brilliant account of the foremost academic debate on CSR.⁸²

⁷⁷ D Windsor 'Corporate social responsibility: Three key approaches' (2006) 43(1) *Journal of management studies* 93-114

⁷⁸ R J Klonoski 'Foundational considerations in the corporate social responsibility debate' (1991) 34(4) *Business Horizons* 9-18

⁷⁹ Garriga & Mélé (n 7)

⁸⁰ Mélé (n 75)

⁸¹ Klonoski (n 78)

⁸² A Crane, D Matten and L J Spence *Corporate Social Responsibility: Readings and cases in a global context* (Oxford, Routledge, 2008) 58

Garriga and Mele identify four main types of CSR theories and they are: Instrumental theories advancing economic objectives through social activities; Political theories advocating corporate power and its responsible use; Integrative theories expressing the necessity for corporations to integrate social demands; Ethical theories examining the morality and rightness of corporate social action. These theories will be examined briefly below but this will be studied in further detail later in the chapter as exemplifying multiple interpretations that have developed within CSR.

Instrumental theories are traditionally accepted theories on the role of the corporation as an instrument of wealth creation. They cover theories which advocate maximisation of shareholder value. Friedman advocated that ‘the only one responsibility of business towards society is the maximisation of profits to the shareholder within the legal framework and ethical custom of the country’⁸³ and in line with this modern theorists advocate an ‘enlightened value maximisation’⁸⁴ accepting that certain social activities may contribute to the long-term shareholder value of the corporation. This group will also include theories that express corporate social activities in terms of gaining a competitive advantage either within a competitive context⁸⁵ or to generate new untapped markets such as in developing countries.⁸⁶ An example is the growth of telecommunications corporations in developing countries such as India and Nigeria⁸⁷. It will also cover theories which place CSR as marketing and the building of a reputation and brand which adds to the

⁸³ M Friedman ‘The Social responsibility of business is to increase profits’ 13th September 1970, New York Times Magazine 32-33

⁸⁴ M C Jensen ‘Value maximisation, stakeholder theory and the corporate objective function’ (2002) 12(2) Business Ethics Quarterly 235-256

⁸⁵ M E Porter and M R Kramer ‘The competitive advantage of corporate philanthropy’ (2002) 80(12) Harvard Business Review 56-69

⁸⁶ C K Prahalad and A Hammond ‘Serving the world’s poor profitably’ (2002) 80(9) Harvard Business Review 48-58

⁸⁷ R Singh ‘Mobile Phones for development and profit’ Overseas Development Institute (ODI) Opinion April 2009 <<http://www.odi.org.uk/resources/download/2846.pdf>> accessed 18 March 2011

bottom line of profit. This can be demonstrated by the adoption of fair-trade standards and then placing the logos on products. McWilliams and Siegel point out this link by stating that ‘support for cause related marketing creates a reputation that a firm is reliable and honest (and) consumers typically assume that the products of a reliable and honest firm will be of a high quality.’⁸⁸ The focus is on CSR as an instrument of long-term wealth creation.

Political theories highlight the notion of corporate power and its relationship with responsibility within the society. They cover theories by Davis mentioned above⁸⁹, such as, the social power equation and the iron law of responsibility, which fault the classical economic theory of the notion of perfect competition by exposing the power roles of the corporate party and the ability to influence the market. However this also covers newer perspectives such as corporate citizenship.

Corporate citizenship is a term sometimes used synonymously with CSR and therefore has taken on various meanings. However at its root is the notion of the corporation as a citizen in society with rights and responsibilities.⁹⁰ Presently three views of corporate citizenship can be identified.⁹¹ Firstly a limited view which equates corporate citizenship with corporate philanthropy⁹², an equivalent view which equates corporate citizenship with CSR⁹³ and an extended conceptualisation which defines corporate citizenship as describing the role of the corporation in administering citizenship rights for individuals.⁹⁴ There has been severe criticism of

⁸⁸ A McWilliams and D Siegel ‘Corporate social responsibility: a theory of the firm perspective’ (2001) 26(1) *Academy of Management Review* 117-127, 120

⁸⁹ Davis 1979 (n 32)

⁹⁰ J Andriof and M McIntosh (eds.) *Perspectives of corporate citizenship* (Greenleaf, Sheffield, 2001)

⁹¹ D Matten and A Crane *Corporate Citizenship: Towards an extended theoretical conceptualisation* (2005) 30(1) *Academy of Management Review* 166-179

⁹² D J Wood J M Lodgson ‘Business citizenship: From Individuals to organisations’ (2003) *Business Ethics Quarterly* 59-94; S A Waddock and S B Graves ‘The corporations social performance-financial performance link’ 18(4) *Strategic Management Journal* 303-320 (CC as social investing)

⁹³ A B Carroll ‘Four faces of corporate citizenship’ (1998) 100(1) *Business and Society* 1-7

⁹⁴ Matten & Crane (n 91); D Matten A Crane and W Chapple ‘Behind the Mask: revealing the true

the extended conceptualisation as ‘an idea whose time has not yet come’,⁹⁵ especially in the absence of credible accountability mechanisms for the increase of corporate power which this could entail.

Integrative theories examine how business integrate social demands into its business operations, this is embodied in the analysis by Preston and Post on public responsibility⁹⁶ as well as the more popular theories of corporate social performance and of stakeholder management. It has significant descriptive theories focused on corporate response to CSR. Stakeholder management publicized in the works of Freeman⁹⁷ and others⁹⁸ advocates an approach where management takes into cognizance stakeholders or people who affect or are affected by corporate policies and practices.⁹⁹ This management theory is however underscored by an ethical theory that embraces a modified property rights position that requires the corporations to be run on behalf of stakeholders instead of its shareholders.

Corporate social performance involves an integrated theory that adopts the principles of CSR, processes of corporate social responsiveness and outcomes of corporate behaviour¹⁰⁰ Integrative theories therefore represent a synthesis of other categories of theories to provide frameworks for gauging corporate response, analysis and developing corporate policy.

face of corporate citizenship’ (2003) 45(1-2) *Journal of Business Ethics* 109-120

⁹⁵ J Van Oosterhout ‘Corporate Citizenship: An idea whose time has not yet come.’ (2005) 30(4) *Academy of Management Review* 677-681

⁹⁶ L E Preston J E Post *Private Management and Public Policy: The Principle of Public Responsibility* (Prentice-Hall, Englewood Cliffs NJ. 1975)

⁹⁷ R E Freeman *Strategic Management: A Stakeholder Approach* (Pitman, Boston 1984); R E Freeman and W M Evan ‘Corporate Governance: a stakeholder interpretation’ (1990) 19(4) *Journal of Behavioural Economics* 337-359

⁹⁸ S Ogden and R Watson ‘Corporate performance and stakeholder management: balancing shareholder and customer interests in the UK privatised water industry’ (1999) 42(5) *Academy of Management Journal* 526-538; J Preston, L Post and S. Sachs *Redefining the corporation: stakeholder management and organisational wealth* (Stanford Business Books, 2002)

⁹⁹ Garriga & Mélé (n 7) at 59

¹⁰⁰ This notion was more recently popularised by D J Wood ‘Corporate social performance revisited’ (1991) 16(4) *Academy of Management Review* 691-718

Finally ethical theories focus on ethics and in this sense doing what is right for a good society. These ethical theories are often contested hence it is susceptible to varied interpretation. These theories include stakeholder theory, universal rights based on human rights, sustainable development and common good approach.¹⁰¹ Stakeholder theory has used a number of ethical theories to base the requirement of the corporation to take into consideration other persons that affect or may be affected by corporate actions.

They include normative moral theory based on Kantian theory¹⁰², Rawls theory of Justice¹⁰³, and other theories of property and distributive justice.¹⁰⁴ These varied theoretical stances are because of the necessity to justify the stand-point that the corporation can be run in the interests of stakeholders. This stakeholder perspective will also require a fundamental reform in the role of the corporation. For example from a Kantian perspective, it requires the balancing of the property rights of the corporation as a legal person with Kant's principle for respect of a person.¹⁰⁵

Garriga and Mele's attempt at to map CSR theories is exemplary but it is immediately obvious that the boundaries are not clear-cut and there is a tendency for overlap within the theories and a mixed use of descriptive and normative within the theories. In arriving at a workable definition of CSR, a pragmatic approach is

¹⁰¹ See Garriga & Mèlé (n 7) 60-61

¹⁰² W M Evan and R E Freeman 'A stakeholder theory of the modern corporation: Kantian capitalism' in T Beauchamp and N Bowie(eds.) *Ethical Theory and Business* (Prentice-Hall, Englewood Cliffs, 1988) 75-93

¹⁰³ R A Phillips 'Stakeholder theory and a principle of fairness' (1997) 7(1) *Business Ethics Quarterly* 51-66

¹⁰⁴ T Donaldson and L E Preston 'The stakeholder theory of the corporation: concepts, evidence and implications' (1995) 20(1) *Academy of Management Review* 65-91

¹⁰⁵ In this regard, such a perspective applies Kant's practical imperative which requires that one 'act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as a means only 'and re-interprets this to mean that the business as a person should consider the interests of all affected stakeholders in any decision it takes. See: I Kant *Fundamental Principles of the Metaphysics of Morals*, re-printed in L Dennis (ed.) *Groundwork for the Metaphysic of Morals –Immanuel Kant* (Broadview Press, Canada, 2005)88; see also N E Bowie 'A Kantian Approach to Business Ethics' in R E Frederick (ed.) *A Companion to Business Ethics* (Blackwell , Oxford, 1999) 1-16, 10

advisable. Beesley and Evans point out that although CSR has suffered from a lack of definition as an issue and as a consequence discussion has been amorphous and ill-focussed, it may still be an effective way of dealing with outstanding social problems irrespective of whichever of the dominant ideologies is being asserted.¹⁰⁶ There is significant overlap between the theories and the complementary themes and titles that have developed in association with CSR.

Mele in his 2008 study¹⁰⁷ further re-aligns his earlier model of theories with complementary themes or multiple interpretations of CSR that have developed. He analyses four contemporary mainstream theories: corporate social performance, shareholder value theory, stakeholder theory and corporate citizenship theory as exemplifying the integrative, instrumental, ethical and political theories respectively. Therefore the next section follows this pattern when examining the theories further. This will mean that the complementary themes are examined in more detail as exemplifying the theories and multiple interpretations of CSR.¹⁰⁸

The first three themes: corporate social performance, shareholder value theory and stakeholder theory draw from the dominant debates in management discourse representing justification and arguments for CSR from within. They will represent integrative, instrumental and ethical theories respectively. The fourth theory, corporate citizenship begins to introduce language from political science but also represents attempts from practitioners to justify good behaviour in society. This will be examined as an example of political theories.

¹⁰⁶ M Beesley and T Evans *CSR: a reassessment* (Croom Helm, London 1978) 9-10

¹⁰⁷ Mélé (n 75)

¹⁰⁸ Amaeshi & Adi demonstrate that this is not an exhaustive list as they identify other multiple interpretations including business ethics and morality, corporate greening and green marketing, diversity management, sustainability and so on. However the categorisation covers the main themes in current CSR discourse. See K Amaeshi A B C Adi 'Reconstructing CSR construct in Utlish' (2007) 16(1) *Business Ethics: A European Review* 3-18

In addition a fifth complementary theme of corporate accountability is added. This sits outside of the Garriga & Mele categorisation but it draws from normative debates on the role of the corporation and addresses those theories of CSR that have emanated from outside the management and social science fields. It dwells on the external aspects of CSR questioning how society holds corporations to account. Each of these complementary themes as multiple interpretations of CSR will be analysed in more detail in the following section.

2.3.1 Corporate Social Performance (CSP) as Integrative Theory

The key proponents of the CSP theory include Carroll¹⁰⁹, Wartick and Cochran¹¹⁰, Wood¹¹¹ and Swanson¹¹². Wood in 1991 defines CSP as:

‘the configuration in the business organisation of principles of social responsibility, processes of response to social requirements, and policies, programs and tangible results that reflect the company’s relations with society.’¹¹³

The emphasis is on the corporation or business organisation and its response to society hence it is an integrative theory. The rationale is to demonstrate inter-relationship among diverse topics and provide unifying themes.¹¹⁴ Its history as a concept lies in the 70s, with ‘corporate responsiveness and the writings of Ackerman¹¹⁵ and Sethi¹¹⁶.

These writings were focused on corporation behaviour in response to changing societal demands. Sethi in 1975 addressed a model that included social obligations, societal responsibility and social responsiveness. Carroll in 1979 formally introduced the term ‘corporate social performance’ and suggested that corporate response or obligations to society must include the economic, legal, ethical and

¹⁰⁹ Carroll 1979 (n 33)

¹¹⁰ S L Wartick and P J Cochran ‘The evolution of the Corporate Social Performance Model’ (1985) 10(4) *Academy of Management Review* 758-769

¹¹¹ D J Wood ‘Corporate Social Performance Re-visited’ (1991) 16(4) *Academy of Management Review* 691-718

¹¹² D L Swanson ‘Addressing a Theoretical problem by re-orienting the corporate social performance model’ (1995) 20(1) *Academy of Management Review* 43-64; D L Swanson ‘Towards an Integrative Theory of Business and Society: A research strategy for Corporate Social Performance’ (1999) 24(3) *Academy of Management Review* 596-621

¹¹³ Wood (n 111)

¹¹⁴ T Jones, ‘An Integrating Framework for Research in Business and Society: A step towards the elusive paradigm?’ 8(4) *Academy of Management Review* 559-564

¹¹⁵ R W Ackerman (1973) ‘How Companies Respond to Social Demands’ 51(4) *Harvard University Review* 88-98

¹¹⁶ S P Sethi ‘Dimensions of Corporate Social Responsibility’ (1975) 17(3) *California Management Review* 58-64

discretionary aspects.¹¹⁷Wartick and Cochran in 1985 addressed corporate response based on principles of social responsibility, the process of social responsiveness and the policy of issues management.¹¹⁸

Wood developed this model further and created a CSP model based on three aspects principles of CSR expressed at institutional, organisational and individual levels as well as the processes of corporate social response and outcomes of corporate behaviour. In outlining this model, the principles of CSR include a drive for legitimacy at the institutional level¹¹⁹, ‘public responsibility’ at an organisational level , implying that business is responsible for outcomes related to its primary and secondary areas of involvement with society,¹²⁰and managerial discretion at the individual level appealing to principles of moral action. The processes of corporate social responsiveness include environmental assessment, stakeholder management and issues management and the outcomes of corporate behaviour include social impacts, social programs and social policies.

This theory provides an adequate strategy for business when faced with responding to societal pressures and demands for change, it also provides a structure for corporate response to the society but it does not provide a rationale for CSR. It also acts like an integrated systemic response that business can produce in response to calls for CSR. When addressing responsibility, it addresses and draws from existing literature that merely identifies that corporations should be responsible. Nevertheless it focuses from a historical point on corporate response and involves arguments for CSR addressing its response from within the corporation.

¹¹⁷ This was developed in 1991 into the ‘pyramid of CSR’ See AB Carroll ‘ The Pyramid of Corporate Social Responsibility: Towards the Management of Organisational Stakeholders’ (1991) (July/August) Business Horizons 39-48

¹¹⁸ Wartick & Cochran (n 110)

¹¹⁹ This is focused on Davis 1979 (n 32) –society grants legitimacy and power to business and in the long run misuse of such power may result in loss.

¹²⁰ This is based on the principle of ‘public responsibility as advocated by Preston and Post (n 96)

2.3.2 Shareholder Value Theory (SVT) as Instrumental Theory

This is a theory of CSR which is largely in line with the traditional view of the role of the corporation as maximising the profit of its shareholders.¹²¹ It developed largely to re-align responsibility with profit-making. The theory attempts to demonstrate that CSR is instrumental to shareholder value. Friedman encapsulated the original approach in his saying that ‘the one and only responsibility of business towards the society is the maximisation of profits to the shareholders within the legal framework and the ethical custom of the country.’¹²² This therefore meant that those who adhere to this view had to demonstrate that CSR could be profitable and was in the interest of business. They seek a justification that harmonises CSR with profit-making.¹²³

This has led to the notions of ‘enlightened self-interest’, which gives rise to consequential giving and actions aligned to long run interests of the corporation.¹²⁴

Also notions of ‘strategic CSR’ which refers to policies, programmes and processes which yield benefits to the firm, in particular by supporting core business activities and thus contributing to the firm’s effectiveness in accomplishing its mission.’¹²⁵

This is also the main source theory for notions of ‘enlightened shareholder value’ which Jensen describes as long-term value maximisation allowing trade-offs with stakeholders.¹²⁶

¹²¹ A contractual view of the corporation

¹²² Friedman (n 83)

¹²³ Encapsulated in notions of a business case for CSR, or quotes like ‘being good is good for business’

¹²⁴ G D Keim ‘Corporate Social Responsibility: an assessment of the enlightened self-interest model’ (1978) 3(1) *Academy of Management Review* 32-39

¹²⁵ L Burke J M Logsdon ‘How Corporate Social responsibility Pays Off’ (1996) 29(4) *Long Range Planning* 495-502, 496

¹²⁶ M C Jensen ‘Value Maximisation, Stakeholder Theory and the Corporate Objective Function’ (2001) 14(3) *Journal of Applied Corporate Finance* 8- 21

The economist in 2008 pointed out that:

‘One way of looking at CSR is that it is part of what businesses need to do to keep up with (or, if possible, stay slightly ahead of) society's fast-changing expectations. It is an aspect of taking care of a company's reputation, managing its risks and gaining a competitive.... So paying attention to CSR can amount to enlightened self-interest, something that over time will help to sustain profits for shareholders. The truly responsible business never loses sight of the commercial imperative.’¹²⁷

In spite of this, it is however doubtful that all CSR practices can be profitable.¹²⁸

Vogel points out that an extensive body of academic research on the link between CSR and profitability is at best inconclusive.¹²⁹ The grounding for CSR must be beyond self-interest as the problems that CSR seeks to address are serious and do not rely on a narrow self-interested corporate philanthropy vision.

It is significant that in espousing, what has eventually become strategic CSR, Porter and Kramer refer to ‘strategic corporate philanthropy’ and point out that the ‘acid test of good corporate philanthropy is whether the desired social change is so beneficial to the company that the organisation would pursue the change even if no one ever knew about it.’¹³⁰ It may be that the history of this theory which lies in philanthropy, seeks to extend some of its justification to the much more foundational concept of CSR which has arisen from debates about the role of the corporation in society. Yet this theory draws from one of the central debates about the origin and role of the corporation. It relies heavily on a contractual view of the corporation and

¹²⁷ The Economist ‘Do it right: Corporate Responsibility is a matter of enlightened self-interest.’ 17 January 2008 < <http://www.economist.com/node/10491124>> accessed 19 March 2011

¹²⁸ Vogel (n 41)

¹²⁹ D Vogel ‘Is there a market for virtue? The business case for Corporate Social Responsibility’ (2005) 47(4) California Management Review 19-45

¹³⁰ M Porter and M Kramer ‘The Competitive advantage of corporate philanthropy’ (2002) 80(12) HBR 67

draws on the notion of property rights that stresses the shareholders as owners of the business and the managers as their employees.¹³¹

Therefore it inadvertently highlights that true fundamental change to grounding CSR must come from an examination of the role of the corporation in law. The heart of the matter revolves around the role of the corporation in and to society. One of the indications of this is that the notion of 'enlightened shareholder value' has been at the heart of the reform of the company's director's duties in the UK.¹³² It links and contrasts with the next theory which seeks to demonstrate that there are other constituents within the corporation.¹³³

¹³¹ Mélé (n 75) see also P Ireland 'Property and Contract in Contemporary Corporate Theory' (2003) 23 *Legal Studies* 453-493

¹³² See Ministerial Statements, DTI, June 2007 'Companies Act 2006, Duties of Company Directors' <<http://www.bis.gov.uk/files/file40139.pdf>> accessed 19 March 2011 ; A Keay 'Enlightened Shareholder value, the reform of director's duties and the corporate objective' (2006) 3 *Lloyds Maritime and Commercial Law Quarterly* 335- 361

¹³³ This is demonstrated in the changes following the ESV principle that allowed for balancing of interests in s.172 of the Companies Act 2006. See L Cerioni 'The success of the company in s.172(1) of the UK Companies Act 2006: Towards the Enlightened Directors' primacy' (2008) 4(1) *Original Law Review* 1-31

2.3.3 Stakeholder Theory (ST) as Ethical Theory

This theory also analyses CSR from within the corporation and addresses how the corporation should be managed. However in one sense, it is a counter argument to the SVT, because it seeks to demonstrate that management in running the company should 'balance the multiple claims of conflicting stakeholders'.¹³⁴ The stated objective of the stakeholder theory is to replace the duty to shareholders with a duty to 'stakeholders'.¹³⁵ The central concern is to address the question: 'for whose benefit and at whose expense should the firm be managed'?¹³⁶ The theory addresses two aspects, the descriptive aspect used to describe the interests that the manager should take into account in running the corporation and the normative aspects, which involve attempts to justify the adoption of these interests through various ethical theories adapted for business. . These theories have developed as a branch of business ethics promoting ethical behaviour of business.

This concept was originally introduced by Freeman in 1984 as a strategic management principle on how the corporation should be managed.¹³⁷ Evans and Freeman in 1988 gave the following 'stakeholder management principles':

*'The corporation ought to be managed for the benefit of its stakeholders: its customers, suppliers, owners, employees and local communities....Management bears a fiduciary relationship to stakeholders and to the corporation as an abstract entity. It must act in the interest of stakeholders as their agent, and it must act in the interest of the corporation to ensure the survival of the firm, safeguarding the long-term stakes of these groups.'*¹³⁸

¹³⁴ R E Freeman 'A Stakeholder Theory of the Modern Corporation' in T L Beauchamp and N E Bowie (eds) *Ethical Theory and Business* (5th ed. Prentice-Hall, Englewood Cliffs, NJ. 1997) 66-76

¹³⁵ Ibid

¹³⁶ Freeman 1997 (n 134)

¹³⁷ R E Freeman *Strategic Management: A Stakeholder Approach* (Boston, Pitman, 1984)

¹³⁸ W.M. Evan R E Freeman 'A Stakeholder Theory of the Corporation' in T L Beauchamp and N E Bowie (eds) *Ethical Theory and Business* (Prentice-Hall, Englewood Cliffs, NJ. 1988) 75-93

These principles were based on Kantian ethics and the respect for persons¹³⁹, However others in trying to justify the stakeholder theory position have based their arguments on several normative ethical positions: Donaldson and Dunfee's integrative social contracts¹⁴⁰, utilises notions of social contract as found in Locke and Rawls to derive hypothetical 'macro' contract and extant 'micro' contracts for business, Argandona proposes an extension of the common good theory as a basis for the stakeholder theory¹⁴¹, Wicks and others extend feminist ethics and find a theoretical basis for stakeholder theory which is relational and caring¹⁴² and Phillips who extends principles of fairness to stakeholder theory¹⁴³.

In failing to identify a strong ethical or normative basis, stakeholder theory does not provide a wholesome justification for its version of CSR but it does add to the debate on the role of the corporation in society. Yet Freeman endorses this plurality of theories as central to the stakeholder theory, citing that 'the stakeholder theory can be unpacked into a number of stakeholder theories, each of which has a 'normative core'¹⁴⁴. The related nature of shareholder and stakeholders can be seen in Jensen's enlightened shareholder value theory which sought to distinguish itself from stakeholder theory and provided justification for considering other interests in the form of trade-offs. Stakeholder theory has been crucial in highlighting that the stake and interest in the corporations is not exclusive to shareholders. However this is a

¹³⁹ Ibid

¹⁴⁰ T Donaldson T W Dunfee *Ties that Bind: A Social Contracts Approach to Business Ethics* (Boston, Harvard Business School Press, 1999)

¹⁴¹ A Argandona 'the Stakeholder Theory and the Common good' (1998) 17(9-10) *Journal of Business Ethics* 1093-1102

¹⁴² Structuring value-creating activity along principles of caring and connection: A C Wicks D R Gilbert and R E Freeman 'A feminist re-interpretation of the Stakeholder Concept' (1994) 4(4) *Business Ethics Quarterly* 475-497

¹⁴³ R A Phillips 'Stakeholder Theory and a Principle of Fairness' (1997) 7(1) *Business Ethics Quarterly* 51-66

¹⁴⁴ Freeman 1997 (n 134)

theory emerging from within the corporation (management), justifying its actions or non-action as response or balancing.

In addition, the practical question of how these interests are to be balanced has also plagued practitioners. This has led to suggestions such as the team production theory which suggest a re-orientation of the corporation towards all stakeholders who contribute firm-specific resources towards corporate production.¹⁴⁵ Yet the search for a workable alternative model of managing the corporation's interests from within goes on because it is important that solutions are practical as well as theoretically sound. This is why stakeholder theory can be criticised as potentially self-serving. Sternberg proposes that a business that is accountable to all is actually accountable to none.¹⁴⁶ This is suggested against the backdrop that the manager may attempt to justify self-serving behaviour by reference to considerations of one or more of the stakeholder groups.

Another limitation of this approach is that it focuses attention on a narrow aspect of the question, which is to determine which groups can be regarded as having a stake, but what is required is a functional basis of responsibility, as it is possible that the groups to whom responsibility is owed may vary from setting to setting.¹⁴⁷ CSR must also deal with the external question of its significant effect on society and responsibility for that effect. Therefore to a large extent, the stakeholder theory still informs an internal management perspective.

¹⁴⁵ M M Blair L A Stout 'A Team Production Theory of Corporate Law' 85(2) Virginia Law Review 247-328

¹⁴⁶ E. Sternberg *Just Business: Business Ethics in action* (2nd ed. OUP, Oxford 2000) 51

¹⁴⁷ Teubner (n 66)

2.3.4 Corporate Citizenship as Political Theory

Corporate citizenship has at its root the notion of the corporation as a citizen in society with rights and responsibilities.¹⁴⁸ This is a term drawn from the political sciences. Presently three views of corporate citizenship can be identified.¹⁴⁹ Firstly a limited view which equates corporate citizenship with corporate philanthropy¹⁵⁰, an equivalent view which equates corporate citizenship with CSR¹⁵¹ and an extended conceptualisation which defines corporate citizenship as describing the role of the corporation in administering citizenship rights for individuals.¹⁵²

The term 'corporate citizenship', has developed from a practitioner perspective reflecting on the notion of participation in society and being a good corporate citizen. In 1951 Abrams in analysing management responsibility in a complex world pointed out that management as a 'good citizen'¹⁵³ and because it cannot function properly in an acrimonious and contentious atmosphere has the positive duty to work for peaceful relations and understanding among men. He proposes management balancing claims of various interested groups, similar to the basis of stakeholder theory.¹⁵⁴

For some, corporate citizenship is seen as an extension to CSR, that reflects how business should act towards stakeholders but there are severe limitations to this extension, as it is basically analysing and considering the same questions as CSR, question about the role of the corporation in society. The notion of a good citizen and socially responsible corporation are not radically different.

¹⁴⁸ See J Andriof M McIntosh (eds.) *Perspectives of corporate citizenship* (Greenleaf, Sheffield 2001)

¹⁴⁹ Matten and Crane (n 91)

¹⁵⁰ D J Wood J M Lodgson Business citizenship: From Individuals to organisations (2003) *Business Ethics Quarterly* 59-94; S A Waddock S B Graves The corporations social performance-financial performance link 18(4) *Strategic Management Journal* 303-320 (CC as social investing)

¹⁵¹ A B Carroll Four faces of corporate citizenship (1998) 100(1) *Business and Society* 1-7

¹⁵² Matten & Crane (n 91); Matten, Crane and Chapple (n 94)

¹⁵³ F W Abrams, 'Management's Responsibilities in a Complex World' 29(3) *HBR* 1951 29-34,30

¹⁵⁴ *Ibid*

Wood and Logsdon propose a view of citizenship of business that is amenable to universal rights.¹⁵⁵ However this does not advocate that the corporation is compelled by universal rights but that good behaviour via processes and practices that abide with these universal ethical standards is desirable. This results in:

‘a set of policies and practices that allow a business organisation to abide by a limited number of universal ethical standards (called hyper norms), to respect local cultural variations that are consistent with hyper norms, to experiment with ways to reconcile local practices with hyper norms when they are not consistent and to implement systematic learning processes for the benefit of the organisation, local stakeholders and the larger global community.’¹⁵⁶

This Global business citizenship model outlines practical steps of corporate behaviour by appealing to respect of universal rights of citizens. The extended conceptualisation of corporate citizenship mentioned earlier even goes a step further in assigning a role for the corporation in administering citizen rights¹⁵⁷ although this view is quite problematic in the absence of political electoral processes for corporations similar to those of governments’.¹⁵⁸

Windsor puts forward a severe criticism of citizenship as an attempt to escape from the debate between the economic (SVT) and the ethical (ST) positions.¹⁵⁹ He points out that citizenship as a metaphor separates into two kinds: instrumental citizenship, which for him is economics in disguise and idealised citizenship which simply reflects ethics in disguise. Wood and Logsdon’s view of corporate citizenship would

¹⁵⁵ DJ Wood J M Logsdon ‘Theorising Business Citizenship: From Individuals to Organizations’ in J Androif & M McIntosh (eds.) *Perspectives on Corporate Citizenship* (Sheffield, Greenleaf Publishing, 2001) 83-103

¹⁵⁶ J M Logsdon D J Wood ‘Implementing Global Business Citizenship: Multi-Level Motivations’ in J Hooker (ed) *International Corporate Responsibility: Exploring the Issues* (Carnegie Mellon University Press, Pittsburgh 2005)

¹⁵⁷ Matten and Crane (n 91)

¹⁵⁸ J (Hans) van Oosterhout ‘Corporate Citizenship: An Idea Whose Time Has Not Yet Come’ (2005) 30(4) *Academy of Management Review* 677-684

¹⁵⁹ D Windsor ‘Corporate Social Responsibility – three key approaches’ (2006) 43(1) *Journal of Management Studies* 93-114, 106

be an idealised view of corporate citizenship, while the instrumental view is aligned with notions of obtaining a social licence to operate, which exploits an essentially economic position of strategic self-interest. Corporate citizenship represents an attempt to frame several aspects of the CSR debate from a political perspective and there is a lot of room for developing some of the ideas.

2.3.5 Corporate Accountability

Corporate accountability can be identified as either synonymous with CSR or in opposition to it. However most importantly it re-aligns CSR with its history and drivers. The drive for corporations to become responsible has not only occurred from within the corporation. Corporate responses from within have been in reaction to other aspects of society pushing for change.¹⁶⁰ In a sense the corporate position of strict self-interest became untenable because there are many drivers of CSR practice¹⁶¹. They include civil society, communities, consumers, government and employees.¹⁶²

One of the most important drivers is civil society and this can be defined as ‘an area of association and action independent of the state and the market in which citizens can organise to pursue purposes that are important to them individually or collectively.’¹⁶³ Civil society including non-governments organisations and communities highlighted the critical incidents that occurred in several parts of the world and began to draw attention to the negative aspects of corporate power. These would include: the Shell Brent Spar incident¹⁶⁴, the Shell crisis in Nigeria¹⁶⁵, the

¹⁶⁰ D L Owen T A Swift C Humphrey M C Bowerman ‘The new social audits: accountability, managerial capture or the agenda of social champions’ (2000) 9(1) *European Accounting Review* 81-98

¹⁶¹ Haigh and Jones identify six sets of influences: ‘internal pressures on business managers, pressure from business competitors, investors and consumers and regulatory pressures coming from governments and non-governmental organisations.’ M Haigh M Jones ‘The drivers of corporate social responsibility: a critical review’ (2006) 5(2) *The Business Review Cambridge* 1-9

¹⁶² DFID; DFID and Corporate Social Responsibility issues paper <<http://www.dfid.gov.uk/pubs/files/corporate-social-resp.pdf>> accessed 16 March 2011 These are all factors counter-influenced by globalisation to varying degrees.

¹⁶³ L D Brown S Khagram M H Moore P Frumkin ‘Globalisation, non-governmental organisations and multi-sectoral relations’ in JS Nye & JD Donahue (eds) *Governance in a globalizing world* (Washington, Brookings Institute, 2000) 271-286

¹⁶⁴ Greenpeace controversially stopped the dumping of the Brent Spar (North Sea) oil storage facility

Bhopal chemical spill¹⁶⁶, the Exxon Valdez Oil spill¹⁶⁷, the use of slave labour in Burma and the controversial working conditions in Asian factories¹⁶⁸, the baby milk scandals¹⁶⁹, the conflicts between indigenous peoples, mining communities and mining companies in South American countries, West Papua and other areas¹⁷⁰, the pharmaceutical industry and the anti-retroviral drugs crisis¹⁷¹, the Enron collapse¹⁷² among others.

It gave rise to anti- globalisation feelings expressed vividly in the 1999 Seattle protests against WTO and at large global or business meetings since then.¹⁷³ It is in this sense that scholars conclude that ‘the emergence of organised civil society and

in the ocean. See G Jordan Shell, *Greenpeace and the Brent Spar* (Basingstoke, Palgrave, 2001)

¹⁶⁵ Shell’s alleged complicity in the deaths of Ogoni human rights activists and other human rights violations. See D Wheeler H Fabig R Boele ‘Paradoxes and Dilemmas for stakeholder responsive firms in the extractive sector: lessons from the case of Shell and the Ogoni’ (2002) 39(3) *Journal of Business Ethics* 297-318; B Manby *Shell in Nigeria: Corporate Social Responsibility and the Ogoni Crisis* Case Study # 20 (2000) Carnegie Council case study series

¹⁶⁶ This was a chemical leak from a storage facility in Bhopal, India that resulted in the death of thousands. See R A G Monks and N Minow *Corporate Governance* (3rd ed. Blackwell, Oxford 2004) 18-19

¹⁶⁷ An oil tanker accident resulting in one of the largest oil spills. This occurred in a region of Alaska which is a habitat for different sea creatures and fishes. The livelihood of the local fishing population was also adversely affected see M Baker Companies in crisis: what not to do when it all goes wrong Exxon Mobil and Exxon Valdez <<http://www.mallenbaker.net/csr/crisis03.html>> 10 April 2011

¹⁶⁸ A Ramasastry ‘Corporate Complicity: From Nuremburg to Rangoon, an examination of forced labour cases and their impact on the liability of MNC’ (2002) 20 *Berkeley Journal of International Law* 91-137

¹⁶⁹ Nestle as the largest artificial baby milk producer had been implication in allegations of scandalous marketing practices especially in developing countries. The Business and Human Rights websites details various baby food and baby milk controversies: <<http://www.business-humanrights.org/Categories/Sectors/Agriculturefoodbeveragetobaccofishing/Babyfoodbabymilk>> accessed 10 April 2011

¹⁷⁰ N Yakovleva *CSR in the mining industries* (Ashgate, Hampshire 2005); T E Downing and others *Indigenous peoples and mining encounters: strategies and tactics* April 2002 Report no. 57 (MMSD) (IIED/WBCSD, 2002)

¹⁷¹ World Bank Development Report 2006 *Equity and Development* (IBRD/WB/OUP, Washington 2005) 215

¹⁷² The sudden collapse of a large energy corporation, Enron opened up questions on the ethical aspect of such corporations. Buhr & Grafstrom remark that ‘ the collapse of ENRON in the autumn of 2001 marked a watershed in the discussion of CSR’ H Buhr & M Grafstrom ‘The making of meaning in the media, the case of CSR in the FT’ in F Den Hond & others *Managing CSR in action: talking, doing and measuring* (Hampshire, Ashgate 2007) 15-32, 26

¹⁷³ J Bendell *Barricades and Boardrooms: A contemporary history of the Corporate Accountability Movement* (Paper 13: UNRISD, Geneva 2004)

of NGOs as an organisational manifestation of broader social movements has dramatically altered the global-political-economic landscape.’¹⁷⁴

The large corporation is viewed as an archetype of globalisation and its actions symptomatic of growing power and effect on society. Various aspects of civil society decidedly focused the issue of change onto the agenda and this occurred against a background of weak instruments and failed initiatives at the international level that NGOs have begun to target multinational corporations with increasing frequency and vigour in recent years.¹⁷⁵ They excelled in the use of media to disseminate information especially through the internet. This is demonstrated by the Greenpeace and Brent Spar campaign which galvanised media and consumer focus on Shell and prompted a change of tactics by the oil corporation.¹⁷⁶ These NGOs began to attack corporations directly because of the perception of an inability to govern multinational corporate conduct at an international level. At the International level states are deemed the only direct addresses of International law and attempts to directly regulate non-state actors such as multinational corporations have proved unsuccessful so far.¹⁷⁷

The effectiveness of the NGO attack on transnational corporations was greatly assisted by the speedy and widely available communication networks that now exist under globalisation. An example is given as follows:

‘a developing country protester with a digital video camera(perhaps provided by a developed country NGO) can film an indiscretion of oil company security forces and send the clip by e-mail instantly to influence media and developed country decision-

¹⁷⁴ H Teegen, J P Doh S Vachani ‘ The importance of non-governmental organisations in global governance and value creation: an international business agenda (2004) 35(6) Journal of International Business 463-483, 463

¹⁷⁵ P Newell ‘Managing multinationals: The governance of investment for the environment’ 13 Journal of International Development 907-919; 910

¹⁷⁶ G Jordan Shell, *Greenpeace and Brent Spar* (Palgrave Macmillan, New York, 2001)

¹⁷⁷ Examples include : M Noortmann, C Ryngaert *Non-State Actor Dynamics in International Law* (Ashgate, England, 2010)

*makers) The internet essentially provides a big floodlight for NGOs the shine on the overseas operations of multinational corporations.'*¹⁷⁸

As CSR discourse emerged Bendell points to a critical point in 2002 when a key divide emerged between those who regarded corporate power as a problem and those who either accepted it or considered it as an opportunity, if engaged appropriately.¹⁷⁹ He referred to the first group as 'corporate accountability' and the second group as 'corporate responsibility'. This distinction is nevertheless an artificial one, as this may be said to represent varying levels of critique of corporate power and the corporation's role in society.¹⁸⁰

Corporate accountability is therefore an integral part of CSR. As Kerr and others¹⁸¹ point out that the relevant aspects of accountability are complementary to CSR. These include: giving justification or account of actions, receiving rewards or punishments for those actions and achieving results in line with stated business goals, legal requirements and social expectations. This area has also re-vitalised the interface between CSR and the law. It highlights law as an important aspect of CSR toolkit.¹⁸²

¹⁷⁸ P Swanson 'Corporate social responsibility and the oil sector' 11(1) CEPMLP Journal 1-4

¹⁷⁹ Bendell (n 173), 18

¹⁸⁰ M Kerr, R Janda and C Pitts *Corporate Social Responsibility –A Legal Analysis* (LexisNexis, Canada, 2009)

¹⁸¹ *Ibid* at 25

¹⁸² H Ward 'Corporate Social Responsibility in Law and Policy' in N Boeger, R Murray and C Villiers *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham, 2008) 8-38

2.4 Extending essentially contested concepts (ECC) as an analytical tool to CSR

In view of the multiple interpretations and theories of CSR as well as the level of contestations, it is quite difficult to decipher a single definition of CSR. Nevertheless this section will apply Gallie's ECC theory as an analytical tool and examine CSR as an essentially contested concept. The aim is to propose a common core in the contest that unites themes of CSR. Therefore this section will explain the ECC theory and then apply it to CSR

2.4.1 Explaining ECC

Gallie in 1956 proposed a '*single explanatory hypothesis calling for some fairly rigid schematization*'¹⁸³ which he had hoped would give us enlightenment of a much needed kind, with regard to concepts which perpetually engender disputes. Gallie pointed out that 'there are concepts which are essentially contested concepts, the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.'¹⁸⁴

Gallie in setting out his theory of ECC laid out seven important criteria, which are as follows:¹⁸⁵

1. An ECC must be appraisive in the sense that it signifies or accredits some kind of valued achievement.
2. This achievement must be of an internally complex character; for all that its worth is attributed to it as a whole.
3. Any explanation of its worth must therefore include reference to the respective contributions of its various parts and features
4. The accredited achievement must be of a kind that admits of considerable modification in the light of changing circumstances.

¹⁸³ W B Gallie *Essentially Contested Concepts* (1958) 56 *Proceedings of the Aristotelian Society* 167-198 reprinted in M. Black(ed.) *The Importance of Language* (Englewood Cliffs Prentice-Hall 1962) 121- 146,122

¹⁸⁴ *Ibid* at 123

¹⁸⁵ Gallie (n 183) 125 & 136

5. To use an essentially contested concept means to use it both aggressively and defensively.
6. The derivation of any such concept from an original exemplar whose authority is acknowledged by all the contestant users of the concept.
7. The probability or plausibility of the claim that the continuous competition between contestant users of the concept enables the original exemplar's achievement to be developed in optimum fashion.

Fortunately, Gallie in setting out these conditions also used examples to further our understanding of what he meant. For our purposes, one of the most appropriate is that of the political concept of democracy. For Gallie, democracy is appraisive or evaluative because a primary question in major policy decisions, has come to be is it democratic?¹⁸⁶ And the response signifies a valued achievement. This valued achievement is however dependent on other value judgements that may be made to assess if democracy is of good value.

In this vein Connolly points out that there is an inherent value judgement in assessing such concepts, therefore 'if we say a society is undemocratic or that a practice does not meet democratic standards...we are describing it from the vantage point of accepted standards of political participation, debate and accountability'.¹⁸⁷ For Connolly therefore, this relationship between the criteria of a concept and its purpose is what makes notions such as democracy subject of intense disputes. This may be the sense in which 'the evaluative nature' is the criterion and not the response as it may equally apply to concepts which may signify 'disapproved or denigrated phenomena'.¹⁸⁸ Therefore for ECC the evaluative or appraisive nature is a multi-layered one, firstly because we assess for valued achievement or disapproved phenomena and also because this assessment is based on inherent value judgements.

¹⁸⁶ Gallie (n 183) 135

¹⁸⁷ W E Connolly *The Terms of Political discourse* (3rd ed.) (Blackwell, Oxford 1993) 29

¹⁸⁸ M Freedon *Ideologies and Political Theory – a conceptual approach* (OUP, Oxford 1998) 56

For Gallie, the second and third conditions are linked, he points out that democracy is internally complex and therefore admits to a variety of descriptions in which its different aspects are graded in different orders of importance. For by his example democracy could mean power of majority of citizens to choose or remove government; or equality of all citizens irrespective of race, sex etc to lead politically or; the continuous active participation of citizens in political life at all levels. In different political traditions, western or otherwise, the aspects of democracy emphasised vary to a greater or lesser degree on the relevance to that tradition.¹⁸⁹ This nature of an ECC is occasionally referred to as ‘diverse describability’ because an ECC can be described in a variety of ways. It has also been highlighted that ‘diverse describability’ may involve an exclusive emphasis on one or more facets of the concept.¹⁹⁰

The fourth criterion which specifies the accredited achievement must be of a kind that admits of considerable modification in the light of changing circumstances, is usually surmised as rendering such a concept to be ‘open in character’¹⁹¹. For Gallie, democratic targets will be raised or lowered as circumstances alter and democratic achievements judged in light of those changing circumstances.¹⁹² This is another key factor which creates essential contestability; as such modification may create new facets previously unattributed to the original concept.

To satisfy the fifth requirement, democracy in his example can also be used aggressively and defensively hinging on a general use of it.¹⁹³ In this sense, it is used against other uses and recognised that it is to be maintained against other uses. Some

¹⁸⁹ Gallie (n 183) 135

¹⁹⁰ D Collier and others ‘Essentially Contested Concepts: debates and applications’ (2006) 11(3) *Journal of Political Ideologies* 211-246, 217

¹⁹¹ Gallie (n 183) 125

¹⁹² *Ibid* at 136

¹⁹³ Gallie (n 183) 136

analysts query this criteria pointing out that some proponents of an ECC, use a concept in such a way as to differ from other usages¹⁹⁴; however aggressive and defensive use of concepts always exist within the contested uses of the ECC as a whole, although perhaps not within each individual work.

The sixth criterion has been the most controversial; as it points to an incontrovertible issue which is that there is the need for an 'exemplar' i.e. common basis. He elucidates on this point thus: 'This exemplar's way of playing must be recognised by all contesting teams... as the way the game is to be played, yet because of the internally complex and variously describable character of the exemplar's play, it is natural that different features in it should be weighted differently by different appraisers, and hence that our different teams should have come to hold different **conceptions** of how the game should be played.'¹⁹⁵ It is in light of this that other philosophers have chosen a concept /conceptions distinction¹⁹⁶; correctly pointing out that there is a core notion and multiple interpretations.

It is in this sense of the 'exemplar' that Rawls in his book the *Theory of Justice* points to a distinction between a concept and its conceptions; when with regard to the concept and conceptions of Justice he writes that:

'... those who hold different conceptions of justice can then still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine the proper balance between competing claims to the advantages of social life. Man can agree to this description of just institutions since the notion of an arbitrary distinction are left open for each to interpret according to the principles of justice that he accepts...'¹⁹⁷

¹⁹⁴ Collier (n 190)

¹⁹⁵ Gallie (n 183) 129

¹⁹⁶ J Rawls *A Theory of Justice* (Oxford, OUP, 1971) 5-6; S Lukes *Power: a radical view* (Macmillan, London 1974)

¹⁹⁷ Rawls *Ibid*

In relation to our chosen example, democracy, Gallie points to an exemplar of ‘a long tradition...of demands, aspirations, revolts and reforms of a common anti-inegalitarian character’.¹⁹⁸ For the final criterion, Gallie prescribes that continuous competition between contestant users enables the exemplar to develop in optimum fashion but he concedes that within democracy it may rather fan flames of conflict.¹⁹⁹ He suggests some mitigation may be possible if the essentially contested nature of the concept is accepted. Still the additional point recognised at this juncture is that continuous competition can be beneficial or harmful to the development of an ECC.

Gallie’s hypothesis has provoked a huge response²⁰⁰ because a conflict resides within it, that is replicated in many concepts of social sciences. The reality that even where we accept the essentially contested nature of a concept, there is a need to identify something in common if contestants are to claim that they partake in the same contest. As Gray points out:

‘Unless divergent theories or world-views have something in common, their constituent concepts cannot be “contested” even though their proponents are in conflict. References to definitional “contests” have a point only if there is something which is not treated as “contestable”.’²⁰¹

If from the following analysis CSR proves to be an ECC, this is also an inherent conflict which must be resolved.

¹⁹⁸ Gallie (n 183) 136

¹⁹⁹ Gallie (n 183) 137

²⁰⁰ J Waldron ‘Is the Rule of Law an essentially contested concept (in Florida)?’ (2002) 21(2) *Law and Philosophy* 137-164,149

²⁰¹ J N Gray ‘On the contestability of social and political concepts’ (1977) 5(3) *Political theory* 331-348, 342

2.4.2 CSR as ECC

To fit into Gallie's theory of essentially contested concepts, CSR will have to satisfy seven conditions already highlighted above. Gray points out more generally that 'essentially contested concepts occur characteristically in social contexts which are recognizably those of an ideological dispute'.²⁰² CSR is undoubtedly a social phenomenon which not only questions what sort of relationship business should have with society but if business should have any relationship with society and what form this relationship should take.

Firstly, CSR can be perceived as appraisive or evaluative, in the sense that it is seen as accrediting a vital element to corporations. Therefore for CSR similar to Gallie's example on democracy: the question has come to be is the corporation socially responsible? And the response often signifies or accredits a kind of valued achievement. Social responsibility is seen as a valued achievement, valued by management, civil society and other stakeholders.

Websites of companies upload reports to affirm CSR activity and corporate reporting of CSR is now firmly established as desirable activity.²⁰³ Non-governmental organisations keep a firm watch for corporate behaviour to highlight irresponsibility. Connolly correctly points out that the value of the response will depend on the inherent value judgements to the questioner, in the same way that there are proponents for and against CSR in business, who still question whether CSR is a 'good' or a 'bad' thing although there is more consensus that CSR is desirable.

²⁰² Ibid at 333

²⁰³ J Allouche(ed.) *CSR: Concepts, Accountability and Reporting* (Palgrave Macmillan, London 2006)

Next CSR can be shown to be internally complex as it admits ‘a variety of descriptions in which its different aspects are graded in different orders of importance’²⁰⁴. The complexity of CSR reveals itself in the multiple interpretations and dimensions that have so far been analysed by several writers. Dimensions identified from CSR definitions include the economic, legal, ethical and discretionary dimensions or the human rights, environment and labour angles.²⁰⁵ The emphasis placed on each of these dimensions depends on motivation, interest or objective of the writer. The importance given to each of these different aspects has varied across different proponents.

Therefore a business definition of CSR will give credence to the economic and perhaps seek to prove that CSR is subsumed under a profit objective, an example is the Confederation of Business Industry (CBI) definition ‘CSR requires companies to acknowledge that they are publicly accountable not only for financial performance, but also for their social and environmental record...’²⁰⁶; whereas the non-governmental organisation would seek to emphasise the legal and ethical angles. Dahlsrud in his recent article identifies environmental, social, economic, stakeholder and voluntariness dimensions from the frequency of words used in a ‘google’ search on the internet.²⁰⁷

Another indication of the internal complexity can be exemplified by attempts to map CSR scope, theories and approaches. This has been done in diverse ways. Lantos by distinguishing between ethical, altruistic and strategic CSR²⁰⁸; Garriga and Mele by identifying four groups of CSR approaches: instrumental, political, integrative and

²⁰⁴ Gallie (n 183)

²⁰⁵ A Dahlsrud ‘How CSR is defined’ (2008) 15 *CSR and Environmental Management* 1-13

²⁰⁶ C A Hemingway *An exploratory analysis of CSR: definitions, motives and values* (2002) Research Memorandum 34 University of Hull Business School

²⁰⁷ Dahlsrud (n 205)

²⁰⁸ G Lantos ‘The boundaries of strategic CSR’ (2001)18(7) *Journal of Consumer Marketing* 595-630

ethical.²⁰⁹ For Garriga and Mele, instrumental theories perceive CSR as mere means to the ends of profits, while the political theories emphasise the social power of the corporation in relations to society and its responsibility. The integrative group consider that business ought to integrate social demands as it depends on society for continuity and growth, while ethical theories entrench this in ethical views pointing out that firms ought to accept social responsibility as ethical obligation. For instance ethical theories and approach cover the use of sustainable development, human rights and the stakeholder theory. However there are no clear-cut maps and overlaps occur in the use of theories and approaches.

Additionally there has been use of differing terminology to emphasise and attempt to distinguish certain aspects of CSR. One of the best examples is the attempt to apply the political concept of citizenship to CSR. Yet corporate citizenship is not defined very differently to CSR, 'good corporate citizenship ...can be defined as understanding and managing a company's wider influences on society for the benefit of the company and society as a whole'²¹⁰ A survey of competing terminology²¹¹ reveals other terminology which include corporate sustainability²¹², corporate social performance²¹³ and corporate accountability²¹⁴ among others. These terms are often defined in similar terms and used interchangeably with CSR.

Well-founded CSR debates refer to the different features ascribed to the term and these considerable features of CSR have changed over time. This diverse describability is the sense in which several CSR writers focus on specific features of

²⁰⁹ Garriga & Mélé (n 7)

²¹⁰ M McIntosh and others *Living corporate citizenship* (Financial Times/ Prentice-Hall, London, 2002); C. Marsden and J Andriof 'Towards an understanding of corporate citizenship and how to influence it' (1998) 2(2) *Citizenship studies* 329-352

²¹¹ Amaeshi and Adi (n 108)

²¹² M Van Marrewijk 'Concepts and definitions of CSR and corporate sustainability: between agency and communion' (2003) 44(2-3) *Journal of Business Ethics* 95-105

²¹³ Wood (n 111)

²¹⁴ Bendell (n 173)

CSR aligning it to their own situations and challenges and in the process, the content of CSR practice has varied over time to reflect the needs of the particular participants in the relationship. An example would be the inclusion of anti-corruption as the 10th principle in the UN Global Compact with the earlier nine principles drawn from human rights, labour standards and environmental principles.²¹⁵

In addition it should be possible to assert that the concept of CSR is used both aggressively and defensively, perhaps a good illustration is in the sense of non-governmental organisations (NGO) campaign for Multinational corporations to adopt CSR contrasted with the multinational corporations' defensive claims of CSR practice.²¹⁶

The most significant criteria, is whether discussions of CSR should claim authority from an original exemplar whose authority is acknowledged by all the contestant users of the concept. Perhaps the solution may be that while there can be varied conceptions; there is a core that links these debates. In Gallie's example of democracy he speaks of 'a long tradition of demands, aspirations, revolts and reforms of a common anti-inegalitarian character...'²¹⁷ and perhaps, in relation to CSR it would be the long tradition of societal demands for control of corporate power.

In a more generalised way, CSR is about the changing relationship and expectations between corporations and society yet the debates are triggered by the increasing corporate power and the drive to make it legitimate in today's society. For example Carroll in charting the modern era of CSR points out that 'Bowen's work in 1953

²¹⁵ The UN Global Compact is an International CSR Initiative aimed at creating voluntary global networks to enhance CSR practice. It draws on the Universal Declaration of Human Rights, the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the UN Convention against Corruption. See D Leipziger *The Corporate Responsibility code book* (2nd ed. Greenleaf, Sheffield 2010)

²¹⁶ A Dahlsrud 'How CSR is defined' (2008) 15 *CSR and Environmental Management* 1-13

²¹⁷ Gallie (n 183)

proceeded from the belief that the several hundred largest businesses were vital centres of power and decision-making and that the actions of these firms touched the lives of citizens at many points'.²¹⁸ This statement on power and its effect on the lives of citizens in society is even more so today. Donaldson points out that power are a morally neutral concept, capable of being used for good or evil.²¹⁹ It is that capability and use that is in contention.

Therefore some of the resulting ideas include capability for good use such as questions about the corporate managers' role in society, the challenge of balancing competing claims to corporate resources and philanthropy²²⁰ calls for social justice represented by appeals for a human face to global markets²²¹ and the business role in sustainable development.²²² While demanding responsibility for some wrongful use which would include 'financial scandals, human rights violations, environmental side-effects, collaboration with repressive regimes...'²²³ These issues demonstrate the increased impact of corporate power and society's need to constrain the ability to misuse such power. CSR also extends to channelling such power for constructive uses beneficial to society.

The final criteria is that the continuous competition by the contestant users of CSR sustain the development of CSR in optimum fashion. It could perhaps be argued that it is this contentious nature of CSR that has seen CSR develop into a distinct field. However such a contentious nature can also be harmful. Gallie with his example, democracy questions if contention within democracy is not rather more likely to fan

²¹⁸ A B Caroll 'CSR: Evolution of a Definitional Construct' (1999) 38(3) *Business and Society* 268-295, 269

²¹⁹ T Donaldson; *The Ethics of International Business* (OUP, Oxford 1989) 32

²²⁰ W Frederick *Corporation be good! The story of CSR* (Dog Ear Publications Inc, 2006)

²²¹ McIntosh (n 210)

²²² J G Frynas 'The false developmental promise of CSR: evidence of multinational oil companies' (2005) 81(3) *International Affairs* 581-598

²²³ G Palazzo and A G Scherer 'Corporate Legitimacy as deliberation: a communicative framework' (2006) 66 *Journal of Business Ethics* 71-88

the flames of conflict. He resolves this by proposing the possibility that an acceptance of the essentially contested nature of such concept might affect such conflict. However for CSR, contention about its appropriate meaning has been detrimental to establishing and assessing CSR achievement. Van marrewijk points out that the ‘subsequent diversity and overlap in terminology, definitions and conceptual models hampers academic debate and on-going research.’²²⁴ While Whitehouse comments that as a consequence ‘the whirlwind of debate over the last 75years has consumed substantial energy while ultimately going around in circles.’²²⁵

Perhaps the view of CSR as ECC will serve a purpose if other participants in the contest will take more time to get a wholesome view of the various conceptions before adding theirs. However within this thesis this view will help in deriving an exemplar for CSR whilst leaving room for contextual interpretations of CSR.

²²⁴ Van Marrewijk (n 212)

²²⁵ L Whitehouse ‘CSR as regulation: the argument from democracy ’ in J O’Brien (ed) *Governing the corporation* (London, Wiley, 2005) 141-162

2.5. Deriving a CSR Exemplar

From the analysis, it is evident that on a general level CSR focuses on the relationship between corporations (business and society). This relationship has many variables and the tendency to change over time. On the one hand is the nature of this corporation, questions of its ownership, structure and role and on the other is the impact on society. However at the onset of CSR, the triggers were questions which are all predicated on notions of corporate power and with time have spread to concerns of the social impact of such use or misuse of power.

Kercher in his work on CSR draws a contextual historical timeline from the 1930s to current, emphasising that traditionally CSR debates have been focused on power but that this has evolved over time to consider social impacts of such corporate power.²²⁶

This links in with the growing concern with social, labour, human rights, environmental degradation, community rights, and corruption issues as social impacts of corporate misuse of power as well as questions of how corporations can rightly use their power to contribute to global development. These concerns and issues are symptomatic of the social impact of corporate power and capacity.

Therefore crucial questions within CSR are questions of corporate power: its use by management, responsibility for its use, accountability for its use or non-use and the capabilities which such powers provide. This is why CSR has become more important as perceptions of increasing corporate power have developed.

²²⁶ K Kercher 'Corporate Social Responsibility: Impact of globalisation and international business' (2007) Corporate Governance e-journal (Bond University) <<http://epublications.bond.edu.au/cgej/4>> accessed 10 December 2011

Therefore the exemplar or central theme of CSR is the drive for legitimacy of corporate power.

The drive for such legitimacy has come from several perspectives. The traditional instrumental perspective sees corporate power within the law and posits that it should have an economic area of competence which is profits and thereby contribute to society through payment of taxes and relevant levies. The ethical perspective which highlights that corporate power implies responsibility to society but fails to fully demonstrate a universal basis of responsibility because there may be no such universal basis.

At best what must be found is a functional basis that takes context into account, identifying above all the objectives which such responsibility seeks to achieve at that point in time. Yet still there is the political citizenship perspective which focuses on rights and obligations that flow from existence in a societal context and therefore views corporate power in the context of citizenship rights and responsibilities. Or the perspective of corporate accountability which demands a more explicit focus on accountability for such power.

Applying Gallie's ECC analysis, it becomes evident that the core or central theme of these CSR debates is based on questions of corporate power in the business and society relationship. It reveals conceptions based on varying aspects of corporate power and its impact on society prompting questions and re-evaluation of its proper role in today's society. The core can then be outlined as the legitimacy of corporate power.

2.6 Conclusion

This chapter establishes that CSR can be seen as an essentially contested concept. Therefore the level of contention and variety within CSR begins to make sense as one understands that the possibility of a uniform interpretation of such a concept is a difficult one. Essentially contested concepts (ECC) are concepts open to continuous contestations yet Gallie provides a framework that allows for an exemplar or a central idea. This result in contestation can be fashioned in a constructive direction.

It has also been pointed out that the level of reflection that contestation provokes is deepened when participants understand the implications of essential contestedness.²²⁷ This is because it allows parties to gain a sense of lack of exclusivity of definition or issues and to garner an understanding of other aspects of such contestations surrounding the central idea of the concept.

CSR embodies issues regarding the relationship of the corporate form to society. These are issues which provoke extensive debate as a result of the theoretical viewpoints of the parties to this debate. There are theories with regards to corporation which privilege contract over community or vice-versa. There are also theories about the role of corporations within society and these theories are also constantly being reviewed in the light of changing circumstances. An illustration would be the impact of multinational oil corporations on areas of human rights, environment, labour and anti-corruption which has shifted CSR in those practical directions.

²²⁷ Waldron (n 200)

However the anchor for those issues has been the changing perception and questions of corporate power in the corporate-society relationship. The perception of power and its perceived impact in the hands of these corporations has also meant that there has been a corresponding increase in the responsibility demanded of these corporations. This chapter therefore reveals that a core or central theme of CSR is focused on the legitimacy of corporate power. Therefore CSR is about debates on issues arising from the relationship between corporation and society which are centred on the impact of corporate power. The central theme or exemplar for CSR is that corporate power possessed within society should be subject to suitable constraints that allow for its legitimate exercise

To fully explore and understand this central theme or exemplar of CSR, the next chapter will continue with the exploration this core notion of power. While Chapter four will examine the link between law and legitimacy in order to introduce the legal perspectives.

CHAPTER THREE

POWER AS EXEMPLAR: AN EXAMINATION OF CSR IN CONTEXT

*'The issue of power is central for the normative discussion about CSR.'*¹

3.1 Introduction

The preceding chapter examines CSR definition and meaning and discovers the centrality of questions of corporate power. This chapter goes further to examine power as a concept which is central to CSR. It examines power as a concept and then applies this to corporations in order to broaden our understanding of what corporate power means within CSR. Power in itself is a contested concept but it is perceived both as an ability and capability to affect the relationship between corporations and society.

Therefore in line with Gallie's examination of the ECC exemplar, where the core question is 'why CSR?' the answer would indicate that demands for CSR have been primarily driven by perceptions of power in the hands of large corporations and the need to justify such power. The analysis within this chapter examines what 'power' means both as a theoretical concept and within CSR. The chapter then contextualises the analysis within CSR, by using examples from one of the foremost CSR industries, the oil industry.

¹ J Tullberg 'Illusions of Corporate Power: Revisiting the Relative Power of Corporations and Governments.' (2004) 52 Journal of Business Ethics 325-333, 325

3.2 The exemplar nature of Power

While there is some agreement as to the centrality of power² there are two further issues which arise: firstly the notion of some distinction between power and perceptions of power and secondly the division between those who regard power as an issue or problem and others who regard power as an opportunity.³ Thus it is essential to explore what is meant by power and this section in doing so addresses three sub-questions: Firstly why define power, secondly what does power mean and thirdly are there different modes of power?

The existence of power can only be established when some understanding of the concept is acquired. This is because it is a complex and dynamic concept which does not lend itself to exact scientific and verifiable measurement.⁴ This will also clarify its centrality to CSR. This will set in place the context for examining the corresponding requirement that such power should be subject to limitations that render them accountable. The necessity for justification or legitimising exercise or possession of power is a task that corporations face and CSR has developed as a result of this.⁵

² Ibid

³ J Bendell *Barricades and Boardrooms: A contemporary history of the Corporate Accountability Movement* (Paper 13: UNRISD, Geneva 2004) 18

⁴ R A Dahl 'Power as the control of behaviour' in S Lukes(ed.) *Power (Readings in Social and Political Theory)* (Basil Blackwell, Oxford 1986) 37-58 indicates the problems that exist with any attempt to empirically measure power. Although looking at political systems, this is applicable as he notes that 'attempts to arrive at a better understanding of the more concrete phenomena of political life and institutions often sacrifice a good deal in the rigor of logic and verification in order to provide more useful and reliable guides to the real world' He also further notes that 'at a very general level, attempts to analyze power share with many- perhaps most- other inquiries in the social sciences the familiar dilemma of rigor versus relevance'.

⁵ N Mitchell 'Corporate Power, Legitimacy and Social Policy' (1986) 39(2) *The Western Political Quarterly* 197-212, 199-200

3.2.1 Why define Power?

Power is an extremely common word yet its meaning as a concept is highly contested. Nevertheless it is irreplaceable as a notion which assists with the assigning of authority or responsibility in social relations. The importance of defining power is primarily to be able to identify this concept in given situations. Therefore if the notion of power is central to CSR defining power helps the identification of this concept as trigger for CSR demands. However such identification cannot be just for its own sake. There are a number of reasons why it is necessary to identify power. It may have an allocation role, in the sense of allocating responsibility for action but it is also essential for identifying persons of authority. The reasons for identifying power must be seen in context.

Moriss in his important work on Power identifies three contexts within which we talk of power. They are the practical, moral and evaluative contexts.⁶ The practical context involves knowing ‘the power of others’. That is, identifying and knowing those who can get things done. They are the ones with the ‘capacity to affect outcomes’. The second context is the moral context and this involves allocating responsibility. And the third context is the evaluative context, in the sense of evaluating social systems to locate power distribution.⁷

These contexts can be identified in everyday life. For instance the practical context is used when governments are said to be in power, having control over certain aspects of public life. However it is also used to call upon the power of the MNC to get things done. Donaldson speaks of great power enhancing the possibility of effecting great good. He points out that ‘attributing power to multinational corporations is not

⁶ P Moriss *Power: A Philosophical Analysis* (2nd ed.)(Manchester, Manchester University Press, 2002) 37-42

⁷ Ibid

the same as attributing morality. Power is seen as morally neutral. Great power enhances the possibility of effecting great evil but similarly the possibility of effecting great good.⁸

In the moral context, power and responsibility have a corresponding relationship. Davis within his power responsibility model points out that the greater the power of the firm, the greater the firm's social responsibility and concludes whoever does not use its social power responsibly will lose it.⁹ This context is very important to the focus of the work however it is modified by the view that such power and responsibility is not only important for social status but also for accountability and legitimacy in society. This is also linked with the evaluative context which evaluates power within social systems, because it is through such evaluation that reform of laws and administrative responsibility occurs. This is similar to the assertion that power must be legitimately accountable within liberal society. Power within social systems can be analysed with the aim of assessing legitimacy for such power.¹⁰

The moral and evaluative contexts are crucial to our analysis. This is because although distinct they are related. It is possible to find that those who have acquired power in society are not fully accepting of consequential responsibility, this could prompt a re-evaluation of the social system where power use within that society is judged as falling short of the required legitimate standards. This can lead a push for changes in social systems.

⁸ T Donaldson; *The Ethics of International Business* (OUP, Oxford 1989) 32

⁹ K Davis 'The case for and against the assumption of social responsibilities' (1973)16(2) *Academy of Management Journal* 312-322

¹⁰ M Stokes 'Company Law and Legal Theory' in W Twining(ed) *Legal theory and Common law* (Basil Blackwell Oxford 1986) 155-183

The relationship between power and responsibility is a complex one. The initial presumption is as Moriss points out that ‘you are not usually considered responsible for something if you did not do it’¹¹ However he concedes that you can fail to do something for two reasons ‘disinclination’ or ‘inability’ and that the first is more blameworthy. To this regard responsibility can be for action or omission, especially where omission is as a result of ‘disinclination’ within a sphere where there lies the ability. For our purposes it is important to identify multinational corporations as one of the powerful global actors and then assign responsibility falling squarely within the sphere of such power and influence. This will include responsibility for their direct acts but also responsibility for the failure to act in certain circumstances. This is the crux issue of CSR. For as Ball states:

‘When we say that someone has power or is powerful we are...assigning responsibility to a human agent or agency for bringing (or failing to bring) about certain outcomes that impinge upon the interests of other human beings’.¹²

Lukes in his seminal work on power agrees that the second context is not only moral but political as well. He notes that ‘the powerful are those whom we judge or can hold to be responsible for significant outcomes’¹³ In other words, ‘the point of locating power is to fix responsibility for consequences held to flow from the action, inaction of certain specifiable agents’.¹⁴ This is the difference that strengthens a power legitimacy relationship. The fact that it is not only important that power be responsible but also that power can be *held* responsible. As a result it is essential

¹¹ Moriss (n 6) 38

¹² T Ball ‘Review of S. Lukes, *Power* and J. Nagel, *The Descriptive Analysis of Power*’ (1976) 4 *Political Theory* 246-249, 249

¹³ S Lukes *Power: A Radical View* (2nd ed. Palgrave Macmillan, Great Britain 2005) 66

¹⁴ S Lukes *Power: A Radical View* (1st ed. Macmillan, London 1974) 56

that 'power must be defined prior to locating responsibility for its exercise'.¹⁵ Thus in this examination of CSR, the initial task is to lay a foundation for defining power of the corporation in relation to society. This is to further justify the position that power is central to the discussion of CSR.

It is also important at this point to note that the general notion of responsibility is a variable concept. There are different levels of responsibility therefore one could be fully responsible or partially responsible¹⁶. Responsibility as a concept can be classified into different types for instance. Whitehouse¹⁷ identifies three categories. They are personal, obligatory and causal responsibility. Personal responsibility in this sense refers to a qualitative judgement that an individual or person is responsible; Obligatory responsibility invokes a sense of compulsion while causal responsibility denotes responsibility for a certain situation arising but these categories are not rigid.

In applying responsibility to individuals it becomes important to apply moral or legal rules. Moral rules have a significant link with causal responsibility to the extent that moral responsibility has been described as:

'responsibility for a given harm or defect if the person's conduct played a significant causal role in that harm or defect, the person's conduct was blameworthy or it was morally faulty in some other way and the aspect of the act that was faulty was also one of the aspects in virtue of which it was a cause of the harm'.¹⁸

¹⁵ A Kernohan 'Social power and Human Agency' (1989) 86 (12) *The Journal of Philosophy* 712-726, 722

¹⁶ Kernohan *ibid* 'Responsibility comes in degrees ranging from full through partial to none and this is relevant to identifying power.' 723

¹⁷ L A Whitehouse 'The company: property, power and responsibility' in A Hudson (ed.) *New Perspectives on Property Law, Obligations and Restitutions* (Cavendish, 2004) 331-344

¹⁸ G F Mellema, *Collective Responsibility* (Rodopi, Georgia 1997) 7

Legal responsibility is based on legal rules which may not always be based on causal responsibility in the direct sense but does infer compulsion and obligation as

Whitehouse puts it this way:

‘Although both legal and moral responsibilities are only attributed to those who are causally responsible for the outcome in question either by act or omission, it is possible to impose responsibility on an individual when they are not directly responsible for the harm’.¹⁹

Within CSR responsibility hinges on both moral and legal rules. Even where one is interested in legal responsibility, it is important to establish moral responsibility as it is a good starting point.²⁰ Power has a role in finding out who is morally or causally responsible by act or omission. Power’s role in this detection may sometimes be theoretical because a corporation’s responsibility for its actions stem from the power that endures to the corporation as a whole giving it capacity to achieve great good or evil. Nevertheless in practical terms, this can also be given effect by the actions or inactions of its employees.

Yet studies of power become practical when it is linked with the law’s prospective regulatory role of assigning responsibility that is, duties and liabilities. Therefore law may look to the power of an entity and then prescribe duties and responsibilities. In light of this, the political theorist Connolly correctly points out that:

‘To acknowledge power over others is to implicate oneself in responsibility for certain events and to put oneself in a position where justification for the limits placed on others is expected. To attribute power to another, then is not simply to describe his role in some perfectly neutral sense but is more like accusing him of something, which is then denied or justified’²¹

¹⁹ Whitehouse (n 17)

²⁰ J. Feinberg ‘Problematic Responsibility in Law and Morals (1962) 71 (3) *The Philosophical Review* 340-351, 344

²¹ W. Connolly *The Terms of Political Discourse* (Heath, Boston 1974) 97 ; also Kernohan (n 15)

This assertion is strengthened by the lengths which corporate groups would go to deny possession of power in past times.²² However power in itself is just a dispositional concept indicating ability or capacity.²³ The possession of power therefore points to possession of capacity. Power is linked to responsible and legitimate use of such capacity.

Where significant power over others is established then it implies responsibility for the exercise of such power. This is inclusive of both moral responsibility in the sense of taking care but also responsibility that can be held to account within legitimate frameworks. This is why it is necessary to define power and apply it to our context as this will determine the importance of the drive for accountable and legitimate frameworks for such power.

²² It obviously matters that they have such power. 'There must be some misuse of power when those who obviously possess it are so at pains to deny having it' J K Galbraith *The Anatomy of Power* (Houghton Mifflin, 1983) 142

²³ Lukes 2005 (n 13) 63

3.2.2 Meaning of Power

The task then is to define what power means.²⁴ This is not an uncomplicated task but it is important to outline what it means within the context of this thesis. In the texts there is a distinction between ‘power to’ and ‘power over’. Where the former refers to ability as evidenced by Hobbes definition involving the power of man (to take it universally) in his present means to obtain some future end.²⁵ While in the latter sense ‘power over’, turns over our attention to those on the giving and receiving end of the relationship.²⁶ Yet they are closely related as Lukes views power over ‘potestas’ as a sub-concept of power to ‘potentia’.²⁷

The meaning of power as a concept is not settled and there are different views of power resulting from disparate focus on certain aspects of power.²⁸ However one of the most comprehensive and persuasive definition of power is that given by Lukes. In his assessment of the concept of power, he considers three views of power. He accepts that the views of power considered can be seen as alternative interpretations and applications of one and the same underlying concept of power, according to which *A exercises power over B when A affects B contrary to B's interests.*²⁹ He later amends this definition in 2005 to reflect power as capacity, not just exercise.³⁰

²⁴ ‘Few words are used so frequently with so little seeming need to reflect on their meaning as power’ J K Galbraith ‘Power and Organization’ in S Lukes (ed.) *Power – Readings in Social and Political Theory* (Basil Blackwell, Oxford 1986) 211 -228, 211

²⁵ T Hobbes *Leviathan* (Oxford World Classics, re-issue 2008) Chapter X

²⁶ Connolly (n 21), 87. Lukes 2005 (n 13) at 69 proposes “ that there is , indeed , a single generic concept of power common to all cases and that , in application to human agents [individual and collective] it exhibits two distinct variants (which we can provisionally, but misleadingly label as concepts of ‘power to’ and ‘ power over’) where the latter is a sub species of the former and that alternative ways of conceiving a version of the latter exhibit what has been called ‘essential contestedness’ with significant consequences for our understanding of social life’

²⁷ Power over reflects for him the ability to have another or others in your power, by constraining their choices, thereby securing compliance.

²⁸ Connolly (n 21) 86-88

²⁹ Lukes 1974 (n 14) 27

³⁰ This is his opinion 30 years after in his second edition, see Lukes 2005(n 13) at 109. Still standing

Beyond this he identifies three views or conceptions of power in the one dimensional, two dimensional and three-dimensional modes.

In the one dimensional view category, Lukes points to Dahl, who describes his intuitive idea of power as '*A has power over B to the extent that he can get B to do something that B would not otherwise do*'³¹ and in addition his intuitive view of the power relations as to involve a successful attempt by A to get a to do something he would not otherwise do. Polsby another proponent of this view points out that 'one can conceive of power... as the capacity of one actor to do something affecting another actor, which changes the probable pattern of specified future events...'³²

This view focuses on behaviour in making decisions over key or important issues as involved in actual observable conflict.

In the second category, the two-dimensional view accepts this first view but only as one part of power, they raise a second role observing that '*to the extent that a person or a group –consciously or unconsciously- creates or reinforces barriers to the public airing of policy conflicts, that person or group has power*'³³Therefore power may involve initiating, deciding and vetoing but it also could be exercised by confining or limiting the scope of decision making to relatively "safe" issues.

by his work on power, he however finds the definition unsatisfactory for the following reasons. " Firstly it focuses on the exercise of power committing the exercise fallacy; power is a dispositional concept, identifying an ability or capacity, which may or may not be exercised. Secondly it focuses entirely on the exercise of 'power over'...thirdly it equates over with domination ...thereby neglecting the manifold ways in which power can be productive, transformative, authoritative and comparable with dignity, fourthly, assuming that power thus defined...offers no more than a perfunctory and questionable account of what those interests are and finally it operates with a reductive and simplistic picture of binary power relations."

³¹ R A Dahl, 'The Concept of Power' (1957) 2 Behavioural science 201-210; Lukes 1974 (n 14) 11

³² N W Polsby, *Community Power and Political theory* (New haven and London: Yale University Press) 3-4; see also Lukes 1974 (n 391) 12

³³ This view is expounded by Bachrach and Baratz . See P Bacharach M S Baratz *Power and Poverty. Theory and Practice* (OUP, New York 1970) 8. They importantly bring the idea of 'mobilisation of bias' into the discussion of power. This is ' a set of pre dominant values, beliefs, rituals and institutional procedures that operate systematically and consistently to benefit certain persons and groups at the expense of others..' See p.43-44; see also Lukes 1974 (n 14) 16-17

Finally Lukes himself proposes a three-dimensional view, which is rather a critique of the behavioural focus of the first two views.

He writes that:

‘the first two views... allow for consideration of the many ways in which potential issues are kept out of politics whether through the operation of social forces and institutional practices or through individual decisions. This can moreover occur in the absence of actual observable conflict, which may be successfully averted – though there remains here an implicit reference to potential conflict. The potential may never be actualised. What one may have here is a latent conflict between the interest of those exercising the power and the real interests of those they exclude. The latter may not express or even be conscious of their interests...’³⁴

The third radical view despite its difficulties in application allows the language of power to be applied to certain relevant situations where power is more pervasive and less easily identifiable. Broadly speaking he points out that:

*‘A may exercise power over B by getting him to do what he does not want to do , but he also exercises over him by influencing, shaping or determining his very wants. Indeed is it not the supreme exercise of power to get another or other to have the desires you want them to have- that is to secure compliance by controlling their thoughts and desires.’*³⁵

Therefore for Lukes actions as well as inactions show power. He highlights certain examples such as where the consequence of inaction may lead to a further non-event of a political issue. He cites the case of Crenson’s analysis of US Steel.

Crenson in his case study concluded that US Steel which had built Gary and was responsible for its prosperity had for a long time effectively prevented the issue of pollution from even being raised through its power reputation operating on anticipated reactions and then for a number of years thwarted attempts to raise the

³⁴Lukes 1974 (n 14) 24

³⁵Lukes 1974 (n 14) 23

issue and finally decisively influenced the content of the anti-pollution ordinance enacted. Crenson pointed out that:

‘US Steel exercised influence from outside the range of observable political ... behaviour though the corporation seldom directly intervened directly in the deliberations of the town’s air pollution policymakers, it was nevertheless able to affect their scope and direction.’³⁶

This analysis also answered questions for him about why many cities and towns in the United States delayed or failed to make a pollution issue of their air pollution problems. This third view also affirms that ‘unconsciousness’, disinclination or omission can be another variant of inaction.³⁷

In this category, a relevant example is that of a drug company which markets a dangerous drug. Lukes points out that the allegation that power is being exercised cannot be refuted by merely showing that the company’s scientists and managers did not know the drug’s effects were dangerous where they could have taken steps to find out.’³⁸ Power therefore can manifest in many forms. While it is not always important that the powerful actor intend the consequences of his action, they need to be aware of their power.

This may seem a far-fetched notion of power but it is decidedly relevant to the relationship between society and large corporations, as it is undeniable that these corporations have become very essential to our everyday life and thinking. As Monks and Minnow highlight, corporations are such a pervasive element in everyday life that it is difficult to step back far enough to see them clearly.³⁹ It is perhaps best

³⁶ Lukes 1974 (n 14) 42 & 51

³⁷ He deals with a three-way split [a] one may be unaware of what is held to be the ‘real’ motive or meaning of one’s action or [b] one may be unaware of the consequences of one’s action or [c] one may be unaware of how others interpret one’s action. The example highlighted deals with scenarios from the third group.

³⁸ Lukes 1974 (n 14) 52

³⁹ R A G Monks and N Minnow *Corporate Governance* (3rd ed. Blackwell, Oxford 2004) 14

described by Hertz in her use of the apt title ‘the silent takeover’, when analysing the new global relations involving multinational corporations.⁴⁰

This also ties in with the Galbraith classification of power into three types: condign, compensatory and conditioned power.⁴¹ The first two types, condign power and compensatory power are visible and objective. Condign power involves the use of physical force and sanction while compensatory power involves the use of inducement and incentive. However he describes the third type conditioned power as follows:

‘Conditioned power, in contrast, is exercised by changing belief. Persuasion, education, or the social commitment to what seems natural, proper or right causes the individual to submit to the will of another or of others. The submission reflects the preferred course; the fact of submission is not recognised.’⁴²

This implies that this type of power can be applied in a very subtle sense to manipulate and create preferences. Again these preferences are not necessarily wrong or evil but the capacity to influence is in itself power. In this sense, the media can be referred to as powerful in so much as they can change public opinion. Perhaps this view of power becomes less radical in view of examples that follow on modes of power. Nonetheless it can be deduced that power is a capacity which may be overt or covert, exercised or unexercised, evidenced by action or omission. This capacity to affect others will include influence as well as compulsion.

⁴⁰ N Hertz *The Silent Takeover: Global Capitalism and the death of democracy* (Heinemann London 2001)

⁴¹ J K Galbraith ‘Power and Organisation’ in S. Lukes [ed.] *Power - Readings in Political Philosophy* (1986, Basil Blackwell, Oxford) 211-228 see also See J K Galbraith *The Anatomy of Power* (Houghton Mifflin, Boston 1983) 24

⁴² Ibid at 214

3.2.3 Modes of Power

Power is often classified in different modes or types. However the most important classification of modes of power when dealing with MNC can be found in the works from the International Political Economy (IPE) field. Strange who is one of the foremost writers on this issue in this field refers to the two modes of power as: *relational or agency power and structural power*. According to Strange:

‘The concept of relational power is clear and consists in the ability of A to get B by coercion or persuasion to do what B would not otherwise do. The concept of structural power is less clear and requires some definition. It consists in the ability of A to determine the way in which certain basic social needs are provided.’⁴³

She cites four basic societal needs, that is, security, knowledge, production and credit with production as the fundamental essential.⁴⁴ Production has a vital role for credit, knowledge and even security. Beyond provision of basic societal needs structural power reveals an indirect and subtle way of influencing the structural system of society. She points out the link between the dominant position of the US in world affairs and the desire of multinational corporations to invest and trade in the US economy.⁴⁵ Indeed the most interesting analogy she makes is about the use of knowledge as structural power. In her opinion:

‘the acceptance by intellectuals in the ex-socialist countries of central Europe, for instance, of the idea that the less the state intervenes in the market economy the better, that protection of local firms is always against national interest, and that keeping inflation to a minimum is always the first priority of the central

⁴³ S Strange ‘Towards a Theory of a Transnational empire’ (1989) in R Toose C May (eds.) *Authority and Markets Susan Strange’s writings on International Political Economy* (Palgrave Macmillan, Basingstoke 2002) 141-156

⁴⁴ There is considerable agreement on this; Although it has its roots as a Marxist concept

⁴⁵ Strange (n 43) 147

bank, is all a classic instance of power exercised through the knowledge structure.’⁴⁶

These examples of knowledge power are replicated in several countries, through the new and dominant ideology within foreign investment which is promoted by world financial institutions and these large corporations and as a result has opened access and afforded protection to huge markets globally.⁴⁷ This not simply a question about value judgements on whether this wholesale export of an ideology has been a good choice rather an acceptance of the fact that it undoubtedly affords these corporations and institutions, power.

Farnsworth pinpoints another method of addressing the agency-structural power classification.⁴⁸ He points out that agency power has been employed at an International level to guard against the adoption or implementing of international policies contrary to business interests and conversely this has helped protect structural power which allows corporations to play states off against each other. In addition, agency power is played out through lobbying, institutional participation, sponsorship and funding of political parties as well as direct corporate social provision. While on the other hand, structural power is used in the control over investment, labour and state revenue dependency. While his focus was on the British

⁴⁶ S Strange ‘Who governs? Networks of Power in World Society’ (1994) in R Toose and C May(eds) *Authority and Markets Susan Strange’s writings on International Political Economy* (Palgrave Macmillan, Basingstoke 2002) 171-184, 176

⁴⁷ This echoes modified replication of ideas that are attributable to Gramsci’s theory of securing consent for hegemony. See Antonio Gramsci *Selections from the Prison Notebooks* (International Publishers, New York 1971). In one interpretation: Gramsci’s view was that in the West it was ideology that constituted the mode of class rule secured by consent by means of bourgeoisie’s monopoly over ideological apparatuses See Lukes 2005 (n 390) at 7-9. For Analysis of Gramsci’s works in relation to the International Political Economy see: R W Cox ‘Gramsci, Hegemony and International Relations: An Essay in Method’ (1991)12 (2) *Millennium: Journal of International Studies* 162-175; J Femia ‘Gramsci’ Machiavelli and International relations’ (July 2005) 76(3) *The Political Quarterly* 341-349

⁴⁸ K Farnsworth *Corporate Power and Social Policy –British welfare under the influence* (Bristol, Policy Press, Bristol 2004)

welfare economy, it holds out very vital points for our analysis for power of multinational corporations on the International sphere.

These views also highlight the inter-dependency of power and structures.⁴⁹ Power takes place within structural limits which expand and contract over time and while those structures determine who exercises power and how power can be exercised, yet the powerful can through action and influences re-shape those structures.⁵⁰ Indeed power relations are fluid in nature and may vary over time but within the context of globalisation and its resulting global market economy, business interests are set to remain powerful for quite some time.

To speak of Multinational corporate power is not to assume that all these corporations think and act in the same way but rather that there is oneness of purpose which is easier to identify at an international level. Farnsworth finds that 'in some ways, cooperation between various business groups at an international level has facilitated a greater degree of cohesion than that which often emerges at the level of the nation state'.⁵¹ With this background on power and its manifestations, the next section then specifically addresses the modes of power of large oil multinational corporations as exemplar or central theme for CSR.

⁴⁹ S Lukes states in his analysis of power and structure in *Essays in Social Theory* (London, Macmillan, 1977) 29 that 'Social life can only be properly understood as a dialectic of power and structure, a web of possibilities for agents, whose nature is both active and structured, to make choices and pursue strategy within given limits that expand and contract over time.'

⁵⁰ Farnsworth (n 48) 22

⁵¹ Ibid at 81

3.3 Large MNC and Power

The next step is to exemplify power by the actions or inactions of multinational corporations. Perceptions of power and the evidence of its significant effects on society has been the main trigger for calls for CSR. The aim within this section is to attempt to demonstrate this power. Coleman suggests that ‘one may measure the power either by measuring the investments which show the power thus collected or by measuring the outcomes of transactions which show power in use’.⁵² This use of multinational corporate power in practical terms can be classified into agency and structural power. Where agency power involves the exercise of direct power and influence over the policy process, and structural power is more pervasive, as it involves ‘power to influence without taking direct action’.⁵³

The analysis will show the use of structural power on the one hand, for controlling foreign direct investment, trade and its influence in dealings with the state and on the other hand, the use of agency power for participation, lobbying and funding. Farnsworth points out that business does not always *desire* to influence all forms of policy-making and that where and how such corporations act depends on policy areas and the prevailing political context⁵⁴, but the crucial issue for multinational corporations is that they demonstrate a *capacity* to exercise significant power. In several instances this capacity is reflected in actual exercise of power which can be detrimental or beneficial.

⁵² J S Coleman ‘Reply to Hayduk’ (1976) 41(6) American Sociological Review 1080-1082, 1081

⁵³ Farnsworth (n 48) 1-8, 6

⁵⁴ Farnsworth (n 48)

Indeed the evidence suggests a significant capacity to make decisions in private with substantial public effects.⁵⁵ This may be one reason for the substantial catalogue of abuses of power by multinational corporations especially in the oil and natural resources industry, from the involvement of ITT in US plans to overthrow the government of Salvador, Allende in Chile to the Bhopal tragedy, the antics of Shell in Nigeria, and the Enron crisis, extending to the use of slave labour in Burma, repression of opposition groups in Nigeria or Colombia, dangerous working conditions in the toy factories of Asia, intimidation of trade unionists on banana plantations in Costa Rica, the rights of indigenous communities threatened by a mining company in West Papua, to consumer's rights abuses by manufacturers of baby milk and cigarettes.⁵⁶

Possession of such strategic power can be found in large multinational corporations and blurs the distinction between private property and public entity. This is akin to the assertion that 'the attack on the public/private distinction was the result of widespread perception that the so-called private institutions were acquiring coercive power that had been formerly reserved to governments'.⁵⁷ In this sense power acquisition, its exercise and the control of its exercise in the relationship between corporation and society at different levels becomes the key issue for CSR.

⁵⁵ J E Parkinson *Corporate Power and Responsibility* (Clarendon Press, Oxford, 1993) 10

⁵⁶ See J Woodroffe, 'Regulating Multinational Corporations in a World of Nation States' in M K Addo (ed.) *Human Rights Standards and the responsibility of Transnationals* (Kluwer International, 1999) 131-140, 131

⁵⁷ A Mills 'The Private history of International Law' (2006) 55 *International and Comparative Law Quarterly* 1- 50

The following sections will take an in-depth look at factual evidence of ‘power-in-use’ by the large MNCs. This examination will be classed under structural power and agency power. Yet as we have seen these modes of power are intertwined. The singular most important factor, attributable to these corporations is that they make decisions that can significantly affect not only related parties like investors and employees but society and in this case global trends. Therefore as Parkinson states: ‘the scope of significant choice open to [an actor]... his power over others is the power scope of his choices which affect them significantly’.⁵⁸ He notes that the two key elements are discretion and significant effects. Therefore these ‘companies are able to make choices which have important social consequences: they make private decisions with public results’.⁵⁹

The World Bank Institute (WBI) demonstrates this capacity in a significant way, when it posits that:

‘in the era of economic globalisation, political transition and technological transformation, rapid changes are taking place which are bringing more than three billion people into economies operating on market principles. The private sector is the main engine of growth and development something which has raised a number of new and fundamental questions about the role of the private sector in sustainable development, in particular for multinational companies....’⁶⁰

Indeed the bottom-line in global affairs is that large multinational corporations possess significant power.

⁵⁸ Parkinson (n 55) quoting C Kaysen, ‘The Corporation: How Much Power? What Scope?’ in E. S. Mason (ed.), *The Corporation In Modern Society* (Harvard University Press, Cambridge 1959) at 85

⁵⁹ Parkinson (n 55) 10

⁶⁰ See document: CSR Main concepts World Bank Institute Section on CSR
<http://www.worldbank.org/wbi/corpgov/csr/pdf/csr_mainconcepts.pdf> accessed 10 December 2008

3.3.1 MNC and Structural Power

The context of globalisation is where the large multinational corporations have become structurally powerful. Globalisation is the process of opening up of states and national markets to create more global interaction and inter-dependency. This process began with the gradual global adoption of the market economy as the successful economic model and then subsequent global integration as a consequence of a major ideological shift among states towards capitalism.⁶¹

‘National and international economic policies shifted sharply in the 1970s and 1980s towards more reliance on the market—diminishing the role of the state.’⁶² This was further facilitated by the end of the cold war between 1989-1991 with the fall of the Berlin wall and the collapse of the Soviet republic. Since this time, huge merit has been placed on the opening up of national markets of goods and services to foreign investment by multinational corporations through liberalisation and privatisation.⁶³

Dunning points out that:

‘the current round of globalisation,...can be traced back to the fall of the Berlin wall in 1989; to the renaissance of market economies, spearheaded by Margaret Thatcher in the United Kingdom and Ronald Reagan in the United States. Also to the emergence of new wave technological advances that culminated in the global embrace of e-commerce in the late 1990’s; inter-alia it has been fashioned by a widening and deepening of all forms of international business

⁶¹ The ideological perspective of states before this time could easily be categorised into eastern bloc with its socialism ideas and the western bloc with capitalist ideas.

⁶² This was ‘driven by technocrats [and] the changes were strongly supported by the International Monetary Fund [IMF] and World Bank financing as part of comprehensive economic reform and liberalisation packages. Conditions of membership in the WTO and the Organisation for Economic Cooperation and Development [OECD] were important incentives.’ See The UNDP Human Development Report (HDR) 1999 *Globalisation with a human face* (OUP, 1999) 29

⁶³ ‘Growing cross-border inter-connectivity of economic activity’ J H. Dunning ‘More and yet more—on globalisation’ (2005) 14(2) *Transnational Corporations* 159 - 168 He relevantly comments that, ‘As a result, for good (or bad), what, 60 years ago, were a collection of economically protected states are now, for the most part, better regarded as inter-related parts of a global village’ 160

activity, especially of foreign direct investment (FDI)” (*by multinational corporations*)⁶⁴.

MNCs have benefited immensely from this process of globalisation. They have continued to grow even bigger as a result of the increase in foreign direct investment and global inter-connectivity to become substantial and very powerful global actors.⁶⁵ The UNDP Human Development Report 1999 surmises that, this trend of global integration and opening up of markets has been of immense benefit to Multinational Corporations giving them more economic power than certain states.⁶⁶ The Multinational Corporation has therefore acquired the capacity to influence the society through its actions in ways which affect how the society provides its basic needs.

The emergence of a strong global economy had been heralded as the cure to most of the ills in society so emphasis was placed on states rolling back from the creation of a welfare state to embrace liberalisation of markets, privatisation of economic activity and even public services. However the success of globalisation has been limited in dealing with society and its problems, The effect of globalisation has left unevenness in its success, there are core areas of human rights, labour standards, environmental practices that are unsatisfactory, furthermore public services are failing and do not work for the world’s poor.⁶⁷ This has created the necessity to hold

⁶⁴ Ibid (words in italics are mine.)

⁶⁵ In January 2006 for example: Exxon Mobil & Shell announced record profits of £18 and £12.9 billion respectively. In spite of this, the state is still the only primary subject of International law although it is acknowledged that ultimately international rules affect the behaviour of human beings and may impose direct obligations such as in compliance with the International humanitarian law rules applicable in International armed conflict or may grant direct rights such as access to International adjudicatory organs without support from any home state. The situation for multinational enterprises under International law is unclear and therefore in need of review, they are aptly referred to as ‘controversial candidatures’ . See I Brownlie *Principles of International Law* (6th ed.) (OUP, 2003) 65.

⁶⁶ See UNDP HDR 1999 (n 62) 1

⁶⁷ The World Bank (WB) in its World Development Report (WDR) 2004 admits that ‘the private sector if left to its devices will not achieve the level of health and education the society desires. See World Bank WDR 2004 *Making services work for poor people* (OUP/ WB, New York, 2004) 3 (Box 2-services- a public responsibility).

all global actors accountable, that is, to set limits and define responsibilities for all actors through legitimate frameworks. To outline the structural power of large MNCs, the following issues will be examined: Control of foreign direct investment; control of trade; influence over the state; ideological control.⁶⁸

i. *Foreign Direct Investment*⁶⁹

Multinational Corporations (MNC) finance foreign direct investment through equity capital, intra-company loans and re-invested earnings.⁷⁰ MNCs are sometimes defined in terms of foreign direct investment, Therefore a multinational or transnational enterprise can be defined as an 'enterprise that engages in foreign direct investment and owns and controls value-adding activities in more than one country.'⁷¹ Whereas this may not be a wholly satisfactory definition, it highlights one of the most important activities of multinational corporations.⁷²

⁶⁸ Farnsworth concludes that the structural power of capital rests on its control over investment; the dependency of the state on economic success for its revenue; the asymmetrical power over labour and its hegemonic power' Farnsworth (n 48)

⁶⁹ In spite of the inability to conclude a multilateral agreement on investment, the United Nations Conference on Trade and Development [UNCTAD] World Investment Report 2000 estimates that the number of Bilateral Investment Treaties has risen to 1,856 at the end of 1999 and these all contain varied levels of investor protection. (now estimated by UNCTAD as over 2000 by 2005- see N Gal-Or 'NAFTA chapter eleven and the implications for the FTAA: the institutionalisation of the investor status in public international law' (2005) 14 (2) *Transnational Corporations* 129- 158.

Newfound rights have been accorded to investors under the North American Free Trade Agreement Chapter 11 and the Energy Charter Treaty [both multilateral investment treaties], which permit investors to sue the state for violations of the treaty standards of investor protection. Liberalisation of Foreign Direct Investment Policy is also often conditionality in the IMF and World Bank adjustment programmes for developing countries, further guaranteeing open doors for MNC investment. See also H Ward, 'Corporate citizenship: International perspectives on the emerging agenda' Conference Report Royal Institute of International Affairs Energy and Environment Programme June 2000

⁷⁰ See UNCTAD World Investment Report (WIR) 2005 *Transnational Corporations and Internalization of R&D* [UN, New York & Geneva,2005) p.10

⁷¹ J H Dunning *Multinational Enterprises and the global economy* (Addison-Wesley Publishing Ltd, England 1993) 3 He also notes two distinctive features of the multinational enterprise, first that it organises and co-ordinates multiple value-adding activities across national boundaries and second it internalises the cross-border market for the intermediate products arising from these activities, see p.4

⁷² The relationship between multinational corporations and foreign direct investment is important but is not synonymous. Mira Wilkins puts it best, when she states that '*multinational enterprises make foreign direct investment and carry on other tasks as well. The investment of capital flows are only*

Foreign direct investment can be defined as:

‘an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate) FDI has three components: Equity capital is the foreign direct investor’s purchase of shares of an enterprise in a country other than its own; Reinvested earnings comprise the direct investor’s share (in proportion to direct equity participation) of earnings not distributed as dividends by affiliates or earnings not remitted to the direct investor. Such retained profits are re-invested; Intra-company loans or intra company debt refer to short or long term borrowing and lending of funds between direct investors (parent enterprises) and affiliate enterprises.’⁷³

Foreign direct investment seen in global terms has made huge leaps, outpacing world output as the stock of outward FDI grew from \$1.7 trillion in 1990 to \$ 6.6 trillion in 2001.⁷⁴ The UNCTAD World Investment Report 2005 considers that “the universe of transnational corporations is large, diverse and expanding... (and) the role of transnational corporations in the world economy has thus continued to grow as reflected in the expansion of FDI stock and in the operations of affiliates.”⁷⁵

By 2011, the World Investment Report points out that these ‘transnational corporations worldwide in their operations both home and abroad, generated value-

part of the activities of a multinational enterprise. These companies must have a business association with foreign operations.’ This is because there are different multinational corporations but in spite of the differences there is congruence in the behaviour of multinationals from different countries. See M Wilkins ‘European and North American Multinationals 1870-1914: Comparisons and Contrasts’ in M Casson *Multinational Corporations* (Edward Elgar, England, 1990) 541

⁷³ See UNCTAD WIR 2005 (n 446) 297 Dunning perceives foreign direct investment as ‘(1) The investment is made outside the home country of the investing country of the investing company, but inside the investing company. Control over the use of resources transferred remain with the investor; (2) It consists of a package of assets and intermediate products such as capital, technology, management skills, access to markets and entrepreneurship.’ This is contrasted with Portfolio or contractual transfer of resources as (1) Specific assets and intermediate products (e.g. capital, debt or equity, technology) are separately transferred between two independent economic agents through the modality of the market. Control over resources is relinquished by the seller to the buyer; (2) Only these resources are transferred. See J H Dunning (n 447) 5

⁷⁴ UNCTAD WIR 2002, *TNC and Export Competitiveness* (UNCTAD, Geneva, 2002)

⁷⁵ UNCTAD WIR 2005 (n 73) 13

added of about \$16 trillion in 2010- about a quarter of total world GDP.’⁷⁶ This major growth in the significance of foreign direct investment can be mainly attributed to globalisation. The decision to invest is a private decision but with very important consequences.

Przeworski and Wallerstein confirm that ‘investment decisions have public and long-lasting consequences, they determine the future possibilities of production, employment and consumption for all, yet they are private decisions.’⁷⁷ Several states in today’s global economy are without strong domestic investment as important markets have been opened up to foreign direct investment, therefore lending power to the investors. A case in point are the developing countries that have borrowed from the IMF and bought into the whole package of structural adjustment policies which include privatisation, removal of restrictions on foreign investment and trade barriers⁷⁸ The sectors of the economy now open to business stretch from traditional industries such as manufacturing, financial services, commodities to former public services such as telecommunications, water provision, energy, hospital services and so on. The old narrow confine of responsibility to shareholders does not begin to comprehend the sphere of influence currently bestowed on business and MNC in particular by society.

⁷⁶ UNCTAD WIR 2011 *Non- Equity Modes of International Production and Development* (UNCTAD, Geneva, 2011) 4

⁷⁷ A Przeworski M Wallerstein, ‘Structural Dependence of the state on Capital’ (1988) 82(1) *American Political Science Review* 11-29, 12

⁷⁸ J Stiglitz, *Globalisation and its Discontents* (London, Allen Lane, 2002) on the impact of World Bank and IMF on Globalisation.

ii. Trade

Another aspect that demonstrates the significant corporate power is trade. Multinational corporations also account for an important and growing proportion of world trade. For instance, Dunning and Sauvant surmised that

‘The production of the affiliates [of transnational corporations (TNC)] exceeds world exports; For most of the past three decades , FDI flows have been increasing at a higher rate than both the world’s gross national product and world’s exports; TNC account for between 25 per cent to 30 percent of the world’s gross national product, about three-fifths of non-agricultural trade and about three-quarters of the world’s stock of privately generated innovatory capacity; TNC employ directly some 73 million people or 10 percent of employment in non-agricultural activities world-wide.’⁷⁹

They conclude that as wealth-producing institutions multinational corporations have played a critical role in shaping the international allocation of economic activity, the pace and structure of development, the ownership of resources and the capabilities and the distribution of income between countries.⁸⁰

Cowling and Tomlinson point to evidence of more concentration in the international market for commodities citing that a significant proportion of commodity market trade of special significance to domestic countries rests with a few large multinational corporations.⁸¹ They confirm that between three to six of the largest MNC have the following proportions of commodity trade: 85-90% for coffee; 85%-90% for Jute, 75-80% for tin.⁸² Interestingly they point out that the:

⁷⁹ J H Dunning K P Sauvant, “Transnational Corporations in the world economy” in *Transnational Corporations and World Development* (ITBP/UNCTAD publications, 1996) p. xi

⁸⁰ See *ibid*

⁸¹ K. Cowling and P.R. Tomlinson, ‘Globalisation and Corporate Power’ (2005) 24(1) *Contributions to Political Economy* 33-51, 35

⁸² *Ibid*

‘Dominant position of a few transnationals is rarely pointed out in the debates that revolve around access to markets in the developed world by the developing world. It is the governments who are generally seen as the villain of the piece, when it is likely that the power of corporate giants in commodity markets is likely to be of similar significance in determining export earnings, and thus development strategies, in the developing world.’⁸³

If a comprehensive look is taken at the position of multinational corporations in the trade market, it reveals a very potent and dominant force, where generally these corporations account for two-thirds of world exports and approximately one-third of world exports intra-firm, notwithstanding sub-contracted relationships.⁸⁴ This can be seen as cornering the market. It is indeed ironical that in this aspect, the law will regard the market as competitive as long as each single unit of the corporation is separately incorporated or registered as a different legal person.

The 2011 World Investment report also points out a middle ground and growing area of influence in the area of International Production, which is neither FDI nor trade. This area is referred to as ‘non-equity modes’ of production and includes newer forms of contractual relationships which MNC now enter for influencing production. This will cover contract manufacturing, services outsourcing, contract farming, franchising, licensing, management contracts and so on. The report points out that through these relationships, MNCs co-ordinate activity in their global value chains and influence the management of host country firms without owing equity stake in it.

⁸⁵These activities have been estimated to generate \$2 trillion in sales in 2010.⁸⁶

⁸³ Cowling & Tomlinson (n 81)

⁸⁴ Ibid

⁸⁵ UNCTAD WIR 2011 (n 76) 16

⁸⁶ UNCTAD WIR 2011 (n 76) 15

iii. State Dependence

The influence of corporations over the state in the light of globalisation is in line with the status as a significant economic power.⁸⁷ This is important because states remain the only full-fledged recognised actor in International law. Traditionally the state depends on taxation for revenues. Taxation of business is supposed to be a major income earner. There is disputed evidence to show lower taxation in light of globalisation and the competition to create adequate and attractive investment climates.⁸⁸

Problems also arise when the bargaining power of these corporations are enhanced by the competition between states for foreign investment⁸⁹ These corporations have an integrated structure of business activities with reach beyond state borders but in spite of the strong activity of multinational corporations on the International plane, they are regarded as entirely private bodies subject to the jurisdiction of the states in which they are located. What this does in effect is to give these corporations protections of a private person and the powers of a significant public international actor. As Muchlinski puts it there is a mismatch between, on the one hand, integrated character of business activities with its managerial and operational reach and the jurisdictional reach of the state that seeks to regulate the MNE resulting in situations where such regulation may be ineffective.⁹⁰

States often will not pursue policies contrary to business interests. This in itself may imply coercive power and when it affects policies which may be in the wider public

⁸⁷ "The growing influence of corporate power over the state should be seen in the context of globalisation and as going hand-in hand with the emergence of the transnational corporation as the dominant business entity" See Cowling & Tomlinson (n 81) 44

⁸⁸ Farnsworth (n 48) 44; see also P Genschel, 'Globalisation, tax competition and the state' (2002) 30 (2) *Politics and Society* 245-275; M P Deveraux, R Griffith and A Klemm 'Corporate income tax reforms and international tax competition' (2002) 17(35) *Economic Policy* 449-495

⁸⁹ P J Buckley M Casson *The Future of the Multinational Enterprise* (Palgrave Macmillan, New York 2002)

⁹⁰ P T Muchlinski, *Multinational Enterprises and the Law* (Blackwell, Oxford 1999) 108

interest. This may be perceived as regulatory capture,⁹¹ but it is best described as a form of conditioned power where business would like to see society make its decisions within a business friendly framework. Reagan puts forward the argument that in essence:

‘corporations are not only much concerned to protect their own immediate legislative interests but are reaching out in an attempt to create a business-orientated political and social framework within which all public decision-making would be constrained. Instead of the society channelling business decisions within the bounds of public interest, the corporation seek to channel public-interest decisions within business-interest bounds.’⁹²

In this vein, Cowling and Tomlinson conclude from their research that the transnational base of the corporation provides it with significant leverage in bargaining situations.⁹³ Such leverage can be applied against nation states since it is often the case that these corporations bargain with governments over measures that enable them to increase profits. Such measures may include the introduction and maintenance of favourable investment subsidies, infrastructural support, employment legislation and tax regimes. Since there are political rewards in attracting and retaining such investment, governments are often compelled to accommodate such measures.⁹⁴ This has a spiral effect as such corporations will use this influence to deter policies that are detrimental to their interests; Apart from this, these corporations in taking decisions on the conduct of their business, can in some very dependent countries influence decisions on employment, revenue, production and this in turn instantly affect social life.

⁹¹ Cowling & Tomlinson (n 81)

⁹² M D Reagan, *The Managed Economy* (New York, 1963) 129-130 cited in Parkinson (n 55) at 21

⁹³ Cowling & Tomlinson (n 81) at 44

⁹⁴ *Ibid* Another interesting example which they raise is the reversal of US policy to ratify the International Kyoto protocol agreement after the election of the Bush Administration, which may be attributable to the fact that the Bush campaign was largely funded by the oil industry.

Leonard finds that MNCs in developing countries by virtue of their normal conduct of business, can help shape the broader social forces that influence how a government relates to its constituents, social forces that influence how a government relates to its constituents, the relationship between the elite groups, the relationships between the urban and rural sectors and the ability of a developing country to pursue autonomous development strategies.⁹⁵ He accepts that one need not take a cynical view of corporate intentions or fall back on past legacies of sinister corporate conduct to conclude that multinationals have power, rather he points out that

‘–by affecting a society’s capacity to control the rate, direction and beneficiaries of change –are a significant force in a country’s political development and that whether intentionally or not, the multinational corporation is a distinct political actor in the domestic politics of any state within which it operates.’⁹⁶

This power of the MNC as a significant force may be more observable in developing countries but it is not restricted to developing countries as for example the decision to outsource jobs from communities in the US to India has had a huge impact on the social lives of such communities both in the US and in India.⁹⁷ This issue is often that the influence or impact though easily felt is very difficult to describe in tangible terms. In addition, the problem with the use of such power over the state lies not only in its effect but in the lack of such power being called to account.

⁹⁵ H J Leonard ‘Multinational Corporations and Politics in Developing Countries’ (1980) 32(3) World Politics 454-483, 457

⁹⁶ Ibid

⁹⁷ To read an emotional account of the situation in West Virginia, USA; read the Shell-economist prize-winning essay by Claudia O’Keefe ‘The Travelling Bra Salesman’s Lesson’ www.shelleconomistprize.com (published The Economist 17th November, 2004)

iv. Ideological Influence

A final aspect of the evidence of structural power can be found in the subtle use of ideological influence. This is sometimes referred to as hegemonial power and can be traced to the writings of Marxists and Lindblom. An Italian Marxist, Gramsci brought this aspect of power to the fore in his writings.⁹⁸ In one preferred interpretation of his work, he sees culture and ideology as means of class rule secured by consent. The issues he points out at that time are particularly relevant today.

Our society reinforces our view of business with pro-business ideology and this strengthens the power of business. Then business through advertising and marketing can shape consumer preferences. In the context of globalisation, business has been nominated as the vehicle of choice for greater prosperity. Conventional wisdom in society teaches that business is the best way. This in turn makes us turn to business for advice and solution.

Lindblom sees it this way; ‘businessmen achieve indoctrination of citizens so that citizens serve not their own interests but the interests of businessmen. Citizens become allies of businessmen’.⁹⁹ However this is not a brain-washing process, individuals give tacit consent because there is no viable alternative. Indeed to become independent of the influence of MNC in daily life is very difficult in most

⁹⁸ A Gramsci *Selections from the Prison Notebooks* (International Publishers, New York 1971). In one interpretation: Gramsci’s view was that in the West it was ideology that constituted the mode of class rule secured by consent by means of bourgeoisie’s monopoly over ideological apparatuses See Lukes 2005 (n 390) at 7-9. For Analysis of Gramsci’s works in relation to the International Political Economy see: R W Cox ‘Gramsci, Hegemony and International Relations: An Essay in Method’ (1991) 12 (2) Millennium: Journal of International Studies 162-175; J Femia ‘Gramsci’ Machiavelli and International relations’ (July 2005) 76(3) The Political Quarterly 341-349 There are many interpretations of Gramsci’s work.

⁹⁹C E Lindblom *Politics and Markets* (Basic Books, New York 1977) 202

countries of the world. They have a stake in your energy supply, food, household goods and so on. Galbraith in his work puts forward a probable picture of a corporate system that is able to create demand for particular goods and also shape prevailing social values.¹⁰⁰

Strange also points out that production is the basic and fundamental essential requirement of society because she makes the point that ‘who or what provides for these needs in society enjoys structural power through the capacity to determine the terms on which those needs are satisfied and to whom they are made available.’¹⁰¹

MNCs through foreign direct investment, trade and even new non-equity modes of International production have a substantial say in determining the production needs of society. The section on trade has demonstrated that these corporations control a huge proportion of production directly. Production and its link to finance has become a driving force in most economies in the world. It determines the sort of knowledge the population can acquire by advertising and marketing but especially through funding in research and development of newer technologies or sciences such as in pharmaceutical drugs. It also has strong links with credit.

Interestingly, the IMF World Economic Outlook in 2006¹⁰² after examining a trend pointed out that the corporate sector of the G-7 countries has moved from being a net borrower to a substantial net saver and that this coupled with the earlier move by emerging market countries to a net saver status following the financial crisis of the late 1990s’, have substantially altered the financial landscape of the global economy concluding that ‘these changes in behaviour are one factor behind the relatively low

¹⁰⁰ J K Galbraith, *The New Industrial State* (2ed. Harmondsworth, 1972) 217 cited in Parkinson (n 55) 15

¹⁰¹ Strange (n 43) 145

¹⁰² IMF, World Economic and Financial surveys , *World Economic Outlook, 2006, Globalisation & Inflation* (IMF, Washington 2006) 153

level of global long-term interest rates at present'.¹⁰³ This statement substantiates the view that the behaviour of these corporations affects global saving significantly and in turn affects society, in this case with relatively low level interest rates. There is also a link between finance and security. Funding and capital generation is often necessary for security.¹⁰⁴

This is further evidenced by the 2008 financial crisis and the drive for restored capital generation.¹⁰⁵ Questions raised by the crisis have not forced a re-think on the role of global business rather it appears to have reinforced the idea of business and capital generation as key to development and success. There is a perception of the lack of ideological options. The MNC ability to influence is strong enough to significantly affect the society or state within which it is located by virtue of its unique multinational position and economic strength therefore it should be regarded as having substantial structural power.¹⁰⁶

¹⁰³ Ibid

¹⁰⁴ However there is a converse side to this, as insecurity breeds unproductiveness, which cripples economies and breeds yet more instability.

¹⁰⁵ J Reed 'Corporate Governance: Lessons from the Financial Crisis' OECD Observer No. 273 June 2009

¹⁰⁶ Parkinson (n 55) defines this as the ability to influence governmental policy and law-making see p.19

3.3.2 MNCs and Agency Power

Another mode of power is Agency power. This refers to more direct forms of power and will fall within the earlier two views of power in Lukes' model. Agency power in this section examines ways in which multinational corporations directly participate in the affairs of the state. This type of power is less obvious at a national level in view of the substantial structural power in the corporations favour but it can be better demonstrated at the International level.¹⁰⁷The issues that will be analysed include direct participation in International affairs, lobbying and sponsorship /funding.

i. Direct Participation and Action in International Affairs

In spite of the fact that International law has little or no recognition of non-state actors,¹⁰⁸ especially as MNCs do not have a single international legal personality but they are nevertheless active at the International level. Some of the key organisations who represent strategic business interests, such as the International chamber of commerce (ICC), the World Economic Forum (WEF) and the World Business Council for Sustainable Development (WBCSD) have consultative status with the UN Economic and Social Council.¹⁰⁹In the case of the ICC, this status was gained in

¹⁰⁷ Farnsworth (n 48) 59

¹⁰⁸ The focus is on states but the Reparations case showed UN as International organisation with limited recognition, the International Criminal courts, do deal with individuals and there is a recognition of the rights of peoples to self-determination

¹⁰⁹ List of non-governmental organisations with consultative status with the Economic and Social Council as of 18th September 2008 E/2008/INF/5
< http://www.un.org/esa/coordination/ngo/pdf/INF_List.pdf> accessed 10 March 2011

1946.¹¹⁰The notion of the consultative status has its foundation in Article 71 of Chapter X of the UN charter, which permits engagement of the ECOSOC with non-governmental organisations.¹¹¹This is however not contentious involvement as the ECOSOC engagement with non-governmental organisations is wide-ranging involving other types of non-governmental organisation

However the specific impact of corporate power on the International level has prompted the drive to assign formal responsibilities, a drive which the corporations have so far successfully opposed. This is mirrored by the failure of the Draft UN code of conduct for Transnational Corporations which had been drafted by the then UN Commission on Transnational Corporations in 1982¹¹² and the vehement opposition to the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human rights as this was intended to be a set of binding principles drafted in 2004 by the sub-commission of the then UN Commission on Human Rights.¹¹³

The MNCs were directly involved through the ICC in opposing the norms and its binding nature at the International Level.¹¹⁴ This failure resulted in the UN Secretary-General's appointment of a Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises to make recommendations of a non-binding nature.¹¹⁵

¹¹⁰ Ibid

¹¹¹ 'The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.'

¹¹² Muchlinski (n 90)

¹¹³ T Sorrell 'UN Norms' in J Dine A Fagan *Human Rights and Capitalism: A Multidisciplinary Perspective on Globalisation* (Edward Elgar, Cheltenham 2006) 284-299

¹¹⁴ Ibid

¹¹⁵ UN, The UN 'Protect, Remedy and Respect Framework for Business and Human Rights-Background' September 2010 <<http://198.170.85.29/Ruggie-protect-respect-remedy-framework.pdf>> accessed 10 March 2011

The evidence of impact and power can also be demonstrated in the key areas of global governance of trade and investment. This impact is visible in the privileging of private interests on a global level on in these key areas. This can be seen in the use of WTO law by the US and the EU through s. 301 of the Trade Act and the EC under the trade barrier regulation to permit some private entities to invoke WTO law at the national level.¹¹⁶ On this issue Shaffer speaks of the blurring of public and private interests pointing out that ‘...private firms collate with governmental authorities in the US and the EU to challenge foreign trade barriers before the WTO legal system and within its shadow.’¹¹⁷

In the area of specific investment, the investment agreements give MNCs in their role as investors’ access to arbitration for the defence of their protected rights of non-discrimination or other relevant aspects of the treaty. This thereby enables them to use the procedure of arbitration to override state law.¹¹⁸ This is driven by a dominant philosophy which sees the corporate instrument as overwhelmingly useful. Hurst points out that: ‘we treated the corporate instrument as so useful for desired economic growth as to warrant using law to make it available on terms responsive to the businessman’s needs and wishes.’¹¹⁹

These tri-lateral and bi-lateral investment agreements are signed by states to attract foreign investment and there has been a huge surge in the numbers signed.

¹¹⁶ G C Shaffer *Defending Interests: Public-private partnerships in WTO litigation* (Brookings Washington 2003) 3

¹¹⁷ Ibid at 5 He also notes that ‘...the reaction of private parties throughout the world in opposition to or support of the WTO system and its stream of legal complaints and verdicts is just one indication of WTO law’s relevance to the states and its constituents.’ 4

¹¹⁸ G Van Harten *Investment Treaty Obligations and Public law* (OUP, Oxford 2007)

¹¹⁹ J W Hurst *The Legitimacy of business in the Law of the United States 1780-1970* (University of Virginia Press Charlottesville 1970) 62

Newcombe and Paradell in their study of investment treaties give the following estimation:

‘By the end of 2006, this network comprised of some 2573 bilateral investment treaties and 241 bi-lateral and trilateral free trade and investment agreements. The network also includes a number of regional and sectoral agreements that include investment protection provision notably NAFTA, The ECT and Framework Agreement on the ASEAN Investment area. In addition there is a network of 2,651 double taxation treaties.’¹²⁰

The driving force behind this is corporate power both from an ideological stand point and from the capability perspective. It ties in with the global trends where governments are committed to ideals of liberalisation and enhancing international flow of goods, services and investment therefore making foreign investment a key resource for state funds.¹²¹

A further indication of corporate power and the influence is the existence of tax havens which create a bargaining environment for MNC. These tax havens can be viewed as jurisdictions which minimise taxes and reduce or eliminate other restriction on business operations.¹²² The desire to offer privileges and to make your jurisdiction attractive to foreign investment can lead to commercialisation of sovereignty.¹²³ Palan points out that corporation were given the opportunity to spread themselves to different localities and they went shopping for the jurisdictions that offered the best arrangement and through this commercial sovereignty has spread.¹²⁴

This highlights the strength and bargaining position of corporations in global affairs.

¹²⁰ A Newcombe L Paradell *Law and Practice of Investment Treaties* (Kluwer Law International, Netherlands 2009) 57-58; In 2011 the UNCTAD WIR (n 76) point out that this regime of International Investment Agreements is now close to 6,000 treaties with many on-going negotiations and multiple dispute-settlement mechanisms p ix

¹²¹ Ibid at 48

¹²² R Palan ‘Tax havens and the Commercialisation of State Sovereignty’ (2002) 51(1) *International Organisations* 151-176, 154

¹²³ Ibid

¹²⁴ Palan (n 122) 172

This has also resulted in a different drive to engage with the corporations on their own voluntary terms. A good example of this is the UN Global Compact (UNGC) which was suggested at the World Economic Forum, Davos in 1999.¹²⁵ The UNGC is a drive for these corporations to join UN agencies, labour and civil society in the promotion of ten core principles of human rights, labour, the environment and anti-corruption. It demonstrates the current indispensability of multinational corporations from the success of any global agenda.

The former Secretary-General of the UN, Kofi Annan pointed out that:

‘we have to choose between a global market driven only by calculations of short-term profit and one which has a human face; between a world which condemns a quarter of the human race to starvation and squalor and one which offers everyone at least a chance of prosperity, in a healthy environment; between a selfish free-for-all in which we ignore the fate of the losers and a future in which the strong and successful accept their responsibilities showing global vision and leadership’,¹²⁶

Therefore depicting that in this huge global developmental challenge, multinational corporations must lend their power to the endeavour.

The question remains that for issues so fundamental should international society continue to cajole corporations or device productive frameworks and systems for legitimating such power towards CSR goals. UNCTAD in its 2011 report helpfully suggests that governments can maximise developments benefits deriving from CSR standards through appropriate policy that harmonises corporate reporting regulations, provides for capacity-building programmes and integrates CSR standards into Investment regimes.¹²⁷ This suggestion can also be acted upon by other actors in

¹²⁵ It appears to be an acknowledgement of business power; accepting that corporations cannot be compelled to observe fundamental rules of society and thus pleading with them at their own forum to re-consider. see the website: www.unglobalcompact.org

¹²⁶ Kofi Annan’s World Economic Forum, Davos Speech UN Press Release SG/SM/6881 1February 1999

¹²⁷ UNCTAD WIR 2011 (n 76) 14-15

society in constructively fashioning their engagement with corporations within the CSR agenda towards legitimacy objectives.¹²⁸

ii. Lobbying and Funding

Research suggests that large corporations often have access to political platforms at national and international level to significantly influence policy. Sklair points out that ‘corporations work quite deliberately and often rather covertly as political actors and often have access to those at the highest levels of formal political and administrative power with considerable success.’¹²⁹ Farnsworth indicates that large corporations and organisations play a major role as lobbyists and participants in the IMF, World Bank and WTO.¹³⁰ This is also supported by the research by Braithwaite and Drahos showing evidence of lobbying for favourable rules on the international scene.¹³¹

This could be due in part to informal links within both organisations as Stiglitz draws attention to the fact that the governing committee of these institutions tend to be finance ministers and central bankers with former links with the business community.¹³² The business organisations are increasingly vocal on its policy preferences over certain issues: for example the Business Industry Advice Council (BIAC) insists that the OECD Guidelines for multinational enterprises must remain voluntary.¹³³

¹²⁸ It has been pointed out that the actualities have changed and the law is changing. See E Duruigbo ‘Corporate Accountability and liability for International human rights abuses: recent changes and recurring challenges’ (2008) 6(2) *North-western Journal of International Human Rights* 223-261

¹²⁹ L Sklair ‘Transnational Corporations as Political actors’ (1998) 3(2) *New Political Economy* 284-287, 286

¹³⁰ Farnsworth (n 48) 65

¹³¹ J Braithwaite, P. Drahos *Global Business Regulation* (CUP, Cambridge 2000)

¹³² Stiglitz (n 78)

¹³³ D Lewis and S MacLeod ‘Transnational Corporations –power, responsibility and influence’ 4 (1)

While it is undeniable that business has a right to be heard, the underlying issue is that it is a powerful bloc which participates on its own terms and dictates the agenda. Korten in this vein, points out that ‘the corporate interest rather than the human interest defines the policy agendas of states and international bodies.’¹³⁴ Large business can ultimately lobby governments to influence policy. Schepers therefore suggests that:

‘fundamental questions remain about the objectives and methods of business-government relations or lobbying, not least about the lack of coherence between CSR and lobbying, about compromise building between private and public interests or about innovative, responsible value based business-government cooperation, beyond the present lobbying’¹³⁵

Lobbying seems stronger when teamed up with funding for example Cowling and Tomlinson point to the reversal of US policy to ratify the International Kyoto protocol agreement after the election of the Bush Administration, as a fact which may be attributable to the fact that the Bush campaign was largely funded by the oil industry.¹³⁶ Funding to think-tanks and research institutes is used to bolster its way of thinking and foist that onto the political arena.

The work of the Institute of Economic Affairs and the Centre for Policy Studies are given as examples for developing and fostering neo-liberal ideas in the 1980s.¹³⁷ Shamir in his work, also points to the establishment of corporate-sponsored and corporate-oriented NGOs as a form of hegemony (corporate power) in the CSR field.¹³⁸

Global Social Policy 77-98, 81

¹³⁴ D Korten *When Corporations rule the world* (Kumarian, London 1995) 54

¹³⁵ S Schepers ‘Business-government relations: beyond lobbying’ (2008) 10(4)Corporate Governance 475-483, 478

¹³⁶ Cowling & Tomlinson (n 81)

¹³⁷ R Desai ‘Second-hand dealers in ideas: think-tanks and Thatcherite hegemony’ (Jan/Feb 1994) 203 *New Left Review* 27-64 cited in Farnsworth (n 48) at 12

¹³⁸ R Shamir ‘Corporate Social Responsibility: A case of hegemony and counter-hegemony’ in B De Sousa Santos C A Rodriguez-Garavito (eds.), *Law and Globalisation from below – towards a*

It is evident that in carrying out action at the International level, the large multinational corporations use a variety of tactics which add to our perception of its agency power. Sands' confirms this position when he points out that:

'Deregulating international flows, promoting private investment overseas and increasing global trade have greatly extended the international role of private and corporate sectors. Not surprisingly, these players are not content with a backseat role in the making and applying of International law. They want to influence the content of the rules and contribute to its enforcement. They do so by pressuring governments and increasingly participating directly in International treaty negotiations.'¹³⁹

The evidence in this section exemplifies corporate power of MNC in a generalised manner but the next section focuses on the specific example of oil industry multinationals to reveal the direct link between activities and incidents showing corporate power and the demands for CSR.

cosmopolitan legality (CUP, Cambridge 2005) 92-117,95

¹³⁹ P Sands *Lawless World* (Penguin, London 2006) 19

3.4 Multinational Power and CSR Demands: The Oil Industry example

3.4.1 The Context for Structural and Agency Power

The large MNCs in the oil industry are a good basis for exemplifying the link between corporate power and CSR demands and response because they are typical examples of global international corporations who can be viewed cross-nationally and they are also significantly involved in documented incidents which have triggered CSR debates and response.¹⁴⁰ The oil industry context is also an ideal CSR example because of its social importance and interesting social history.

This social importance is evidenced by the utilisation of the crude oil product as the main source of energy for the developed and developing world. The by-products of crude oil such as petrol, diesel, Petrochemicals, lubricants, bitumen, liquefied petroleum gas (LPG) provide the backbone for modern life by enabling activities such as heating, lighting, transportation and even the making of perfumes and insecticides. The oil industry has been heavily associated with development and industrialisation. The World Energy Outlook 2007 concludes that oil is still the dominant source of energy and will remain so for the foreseeable future.

¹⁴⁰ This response can be deduced from among other things the significant growth in corporate code of conduct and social reporting P Utting K Ives 'the Politics of Corporate Responsibility and the Oil Industry' (2006) 2 (1) St Anthony's International Review (STAIR) 11-34, 12; However other observers question the effectiveness of CSR initiatives in this industry citing an increased evidence of a gap between declared intentions and actual practice. See J G Frynas *Beyond Corporate Social Responsibility : Oil Multinationals and Social Challenges* (CUP, Cambridge, 2009)

The report states that ‘Fossil fuels (including oil) remain the dominant source of energy accounting for 84% of the overall increase in demand between 2005-2030’¹⁴¹ This increase in demand is attributed mainly to the increasing development of hitherto developing countries such as China and India. While it may be desirable to develop other sources of energy such as solar, wind, hydro or other renewable, these alternative sources currently accounts for a very small percentage of overall energy generated globally and this is likely to remain the case for the foreseeable future. When examining international trade in energy and energy demand, oil is the major product and this accounts for the sheer size of investments and profits made in this industry. This is indicative of the dominant structural power which foreign investment in this sector can have.

The top 10 corporations in the world by profit¹⁴² include the large multinational oil corporations such as ExxonMobil, Shell, BP, Chevron and Total. They are consistently ranked in the top 100 multinational corporations and although there has been a slight upsurge in state-owned companies operating successfully in the oil industry, the biggest corporations are still the multinational oil corporations.

However the oil industry is also an industry that has had a troubled social history and reputation especially because of perceived linkages with state and state dependence on oil investment. For as a historian notes ‘in the 20th century, battles and even whole wars have been fought over the ownership of oil, and have been won or lost through possession or lack of it.’¹⁴³ This chequered social history is in part accountable to the variety of factors surrounding oil exploration and production.

These factors often trigger tensions between society and producing corporation at

¹⁴¹ International Energy Agency (IEA)World Energy Outlook (IEA, Paris 2007) 4

¹⁴² Forbes Magazine 2008 <http://www.forbes.com/lists/2008/18/biz_2000global08_The-Global-2000_Prof.html> assessed 14 March 2009

¹⁴³ S Howarth *A Century in Oil : The ‘Shell’ Transport and Trading Company 1897-1997* (Weidenfeld & Nicolson, London 1997) 18

different levels. These underlying factors include questions of location and ownership of oil resources, the finiteness of oil as a natural resource and its relationship with demand, questions of energy security, problems with host communities, questions associated with oil development such as potential pollution of the environment and the industry's complicity in human rights violations. These issues have direct bearing on CSR as they go to the core issue of the relationship between business and society at different levels: international, national and local.

The nature of oil as a naturally occurring deposit means that it is unevenly distributed globally. Oil reserves are mostly located in developing countries and in some volatile parts of the world.¹⁴⁴ Large reserves exist within the Organisation of Petroleum Exporting Countries (OPEC) such as Saudi Arabia, Kuwait, United Arab Emirates, Iraq, Iran, Venezuela and Nigeria as well as non-members such as Russia, Canada, Mexico and USA; however the bulk of actual oil production is sourced from the OPEC countries and Russia.¹⁴⁵

This partially accounts for the overriding perception that demand is located in western developed countries and supply obtained from developing countries raising questions of exploitation especially as exploration occurs under underdeveloped legal regimes and frameworks of regulation which are open to exploitation by the oil corporations. The plausible defence being that one abides by the law yet not revealing whether there are any relevant or enforceable laws.

This is in addition to the fact that the high demand makes questions of ownership of crude oil resources very vital, as ownership becomes a source of major revenues.

¹⁴⁴ Although this volatility is often a result of the presence of oil; a commodity which is in high demand

¹⁴⁵ US Energy Information Administration
<<http://www.eia.doe.gov/emeu/international/reserves.html>> assessed 31 March 2009. This accounts for the perceived leverage OPEC is assumed to have over oil prices.

¹⁴⁶As a result within most oil producing states, the ownership of mineral resources including oil is often vested in the state. The notable exceptions are the USA and Canada, where there is substantial private, provincial and internal state ownership of mineral resources.¹⁴⁷ For example: Article 27 of the Mexican constitution states that the nation has direct ownership of all minerals or substances that constitute deposits whose character is distinct from the components of the soil...beds of precious stones, combustible solid minerals, petroleum and all solid, liquid and gaseous hydrocarbons.¹⁴⁸ Section 1 of the Nigerian Petroleum Act 1969 vests the entire ownership and control of all petroleum in and under any lands in the state.¹⁴⁹

This is often problematic for federations of states or states with indigenous people. Where the land is inhabited by local communities or indigenous people and the land has to be compulsorily acquired by the state and compensation is paid. In this sense, there are issues with both the process and the substantive loss of land.

This process raises several issues with regards to local communities, the consultative procedure and adequacy of compensation. Particularly for indigenous people there are additional issues to do with the substantive loss of ancestral land. In their case, there is often an irreplaceable attachment to land and a designated way of life. This is further exacerbated where the indigenous peoples and local communities do not have legal ownership. They are reliant on the state and the corporation for social responsibility in the development of the resources, peaceful co-existence and maintenance of the local environment. In this instance the corporation which seeks to obtain development rights will often deal directly with the state government with whom it may have significant influence. The state government then compulsorily

¹⁴⁶ This includes questions of ownership of land and ownership of the resources underneath the land.

¹⁴⁷ E E Smith 'Ownership of Mineral Rights' in E E Smith and others (eds.) *International Petroleum Transactions* (RMMLF, Denver, 2000) 203-337, 248

¹⁴⁸ *Ibid* at 270

¹⁴⁹ Chapter 350 Laws of the federation of Nigeria 1990

acquires the land and pays some form of compensation but the corporation must operate in the environment with the disenchanting local community. This gives rise to questions about a social 'licence to operate'.¹⁵⁰

This disenchantment and dissatisfaction can give rise to social upheaval especially where the operations affect the way of life of the people. For example, dissatisfaction with compensation payments for the acquisition of oil fields has been cited as a contributory factor to the volatility within the Niger-Delta, oil producing regions of Nigeria.¹⁵¹ The host communities are often rural populations and the developmental impact of oil is most harshly felt. Often identified as a 'resource curse' the income from production of oil is diverted to an unaccountable government and a very profitable corporation and the resulting focus is on oil revenues for the corporation and state with little consideration for host community welfare.¹⁵² In some countries, the state and corporations are alleged to be complicit in human rights violations in furtherance of the oil production objective.¹⁵³ There is also evidence of the use of significantly lower standards of operation in developing countries which results in environmental pollution.¹⁵⁴

Nevertheless the search for more oil sources is almost inevitable as the finite nature of oil creates fear of the depletion of current stocks and demands a continued search for more resources, since it is vital to the functioning of many countries, any perceived threat to supply or increase in demand is often reflected in occasional oil price increases and this conversely drives the increased search for more oil sources

¹⁵⁰ Ethical Funds, *Sustainable Perspectives Winning the Social License to operate Resource Extraction with Free, Prior and Informed Community Consent* February 2008

< www.ethicalfunds.com/sitecollectiondocuments/docs/FPIC.pdf > accessed 31 March 2009

¹⁵¹ P S Ogedengbe 'Compulsory acquisition of oil exploration fields in Delta State Nigeria- the compensation problem' (2007) 25(1) *Journal of Property Investment and Finance* 62-76

¹⁵² J. D. Sachs & A. M. Warner 'The curse of natural resources' (2001) 45(4-6) *European Economic Review* 827-838; R Auty *Resource abundance and economic development* (OUP, Oxford, 2001)

¹⁵³ B Manby *The price of Oil* (Human Rights Watch, 1999)

¹⁵⁴ This is evidenced in great detail by the shocking UNEP Assessment of the environment of the Niger-Delta in Nigeria see *UNEP Environmental Assessment of Ogoniland* (UNEP, Kenya 2011).

and production almost at all costs. New potential exploration sites include Tar Sands in Canada and further exploration in Alaska. Although these are often very fragile ecological systems and for the tar sands are home to an indigenous population, the necessity for the product is almost overriding.¹⁵⁵

Problems in the oil industry are long-standing but with the onset of globalisation, these problems plaguing the oil industry have been exacerbated by the widespread publicity. The effect of such publicity has been two-fold; firstly it has allowed several critical cases of misconduct in the industry to come to the attention of world-wide audiences. This is exemplified by the publicity surrounding the Shell Brent Spar, the Shell Ogoni crisis, the oil spill of Exxon Valdez, the problems of BP in Colombia and Texaco in Ecuador¹⁵⁶

On the other hand, the corporations have been able to respond with use of same communicative and publicity medium and publicise responses in the form of reports as well as new remedial action in the form of codes and audits. However this action also indicates corporate ideological influence as the preponderance of corporate practice and activity has been geared towards propounding a CSR that is integrally 'voluntary, non-enforceable and self-regulatory'.¹⁵⁷ This has left corporations open to the charge of de-radicalizing CSR.¹⁵⁸

Since the events of the 1990s the oil industry has been proclaimed a forerunner in the CSR field however this has not always been the case.¹⁵⁹ The industry had been

¹⁵⁵ A Nikiforuk *Tar Sands: Dirty Oil and the Future of a Continent* (Greystone Publishing, Canada 2010); M Levi *The Canadian Oil Sands: Energy Security vs. Climate Change* (Council on Foreign Relations, Canada 2009) Council Special Report no. 47 May 2009

¹⁵⁶ S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, Oxford, 2004)

¹⁵⁷ Shamir (n 138)101

¹⁵⁸ Ibid

¹⁵⁹ Utting & Ives (n 140) 12

forced to confront CSR by a series of ‘critical incidents’¹⁶⁰ that exposed the level of impact that the actions of oil MNC could have on society. This included impact on local communities, environment, issues of human rights, labour rights and so on. These critical incidents caused oil MNC to confront the public impact of their wrongful action or inaction and brought the issue of CSR to the fore.

Therefore as Watts points out, the major challenges to the international petroleum industry come from fast and fundamental changes in the global economic, social and political arenas.¹⁶¹ In the 1990s, changing attitudes and expectations resulting from the evidence of the impact of corporate action spread around and publicised easily in the emerging era of unprecedented global mobile communications and the internet. This caused a focus on corporate impact and demand for CSR.

In the oil industry some of the critical incidents that caused a focus on corporate impact include: The dual problems of Shell with the Brent Spar and Ogoni in Nigeria, the BP climate change campaign and safety incidents and the Exxon Valdez spill in 1989 which highlighted the environmental effect of oil spills. Shell, Exxon-Mobil and BP are ranked 2, 3 & 4 on the 2011 CNN Fortune 500 world’s largest corporations.¹⁶² These critical incidents will be examined in some detail as they indicate examples of complicity in governance, state dependence, foreign investment, ideological influence, wrongful action and so on as indicators of structural and agency power.

¹⁶⁰ T I Vaaland and M Heide ‘Managing Corporate Social responsibility: Lessons from the oil industry’(2008) 13(2) Corporate Communications: An International Journal 212-225 They point out that CSR can be seen as ‘managing the relationship between actors (e.g. key stakeholders), activities (e.g. actions to handles critical incidents) and resources (e.g. internal ethical reporting)’

¹⁶¹ P Watts ‘The international petroleum industry: economic actor or social activist’ in J V Mitchell *Companies in a World of Conflict* (Earthscan /RIIA, 1998) 23-31, 23

¹⁶² See <<http://money.cnn.com/magazines/fortune/global500/2011/index.html>> accessed 10 September 2011

3.4.2 SHELL

Royal Dutch Shell had two major critical incidents that have significantly influenced the demand for CSR and Shell's consequential response. These incidents are the Shell Nigeria crisis and the Shell Brent Spar incident. This is confirmed by Shell the first Shell Sustainability Report titled 'Profits and Principles – Does there have to be a choice?' in 1998.¹⁶³ In this report, Shell states that:

'Multinationals have been criticised as being overly concerned with profit and failing to take their broader responsibilities seriously: to defend human rights, to protect the environment and to be a good corporate citizen...we were all shaken by the tragic execution of Ken Saro-Wiwa and eight Ogonis by the Nigerian authorities; we were ill-prepared for the public reaction to plans to dispose of the Brent Spar off-shore storage buoy in deep water in the Atlantic'.¹⁶⁴

These critical incidents forced focus on corporate power and impact on society and environment and triggered a period of re-evaluation that resulted in increased CSR activity. The first incident involved the Brent Spar was a North Sea oil storage and tanker loading buoy operated by Shell. This facility was no longer in use and had to be decommissioned or disposed of. The options available to Shell were deep-sea disposal or on-shore dismantling. Shell proposed deep sea disposal and they had been granted the UK licence permitting such disposal. This came to the attention of environmental activists, Greenpeace activists who saw this as wrongful impact on the environment. In 1995 they occupied this facility in protest and in a bid to stop such disposal. This intended action was then publicised and this sparked protests from the public against Shell across Europe and resulted in the decline of sales. Shell

¹⁶³ Shell Sustainability Report 1998 Profits and Principles (Shell, 1998)
<http://sustainabilityreport.shell.com/2010/servicepages/previous/files/shell_report_1998.pdf>
accessed 10 March 2010

¹⁶⁴ Ibid at 4

facing huge onslaught of public outcry, falling share price and consumer boycotts decided to dismantle onshore.¹⁶⁵

Also around the same period, Shell's operations in Nigeria were embroiled in human rights and environmental controversy.¹⁶⁶ Shell has been in Nigeria for over 70 years.¹⁶⁷ It first gained an oil exploration licence as Shell D'Arcy in 1938 and discovered a commercial well in Oloibiri in 1956.¹⁶⁸ Shell was accused of complicity in human rights abuses, environmental pollution and severely criticised for its actions and inaction at crucial times during the crisis in the Niger-delta leading up to the trial and execution of the 'Ogoni 9'¹⁶⁹ under the then Military dictator and president of Nigeria.

Manby of the Human Rights Watch pointed out that international attention was centred on Shell Nigeria for three major reasons: It was the biggest and longest-standing oil producer in Nigeria, Shell facilities were onshore and therefore directly exposed to community protests, It was the main target of Movement for the Survival of Ogoni People (MOSOP) which accused the company of complicity in the alleged genocide of the Ogoni people.¹⁷⁰ Other non-governmental organisation point out that although Nigeria is the largest oil producer in Africa, 95% of the Nigerian oil and gas production is carried out by Shell, Exxon Mobil, Chevron, Agip and Total-Elf-

¹⁶⁵ S.C. Zyglidopoulos 'The Social and Environmental Responsibility of Multinational: Evidence from the Brent Spar Case' (2002) 36(1-2) *Journal of Business Ethics* 141-151

¹⁶⁶ B Manby *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch, New York 1999)

¹⁶⁷ This was even before the country's independence in 1960.

¹⁶⁸ G Frynas *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Lit Verlag, London, 2000)

¹⁶⁹ The Ogoni 9 refers to Ken Saro-Wiwa and eight Ogonis who were tragically executed by the Nigerian authorities

¹⁷⁰ Manby (n 166)

Fina – The Big five MNC.¹⁷¹ This is done through joint ventures where they are operators although they hold minority shareholding.¹⁷²

Shell after these events commenced a review of its actions proposing the CSR question in its first report:

‘Clearly the forces of globalisation, rapid improvements in technology and dramatic changes in world order have caused considerable confusion over exactly what is and is not – expected of business. Should it play a bigger role in society, by providing infrastructure and social services where government does not and the face accusations that it is interfering or buying influence? Or should it concentrate on what it does best: serving its customer and getting best return for shareholders?’¹⁷³

This affirms the core issue of CSR, which is that the significant increase in corporate power as a result of globalisation is prompting questions in different areas of the world about the role of the corporation and its legitimacy. Shell in response published its ‘General Business Principles’ where it accepted wider responsibilities to five areas which include shareholders, customers, employees, business partners and society.¹⁷⁴ Since then it has embarked on several CSR initiatives and has been termed in some ways a government: ‘Shell Nigeria act in some ways like a government, spending over \$50million dollars per year in infrastructure projects, consulting those affected by its activity in order to ensure if not its popularity, its acceptance.’¹⁷⁵

Later it was alleged that the figures given by Greenpeace on the amount of oil left on the spar were inaccurate but the non-governmental organisation maintained that ‘the

¹⁷¹ FOE Nigeria Report *Gas Flaring in Nigeria: A Human Rights, Economic and Environmental Monstrosity* (FOE, Amsterdam 2005) 8

¹⁷² The Nigerian State Oil Company holding the other shares

¹⁷³ Shell (n 163) at 4

¹⁷⁴ <http://www-static.shell.com/static/aboutshell/downloads/who_we_are/sgbps/sgbp_english.pdf> accessed 10 March 2010

¹⁷⁵ N H D Foster J Ball ‘Imperialism and Accountability in Corporate Law: the Limitations of Incorporation as a Regulatory Mechanism’ in S Macleod (ed.) *Global Governance and the Quest for Justice: Corporate Governance* (Hart Publishing Oxford 2006) 93-108, 93

amount of oil left on the Brent spar was never central to the campaign'¹⁷⁶ and Shell has since then successfully dismantled Brent spar onshore. Furthermore it is now UK government policy and OSPAR Commission regulation to prohibit offshore dumping of such installations.¹⁷⁷ In spite of these publicised corporate responses, there is still evidence that Shell in its operations in Nigeria fails to comply with some of the basic areas of societal needs such as environmental pollution. This is evidenced by the continuation of the harmful disposal of petroleum drilling waste and gas flaring in the Niger delta area of Nigeria,¹⁷⁸ as well as the damning 2011 UNEP scientific assessment of the Niger-delta (Ogoniland) environment indicating extensive pollution.¹⁷⁹

This context demonstrates the growing contradiction within CSR, where events that demonstrate corporate impact and power trigger a public response and drive the need for justification. The justification in terms of CSR remains at a level which perhaps well-intentioned however does not fully address the triggers. It also reveals a contextualisation where responses differ in different contexts: in this case the UK and Nigeria. This re-evaluation of the legitimacy or justification of power should extend to a creative role for law within CSR that has not been fully explored. This is the issue which will be examined further in the latter chapters.

The response of Shell has been focused on the areas of self-interest but the triggers go beyond self-interest demanding a public interest. For instance Joseph points out

¹⁷⁶ Greenpeace <<http://www.greenpeace.org/international/about/history/the-brent-spar>> accessed 10 March 2010

¹⁷⁷ E A Kirk and others 'OSPAR Decision 98/3 and the dumping of offshore installations' (1999) 48(2) *International & Comparative Law Quarterly* 458-464

¹⁷⁸ M J Ayatamuno 'Effluent quality and wastes from petroleum drilling operations in the Niger Delta, Nigeria' (2002) 13(2) *Environment Management and Health* 207-216

¹⁷⁹ UNEP (n 154)

that Shell's extraction in Ogoni-land in Nigeria caused grave environmental harm with consequent impacts on the rights to food and an adequate standard of living.¹⁸⁰

Shell actions with regard the death of the 'Ogoni 9' had been the subject of litigation under the Aliens Torts Statutes before courts in the United States.¹⁸¹ The assumption of CSR in a non-economic role has therefore been triggered by an awareness of corporate power both on the side of the affected stakeholders and the corporation. This involves power both as capacity to affect as well as exercise or actions. However the dominance of these corporations and the setting of agendas which are non-binding have left open questions of accountability.

¹⁸⁰ Joseph (n 156) This is confirmed by the 2011 UNEP Assessment (n 154)

¹⁸¹ C I Keitner *Kiobel v Royal Dutch Petroleum: Another Round in the Fight Over Corporate Liability Under the Alien Tort Statute* 14(30) ASIL Insight September 30, 2010. These are cases arising from alleged Shell complicity in the execution of the 'Ogoni nine'.

3.4.3 BP

For BP the critical event was a change in direction on the issue of Climate change.

This was a change instigated by the then Chief Executive, John Browne. Vogel points out that their thinking was strongly influenced by memories of the public relations fiasco surrounding Shell's efforts to dispose of the Brent spar.¹⁸² John Browne made a famous speech made in May 1997, where he pointed out that:

‘There's a lot of noise in the data. It is hard to isolate cause and effect. But there is now an effective consensus among the world's leading scientists and serious and well informed people outside the scientific community that there is a discernible human influence on the climate, and a link between the concentration of carbon dioxide and the increase in temperature. The time to consider the policy dimensions of climate change is not when the link between greenhouse gases and climate change is conclusively proven but when the possibility cannot be discounted and is taken seriously by the society of which we are part. We in BP have reached that point.’¹⁸³

Browne promoted the philosophy that a good business could be a success and also ‘*a force for good*’, this led to the eventual re-branding of BP to beyond petroleum.¹⁸⁴

This was an action to take strategic advantage of this novel change as BP was the first multinational oil company to accept the possibility of climate change and adopt the policy of reducing green-house gases. It also began the process of investing in solar energy. It sought to proactively highlight that it would use its corporate power for good purposes, through its own voluntary changes and response. Its action was therefore representative of pre-emptive CSR action.

¹⁸² D Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Washington DC 2005) 123

¹⁸³ J. Browne Addressing Global Climate Change (Part 1) 19th May 1997 Stanford University California available at < <http://www.bp.com/genericarticle.do?categoryId=98&contentId=2000427> > <assessed 30 March 2009

¹⁸⁴ D L Levy A Kolk, ‘Strategic Responses to Global Climate Change: Conflicting Pressures on Multinationals in the Oil Industry’ (2002) 4(3) *Business and Politics* 275-299

BP nevertheless continues to have significant problems with its human rights, environment and safety records. A group of Colombian farmers are claiming compensation from BP for environmental damage allegedly caused by the construction of the Ocesa oil pipeline during the late 1990s in ongoing group litigation.¹⁸⁵ Previously in 2006, BP had reached an out of court settlement for an English High Court case brought by another group of Colombian farmers affected by the construction of this oil pipeline which caused severe environmental damage to their lands¹⁸⁶.

In 2007, BP's Alaskan subsidiary (BP Exploration (Alaska) Inc.) also pleaded guilty to criminal proceedings in respect of discharging oil from Alaskan Prudhoe bay pipelines in violation of the Clean Water Act and paid a fine of about \$20 million dollars as part of the plea agreement.¹⁸⁷ BP also had another significant incident, when massive blast and fire at the Texas City refinery in 2005 which caused 15 deaths and over 170 injuries. BP has admitted falling short of standard safety requirements in that refinery.¹⁸⁸ The incident highlighted the lack of appropriate standards and the resulting impact on society. It seemed to fore-shadow the 2010 BP Gulf of Mexico oil spill¹⁸⁹, which is one of the largest oil spills on record indicating that the disconnect between what is said and what is done as well as the lack of lessons learnt.

The location of some of these incidents has also helped to highlight the differing responses that society applies to the MNC, as litigation and out of court settlements

¹⁸⁵ *Arroyo v BP* (Ocesa Pipeline Group Litigation) (2007) 2 AC 262

¹⁸⁶ Business and Human Rights Resource Centre 'BP Lawsuit (Re Colombia) <<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/BPlawsuitreColombia>> assessed 30 March 2009>

¹⁸⁷ *US v BP (Exploration) Alaska Inc.*, also see *Reese v BP Explorations (Alaska) Inc* 643 F.3d 681(2011) US Court of Appeals 9th Circuit

¹⁸⁸ C Hoyos 'I must learn from what happened at BP America' Financial Times, 23 July 2006

¹⁸⁹ C Read *BP and the Macondo Spill: The Complete Story* (Palgrave Macmillan, 2011)

as well as regulatory fines dominate the US approach to environmental pollution. Nevertheless, this approach is still largely reactionary and only highlights an aspect of the more significant question of social responsibility of corporations for their power and impact.

3.4.4 EXXON

In 1989 the Exxon Valdez (an Exxon MNC, oil tanker) spilled 11 million gallons of crude oil and contaminated 1,300 miles of coastline in Prince William Sound, Alaska.¹⁹⁰ One of the worst oil spills on record. The accident was caused by the human error of an employee of the corporation but the corporation delayed in its admission of guilt and aggravated the situation by arguing over responsibility and delaying clean up.¹⁹¹

However it became obvious in the following public furore that Exxon appeared 'arrogant...ruthlessly capitalistic... and cold and calculating'¹⁹² because in addition to the environmental effect of the oil spill, the human impact was aggravated by the location of the oil spill which occurred in Alaska. Writers comments that:

'The Exxon Valdez limited access to wild life so the native Alaskan's were unable to find food. Fears over contamination in the water and food supply heightened tensions in an isolated environment with minimal access to outside resources. Exxon's attempts to limit responsibility created further distrust and concern as Alaskans began to doubt the effectiveness of the clean-up efforts.'¹⁹³

The claims for compensation became the subject of a court case that has lingered on till 2008.¹⁹⁴

¹⁹⁰ N P Cheremisinoff P Rosenfeld *Best Practices in the Petroleum Industry* (Elsevier Oxford 2009) 113

¹⁹¹ Ibid

¹⁹² Cheremisinoff & Rosenfeld (n 190) 114

¹⁹³ Cheremisinoff & Rosenfeld (n 190) 115

¹⁹⁴ F Beale, M Fernando 'Short-termism and genuineness in environmental initiatives: a comparative study of two oil companies (2009) 27 *European Management Journal* 26 -35

The punitive damages awarded for \$5 billion dollars and then reduced to \$2.5 billion was finally reduced to \$500 million dollars by the US Supreme court after acknowledging that Exxon had spent substantial money on the clean-up operations, however some issues remain outstanding and will have to be decided by the lower courts such as the question on interest payable on the punitive damages.¹⁹⁵

The ability of the oil MNC to drag out the legal process is evident in the delay between 1989 and 2008.¹⁹⁶ Exxon was perceived as one of the most reluctant multinational corporation to embrace CSR and does not have a high CSR profile.¹⁹⁷ However its incident became the first indication of changing reactions from society to demand responsibility for wrongful corporate actions affecting local communities.¹⁹⁸

¹⁹⁵ *Exxon Shipping Co. V Baker* 07-219 available at <<http://www.supremecourtus.gov/qp/07-00219qp.pdf>> assessed May 2009

¹⁹⁶ However it has been noted that enforcement has waned as public attention decreased.

¹⁹⁷ H I Rowlands, 'Beauty and the Beast? BP's and Exxon's Positions on Global Climate Change' (2000) 18 *Environment and Planning* 339-354

¹⁹⁸ The US Oil Pollution Act 1990 was enacted in response to this incident and provides for an oil spill plan for vessels sailing into US waters.

3.5 Conclusion

Demands for CSR arise in general from questions regarding the relationship between these corporations and society. These questions have been based on the impact of significant corporate power on society. Power is a capacity therefore it includes action (exercise) and inaction (omissions) in relevant circumstances. In the case of multinational corporations, power is the capacity to significantly affect the interests of others. Power itself is a morally neutral concept therefore it can be used for right or wrong purposes.

This chapter examined the existence of corporate power and its centrality to CSR demands. It revealed that MNC have significant power and capacity to affect and influence society. This power can be utilised in structural or agency modes. The specific examination of the oil industry shows how the incidents and inadequate corporate responses have changed perceptions of corporate responsibility and caused awareness of the impact of corporate action. This has driven society through its various actors to begin to demand legitimacy and accountability from corporations because corporations wield power that affect and impact significantly on societies interests.

Yet these corporations have in response attempted to set the agenda within this area. These demands and responses are encapsulated within CSR. CSR is driven by demands in the communitarian spirit, demands adjusted to the present liberal society which require that power held within such society must be legitimate and yet it is also driven by the corporate response and the desire the respond from a basis of self-interest.

The challenge is that corporate power demands legitimacy because of the significant impact which it is having on society. Dahl proposes that ‘every large corporation should be thought of as a social enterprise, that is, an entity whose existence and decisions can be justified only in so far as they serve public or social purposes.’¹⁹⁹This also ties in with Dodd’s assertion in the classical CSR debate with Berle that business is permitted and encouraged by law because of it is of service to the community rather than because it is a source of profit to its owners.²⁰⁰

The purpose of CSR is therefore to also present a platform for debates about legitimising corporate power. These legitimacy debates have already taken various forms and perspectives in view of various demands and responses indicated within CSR debates. Yet the overwhelming focus of CSR has been on corporate responses and voluntary undertakings.²⁰¹

Law has so far played a limited role focusing only on the traditional perspectives and highlighted in mainly reactionary circumstances, i.e. contravention of laws (if any) and litigation after the alleged wrong doing or wrongful use of power. However this thesis would like to focus on the potential contribution that newer perspectives of law could bring to the legitimacy debate. Law does not claim to be the only aspect of legitimacy but it is a vital but yet neglected aspect. Therefore the next three chapters will form the second part of the work focusing on legitimacy and law’s role. The next chapter begins this second part to the examination with a general overview of the role of law and regulation within legitimacy.

¹⁹⁹ R A Dahl ‘A Prelude to Corporate Reform’ (1972) *Business and Society Review* 17-23

²⁰⁰ E M Dodd, ‘For whom are corporate managers trustees?’ (1932) 45 *Harvard Law Review* 1145-1163

²⁰¹ Vogel (n 182); S B Banerjee *Corporate Social Responsibility The good, the bad and the ugly* (Edward Elgar, Cheltenham, 2007)16 -18; A Crane at al (eds.) *Readings and cases in a global context* Routledge-Cavendish, Oxon. 2008) 6-9 identifies six core characteristics of current CSR practice as voluntary, Internalizing and managing externalities, multiple stakeholder orientation, alignment of social and economic responsibilities, practices and values, beyond philanthropy

CHAPTER FOUR

TOWARDS LEGITIMACY OF CORPORATE POWER: EXAMINING ROLE OF LAW & REGULATION

‘That legitimacy means responsibility –that an institution with power must be accountable to some judgement other than that of the power holders – expresses the prime emphasis this culture puts on the individual as the ultimate measure of institutions.’¹

4.1 Introduction

This chapter begins the second aspect of our analysis which addresses what potential law and a law-jobs perspective may hold for the exemplar of CSR which is now established as the legitimacy of corporate power. To do this the chapter will address the concept of legitimacy and its link with law, the meaning of law in this context, the relationship between law and regulation and finally law’s current manifestations within CSR. This chapter does this in order to point out perspectives of law which the thesis will analyse in detail for relevance to CSR’s core.

Law can be perceived from a traditional state centred perspective or from a non-traditional decentred pluralist perspective. It may also be classed as hard law and soft law. The analysis of these perspectives is important because it demonstrates the argument that how law is conceived will affect its relationship with contemporary concepts such as CSR. At the onset it is important to identify that legitimacy is used in the sense which implies accountability.

¹ J W Hurst *The Legitimacy of business in the Law of the United States 1780-1970* (University of Virginia Press Charlottesville 1970) 58

Within CSR it has been established that the existence of corporate power that significantly affects societal interests raises the issue of legitimacy for possession and the exercise of such power. Berle points out that ‘whenever there is a question of power, there is a question of legitimacy and this means that the power holder must find some claim of legitimacy which also means finding a field of responsibility and a field of accountability.’² Consequently in view of the societal interest driving for corporate legitimacy compliance with ‘whatever ‘social responsibility’ demands’ is seen as a prerequisite, a defining condition for the possession of power.’³ It has been demonstrated that corporations exert significant power and influence over people’s lives.⁴ This concern with power perceived and expressed in varied ways is the core issue for the debates within CSR. This can be seen as the power-legitimacy exemplar within CSR.⁵

Therefore CSR discourse has arisen as a result of the crucial necessity to justify and constrain the possession and exercise of such corporate power. When this issue of justification or constraints within legitimacy is raised then the role of law in facilitating this accountability can be explored. However in CSR discourse the role of law is largely contested.⁶ The stumbling block has been that CSR is often

² A A Berle ‘Economic Power and the Free Society’ in A Hacker(ed.) *The Corporation Takeover* (Double Day, Anchor, 1965) 86,98-99, also cited in R Chen & J .Hanson ‘ The Illusion of Law: The legitimating schemas of modern policy and corporate law (2004) 103(1) Michigan Law Review 1-149; 148-149

³ J E Parkinson, *Corporate Power and Responsibility: Issues in the theory of Company Law* (Clarendon Press, Oxford 1995) 25

⁴ This is illustrated in the last chapter through some of the critical incidents in the oil industry. See also L Rayman-Bacchus ‘Reflecting on Corporate Legitimacy’ (2006) 17 Critical Perspectives on Accounting 323-335

⁵ M Stokes ‘Company Law and Legal theory’ in W Twining (ed.) *Legal Theory and Common Law* (Blackwell, Oxford 1986) 155-183; T F McMahon ‘Models of the Relationship of the Firm to Society’ (1986) 5 Journal of Business Ethics 181-191 details an overall analysis of the various models of relating corporations (firms) to society contrasting the rights approaches to the power models.

⁶ D McBarnet ‘Corporate social responsibility beyond law, through law, for law: the new corporate accountability’ in D McBarnet et al (eds.) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge CUP, 2007) 45- 56

portrayed as intrinsically voluntary while law is perceived as mandatory rules.⁷ Though it is important to stress that such simple categorization is problematic at various levels, yet the way law is defined will influence the depth and intensity of relationship between the two concepts. Kerr and others point out that ‘at first glance the concept of CSR does not appear to fit comfortably within a traditional legal setting’.⁸ This is because CSR is in a constant state of evolution as the ‘notion of what is socially responsible is situated by contemporary needs and concerns and thus cannot be pinned down in precise and unchanging terms’.⁹

Yet it is accepted that there are other contemporary legal notions which embody this flexible nature.¹⁰ The law is an integral aspect of the drive for legitimacy and can fulfil the role of accountability. It frames legal action and can provide tools which enhance the corporate-society relationship. The challenge is to reveal the potential that law may hold for contemporary concepts such as CSR. In demonstrating such potential, theoretical conceptions of law allow us to indicate the potential of meeting contemporary challenges of legitimising concepts without inhibiting their natural growth and flexibility.

This thesis aim is to discover what potential chosen legal perspectives can contribute to this fundamental aspect within CSR. This will be revealed through an analysis of

⁷ This is entrenched in the positivist view of law especially with regard to narrowing law to state law or regarding state law as central and core. See D Galligan *Law in Modern Society* (Oxford, Clarendon, 2006) 177 -178

⁸ M Kerr, R Janda and C Pitts *Corporate Social Responsibility –A Legal Analysis* (LexisNexis, Canada, 2009)5

⁹ Ibid

¹⁰ Kerr, Janda & Pitts (n 8) gives examples such as corporate governance, best interests of a child but other examples would include precautionary principle & sustainable development see T O’Riordan J Cameron *Interpreting the Precautionary Principle* (EarthScan, London 1994) Cameron, J and Abouchar, J ‘The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Environment’(1991) 14(1) Boston College International and Comparative Law Review (Article 2) 1- 27 M Decleris *The Law of Sustainable Development* (A report produced for the EC, 2000) A Ross *Sustainable Development Law in the UK: From Rhetoric to Reality?* (Routledge, 2011)

law itself and how law may choose to engage with CSR in traditional and non-traditional ways.

This chapter will therefore examine law and regulation as a key component of legitimacy in order to derive two chosen perspectives which will be examined in following chapters. Chapter five will then analyse traditional corporate law to indicate limitations which traditional conceptions of law such as corporate law now face in achieving this legitimising role and then in the sixth chapter the thesis will suggest a non-traditional law-jobs perspective which holds potential for viewing law within CSR through new lens.

4.2 Legitimacy and Law

The assertion that law can contribute to the legitimacy of corporate power requires that the linkage between law and legitimacy is established. Legitimacy as a concept embraces three inter-related conceptions: legal, sociological and moral.¹¹ Legitimacy encapsulates the notion of justification and accountability from these different conceptions. The legal conception of legitimacy is concerned with justification by reference to governing legal norms.¹² In line with this, Jones defines legitimacy as referring to ‘a system of widely accepted rules and standards governing the way in which power is achieved and exercised.’¹³

The sociological conception premises people’s obedience or respect. It adopts the Weberian view of legitimacy as deriving from people’s belief in its legitimacy.¹⁴ In this sense the justificatory source is people’s beliefs. It is in line with this that Mitchell asserts that legitimacy refers to ‘the belief among groups within the affected population, workers, consumers and managers themselves that the exercise of power is justified.’¹⁵ and Suchman defines legitimacy as ‘a generalised perception or assumption that actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs and definitions.’¹⁶

Lastly, the moral conception refers to ethics and therefore seeks a moral or ethical justification for exercise of such power. This is the sense in which one asserts that

¹¹ R Fallon ‘Legitimacy and the constitution’ (2005) 118 HLR 1787- 1801

¹² Ibid

¹³ R H Jones ‘The Legitimacy of the Business Corporation’ 1977 20(4) Business Horizons 5-9, 6
Jones was the Chairman and Chief Executive of the General Electric Company

¹⁴ M Weber *Economy and Society* (University of California Press 1968)

¹⁵ N Mitchell ‘Corporate Power, Legitimacy and Social Policy’ (1986) 39(2) The Western Political Quarterly 197-212, 202

¹⁶ M C Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20(3) The Academy of Management Review 571-610, 574

use of force should be morally legitimate. This conception of legitimacy derives from an ethical justificatory core. This could be exemplified by focus on ethical standards such as human rights and rights of participation.¹⁷ Buchanan argues when speaking of moral legitimacy that ‘an entity that exercises political power is morally justified in doing so only if it meets a minimum standard of justice, understood as the protection of basic human rights’¹⁸. This categorisation assists in the use of standards in analysis or in the clarity of the conception that one adopts but these conceptions are also inter-related.¹⁹

Beetham crucially points out that ‘a given power relationship is not legitimate because people believe in its legitimacy but because it can be justified in terms of their beliefs’ and these beliefs are often based on normative standards.²⁰ These normative standards are frequently embodied in laws in that given context. Often such normative standards must have a moral or ethical content, if it is to appeal to people’s obedience or beliefs. This can be appreciated in the light of longstanding debates within law on the role of morality or more recently the integral nature of fundamental human rights to law.²¹ This is why Doak and O’Mahony point out that legitimacy that rests purely on the legal nature of a particular action can provide a veneer of technical legality to practices that might be otherwise regarded as illegitimate especially where it does not depend on any external moral or normative values.²²

¹⁷ J J Kirkpatrick *Legitimacy and Force: Political and Moral Dimensions* (Transaction Inc, New Jersey 1988) 10-11

¹⁸ A Buchanan *Justice, Legitimacy and Self-determination: Moral foundations for International law* (OUP, New York 2004) 234; A Buchanan ‘Political Legitimacy and Democracy’ (2002) 112(4) *Ethics* 689-719

¹⁹ A. Simmons *Justification and Legitimacy* (CUP, Cambridge 2001)

²⁰ D Beetham *The Legitimation of Power* (Palgrave, Hampshire 1991) 11

²¹ T Bingham *Rule of Law* (Allen Lane, 2010)

²² J Doak D O’Mahony ‘In search of legitimacy: restorative youth conferencing in Northern Ireland’ (2011) 31(2) *Legal Studies* 305-325, 307

When this inter-connectedness of legitimacy perspectives is applied to CSR it becomes easy to see why there is an inter-play of marketing, public relations, reporting (all playing to people's beliefs) and normative quasi-legal standards (codes and regulations) often derived from ethical standards and basis (such as human rights) driving towards creating legitimacy for corporate power. The problem however is that the sociological perspectives focusing on people's beliefs have been dominant and to a large extent captured by the powerful corporations who seek to centre CSR on the notion of changing perceptions through appeals to normative ethical standards.²³ Yet the veracity of legitimacy also lies primarily on legality, the ability to have a legal framework that encourages or induces corporate responsibility.²⁴

Whilst legality is not the self-sufficient criteria of legitimacy, it is a primary criterion. It is a focal area of interest for legal scholars who seek to ensure that 'power is legitimate, where its acquisition and exercise conform to established law.'²⁵ They also seek to examine the definition and interpretation of legal rules and examine how these can be initiated, revised and enforced.²⁶ Nevertheless such scholars are not only pre-occupied with conformity to the 'rule of law', there is also a significant amount of legal literature which questions the legitimacy of law itself in particular contexts and accepts that procedures for forming the law, ethical content of the law and the subjection of laws to accountability is an integral part of legitimacy.²⁷

²³ B O'Dwyer 'Conceptions of CSR: The nature of managerial capture' (2003) 16(4) *Accounting, Auditing and Accountability Journal* 523-557; R Shamir 'The De-radicalization of CSR' (2004) 30(3) *Critical Sociology* 669-689

²⁴ Parkinson (n 3) 25

²⁵ Beetham (n 20) 4

²⁶ Beetham (n 20) 4

²⁷ Fallon (n 11)

This is why Hart, the foremost legal scholar acknowledged that the legal order provided for law as a union of primary and secondary rules; with the secondary rules concerned with how the primary rules may be ‘conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined.’²⁸ This is necessary because on the one hand law can be used as an instrument for the powerful²⁹ and therefore frames and enables power and organisations such as corporations but on the other hand it is also capable of providing limitations and giving valid expression to opponents of such power, providing room for contest and for change.³⁰

As a result of this juxtaposition legal scholars’ centre on analysis of the moral and sociological conceptions inter-twined with law. One recurrent theme is often whether the duty to obey the law requires a moral reason and whether legitimacy of law is drawn from this moral core.³¹ The focus could also be on procedures that allow for consent, participation and acquiesce of the people or on the fundamental nature of human rights to rules that make for such integral moral legitimacy³² This aim of such introspection is to avoid a situation where law is used exclusively as an instrument of power exclusively rather than as a limitation to power also.

Within this thesis, the focus is primarily on the legal aspect of this interconnected conception of legitimacy of corporate power but it will also become apparent that law of the type suggested must also acknowledge the sociological and ethical perspective. The aim is to suggest that law will need to develop flexibility to frame normative aspects of CSR and to fully perform its aspect of the legitimating

²⁸ H L A Hart *The Concept of Law* (Clarendon Oxford 1994) 94

²⁹ Beetham (n 20) 67 This is also a Marxist perspective of law

³⁰ B De Sousa Santos (ed.) *Law and Globalisation From Below: Towards a Cosmopolitan Legality* (CUP, Cambridge 2005)

³¹ J Raz *The Authority of the Law: Essays on Law and Morality* (OUP, Oxford, 1979, 2002). Raz defined power over others as authority over them see p.19

³² A E Buchanan *Human Rights Legitimacy and the Use of Force* (OUP Oxford 2010)

function. The assertion is not that only law can help CSR achieve its legitimizing function but that it is a fundamental aspect of such legitimating agenda. Yet law has to appear in its fully dynamic guise to embrace and assist the complexity that is CSR.

Within CSR the question of corporate legitimacy has often been put in this form:

‘Who selected these men, if not to rule over us, at least to exercise vast authority and to whom are they responsible? The answer to the first question is quite clearly: they selected themselves. The answer to the second is at best nebulous. This in a nutshell constitutes the problem of legitimacy.’³³

When the question of legitimacy for corporations is analysed from a legal perspective, two aspects become visible: the internal aspects of how the corporation is run and the external aspect of responsibility for such running. Stanfield and Carroll outline what this may mean by stressing that ‘power is exercised legitimately when it is deployed within the bounds of dominant rules and norms, that is, when it is transparently deployed such that the information is available to those who must hold its use accountable’³⁴

Thus the question could be that where the legitimacy of government power is ensured through accountability processes to the electorate, sufficient accountability must be devised for such corporate power. Or in the alternative exercise of such power must be constrained and brought under the ambit of adequate democratic or representative control, yet the over-riding issue is that of transparent constraints. Therefore the link in this thesis is focused on accountability aspects of legitimacy and law’s ability to foster accountability. The nature of the corporation differs from

³³ L Rayman-Bacchus ‘Reflecting on Corporate Legitimacy’ (2006) 17 *Critical Perspectives on Accounting* 323-335 at 324 citing E S Mason *The Corporation in Modern Society* (Cambridge, Harvard University Press, 1959); B. Sutton (ed.) *The Legitimate Corporation* (Bodmin, Basil Blackwell, 1993)

³⁴ J R Stanfield M C Carroll, ‘Governance and the Legitimacy of Corporate Power: A Path for Convergence of Heterodox Economics?’ (2004) 38 (2) *Journal of Economic Issues* 363-370

that of the government, so their accountability processes will not mirror each other, but this does not negate the need for visible constraints.

Stokes in this vein stresses that:

‘If private property is to be legitimate within the framework of liberal society, it is also necessary to show that there are constraints which prevent it from becoming a source of power which threatens the liberty of the individuals or rivals the power of the state.’³⁵

Law’s ability to frame or facilitate accountability frameworks is therefore the core issue however law itself in the globalised society has not remained unaffected. Therefore the following section will define perspectives of law in this context to capture a significant picture of law’s potential role and outline the emergence of traditional and non-traditional perspectives in this context.

³⁵ M Stokes ‘Company Law and Legal Theory’ in W Twining (ed) *Legal theory and Common law* (Basil Blackwell Oxford 1986) 155-183

4.3 Perspectives of Law

The concept of law is not easily defined but it is necessary to outline conceptions of law because the way law is defined spells out the role for law within contemporary debates. In other words the legal theoretical conception of law will dictate to a large extent the role of law in the task of legitimising corporate power. Hart reminds us that ‘few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange and paradoxical ways as the question ‘what is law?’³⁶. So within this section the aim is to address what is meant by law within this thesis to give a framework for the legal perspectives that will be analysed.

Whilst CSR is a global phenomenon, the notions of law often do not travel well.³⁷ International law which has a fair claim to universality remains the primary preserve of state actors³⁸ so the challenge becomes the ability of to frame a conception of law that can be viewed from a global perspective. This challenge is identified by Twining as suggesting a way of constructing one or more general conceptions of law that may be useful for looking at legal phenomena from a global perspective.³⁹

This necessity for a broad conception of law that is useful for examining legal phenomena from a global perspective is predicated on the novel nature of actors and actions within CSR. This attempt to define our chosen conceptions of law will only

³⁶ Hart (n 28) 1

³⁷ For example R Dworkin *Laws Empire* (Hart Publishing, Oxford 1998) at 102 points out that ‘Interpretative theories are by their nature addressed to a particular legal culture, generally the culture to which the authors belong.’

³⁸ The ICJ point out that it is the fundamental principle of state sovereignty on which the whole of International law rests – *Case concerning military and para-military activities in and against Nicaragua (Nicaragua v US) Merits* (1986) ICJ Reps 14 at para.263

³⁹ W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP, Cambridge 2009) 103

form a brief analysis of the much wider discourse about law's nature. This wider discourse often termed 'jurisprudence' covers several theoretical questions 'about the nature of laws and legal systems, about the relationship of law to justice and morality and about the social nature of law'.⁴⁰The seminal debates on the relationship between natural law school and legal positivism between Hart⁴¹ and Fuller⁴² as well as the fundamental addition of Dworkin⁴³ on rules and principles will not be covered in great detail. The interesting debates about the relationship of law to justice covered extensively by Nozick⁴⁴ and Rawls⁴⁵ as well as the issue of rights as expounded by Hohfield⁴⁶ and Kant⁴⁷ are of little relevance to this work.

This analysis will dwell on nature of law in the much narrower sphere of 'law and society' and the attempt to derive a conception of law applicable to global concepts such as CSR. It will seek to draw out views on legal centralism and legal pluralism as well as debates on hard law and soft law. In other words, it raises the question: is law limited in form to state made law conditional on certain key features or is law multifarious and of different kinds on different levels tied together by the role it performs? The aim is to discover conceptions of law that bear most relevance to globalisation and our analysis of legitimacy of corporate power within CSR.

⁴⁰ M D A Freeman *Lloyds Introduction to Jurisprudence* (Sweet & Maxwell, London, 2008) 3

⁴¹ H L A Hart 'Positivism and the Separation of Law and Morals' (1958) 71(4) HLR 593-629

⁴² L L Fuller 'Positivism and Fidelity to Law' – A Reply to Professor Hart' (1958) 71(4) HLR 630-672

⁴³ R Dworkin *Law's Empire* (Hart Publishing, Oxford 1998)

⁴⁴ R Nozick *Anarchy State and Utopia* (Wiley-Blackwell, 2001)

⁴⁵ J Rawls *A Theory of Justice* (Oxford, OUP, 1971) 5-6; S Lukes *Power: a radical view* (Macmillan, London 1974)

⁴⁶ W N Hohfield *Fundamental Legal conceptions as applied in judicial reasoning* (Yale University Press, 1964)

⁴⁷ I Kant *Fundamental Principles of the Metaphysics of Morals*, re-printed in L Dennis (ed.) *Groundwork for the Metaphysics of Morals –Immanuel Kant* (Broadview Press, Canada, 2005)

4.3.1 Traditional Legal Perspectives (Legal Centralism)

One of the most influential definitions of law is given by HLA Hart in his book *The Concept of Law*.⁴⁸ Hart sees law in a legal system as primarily a union of primary and secondary rules. This modifies the earlier theories of law which placed law in the realm of orders given by a sovereign and backed by threats.⁴⁹ For Hart these rules derived their validity from the rule of recognition which itself is a social fact accepted by officials of the legal system.⁵⁰ This definition has remained definitive in explaining legal systems and in explaining social structures of laws in many developed countries,⁵¹ but this definition is mainly concerned with municipal law in the modern state⁵²

Galligan outlines features of Hart's definition of law that narrows it to the 'modern legal order' and a view which is centred on the state. The features are as follows⁵³: primarily enacted law made by legislative bodies in their exercise of will, specialised organisations and institutions of officials with authority to make, apply and enforce that law, coercion as a central aspect, state law as final authority over other systems

⁴⁸Tamanaha points out that John Austin and HLA Hart respectively, are the most influential early and current theorists of legal positivism. B Z Tamanaha *A General Jurisprudence of Law and Society* (OUP, Oxford 2001) 22 Tamanaha points out the problem of law's definition and suggests that 'until this problem is resolved, however, the concept of legal pluralism will not have a sound foundation'. B Tamanaha 'A Non-Essentialist Version of Legal Pluralism' (2000) 27(2) *Journal of Law and Society* 296-321, 297 However it is doubtful that the question of law's definition can ever be settled for it is an essentially contested concept but I do accept that each debate must be founded on an identified definition of law. In other words you must define 'law' in that context

⁴⁹ Austin, *The Province of Jurisprudence Determined* (ed. Hart, London, 1954)

⁵⁰ Hart (n 28) 79

⁵¹ Tamanaha 2001 (n 48) at 133 notes that Hart's core analysis has survived relatively unscathed following forty years of critique See also D Galligan *Law in Modern Society* (Clarendon, Oxford 2006)

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⁵² Twining notes that 'with the exception of public international law as it was conceived in 1960, this model is confined to state or municipal law'. Twining 2009 (n 39) 89. However Hart acknowledges the existence of other 'pre-legal' norms

⁵³ Galligan (n 51) 21-22

of rule within jurisdiction, the regulatory aspect of law as facilitating and protecting social relations of citizens, officials with extensive power constrained by sets of standards and this results in a distinctive normative stricture based on the idea of rule of law. Griffiths calls this legal centralism and defines this as the view that 'law is and should be law of the state uniform for all persons, exclusive of all other laws and administered by a single set of state institutions.'⁵⁴

This traditional definition is often the most recognisable form of law and ties in with the institutional nature of law identified by Raz as a component for the test for law's existence and identity.⁵⁵ Raz points out that:

'It is widely agreed ...that a system of norms is not a legal system unless it sets up adjudicative institutions charged with regulating disputes arising out of the applications of norms of the system. It is also generally agreed that such normative system is a legal system only if it claims to be authoritative and to occupy a position of supremacy within society that is: it claims the right to legitimise or outlaw all other social institutions.'⁵⁶

He therefore identifies the legal system as 'a system of guidance and adjudication claiming supreme authority within a certain society and therefore where efficacious also enjoying effective authority'⁵⁷. The consequence of such analysis has been to link law with state institutions such as courts. In this sense also Kelsen identifies law as norms addressed to court⁵⁸, Hart points to laws as standards courts are bound to apply and use in adjudication⁵⁹

The advantage of this way of identifying law is that it becomes fairly distinctive from other forms of social rules and its enforceability is linked to the state

⁵⁴ J Griffiths 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1-56, 3

⁵⁵ Raz points out that the test for the identity of a legal system involves 3 elements: efficacy, institutional character and sources J Raz *The Authority of Law: Essays on Law and Morality* (OUP, Oxford 2009) 42

⁵⁶ *Ibid* at 43

⁵⁷ Raz (n 55) at 43

⁵⁸ H Kelsen *The General Theory of Law and State* (New York, 1945) 29

⁵⁹ Hart (n 28) 89

institution. In this sense corporate laws can be derived from the body of rules enjoying effective legal authority from the state and regulating formation and running of the corporations. While this approach is desired for its simplicity, one finds that applying such traditional law to CSR is difficult as it is a concept that demonstrates some of the more significant effects of globalisation on law. It does not currently utilise forms of rules clearly linked to the traditional perspectives of state law and it is influenced by a variety of actors. Furthermore there are limitations within corporate law itself which will be demonstrated in the next chapter that require that law within CSR should be a broader concept than the traditional view permits.

Barnet examining the role of traditional state law in CSR points out three general limitations. These are the effect of business lobbying, the lack of regulatory enforcement and creative compliance.⁶⁰ The influence of business on the substance of law at national and international level is evident. This is done through lobbying and negotiation which is an aspect of agency power and this may result in backtracking on an agenda.⁶¹ State regulation has a cost attached and resources are limited, penalties may be weak and enforcement may not be effective.⁶² Finally compliance can be 'creative'. Barnett speaks of complying with the letter of the law, not the spirit of the law. She gives examples of tax avoidance and creative accounting.⁶³

⁶⁰ D McBarnet 'Corporate social responsibility beyond law, through law, for law: the new corporate accountability' in D McBarnet et al (eds.) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge CUP, 2007) 45- 56

⁶¹ Ibid. The climb-down on initiatives such as the binding UK Operating and Financial Review (OFR) binding reporting requirement for companies are indicative of governments under pressure to favour business interests in decision-making.

⁶² Ibid

⁶³ Ibid

Although these limitations are not exclusive to traditional law,⁶⁴ the key issue is that new ways of thinking are relevant within CSR and this will include new ways of thinking about law. The effect of globalisation on law has resulted in the search for definitions of law that is more reflective of global concepts. Although it is important that law retains its distinctive nature, it also needs to retain relevance. This search for relevance is made more urgent by the inherent limitations of traditional state law in the context of global concepts like CSR.⁶⁵ Nelson helpfully points out that ‘the core issue is about changing attitudes, values and approach. It is about thinking and acting in non-traditional ways. It is about a new way of governance- at both societal and corporate level.’⁶⁶ This is what recommends the broader pluralist perspectives analysed in the next section. This will include perspectives which are more inclusive of rules emerging from various actors and which could be harnessed towards the goal of legitimacy of corporate power.

⁶⁴ As questions of enforcement and compliance plague other non-formal ways of regulation as well

⁶⁵ Kerr (n 8)

⁶⁶ Jane Nelson cited in J Elkington ‘the triple bottom line for twenty-first century business’ in JV Mitchell *Companies in a World of Conflict* (RIIA/ Earthscan London 1998) 32-61, 63

4.3.2 Non-Traditional Legal Perspectives (Legal Pluralism)

Long before notions of ‘globalisation’, legal scholars had an interest in law as a social phenomenon and this school was termed ‘sociological jurisprudence’. The influential thinkers in this group were scholars such as Durkheim who distinguished between formal laws and informal laws⁶⁷ and Ehrlich who distinguished between the ‘living law’ and state law administered by courts.⁶⁸ Ehrlich is most relevant for this analysis because he points to the reality of a ‘living law’ that underlies the formal rules of the legal system and suggests that the task of the judge or jurist is to integrate the two types of law.⁶⁹ Ehrlich gives the example of commercial law which tries to keep up with commercial usage as an example that the ‘centre of gravity of legal development therefore from time immemorial has not lain in the activity of the state but in society itself.’⁷⁰

This analysis is subsequently highlighted in the work of Teubner who analyses the *lex mercatoria* – the transnational law of economic transactions as one of the most successful examples of global law without the state. He points out with regard to business that: ‘technical standardisation and professional self-regulation have tended towards world-wide co-ordination with minimal intervention of official international politics’.⁷¹ Globalisation and its resulting complexities of relationships have reignited and posed additional questions about the nature of law within global concepts such as CSR.

⁶⁷ E Durkheim *Division of Labour in Society* (Macmillan, New York 1933)

⁶⁸ E Ehrlich *Fundamental Principles of the Sociology of Law* (Russell & Russell, 1936)

⁶⁹ *Ibid*

⁷⁰ Ehrlich (n 68) 390

⁷¹ See in G Teubner ‘Global Bukowina: Legal Pluralism in the World Society in G Teubner (ed.) *Global Law without the State* (Dartmouth, Aldershot 1997) 3-28

Therefore writers point out transnational law that is emerging under the processes of globalisation of the second half of the twentieth century.⁷² In the case of MNCs this is partially the result of inapplicability of International law to MNC as identified subjects and the resulting exploitation of ‘a vacuum between ineffective national laws’ as a result of the preservation of the corporate legal personality concept.⁷³ This has been referred to as the invisibility of MNCs under International law but this has not prevented rule-making and normative activity globally because of the reality of MNC actions and impact on a global scale.⁷⁴ It has led to the emergence of an enormous amount of non-state law and rules guiding conduct from various actors at various levels of global society.

These non-state law and rules emanate from various bodies including trade associations, international institutions, corporations themselves and non-governmental organisations. Jenkins identifies five types of codes of conduct in the CSR field: company codes, trade association codes, multi-stakeholder codes, model codes and inter-governmental codes.⁷⁵ In addition to this a compendium on CSR instruments identifies reporting guidelines, state CSR laws and government initiatives, issue based principles, conventions and standards focused around environment and sustainable development, labour, human rights, gender, corporate governance, money-laundering and anti-corruption.⁷⁶

⁷² K Von Benda-Beckmann ‘Globalisation and Legal Pluralism’ (2002) 4 *International Law Forum du droit International* 19 -25

⁷³ R Fowler ‘International Standards for Transnational Corporations’ (1995) 25 *Environmental Law* 1-30, 3; P T Muchlinski *Multinational Enterprises and the Law* (2nd ed. OUP, Oxford 2007); C D Wallace *The Multinational Enterprise and Legal Control: Host State Sovereignty in an era of economic globalisation* (Martinus Nijhoff, the Hague 2002); O Amao ‘Mandating Corporate Social Responsibility: Trends in Nigeria’ (2008) 6(1) *Journal of Commonwealth Law and Legal education* 75-95, 75

⁷⁴ See A C Cutler *Private Power and Global Authority –transnational merchant law in the global political economy* (Cambridge, CUP 2003) 196

⁷⁵ R Jenkins ‘Corporate Codes of Conduct: Self-Regulation in a Global Economy’ Technology, Business and Society Programme Paper No. 2 (UNRISD, 2001)

⁷⁶ *Compendium of Ethics Codes and Instruments of Corporate Responsibility* (compiled as a

Santos captures something of this diversity in his work where he discusses the globalisation of legal relations and depicts the contrary tensions that all work the legal field: *lex mercatoria*, law of regional integration, transnational factors causing changes in state law, migration laws, laws of groups within the state (indigenous peoples, grass-root movements, NGOs and so on), cosmopolitan law.⁷⁷

The challenge has been the ways of conceiving and addressing these emerging non-state law and regulation.⁷⁸ These attempts to conceive of law at a pluralistic and broad level have been termed ‘legal pluralism’⁷⁹ and draws upon previous traditions from legal anthropology which examined customary laws, religious law and local laws.⁸⁰ Scholars point out that ‘transnational law’ in itself does not create legal pluralism but add to already existing constellations of legal pluralism.⁸¹

These theories and debates which were founded on issues arising from legal anthropology have moved to debates about the pluralistic nature of law in modern societies.⁸² Legal pluralism stands in contradiction to legal centralism, it disputes the focus on state law stressing that law is itself constituted by virtue of social relations.⁸³

companion to W Cragg (ed.) *Ethics Codes, Corporation and the Challenge of Globalisation* (Edward Elgar, 2005)

⁷⁷ B De Sousa Santos *Towards a new legal common sense: Law, Science and Politics in paradigmatic transition* (Routledge, New York 1995) Chapter Five

⁷⁸ See Twining 2009 (n 39) for a discussion of the implications of globalisation on legal theory. See also Tamanaha 2001 (n 48). G Teubner(ed.) 1997 (n 71) B De Sousa Santos (ed.) *Law and Globalisation From Below: Towards a Cosmopolitan Legality* (CUP, Cambridge 2005)

⁷⁹ This has been described as a ‘central theme in the re-conceptualisation of the law/society relation.’ S E Merry ‘Legal Pluralism’ (1988) 22(5) *Law and Society Review* 869-896,869. This is often contrasted with Legal centralism see Gilligan (n 51)

⁸⁰ Benda-Beckmann (n 72) 19; Llewellyn would be placed in the earlier era of legal anthropology.

⁸¹ *Ibid*

⁸² S E Merry ‘Culture, Power and the Discourse of Law’ (1992) 37 *New York Law School Law Review* 209-226

⁸³ Merry *ibid* at 209 See also Griffiths (n 54)

Within this field, several theorists have raised debates specifically relevant to the applicability of law to global concepts. Teubner examines the 'Global Bukowina'.⁸⁴ He analyses the possibility of the emergence of global law without the state by pointing out that 'it is not only the economy, but various sectors of the world society that are developing global law of their own.'⁸⁵ He puts forward his view of legal pluralism as involving 'a multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal.'⁸⁶ This perspective leads on to a broader conception of law delinked from the state.

In line with this delinked or de-centred perspective, De Sousa Santos defines law as 'a body of regularised procedures and normative standards, considered justiciable in any given group, which contributes to the creation and prevention of disputes and to their settlement through an argumentative discourse, coupled with threat of force.'⁸⁷ This would allow for a pluralistic application of law which does not exclude the state but includes other groups.⁸⁸

Therefore law within CSR is more readily identifiable when linked with pluralistic perspectives of law amenable to globalisation. This perspective can operate at different levels: local, national and multi or transnational. It is more readily identifiable with pluralistic examples of law. Therefore the conceptions of law that are relevant are conceptions which examine law from a more flexible perspective. The focus is on how law can be conceived from a global standpoint while allowing the flexibility for to engage actively with both state and non-state law.

⁸⁴ Teubner 1997 (n 71)

⁸⁵ Ibid at 3

⁸⁶ Teubner 1997 (n 71) 14-15

⁸⁷ B De Sousa Santos *Towards a new legal common sense: Law, Science and Politics in paradigmatic transition* (Routledge, New York 1995) 428-429

⁸⁸ Another such analysis is carried out by Muchlinski, where he examines particular 'proto-legal' phenomena exploring the possibility of viewing the multinational enterprises as producers of a kind of transnational law. P T Muchlinski 'Global Bukowina' Examined: Viewing the Multinational Enterprise as a transnational law-making community' in G Teubner *Global Law without a State* (Dartmouth, Aldershot 1997) 79-108

The question is therefore one of legal conceptions relevant to global concepts like CSR. Twining in his work on general jurisprudence points out three conceptions of law which may have relevance to globalisation and these are conceptions of law by Hart, Tamanaha and Llewellyn.⁸⁹

Twining finds that Hart's conception of law through Tamanaha's modification can accommodate other forms of law outside of state law. Tamanaha modifies Hart conception stated earlier by re-stating law as '*whatever people identify and treat through their social practices as law (or recht or droit etc)*'.⁹⁰ Therefore for Tamanaha a state of legal pluralism exists whenever more than one kind of law is recognised through the social practices of a group in a given social arena...'⁹¹ This re-statement emphasises Hart's rule of recognition but it does not provide a useful outline or criteria for examining such legal perspectives in context. CSR in different contexts within globalisation is giving rise to rules, procedures and mechanisms which may not yet be recognised as law in the social practices of group but may however be performing law- like functions and fulfilling law roles.

Therefore what is relevant in such a scenario is a definition that can present a working framework of enquiry in order to discover what the law is, how it is performed or carried out and whether it could be carried out differently. In this manner the questions of legal format are less relevant rather the answers being sought are for those problems posed by emerging from global perspectives, where the 'living law' scenario is evident.⁹²The issue is not really one of 'form' rather it is

⁸⁹ Twining 2009 (n 39) Chapter 4

⁹⁰ Tamanaha 2001 (n 48) 194

⁹¹ Ibid; There is a similarity in logic between this assertion and Gilligan's defence of legal centralism where he states that independence and autonomy of rule-based associations occur within the jurisdiction of state law and in relationship with it' therefore basing the recognition in state law Galligan (n 51) 177

⁹² Living law from the perspective of E Ehrlich 'Montesquieu and Sociological Jurisprudence' 29 *Harvard Law Review* 582-600, 584; law in practice, where the rules that matter may not be the formalised rules or even where no formalised rules exist.

one of fulfilling vital roles. This is what recommends the examination of Llewellyn's law-jobs because it provides such a working framework of inquiry. It could outline roles that are geared towards frameworks for accountability and legitimacy within CSR.

Llewellyn developed the law-jobs theory to solve his particular research problem which was to enable him study the law of the indigenous Indian groups,⁹³ but in doing so developed a law-jobs theory which could therefore provide a working framework of enquiry, applicable to the discovery of law's role in contemporary group scenarios. This could be intra-group⁹⁴ or inter-group⁹⁵. It is a flexible theory which does not have its own content but rather can be applied to various groupings, group rules and inter-relationships emerging even on a global scale.

This law-jobs perspective asks for the identification of the doing of the five law jobs and shifts the question of law from 'format' to 'role'. The five law-jobs are the disposition of trouble cases; the preventative channelling and the re-orientation of conduct and expectations so as to avoid trouble; the allocation of authority and the arrangement of procedures which legitimise action as authoritative; the net organisation of the group or society as a whole so as to provide direction and incentive and the use of the juristic method.⁹⁶

In this thesis this will serve as an analytical tool that redefines our approach to what is termed as law within CSR and thus broadens the basis of engagement of law with

⁹³ Twining 2009 (n 39) 106

⁹⁴ For example: In examining the use of contractual control in global supply chains See D McBarnet and M Kurkchyan 'Corporate Social Responsibility through contractual control? Global supply chains and 'other regulation' in D McBarnet and others (eds.) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP, Cambridge 2007) at 59-92

⁹⁵ For example when examining interactions between transnational corporations and society through regulation especially codes of conduct and reporting. A Wawryk 'Regulating Transnational Corporations through Corporate Codes of Conduct' in J G Frynas S Pegg *Transnational Corporations and Human Rights* (Palgrave Macmillan, 2003) 53-78

⁹⁶ K N Llewellyn 'The Normative, the Legal and the Law Jobs: The Problem of the Juristic Method' (1940) 49 *Yale Law Journal* 1355-1400,

CSR. The aim is to highlight in Chapter six, the potential of taking a ‘law-jobs’ legal perspectives within the field of CSR.

Twining affirms the utility of Llewellyn’s law job theory when he states that ‘as a heuristic device it provides a useable framework and a set of questions that can be asked.’⁹⁷ Furthermore Harden and Lewis point out that the law-jobs theory will allow for the identification of various mechanisms as legal and this will serve as a pre-cursor to questions of effectiveness and accountability. So in advocating the utility of the law-jobs theory, they point out that ‘questions of how well they function, how publicly visible they are and whose interests they serve are of course crucial questions of legitimacy – but unless we identify such mechanisms as ‘legal’ we have no initial purchase even to raise questions of legitimacy’⁹⁸This will mean that for CSR unless its mechanisms are identified as valid legal subjects as well, there may be no basis on which legal scholars can raise questions of legitimacy and accountability. In a practical sense a CSR instrument such as a code should firstly be highlighted as fulfilling a law-job role and then it can be assessed for its adequacy in achieving such a role and so on.

Another major advantage of the law-jobs approach is the transferability of the framework because it emphasises the ‘legal quality’ on basis of role and not form. Therefore diversity of regimes is still possible as McCoubrey highlights when she states that ‘...granted the diversity of municipal societies, such a functional criterion seems far more soundly based than a demand for institutional convergence with particular forms of Western Urban Industrial societies...’⁹⁹

⁹⁷Twining 2009 (n 39) 104; footnote 75

⁹⁸ I Harden, N Lewis *The Noble Lie: The British Constitution and the Rule of Law* (Routledge, 1988) 67

⁹⁹ H McCoubrey ‘Natural Law, Religion and the Development of International Law’ in M W Janis C Evans (eds) *Religion and International Law* (Kluwer (Martinus Nijhoff), Netherlands 1999) 177-190, 178

In this thesis this will allow for an analysis of the law-jobs theory to CSR as a non-traditional approach contrasted with traditional legal perspectives in corporate law. This is to discover potential roles that the law can play in augmenting CSR's legitimizing function. In one sense, the situation with global concepts such as CSR can be likened to a situation where law and governance of several issues is at an embryonic stage because authority over decision-making and rule-making are not clearly allocated, therefore to identify law or law-like in this most basic form serves a very useful function because it forces us to examine actions within concepts such as CSR for developments and for novel ways of handling issues which are encountered in inter-group societal relationships.

Llewellyn reiterates this position (in relation to one of the law-jobs- allocating the 'say') when he states that 'the case is clearest when no one has any idea whose say is to go and both what we think of as law and what we think of as governance is only in embryo (in our case, it is rather inapplicable)...'¹⁰⁰ Although Llewellyn speaks of primitive societies¹⁰¹ in this phrase, he could actually be describing modern global society where there are vacuums especially in International governance of MNC in the CSR area. Therefore the theory becomes a heuristic device for the analysis of the ability of law within CSR to do certain functions necessary for the accountable co-existence of business and society. This will also allow for the suggestion of a diversity of formats for doing the law-jobs within the CSR arena.

¹⁰⁰ Llewellyn (n 96) 1384

¹⁰¹ Ibid at 1360 states that by primitive he means 'without need for organs of expression or for careful deliberation (not) ...outmoded or displaced in any modern or sophisticated culture.'

It is important that law retains a dynamic and relevant nature in the CSR discourse to engage with the legitimacy exemplar. Twining in this vein points out that:

‘the law-jobs theory is a valuable and underused tool as a starting-point for analysing and comparing the internal ordering of groups and organisations...it can easily accommodate notions of normative and legal pluralism, non-state law and different levels of global, transnational and local relations and so can provide a basis for dealing with issues raised by globalisation and interdependence’¹⁰².

These contemporary issues within CSR have made it untenable for solely traditional perspectives of law to remain entirely relevant to newer phenomena such as CSR without the inclusion of broader visions of law. The argument is that contemporary issues have opened up novel analysis about the way law is conceived and therefore the law must now be conceived through this pluralistic lens.

¹⁰² Twining 2009 (n 39) 115; However Twining also points out that this inter-dependence is a relative matter W Twining *Globalisation and Legal Scholarship* Montesquieu Lecture Tilburg University 2009

4.3.3 Hard and Soft Laws

This section deals with another relevant distinction of type of laws found in legal literature. This is the distinction between ‘hard laws’ and ‘soft laws’. This is also linked to questions of format and the new constellations of law which is found in global affairs. This distinction is also a subject of major interest in European community law and International law because the rise in soft law is linked to the context of globalisation and is increasingly utilised in transnational and regional law.¹⁰³

In this context Kirton and Trebilcock suggest that ‘it is thus hardly surprising that the world has increasingly turned to soft law as solutions for the hard choices it confronts’¹⁰⁴ because at the globalised level legal relations are flexible and less rigid and this has given rise to a variety of powerful actors and institutions which have rule-making capability in response to challenges which they face.¹⁰⁵ Furthermore in the face of global challenges such as those posed by the misuse of corporate power, the legal response from international law has been rather muted reflecting the high level of compromise now present at that level.¹⁰⁶

This situation must also be coupled with the point that responsibility for hard legalisation at an international level is still in the hands of state governments and there has been an increasing reluctance to adopt a hard legalistic approach because of

¹⁰³ S Piccioto *Regulating Global Corporate Capitalism* (CUP, 2011)

¹⁰⁴ J J Kirton M J Trebilcock ‘Hard choices and soft law in sustainable global governance’ in J J Kirton M J Trebilcock (eds) *Hard choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (England, Ashgate, 2004) 3-32, 4

¹⁰⁵ K W Abbot D Snidal ‘Hard and Soft law in International Governance’ (2000) 54(3) *International Organisations* 421-456, 423

¹⁰⁶ C May *Global Corporate Power* (Lynne Rienner, 2006)

the ideological move towards capitalism and a free market in many states.¹⁰⁷ This ‘liberal international order’ has driven the adoption of different approaches to governance by states.¹⁰⁸

‘Hard laws’ can be defined as ‘legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing that law’¹⁰⁹ This is similar to the traditional view of law expressed earlier and are easily identifiable in the traditional sense as laws. On the other hand, soft law can be defined as ‘rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects.’¹¹⁰ Soft law has therefore be viewed as a practical response to hard choices faced by real-life actors¹¹¹

Alternatively it can be viewed more cynically as playing into the hands of capitalist power, because its non-binding nature can be exploited.¹¹² Nevertheless there is a sense that these views may be focusing on the wrong issues: laws whether soft or hard are made in reaction to a problem or an issue and therefore it is made to fulfil a role. The crucial question should be: does the given law fulfil that role?

¹⁰⁷ C Brummer *Soft Law and the Global Financial System* (Cambridge, CUP 2011); C Redgwell ‘International Soft law and Globalisation’ in B Barton and others (eds.) *regulating Energy and Natural Resources* (Oxford, OUP 2006) 89-106. This is in a sense the outworking of the ideological shift which lends power to corporations.

¹⁰⁸ Ikenberry identifies some aspects that have featured as part of this liberal international order and they include: open markets, international institutions, cooperative security, democratic community, progressive change, collective problem solving, and the rule of law. See G J Ikenberry ‘Liberal Internationalism 3.0: America and the Dilemmas of Liberal World Order’ (2009) 7(1) *Perspectives on Politics* 71-87. There are ancillary questions about this being an outworking of power in the form of ideological influence.

¹⁰⁹ Abbot & Snidal (n 105) 421

¹¹⁰ F Snyder ‘The effectiveness of EC Law’ in T Daintith (ed.) *Implementing EC Law in the UK* (Chancery, London 1995)

¹¹¹ Kirton & Trebilcock (n 104)

¹¹² This is because soft law is quite fluid and therefore can lack legitimacy and accountability. The variety of codes can disguise inaction or dictate the agenda on terms the terms of rule-making institutions. See A C Cutler *Private Power and Global Authority –transnational merchant law in the global political economy* (Cambridge, CUP 2003) 23

There are two key instruments of soft law. They are voluntary standards and informal institutions at different levels of orderings which include international, transnational and national levels.¹¹³ This also raises questions of whether soft laws are a developmental stage before hard laws can be introduced or whether they are laws in their own right. This is because soft laws often lack the binding force or enforcement of hard law. There is no definitive answer to this question rather it is apparent that soft law is more reactive when dealing with the uncertainty of societal problems. This is ‘especially when it initiates processes that allow actors to learn about the impact of agreements over time’¹¹⁴ and when it facilitates dialogue, compromise and mutually beneficial co-operation between actors with different degrees of power.¹¹⁵

Soft law can be adequately characterised as laws when linked to notions of legal pluralism and decentred perspectives of laws. Robilliant agrees with this view and identifies that the genealogies of soft law lie in the notions of social law and legal pluralism that has come to pervade debates over globalisation of law and harmonisation of European law.¹¹⁶ It is a way of reconceptualising law to recognise rule-making activity with significant impact which does not fall within the traditional view of law. These are attempts to reconceptualise law in a way that is relevant to the issues and concepts emerging or gaining ground as a result of globalisation.

Yet soft law faces some genuine challenges which include a lack of accountability, strong surveillance and enforcement.¹¹⁷ It also introduces uncertainty because there

¹¹³ Kirton & Trebilcock (n 104) at 4

¹¹⁴ Abbot & Snidal (n 105) 423

¹¹⁵ Ibid

¹¹⁶ A D Robilliant ‘Genealogies of Soft Law’ (2006) 54(3) *The American Journal of Comparative Law* 499-554, 501

¹¹⁷ Kirton & Trebilcock (n 104) at 6

are often various voluntary standards.¹¹⁸ This is what strengthens calls for hard laws to complement soft laws.¹¹⁹ Nevertheless the characterisation of laws as ‘soft’ or ‘hard’ represents an attempt to capture the variety of rule-making that is taking place in global affairs. These soft law rules are often introduced in response to urgent social action. As De Sousa Santos concludes the ‘differences in labelling and content notwithstanding, these studies broadly share a diagnosis and a proposal for the solution of the regulatory dilemmas posed by globalisation’.¹²⁰ He fundamentally identifies three different legal spaces and their correspondent legality ‘local, national and world’ but he sounds a note of warning that it is futile to attempt to distinguish these spaces by what they regulate, ‘as they regulate or seem to regulate the same social action’¹²¹.

It is therefore possible to perceive law not just from its labelling or content (that is its ‘form’) but rather from its role in society: for example its role in regulating and attempting to control a given behaviour. Picciotto points out that ‘the question is not whether hard and soft law are mutually exclusive but how they can best be combined to produce effective regulations.’¹²² In this manner it is possible to apply all relevant kinds of rules towards the achieving of the given role and then to modify the rules where the role is not being effectively carried out. The next section will examine the linkage between law and regulation as relevant to this perspective.

¹¹⁸ Kirton & Trebilcock (n 104) at 6

¹¹⁹ D M Trubek M P Cottrell M Nance ‘Soft Law, Hard Law and European Integration: Towards a theory of Hybridity’ (2005) University of Wisconsin Legal Studies Research Paper No. 1002

¹²⁰ B D Santos ‘Law, Politics and the subaltern in counter-hegemonic globalisation’ in B. De Sousa Santos CA Rodriguez-Garavito *Law and Globalisation From Below- Towards a Cosmopolitan Legality* (CUP, Cambridge, 2005) 1-26, .6

¹²¹ B D Santos ‘Law: A Map of Misreading: Towards a Postmodern Conception of Law’ (1987) 14(3) *Journal of Law and Society* 279-302, 287

¹²² Picciotto (n 103) 204

4.4 Law and Regulation

The reference to law and regulation is often extensively made in legal literature. This section indicates how this applies in this thesis to our legal analysis. This is because yet again the relationship between these two concepts ‘law’ and ‘regulation’ will depend on the definition applied to each.¹²³ Black points out that ‘decentred analysis of regulation will have clear similarities with decentred or pluralistic conceptions of law than with centred conceptions’¹²⁴

Regulation can be viewed in several senses. Baldwin and Cave gives a list which includes firstly regulation in a narrow sense, as a specific set of commands involving binding rules given for a specific purpose and applied by a given body.¹²⁵ In this first sense it is similar to Selznick definition of Regulation as ‘sustained and focused control exercised by a public agency over activities valued by a community ...’¹²⁶ In this vein regulation is perceived as an instrument of traditional prescriptive law and one of the means through which law can achieve its objectives.

The second sense of regulation given by Baldwin and Cave involves that of deliberate state influence where regulation refers to the variant forms of regulation that the state may use to influence and control social behaviour. This is a slightly wider term of regulation as it covers state action that may be command-based or

¹²³ J Black ‘Critical Reflections on Regulation’ Discussion Paper 4 January 2002 Centre for Analysis of Risk and Regulation, London School of Economics

< <http://www.lse.ac.uk/collections/CARR/pdf/DPs/Disspaper4.pdf> > accessed 10 March 2010

¹²⁴ Ibid at 22

¹²⁵ R Baldwin M Cave *Understanding Regulation Theory, Strategy and Practice* (OUP, Oxford, 1999) 2

¹²⁶ P Selznick ‘Focusing Organisational Research on Regulation’ in R Noll (ed) *Regulatory Policy and the Social Sciences* (Berkeley, Calif., 1985) 363

economic-based. Here command-based is used in reference to the use of binding rules or economic-based in the use of economic incentives or measures.

However this definition could also be read to include perceptions of state regulation from subject-specific aspects. For example regulation as seen from an economist's perspective could emphasise rules relevant to the correction of market failure.¹²⁷ In relation to this Ogus points out that economic analysis attempts to identify the failure of the market which justifies intervention and select the method of intervention that would correct the failure at least cost.¹²⁸ These theories collectively referred to as 'economic theory of regulation' utilise different perspectives and tools for justifying regulation and its implications. These theories include Public Interest theories and Private Interest theories.¹²⁹

Law in this arena of economic theory may at first sight appear limited especially if it is merely perceived as an instrument of regulation but this is not the case as it can also be re-conceived as creating a facilitative framework which allows for the use of economic incentives.¹³⁰ This perception is compatible with the idea of meta-regulation where law would allow for the recognition of 'some governance mechanisms that we might not have traditionally thought of as law, could in fact be thought of as law in an extended sense and evaluated according to criteria of legality'.¹³¹ Morgan and Yeung also highlight the law's instrumental role in shaping social behaviour as well as the way in which the law may give expression to particular values.'¹³²

¹²⁷ Ibid

¹²⁸ A Ogus *Regulation: Legal Form and Economic Theory* (Clarendon Press, Oxford, 1994)

¹²⁹ Ibid

¹³⁰ B Morgan K Yeung *An Introduction to Law and Regulation Text and Materials* (CUP, Cambridge, 2007)

¹³¹ C Parker 'Meta-regulation: Legal accountability for corporate social responsibility' in D McBarnet et al (eds.) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge CUP, 2007) 207-240, 213

¹³² Morgan & Yeung (n 130) 5

They point out that law in regulation may have two roles: facilitative and expressive. Their given example is that of a community that decides to maintain the quality of its water-ways. It may do so through prohibitory orders or through tradeable permits for dumping. In their opinion the law is involved in both: in one sense as threat and in the other, in facilitating the interaction between state and the market.¹³³ This can be exemplified through some emerging CSR practice like in Denmark, where legislation has been passed mandating the publication of CSR policies where the corporation has one.¹³⁴ The choice to have a policy remains voluntary but once that decision is made, then publication of this policy is mandatory.

Finally regulation in the third sense, involves a broad conception of regulation to include all forms of social control or influence.¹³⁵ This would include regulation at an international, national or local level as well as regulation by the state or other actors. This would also include self-regulation.¹³⁶ Self-regulation embraces a wide range within regulation and may apply to a range of institutional arrangements.¹³⁷

Ogus points out that such arrangements may vary in the degree of autonomy, degree of legal force and degree of monopolistic power¹³⁸. Black examines four types of self-regulation which include¹³⁹: mandated self-regulation, sanctioned self-regulation, coerced self-regulation and voluntary self-regulation. She defines self-regulation as ‘the situation of a group of persons or bodies, acting together,

¹³³ Ibid

¹³⁴ Law on CSR Reporting, Danish Commerce and Companies Agency Website <<http://www.csrgov.dk/sw51377.asp>> accessed 1 July 2010

¹³⁵ Baldwin & Cave (n 125) 2

¹³⁶ See Ibid at 125. See also A Ogus ‘Rethinking Self-Regulation’ in R Baldwin C Scott and C Hood *A Reader on Regulation* (OUP, Oxford 1998) 374-388; J Black ‘Constitutionalising Self-Regulation’ (1996) 59 (1) *Modern Law Review* 24-55; More relevant to the global context see R Jenkins ‘Corporate Codes of Conduct: Self-Regulation in a Global Economy’ Technology, Business and Society Programme Paper No. 2 (UNRISD, 2001)

¹³⁷ Regulation within CSR will cover the use of corporate codes of conduct. See Jenkins ibid

¹³⁸ A Ogus ‘Re-thinking Self-regulation’ (1995) 15(1) *Oxford Journal of Legal Studies* 97-108, 99-100

¹³⁹ J Black ‘Constitutionalising Self-regulation’ (1996) 59(1) *Modern Law Review* 24-55, 27

performing a regulatory function in respect of themselves and others who accept their authority',¹⁴⁰.

This third sense of regulation is the most relevant for this thesis and our contextual definition of law from a law-jobs problem solving perspective because this will refer to all forms of instruments that can be harnessed to achieve the law-jobs. In this sense 'regulation can be described to include all forms of social control available to harness a wide range of actors in addressing a particular set of problems.'¹⁴¹ This third definition of regulation can therefore be referred to as 'decentred regulation' and therefore non-specific as to the position of state actors as drivers of regulation. It has been noted that this resonates with issues arising from globalisation. Black has further refined this definition of regulation in an essentialist sense to mean:

'the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification',¹⁴².

Defined in this way regulation becomes the means of achieving the law-job outcomes through a variety of identified mechanisms which could include variant regulatory instruments, soft laws and hard laws. In other words regulation is a 'law-tool' in the Llewellyn sense. Such dynamism is necessary for an extended and relevant role for law within CSR regulation and globalisation. It opens up the possibility for various permutations of law, regulation and CSR. The next section will analyse contestations of law within the current CSR context to indicate how these debates about law feed into its role within the CSR concept.

¹⁴⁰ Ibid

¹⁴¹ N Gunnigham and P Grabovsky *Smart Regulation* (OUP, Oxford 1999) 4

¹⁴² Black (n 123) 20

4.5 Law within the CSR Context

This section outlines the current perceptions and contestations about law in the CSR context. The current CSR context is dominated by norms, codes, standards and guidelines. These include general global initiatives like the UN Global Compact, the ISO 26000, and the OECD Guidelines for Multinational Enterprises. Other global initiatives focused on specific aspects of CSR such as Human Rights: Universal Declaration on Human Rights, Voluntary principles on Security and Human rights; Labour: International Labour Organisation Tripartite Declaration on Multinational Enterprises; Environment: Rio Declaration on Environment and Environment; Anti-corruption: UN Convention against corruption and the Extractive Industries Transparencies Initiative. There are also various company codes, framework agreements and reporting standards created by a variety of actors.¹⁴³

Yet the starting point when examining a plethora of popular definitions of CSR is often that they appear to exclude law from the purview of CSR purporting that CSR is either beyond law or voluntary.¹⁴⁴ In spite of this it is certain that CSR at its core addresses issues arising from the relationship between corporations and society and

¹⁴³ For a comprehensive list see D Leipziger *The Corporate Responsibility code book* (2nd ed. Greenleaf, Sheffield 2010)

¹⁴⁴ Some examples include: CSR defined as ‘the firm’s consideration of and response to, issues beyond the narrow economic and technical and legal requirements of the firm to accomplish social benefits ...’ K C Davis ‘The case for and against business assumption of social responsibilities’ (1973) *Academy of Management Journal* 312-322, 312; ‘Actions that appear to further some social good beyond the interests of the interests of the firm and that which is required by law’ A McWilliams D Siegel ‘Corporate social responsibility: A theory of Firm Perspective’ (2001) 26(1) *Academy of Management Review* 117 -127, 117; ‘A concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis’ European Commission Green Paper 2001 *Promoting a European Framework for Corporate Social responsibility*. The EC has redefined this in 2011 to accept that CSR is the ‘responsibility of enterprises for their impacts on society.’ EC *A Renewed Strategy 2011-14 for CSR* Brussels Com (2011) 681 Final

that law is undeniably important in this sphere.¹⁴⁵ Sabapathy in this regard, points out that ‘irrespective of the explicit interest of law in framing corporate responsibility, the two are always and necessarily intertwined...’¹⁴⁶ The stumbling block has been that CSR is occasionally perceived as intrinsically voluntary, while law has been perceived as mandatory rules,¹⁴⁷ though it is important to stress that such simple categorization is problematic at various levels. The way law is defined will influence the perception of the intensity of relationship between the two concepts but even at the most superficial level where law is viewed in terms of formal state law backed by state authority, there is still a relationship.

Firstly, because CSR is not inextricably linked to voluntary formats, the choice of a voluntary instrument as a means of achieving CSR objectives is not intrinsic to CSR as a concept. This is because on the one hand, several aspects of CSR are not voluntary, as one writer put it, “many CSR-related issues are already closely regulated”¹⁴⁸; this will include health, safety and environmental regulations which are subject to differing levels of regulation across different countries and then on the other hand, it is important that the concept of CSR should be divorced from the means of regulating to achieve it.

The choice of voluntary instruments for regulation to achieve CSR should not be seen either as a defining feature of CSR or a defining feature of law’s relationship with CSR. Within this area of regulation, one agrees with Zerk when she points out

¹⁴⁵ H Ward ‘Corporate Social Responsibility in Law and Policy’ in N Boeger et al (eds.) *Perspectives of Corporate Social Responsibility*, (Edward Elgar, 2008); see also the influential definition of CSR by Carroll pointing out that the legal is an aspect of CSR: A Carroll ‘Corporate Social Responsibility – Evolution of a Definitional Construct’ (1999) 38(3) *Business and Society* 268-295

¹⁴⁶ J Sabapathy, ‘In the dark all cats are grey: corporate responsibility and legal responsibility’ in S Tully (ed) *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, Cheltenham 2007) 235-253.

¹⁴⁷ This is entrenched in the positivist view of law especially with regard to narrowing law to state law or regarding state law as central and core. See Galligan (n 51) 177 -178

¹⁴⁸ J A Zerk *Multinationals and Corporate Social Responsibility Limitations and Opportunities in International Law* (CUP, Cambridge 2006) 34

that the ‘voluntary versus mandatory debate reflects an overly simplistic view of what law is and how it guides human behaviour’¹⁴⁹ Rather it is preferable to acknowledge that changing priorities and demands in society may lead to certain CSR issues and concerns being regulated in a voluntary, mandatory or hybrid regulatory fashion. A good example would be the environmental and social issues which may impact on climate change such as air pollution from vehicles where a range of measures are used as regulation across different countries.¹⁵⁰

Werther and Chandler assert that this on-going redefinition and evolution of societal expectation causes the CSR response to evolve and in time, these expectations may evolve from a discretionary to a mandatory requirement.¹⁵¹ There is also the distinct possibility that a hybrid system of regulation may emerge where voluntary action is carried out within an enabling framework. This does not define law’s relationship with CSR; it only reflects the chosen methods of demanding social responsibility.

Secondly, even where the choice of CSR regulation remains to use voluntary instruments, that is not tantamount to excluding law. The law can and should be more broadly defined to include not only mandatory legal rules but rules more generally. This is especially relevant in a transnational context. Rules in this sense will cover ‘general norms mandating or guiding conduct or action in a given type of situation’.¹⁵² This would include soft laws described earlier.

Although Law will not cover every rule as moral rules do not always coincide with legal rules, it has a paramount role in the creation of specific legal regulatory rules or broader facilitative framework for other forms of regulation.¹⁵³ This perspective

¹⁴⁹ Ibid at 34-35

¹⁵⁰ W B Werther and D B Chandler *Strategic Corporate Social Responsibility: Stakeholders in a Global Environment* (Sage, 2006) 13

¹⁵¹ Ibid

¹⁵² W Twining D Miers *How to do things with rules*(CUP, Cambridge 1999) 123

¹⁵³ Morgan & Yeung (n 130)

entails examining legal theory for a broad conception of law that captures this broader role of law. This conception would provide for the dynamism of law and its applicability to contemporary phenomena like CSR. Twining, points out that:

‘a broad vision of legal theory helps us see our subject whole, to locate law in a map of all learning to spot gaps, biases and imbalances in contemporary treatments, and to identify questions or lines of enquiry that have been more or less marginalized in our legal culture’.¹⁵⁴

He also aptly surmises the challenge that faces law as one of adaptability and relevance to issues on a transnational level.¹⁵⁵ These features of adaptability and relevance are most pertinent for our purposes because of the complexity of action taking place in the transnational arena

Finally, where CSR is proclaimed as actions taken beyond the law, the relationship between law and CSR has then been referred to as ‘*paradoxical*’.¹⁵⁶ ‘This is referred to as ‘paradoxical’ because even where CSR is seen as beyond the law, it does not operate outside the law. In one sense Parker poses the question: ‘how is it possible for the law to make companies accountable for going beyond the law?’¹⁵⁷ In the way already described, it is questionable that CSR is going ‘beyond the law’ but even where this is accepted the answer depends on how law is conceived. Law which is broadly conceived appears most relevant in this category. Parker in response to this question suggests the potential of ‘meta-regulation’ reflecting – law which seeks:

‘to hold businesses accountable for taking their responsibilities seriously by using various mechanisms to encourage or enforce businesses to put in place internal governance structures, management practices and corporate cultures aimed at achieving responsible outcome.’¹⁵⁸

¹⁵⁴ W Twining (ed.) *Legal Theory and Common Law* (Basil Blackwell, Oxford 1986) 6

¹⁵⁵ Twining 2009 (n 39) 117

¹⁵⁶ C Parker, ‘Meta-regulation: Legal accountability for CSR’ in D. McBarnet et al (eds.) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP, Cambridge 2007) 207-240

¹⁵⁷ Ibid

¹⁵⁸ Parker (n 156)

This is a response which mirrors the practical aspect of a wider conception of law's role. This is because it echoes law's wider role in creating facilitative framework for other types of normative activity. Yet it is still focused on form rather our suggested approach will involve a redefining how law is conceived. This conception draws attention to the cognizance of law's potential role in a changing world.¹⁵⁹ A conception of law which would be focused on the doing of the relevant jobs which law can perform within CSR.

Therefore despite the contestations on the role of law within CSR, it is possible for law to respond from traditional perspective that is state law centred and hard law based or it can respond from a pluralistic perspective geared towards the doing of the law –jobs and the next two chapters examine these perspectives to show the potential contribution law can make to the core of CSR.

¹⁵⁹ For support for this perspective, see Twining 2009 (n 39)

4.6 Conclusion

The chapter explores what law could mean in the context of legitimacy and the drive for CSR. It identifies a traditional perspective which is state-centred and non-traditional perspective which includes pluralistic sources. It argues that to capture the potential role of law there is the need for a pluralistic view of law amenable to concepts arising under globalisation. This view of law is capable of identifying the wider role for law but also capable of stimulating and framing law roles. This is necessary because at the core of CSR is the drive for legitimacy of corporate power. This is an area where law both in its traditional and non-traditional sense has a major role to play.

The complexity of the area of CSR entails demands from different levels and over varying issues requires flexibility and dynamism. Therefore when examining global concepts such as CSR, the role of law and regulation should be viewed from a perspective that is able to capture broader aspects of what the law can do. A conception of law would allow for the inclusion of both state law and non-state law and the evolution of new legal tools and mechanisms as well as the application of old ones where necessary.

The task identified within this thesis of legitimating corporate power within CSR through legal perspectives can now be examined through the traditional and the non-traditional lens. The next two chapters will juxtapose attempts to respond to these demands from a traditional law perspective (corporate law) with the new proposal to examine a broader perspective of law's role through legal theory (Llewellyn's law-jobs). These are not mutually exclusive but the newer approach will allow for

framing of law within CSR under a broad view that will allow the use of varied law tools (traditional and non-traditional).

These perspectives are therefore continued in the next two chapters examining the corporate law perspective as traditional state law approach and the law-jobs perspective as non-traditional perspective. This allows the thesis to explore the potential and limitations that such legal perspectives can bring to the identified core of CSR which is legitimacy of corporate power.

CHAPTER FIVE

LEGITIMACY ISSUES I: CONSTRAINTS ON CORPORATE POWER WITHIN TRADITIONAL CORPORATE LAW

*'...Different theoretical conceptions of the company have been intimately embroiled in the effort of company law to justify the vesting of substantial power in corporate management'*¹

5.1 Introduction

This chapter examines how corporate law as an example of the traditional state-centred legal perspective addresses the legitimacy challenge posed by CSR. Corporate law as the law of corporations is often seen as the natural home for addressing questions of the relationship between law and CSR. This is why scholars have advocated that it would have been desirable to have CSR issues integrated into this basic state legal framework therefore creating an identifiable framework from which CSR initiatives would flow.

Ward puts it thus:

*'The argument here would be that sustainable development (and/or other values associated with CSR) should be integrated within the basic legal framework, governing the formation and functioning of business enterprises – not exclusively as an 'add-on' in the form of environmental, labour or anti-corruption legislation- to name a few examples.'*²

¹ M Stokes 'Company Law and Legal theory' in W Twining (ed.) *Legal Theory and Common Law* (Blackwell, Oxford 1986) 155-183,161

² H Ward 'Corporate Social Responsibility in Law and Policy' in N Boeger, R Murray and C Villiers *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham, 2008) 8-38, 21

Frynas also suggests that:

‘Policy makers should make a concerted effort to re-write company law and other regulatory instruments to increase the power of ‘non-traditional stakeholders’ and to require companies to become more transparent about all of their activities. Corporate governance reforms will help companies to make better social and environmental choices in front of shareholders.’³

Furthermore corporate law represents a peculiar platform because it is the identifiable state legal framework that is common to most states in the world.⁴

This chapter therefore examines corporate law and more specifically the potential of attempts to drive the legitimacy agenda within corporate law. It demonstrates that although corporate law as a traditional view of law can handle the issue of corporate legitimacy within CSR, it chooses to only partially address this issue. This may be because over time corporate law has developed a focus on utility. Utility interpreted narrowly as profit-maximisation.

Hurst points out this two-fold division of the drive for legitimacy within corporate law, the division between the drive for utility and responsibility.⁵ In the US historical corporate context, he remarks that ‘utility and responsibility as legitimizers were ideas which materially affected our public policy...yet utility tended to become an end in itself.’⁶ This emphasis on utility within corporate law underscored law’s role in entrenching legally protected corporate power and offering a structure for the aggregation of power but failing to respond to problems of the responsibility aspect of corporate legitimacy, with the result that this has had to develop outside the context of corporate law. He therefore concludes that ‘so long as dominant opinion

³ J G Frynas *Beyond Corporate Social Responsibility* (CUP, Cambridge, 2009) 175-176

⁴ I Seidl-Hohenveldern, *Corporations in and under International law* (Grotius Publications Limited Cambridge 1987) 1

⁵ J W Hurst *The Legitimacy of business in the Law of the United States 1780-1970* (University of Virginia Press Charlottesville 1970)

⁶ Hurst (n 5) 58 - ‘What the law permits, what it enforces or compels, should be socially useful and socially responsible’

continues to accept the large business as a legitimate constituent element in social power, the division of function between corporation law and regulatory law bearing on corporation's behaviour and impact rather than on their internal governance seems likely to remain',⁷

Yet it must be stated that it is not corporate law which is intrinsically unable to reform itself, it is the nature of corporate law as location for power contests (hence political nature) that detracts from the willingness for reform. Ireland instructively points out that:

'the corporate legal form as presently constituted is not an economic necessity but a political construct developed to further the interests of particular groups...as political constructs, the corporate legal form and its constituent elements- separate legal personality, limited liability and so on -should be subjected to critical analysis.'⁸

This chapter engages in this analysis of corporate law as potential legitimiser of corporate power by initially examining corporate legal theory and corporate governance theory. This is because corporate theories have been influential in the attitude of law towards the corporation. It has also been crucial in the attempt by law to create legitimacy for corporate power by ensuring that there is an adequate framework of checks and balances.⁹

The focus on utility has emerged from the choice of corporate legal theory that privileges private ownership in furtherance of a contractual vision of the corporation.

The chapter also addresses the issue of corporate governance theories and models

⁷ Hurst (n 5) 111

⁸ P Ireland 'Limited liability, shareholder rights and the problem of corporate irresponsibility' (2010) 34 Cambridge Journal of Economics 837-856,838-839

⁹ D Millon "Theories of Corporation" (1990) Duke Law Journal 201- 262 'at any point in time particular theories are perceived to justify particular legal rules or at a more general level, a particular approach to the regulation of business activity' 204 see also M J Horwitz "Santa Clara Revisited: the Development of Corporate Theory" (1985-1986) 88 West Virginia Law Review 173 -224 at 175-176 reprinted in WJ Samuels A S Miller *Corporations and Society: Power and Responsibility* 13- 64 Horwitz argues that the natural entity theory for instance has had a major influence in legitimising big business

within corporate law because this is the specific part within corporate law which can be used to discuss both the organisation of the corporation's affairs and the relationship of the corporation to society.¹⁰

The next section will then analyse an example of state corporate law reform. The chosen example is UK Company law because it has gone through what has been described as a 'landmark review of corporate law'¹¹ It engaged in a long review and reform process. The UK example is seen as the best demonstration of corporate law's response to pressures for change.¹² As Horrigan points out that 'corporate law's conception of corporate responsibility and governance is also facing 21st century pressures (from within and without) to re-fashion itself, in ways that extend beyond simple perfecting the alignment between company, board and share-holder interests.'¹³ This examination will look at the issues of shareholder primacy and director's duties, effective monitoring structure (corporate governance) and the limitations of this substantive approach to broader issues of CSR.

The chapter indicates that corporate law in this traditional form has the potential to contribute to the legitimacy of power but limitations in the substance, framing and focus mean that the utility element of legitimacy is emphasised rather than the responsibility element and as the UK corporate reform indicates the potential for this focus to change is minimal therefore law's response will need to come from outside

¹⁰ See S Bottomley, 'From Contractualism to Constitutionalism: A Framework for Corporate Governance' (1997) 19 Sydney Law Review 277- 313 also cited in B. Sheehy 'Scrooge--The Reluctant Stakeholder: Theoretical Problems in the shareholder-stakeholder debate' (2005) 14 Miami Business Law Review 193- 241 Sheehy *ibid*, surmising that essentially 4 questions have been addressed under corporate governance- what is the entity being governed? By whom should the entity be governed? What is the best way to govern the entity? And in whose interests should the entity be governed?

¹¹ B Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, Cheltenham 2010) 141

¹² Ward (n 2). Ward points out that in the UK, 'the discussion on the proper conceptual framework for linking company law with the pursuit of corporate responsibility took place between 1998 and 2006 in the context of the UK Company Law Reform Process.' P.21

¹³ Horrigan (n 11) 10

corporate law. This leaves room for an alternative view from the non-traditional perspective of the law-jobs which will avoid issues of form altogether.

5.2 Corporate Legal theory

Corporate legal theory has a history that is mingled with the history of the corporations and questions of their true nature. It is important to note that there has been extensive literature on the theories covered in this chapter.¹⁴ Nevertheless the issues involved are still far from settled and the actions of corporations trigger fresh arguments always.

This could be simply because the nature of corporations is contestable or because we need to continuously re-examine these theories as we apply them to a changing and dynamic world. Sommer suggests that ‘our complicated political and economic society is constantly compelling us to re-examine the assumptions and the rules that guided us in the past to determine their relevance to what we confront today.’¹⁵ Therefore as newer and wider forms of corporate power emerge under globalisation the debates are renewed afresh hopefully with new insights and solutions relevant for the age.

¹⁴ Millon (n 9); F Hallis, *Corporate Personality: A study of jurisprudence* (OUP, Oxford 1930) F M Maitland *Introduction to Gierke's Political Theories in the Middle Ages* (CUP, 1900), A. Machen Jr. ‘Corporate Personality (1911) 24 Harvard Law Review 253 -267, P Vinogradoff, ‘Juridical Persons’ (1924) 24 Columbia Law Review 594 -604, J. Dewey, The historic background of Corporate Legal personality (1926) 35 Yale Law Journal 655 - 673, S A. Schane, ‘the corporation is a person: the language of a legal fiction’ (1987) 61 Tulane Law Review 563- 609, K Iwai ‘Persons, things and corporations, the corporate personality controversy and comparative corporate governance’ (1999) 47 American Journal of Comparative law 538-632; For corporate governance theories –the literature is listed within but an essential starting point remains A.A. Berle & G. C. Means *The Modern Corporation and Private Property* (with a new introduction by M. Weidenbaum & M. Jensen) (Transaction Publishers, New Brunswick [USA originally published:1968, 1991])

¹⁵ A A Sommer, Jr. ‘Whom should the corporation serve? The Berle-Dodd debate re-visited sixty years later’ (1991) 16 Delaware Journal of Corporate Law 33- 53

There is a specific body of legal and economic theory built around arguments of the corporation's nature which influence the direction of analysis about the manner of control of corporations and corporate power. Horrigan affirms that 'corporate theorizing is the bedrock of normative justifications that inform corporate law making, law reform and practice.'¹⁶ Recurring through the body of legal theory within corporate law is the question of who is the corporation for and by implication, how it should be controlled? As explained the answers are never static, as these theories must be re-examined and applied to changes in political and economic realities.

The aim of such re-examination is to prompt new perspectives and solutions. The manner in which such theories are interpreted and adapted inadvertently affects the approach adopted to deal with corporations if only to be able to exclude certain solutions as tried and tested or irrelevant. Also the corporation itself by its actions affects and causes us to review our views and interpretations of it.¹⁷ For instance this basis allows for the argument that where it is found that the corporations are entirely private of origin and consistent with principles of contract and private property, then the focus must be inwards at internal regulatory measures and governance that satisfy 'the private owners'.

However one must bear in mind that this analysis is taking place against a background established in the previous chapter of the immense power of multinational corporations to affect societal interests. It seeks redress for the exercise of observable or potential corporate power in today's globalised society. This is a wider perspective relevant to a global but uneven world. Multinational corporations

¹⁶ Horrigan (n 11) 76

¹⁷ Sommer (n 15) - where he surmises that legal theory shapes social practice and practice informs theory at the same time.

do not have legal status in and of themselves as ‘multinational corporations’¹⁸, therefore this study of corporate governance must begin with an examination of the legal theory behind the formation of the simple corporation.

The most common form of medium for large business such as multinational corporations is the public corporation (or company) limited by shares. This is because it offers the four most attractive features¹⁹, that is, (a) legal personality; (b) limited liability for investors and (c) centralised management, (d) free transferability of interests. The corporation therefore may offer shares to the public and may then register to be quoted on the stock exchange market.²⁰ The latter three attributes are derived from the first attribute, which is corporate personality.

An understanding of corporate personality as it has evolved is central to comprehension of why the corporate form can give rise to such power as it possesses today and how its governance models have evolved. The origin and nature of the corporation has been a source of seemingly endless dispute.²¹ There is an astonishing wealth of material on this controversy of the exact jurisprudential nature and origin of the corporation.²²

The source of this dispute on the role of corporations can even be traced further back to two competing notions about the human individual or as Allen put it, ‘what it

¹⁸ This was discussed in the earlier chapter: See also P T Muchlinski *Multinational Enterprises and the Law* (Blackwell Publishing, Oxford 1999) 111.

¹⁹ This is as listed by Dean Robert Clark of the Harvard Law School in RAG Monks and N Minow, *Corporate Governance* (3rd ed. Blackwell, Oxford 2004) 11

²⁰ Hansma and Kraakman list five essential features of business corporations in major commercial jurisdictions as separate legal personality, limited liability, shared corporate ownership, delegated management under a board structure and transferability of shares. H Hansmann R H Kraakman ‘The End of the History of Corporate Law’ in J Gordon M Roe (eds.) *Convergence and Persistence in Corporate Governance* (CUP, Cambridge 2004) 33-68, 34

²¹ M Radin ‘The endless problem of corporate personality’ (1932) 32 *Columbia Law Review* 643-667

²² A sample can be found in the works of Hallis (n 14), Dewey (n 14), Iwai (n 14) & G Teubner ‘Enterprise corporatism, New Industrial policy and the “essence” of the legal person’ (1988) 36 *American Journal of Comparative Law* 130 - 155

means to be human being in society’;²³ Are men individual beings or are they social beings? Allen finds that the first view of men as individuals beings with individual rights, has roots in the works of Hobbes, Locke and Smith, further shaped by Bentham and Mills and then developed in Herbert Spencer’s work.²⁴ This view is of ‘the social world populated by individuals rationally...pursuing their own vision of the good life’²⁵ Hence in this view which he refers to as the liberal-utilitarian model, property law and contracts law are of greatest importance for human welfare.

However the second view, which designates men as social beings, is aptly called the social model. This model perceives the world as ‘populated by persons of limited rationality who lead lives embedded in a social context in a community.’²⁶ This model perceives only limited usefulness in contract and property law re-asserting that their utility rests on the basis of shared norms including fairness and trust. They are prepared to tolerate vagueness in rules in order to achieve a fair outcome. This debate follow through into disputes about the personality of the corporation.

²³ W T Allen ‘Contracts and Communities in Corporation Law’ (1993) 50 *Washington & Lee Law Review* 1395 - 1407

²⁴ *Ibid*; sometimes referred to as social contractarians, Hobbes and Locke believed in a social contract- ‘the idea that only with his consent can a person be subjected to the political power of another’. See R Wacks *Understanding Jurisprudence* (OUP, New York 2005) 20. Hobbes (1651) describing life as ‘solitary, poor, nasty, brutish and short’ and advocated that persons will only pursue their own self-interests. For his most popular work see: T Hobbes, *Leviathan*, M Oakshott(ed.) (Basil Blackwell, Oxford 1960) Locke (1689) though influenced by Hobbes, rejected the nasty, brutish and short premise and promotes the right of oppressed people to resist tyranny and a man’s right to property. For his work read: J. Locke, *Two treatises of Government*, P Laslett(ed.) (CUP, Cambridge 1964). Adam Smith (1776) economist (in line with Locke) viewed property as a natural right and its protection as a law of nature. See A Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* M Cannan (ed.) (5th ed. Methuen & Co. Ltd., London 1904) Book I, Chapter X, Pt. II. Bentham and Mills are both Utilitarians which are concerned are concerned with [among other things] the impact of judges actions, laws and institutions on *individuals*. For a helpful discussion on this subject see N E Simmonds *Central Issues in Jurisprudence –justice, law and rights* (3rd ed. Sweet & Maxwell, 2008) Herbert Spencer, a social Darwinist, was also of the view that the society was evolving to increase the freedom of individuals so that government intervention ought to be minimal in social and political life. See H Spencer ‘Progress: Its Law & Causes’ (1857) 67 *The Westminster Review* 445-465,

²⁵ Allen (n 23) 1396.

²⁶ Allen (n 23) 1397; This model is championed by Emile Durkheim; For Durkheim’s work see E Durkheim, *The Division of Labour in Society*, translated by George Simpson, (Collier-Macmillan, London 1964)

Corporate personality is an attribute of corporation common to most legal systems of the world.²⁷ The International Court of Justice in the case of *Barcelona Traction, Light and Power Company Ltd.*, observed that:

‘seen in historical perspective, the corporate personality represents a development brought about by new and expanding requirements in the economic field, an entity which in particular allows of operation in circumstances which exceed the normal capacity of individuals. As such it has become a powerful factor in the economic life of nations. Of this, municipal law has had to take due account, hence the increasing volume of rules governing the creation and operation of corporate entities, endowed with a specific status. These entities have rights and obligations peculiar to themselves’²⁸.

Nevertheless the exact meaning of the nature of corporate personality and its consequential implications remain the source of incessant contention. The basic contention has been: does the personality of the corporation arise simply because individuals exercise their fundamental contractual rights or is it because society permits this socially desirable form of business?

It now appears settled that the corporation is recognised as a separate legal personality,²⁹ and that as a consequence of such separate legal personality, it is possible to have corporations with limited liability. This limited liability in the case of multinational corporations or ‘groups’ of companies’, implies that the liability of the parent corporation is just as that of a ‘person’ investing limited to the amount left unpaid on the shares.³⁰ The interpretation of the exact nature of the concept of

²⁷ Seidl-Hohenveldern (n 4)1

²⁸ I C J Reports 1970 3 at p.40, para.39

²⁹ The ‘corporate personality’ or ‘separate legal personality’ as it is called, is one of the few legal concepts common to most countries of the world.

³⁰ In *Re Southard Ltd.* Per Templeman LJ ‘(1979) 3 All ER 556, (1979) 1 WLR 1198 ‘English company law possesses some curious features, which may generate curious results. A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter and declines into solvency to the dismay of its creditors, the parent company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the

separate legal personality is at the root of problems regarding how the law views controls of corporate power. The disputes put in a different guise have been simply about what is a corporation? Is it really a group of individuals taking on a fictional personality or is it a group of individuals forming a thing that takes on its own realness, distinct from the creators? These are questions about the nature. There are also questions about the origin, is it formed just because individuals get together and draw up a contract or is it formed only by government recognition or concession? .

Each of these answers has a defining role in what the purpose of the corporation is for. If the corporation is merely a group of individuals contracting together then it follows that there it exists just for their own interests; but if it needs recognition from the society, then it exists for societal interests as well.

The next section will attempt to describe the theories that have arisen in answer to these questions but an important caveat must be added, theories tend to be absolute which in practice is never the case, still inherent in these theories are the fundamental principles which will help us unravel particular issues and adopt applicable and appropriate answers.

debts of the insolvent subsidiary. It is not surprising that when a subsidiary collapses, the unsecured creditors wish the finances of the company and its relationship with other members of the group to be so narrowly examined to ensure no assets of the subsidiary company have leaked away, that no liability of the subsidiary company ought to be laid at the door of other members of the group and that no indemnity from or right of action against any other company or against any individual is by some mischance overlooked'

Pettet notes that not all countries follow this approach notably Germany—West Germany since 1965 has had special rules governing groups of companies the 'konzernrecht' in which parent company may become liable for the losses of the subsidiary in certain circumstances.' B Pettet *Company Law* (2nd ed. Pearson Education Limited 2005) See also C Altig 'Piercing the Corporate Veil in American and German Law-Liability of Individuals and Entities; a comparative view', (1994-1995) 2 *Tulsa Journal of Comparative & Internationall Law* 187 states that 'the United States legal doctrine of corporate veil refers to the common concept of limited corporate liability under which the shareholders of a corporate entity are not personally liable for the entity's debts and obligations. See E.g., Revised Model Business Corp. Act ss 6.22, 2.02(b)(2)(v) (1994) . See also Del. Code Ann. tit. 8, s 102(b)(6) (1992); C S Krendl J R Krendl, Piercing The Corporate Veil: Focusing the Inquiry, (1978) 55 *Denver Law Journal*. 1- 59, 2

Interestingly Bratton Jr. notes that:

‘theorists aspire to provide objective answers to all questions and their theories tend to pose clear-cut, determinant aspirations...legal decision-makers share the theorist’s aspirations but in the end tend to mediate between alternatives’³¹

For the most part, debates about these theories have been used to opposing and sometimes conflicting ends³² but this does not detract from the value that have been derived from such theories over the years. As Millon argues that in specific settings in history legal theory has been used to influence the direction of legal understanding.³³Historically human pursuit is carried out in co-operative ventures. Corporation is not peculiar simply as a cooperative venture. There is evidence of long-distance partnership contract known as ‘naruqqum’ used in conducting long-distance caravan trade in the Old Assyrian state at about 19th Century BC.³⁴

The ancient Romans set up a number of partnerships for their maritime trade and these and other forms of collective business appear common to the pre-modern commercial worlds.³⁵ It appears to be the case that ‘men are social beings’ in the sense that no large business undertaking is carried out without social co-operation.³⁶ However the peculiarity begins with the conception of the corporation as a separate legal person.³⁷ Thus theories about the nature and origin of corporation are vital to understanding corporate law’s approach to the issue of legitimacy.

³¹ W W Bratton ‘Public Values, Private Business and US Corporate Fiduciary Law’ in J McCahery, S Picciotto and C Scott (eds.) *Corporate Control and Accountability: changing structures and the dynamics of regulation* (Claredon Press, Oxford 1993) 23

³² Dewey (n 14) 671

³³ Horwitz (n 9) Millon (n 9)

³⁴ Iwai (n 14) 583

³⁵ Ibid

³⁶ Vinogradoff (n 14) He was quoting Aristotle

³⁷ Villiers describes the combination of the separate legal personality and limited liability as a ‘lethal cocktail’ for attempts to pursue parent corporations for liability of the subsidiaries. p.95 C Villiers, ‘Corporate law, corporate power and corporate social responsibility’ in N Boeger, R Murray and C Villiers (eds.), *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham 2008) 85- 112

5.3 Theories about the nature and origin of the corporation

The origin of the corporation is linked (at least in Anglo-American tradition) to the tradition of concessions by the crown in form of charters or grants creating a body separate. This right, first extended to religious orders, local authorities and guild of merchants, evolved to a point where incorporation by registration and limited liability was introduced in England in 1844.³⁸ In America at least until the 19th Century incorporation for private business objectives was rare. Corporations were usually charitable or municipal corporations as well as privately owned banks, insurance or public utilities.³⁹

With the expansion of communication networks and travels creating newer markets, the scale and scope of business increased.⁴⁰ In that sense the transition from earlier forms of the corporations to the multinational corporations seems to have come initially via the Dutch and English trading companies of the 16th and 17th century chartered by government in long-distance trade and colonial management.⁴¹ In recent history however the origin of multinational corporations is placed firmly within the mid- late nineteenth century with the renewed boost of international commerce and links.⁴²

³⁸ Joint Stock Companies Act 1844; Limited Liability Act 1855

³⁹ Millon (n 9)

⁴⁰ A D Chandler, *Scale and Scope: the Dynamics of Industrial Capitalism* (Bleknep/Harvard University press, 1990)

⁴¹ A M Carlos and S Nicholas 'Giants of an earlier capitalism: the chartered trading companies as modern multinationals' (1988) 62 *Business History Review* 398 - 419

⁴² P Hertner G Jones, *Multinationals: Theory and History* (Gower, 1986)

While it is not the only factor, corporate personality and limited liability with the ability of the corporation to own shares in other corporations has been a major trigger for the continued growth and popularity of the modern corporate form.⁴³

These theories which attempt to explain the nature and origin of corporations are important when one seeks to understand fully what the corporate form is and how they have been shaped by the thinking and practice of this time. These theories are the fiction theory, real entity theory, concession theory and contract theory. In this work, Pettet's distinction between theories that refer to the nature of the corporation such as the fiction theory and the real entity theory and theories that refer to the origin of the corporation such as the concession or contract theories has been of value in clarifying the use of the arguments within this context.⁴⁴ However the theories are not incompatible and various writers have linked them in a number of ways in past writings⁴⁵ but the analysis reveals how they have been used to justify different approaches within corporate law.

⁴³ There are other economic factors. Professor Leslie Hannah is of the view that the availability of the joint stock limited liability company is a necessary precondition to the widespread adoption of modern industrial organisation. L Hannah, 'Mergers, Cartels and Concentration: legal factors in US and European experience' in N Horn and J Kocka (eds.) *Law in the Formation of Big Enterprises in the 19th and 20th centuries* (Vandenhoeck & Ruprecht, Göttingen 1979) 306-315. New Jersey in America was the first American state in 1888 to adopt statute which allowed corporations to own shares in other corporations, creating the concept of a holding corporation Muchlinski (n 130) 40

⁴⁴ In the main, a three-fold distinction commonly used between fictional theory, contract theory and the real entity theory, See P I Blumberg "The Corporate Entity in an era of Multinational corporation" (1990) 15 Del. J. Corp. L. 283 putting forward a strong case for the selective utilisation of enterprise law (piercing the veil in groups of corporations) to supplement application of entity law on a case by case basis. This is three-fold distinction not sacrosanct as other writers use different titles. For example (fiction/ corporate realism/ corporate nominalism- Iwai *ibid*); Creature/group/ person – Schane 'The Corporation is a person: the language of legal fiction' (1987) 61 Tulane Law Review 563 – 595 See Pettet (n 30) 48

⁴⁵ Dewey (n 14) argues that each theory has been used to serve opposing ends. See Pettet *ibid*; see also B Pettet 'Limited Liability: A principle for the 21st Century?' (1995) 48(2) Current Legal Problems 125-159

5.3.1 The Fiction Theory

This is a theory about the nature of the corporation that can be traced to the 19th particularly in France and Germany where there was deep interest in the metaphysical nature of the corporation.⁴⁶ The proponents of this theory firmly asserted that the corporation is a legal fiction, existing only in law. Von Savigny is seen as the main proponent of the fiction theory. He was a German Romanist, who saw the corporation as an ‘artificial subject admitted by means of pure fiction’. Therefore this theory asserts that the corporation is a legal fiction only existing in law.⁴⁷ Schane in this regard notes that although a human being as a conscious and willing entity possessed inalienable rights and individuals may enter into association, but the resulting group does not have independent existence of its own except in the contemplation of the law (as a *persona ficta*).⁴⁸

This view had been prominent for centuries past and was expressed as early as the 17th Century by Coke⁴⁹ and in later years by Kyd⁵⁰ and by Blackstone⁵¹. This view also held sway in the United States at that time as evidenced by Chief Justice Marshall’s observation that ‘a corporation is an artificial being, invisible, intangible,

⁴⁶ Schane (n 14)

⁴⁷ See Jurial relations or the Roman law of persons as subjects of jurial relations: being a translation of the second book of *Savigny’s System of Modern Roman Law* by (W H Rattigan (ed.) Wildy and Sons, 1884) at 181 and 204

⁴⁸ Schane (n 14)

⁴⁹ Schane (n 14) notes an earlier pronouncement in the rolls of parliament for as early as 1444. – This citation from rolls of parliament he notes is recorded under the entry ‘person’ in 7 Oxford English Dictionary 724 (1961) Case of Sutton’s Hosp., 10 Coke 23a, 30b-32b, 77 Eng Rep. 960, 970-973 (1612) – Corporation is “invisible, immortal and rests only in intendment and consideration of the law”

⁵⁰ S Kyd, *A treatise on the law of corporations* (1793) 69-70, 103

⁵¹ W Blackstone, *Commentaries on the Laws of England* (1st ed. , 1765) 475-476

and existing only in the contemplation of the 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.'⁵² This concept has close links with the concession theory of the corporation and this is because at that time the charters and grant were the prevalent form of creating a corporation. Savigny in propounding this theory believed in the necessity of state sanction for the creation of every legal person. Therefore the legal fiction was viewed as a privileged legal creation of the state, with the state able to control and regulate the corporation.

However the fiction theory has more recently been used as a theory of the nature of corporation without its corollary state/ concession theory. This is because it simply envisages a legal fictional person created by law. Indeed recent agency theorists, Jensen and Meckling who see the corporation as a nexus of contracts have also used this theory for justification. They define a 'corporate firm as simply legal fiction which serve as a nexus for a set of contracting relations among individuals.'⁵³ This means that emphasis can shift from the 'law' aspect of the theory to the 'fiction' aspect. This is why this theory is linked to the aggregate or group theory which emphasises the real persons behind the fiction.⁵⁴ Its main advocates were Jhering in Germany and Vareilles-Sommieres in France.⁵⁵ They saw the corporation as a label for identifying members of the group and felt that the corporation was really a group of individuals who contracted for its formation.⁵⁶

⁵² *Trustees of Dartmouth College v. Woodward* (1819) (17 US) 4 Wheat 518 at 636

⁵³ M Jensen W Meckling 'The theory of the firm: Managerial behaviour, agency costs and ownership structures' (1976) 3 *Journal Of Financial Economics* 305-360 at 310

⁵⁴ This appears to have drawn on roman legal theory surrounding the roman association, 'societas' which had legal personality A Dignam & J Lowry *Company Law* (4th ed.) (OUP, 2006) 354

⁵⁵ De Vareilles-Sommieres, *Les Personnes Morales* (1902) in Schane (n 14), A W Machen 'Corporate Personality' (1911) 24 *HLR* 253- 267 at 257-258

⁵⁶ *Ibid*

This is the reasoning behind Morawetz's characterisation of the group theory as stating that:

'Although a corporation is frequently spoken of as a person or unit... the existence of the corporation independently of its shareholders is a fiction; and the rights and duties of an incorporated association are in reality, the rights and duties of the persons who compose it, not an imaginary being.'⁵⁷

The theoretical conception of the corporation as a legal fiction has been used to justify the property rights of the shareholders behind the corporate personality fiction and insist that the corporation is really for its shareholders. However the problematic factor for this perspective is the rule of limited liability.⁵⁸ Limited liability does not flow automatically from the rights and duties of the persons who compose the corporation rather it appears to be a privilege derived as a consequence of incorporation. There must be a justification for limiting the liability of the members because if the corporation were to be regarded as merely individuals coming together under the corporate name, they would be fully liable for debts of that corporation under contract law.

Chief Justice Taney points out that if they were simply members carrying out business under a corporate name and entitled to the privileges of contract, they would be liable under these contracts for the whole extent of its property and for the debts of the corporation like a mere partnership in business corporation.⁵⁹ The counter-position must therefore be that although it is a legal fiction when it is

⁵⁷ V Morawetz, *A treatise on the law of private corporations* (2nd ed.,1886)

⁵⁸ Ireland refers to this as 'the no-obligation, no-responsibility, no-liability nature of corporate shares' and this 'permits their owners or their institutional representatives to enjoy income rights without needing to worry...they are not legally responsible for corporate malfeasance and in the event of failure only their initial investments are at risk.' P Ireland 'Limited Liability, Shareholder rights and the problem of corporate irresponsibility' (2010) 34 *Cambridge Journal of Economics* 837-856, 845

⁵⁹ *Bank of Augusta v Earle* 38 U.S. (13 Pet.) 519, 586 (1839) cited in Horwitz (n 9)

incorporated yet by virtue of law it is endowed with several attributes as a result which gives it a strange realness and power.

In this sense we speak of how corporations invade our lives and acquire responsibility for providing and impacting on several necessary goods and services. This is even extended to notions of criminality of corporate action, where punishment is sought for corporate crimes and criminal conduct.⁶⁰ This notion is reflected in the alternative view of the corporation as a real entity.

5.3.2 The Real Entity Theory

This theory is the competing theory about the nature of the corporation which in contrast to the 'fiction theory' views the corporation as a real and living entity. This theory is generally regarded as the work of 19th Century German realist, Gierke.⁶¹ He saw the corporations as a living organism with a separate existence and life of its own, distinct from that of its shareholders. He pointed to the notion of human nature to form groups and that such groups when formed acquire a life of their own.⁶²

In the United States of America (USA) the important turning point for the corporation towards the real entity theory was the decision in the case of *Santa Clara County v. Southern Pacific Railroad* in 1886⁶³, which declared the corporation a person for the purposes of the fourteenth amendment. The court decided that the provision in the fourteenth amendment to the constitution which forbids the state to deny to any person within its jurisdiction equal protection applies to corporations. By

⁶⁰ Legislation on corporate crimes such as the UK Corporate Homicide and Corporate Manslaughter Act 2007, UK Bribery Act 2010

⁶¹ Maitland, Introduction to O Gierke, *Political Theories of the Middle Age* at xviii-xliii (1900)

⁶² Schane (n 14)

⁶³ (1886) 118 U. S. 394 although Horwitz (n 9) argues to the contrary that the Santa Clara case has only been adapted to suit this view and that they were influenced by thinking on shareholder property rights.

implication, this equates the corporation with a real person therefore having rights and by implication duties and responsibilities.⁶⁴

In England the contrast in legal thinking between fiction and real entity theory can be illustrated by these two contrasting legal observations. Edward, First Baron Thurlow and Lord Chancellor of England in the 18th century remarking: ‘Did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked?’⁶⁵

As opposed to, the statement of Denning LJ that:

‘A company may in many ways be likened to a human body. It has a brain and a nerve centre that which controls what it does. It also has hands which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants or agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of the managers is the state of mind of the company and is treated by the law as such.’⁶⁶

Notwithstanding the slight absurdity of equating the corporation to a real entity, there is an element of practicality which has contributed to this becoming a theory that acknowledges practical influence of the expansion of business. There is a distinct legal personality which can be seen in a natural or artificial way. Machen argues for a distinction between the entity and the recognition of the entity as a person. He points out that in his view ‘a corporation exists as an objectively real entity which any well-developed child or normal man must perceive: the law merely recognises and gives legal effect to the existence of this entity.’⁶⁷

⁶⁴ Millon (n 9)

⁶⁵ Cited in Monks and Minow (n 19) 31

⁶⁶ *Bolton Engineering v. Graham* (1957) 1 QB 159 at 172

⁶⁷ Machen (n 14) 256

Regardless of whether this distinction is accepted, it is the recognition of the real entity nature by law that has been the justifiable basis for allowing corporation as persons to own shares in other corporations paving the way for larger groups of corporations such as MNC. This principle of a separate legal person famously enunciated in *Salomon v Salomon* where Lord MacNaghten expounded that ‘the company is at law a different person altogether from the subscribers to the memorandum’.⁶⁸ This has been extended to MNC in a beneficial way as parent corporations can hold shares in subsidiaries just as a separate person.⁶⁹ The practical effect of this distinctness is demonstrated by the US case of *People’s Pleasure Park Co. v Rohleder*⁷⁰ where the court found that covenants restricting transfer of land to ‘colored persons’ in the early twentieth century did not apply to a company whose entire shareholders were African American. It found that the corporation was legally distinct and separate and could hold land in its own name.

This theory which allows for extension of rights to the separate legal personality of the corporation can by analogy be extended to that of responsibilities. This will permit a personality that demands rights but also acquire responsibilities. This can be gleaned from Lord Halsbury’s statement in *Salomon v Salomon* that ‘once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself.’⁷¹

⁶⁸ (1897) AC 22 (HL)

⁶⁹ Ireland (n 8)

⁷⁰ 61 SE 794 (Va 1908) Case in Virginia USA, Facts given in L E Talbot *Critical Company Law* (Routledge 2008)

⁷¹ (1897) AC 22

There is direct analogy between this reasoning of corporations as distinct legal persons and cajoling the corporations to become better ‘citizens’.⁷² Furthermore Millon identifies that the entity theory could be used a theoretical basis for corporate social responsibility.⁷³ He relies on Dodd’s analysis to indicate that corporation as its own entity can owe responsibilities to society. But there is still some doubt as to how far this analogy can be extended because Keay also puts forward an entity maximisation and sustainability model based on the company being regarded as a distinct legal entity and argues for a core objective of the corporation that is centred on maximising the entity for its sustainable survival.⁷⁴ This is a reflection of a self-interested entity. Nevertheless the question of range of interests that this entity should have is inter-mingled with questions of its origin as well.

5.3.3 Concession Theory

The concession theory pertains to the origin of the corporation. It perceives the source of the corporation’s legal personality as emerging from the states. This proposition may have arisen in response to the state’s desire to regulate groups within it thereby creating a validation process through a grant system or registration system. The state through this process grants the corporate status and its advantages to groups who wish to carry on certain business.

This theory on initial consideration appears outmoded better suited to the times when the state was directly involved in grants by royal charter and so on. However on deeper consideration, there is a fundamental fact which rings true from this theory

⁷² J Androif & M McIntosh (eds.) *Perspectives on Corporate Citizenship* (Sheffield, Greenleaf Publishing, 2001)

⁷³ Millon (n 9) 219

⁷⁴ A Keay ‘Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model’ (2008) 71(5) *The Modern Law Review* 663-698, 665

which some now see as defunct. That is that corporate personality can only be acceptable where the society sees fit to give and recognise it. The idea of corporate personality has been politically and legally constructed on the premise of the utility of the corporation.⁷⁵ Corporate personality is recognition accorded by state law.

It is not inherent in any group to be a body corporate except it complies with outlined steps (albeit simple steps) listed in statute. These steps may have been modified and eased to enable the growth of entrepreneurship and commerce (hence emphasising the utility aspect of corporate legitimacy) but it still remains a privilege accorded to a group in society by government.

If the government is taken to be the expression of the people through a democratic process⁷⁶ this thereby fulfils Dodd's expression that corporations exist because they are beneficial to society.⁷⁷ Although the trend may be to ease restrictions, there is no denying the inherent power of society through government or other means to regulate monitor or change the conditions and basis under which such corporate status should be acquired and how it should operate.⁷⁸

This is exemplified in the UK by the extensive company law review process that culminated in the Companies Act 2006. There will always be a prescription of legal formalities for registering corporations and even where people come together to do business, they are not automatically recognised as corporations because they think they are.

⁷⁵ Millon (n 9) This is seen as defunct because of the change in corporate formation and the death of the ultra vires rule.

⁷⁶ Not always the case but issues of public governance are outside the scope of this work. For an overview of current and new thinking in this area, see J Lenoble M Maesschalck *Democracy, Law and Governance* (Ashgate, England 2010)

⁷⁷ E M Dodd, 'For whom are corporate managers trustees?' (1932) 45 *Harvard Law Review* 1145-1163

⁷⁸ Horrigan (n 11)

It is rather acceptable to assert that:

‘A business corporation is able to act as an independent owner of its own property capable of making a contractual relation directly with others, not because the inside shareholders will it to be so, but because, and in so far as, the outside parties recognise it to be so. Such social recognition is indispensable and the law formalizes and reinforces the social recognition in the form of legal personality’⁷⁹

This possibility of the formalisation of social recognition is what pushes Blumberg to request for the recognition of the new reality of MNC in law with an enterprise personality model.⁸⁰ This model he suggests will recognise the modern enterprise and go beyond the limited entity legal personality now present in national legal systems. He points out that over the last hundred years in which the law has eased permissions of the formation of groups the reality that has emerged is that some large corporations operate under common control as a multinational enterprise.⁸¹ Nonetheless there is reluctance to recognise such an entity because of the decreasing emphasis on the role of the state which is linked to the predominant liberal legal order and the emphasis on privatisation and de-regulation.⁸² This is also what drives the alternative contract theory on the origin of the corporation.

⁷⁹ Iwai (n 14)

⁸⁰ P I Blumberg ‘The Corporate Entity in an era of Multinational Corporations’ 15(2) Delaware Journal of Corporate Law 283-276

⁸¹ Ibid

⁸² G J Ikenberry ‘Liberal Internationalism 3.0: America and the Dilemmas of Liberal World Order’ (2009) 7(1) Perspectives on Politics 71-87.

5.3.4 Contract Theory

The contract theory is also about origin of the corporation. It views the origin of the corporation as rooted in contract. This is more attuned to the individualistic view of the human person and his inherent right to enter into contracts which has thrived in the current liberal legal order. The contract theory views the corporation as based on private contract therefore the role of the state is limited to enforcing contracts.⁸³ The focus is on freedom of contract and the freedom to structure contracts between private persons.⁸⁴ More recently this theory has been refreshed not just as contract but as a ‘nexus of contracts’ and this revival is most evident in the development of economic theories of the corporation.⁸⁵ The proponents of this theory restate the corporation as a complex set of explicit and implicit contracts. For example: Easterbrook and Fischel state that:

‘The corporate structure is a set of contracts through which managers and certain other participants exercise a great deal of discretion that is ‘reviewed’ by interactions with other self-interested actors. The interaction often occurs in markets and we shall sometimes call the pressures these interactions produce ‘market forces’.⁸⁶

The underlying basis of the contract theory is that the individuals who make up the corporation contract to do so and in essence the corporation is a contract agreed among its members. In deference to the incomplete picture this paints, the nexus of

⁸³ H N Butler ‘Contractual theory of the corporation’ 11(4) *George Mason University Law Review* 99-123

⁸⁴ *Ibid* at 100

⁸⁵ See works such as R H Coase ‘The Nature of a firm’ (1937) 4 *Economica* 13-16, M Jensen and W Meckling ‘Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure’ (1976) 3 *Journal Of Financial Economics* 305-360 at 310, O E Williamson, ‘Corporate Governance’ (1984) 93 *Yale Law Journal* 1197-1230

⁸⁶ F H Easterbrook D R Fischel ‘The Corporate Contract’ 89 *Columbia Law Review* 1416-1448, 1418

contracts theorists simply add more layers of contracts which define the role of owners and the managers seen as their agents.

This theory underlies most of the current writing about the corporations, however in spite of its success it is disputable that the corporation as a legal person can be reduced to a bundle of contracts. Yet this has been useful to justify the limited focus on the internal participants. Nevertheless Parkinson points out that even where one accepts the contractual basis of corporations, this does not absolve corporate law from the issue of state intervention especially where such corporate power is contrary to public or societal interest. He however recognises that the concentration of power in private hands has come partly as a result of their existence.⁸⁷

It has become one of the main vehicles of capitalism and forms the basis for corporate governance models in Anglo-American states.⁸⁸ The contractual theoretical underpinnings of corporate governance are the reason for the limited focus on issues of CSR within corporate law. Its impact is also significant globally as the evidence of convergence of corporate governance models increases.⁸⁹

Overall the nature of these well-established disputes about corporations is that they help us understand perhaps the ‘fluctuating reality of corporations’⁹⁰ Teubner suggests that the social reality of the legal person can be found in the collectivity of the socially binding self-description of an organised action system of cyclical linkage of identity and action. He cites Weber as perhaps justified in treating collectivities as

⁸⁷ J E Parkinson, *Corporate Power and Responsibility: Issues in the theory of Company Law* (Clarendon Press, Oxford 1995) 30

⁸⁸ Butler (n 83)

⁸⁹ Hansmann and Kraakman (n 20)

⁹⁰ See G Teubner ‘Enterprise Corporatism: New Industrial Policy and the “ Essence” of the legal person (1988) 36 American Journal of Comparative Law 130, at 138 citing Weber *Economy and Society* (1978)13 , This is also examined in Blumberg (n 80)

ideas in the heads of judges and yet assigning them a powerful and decisive influence on the course of action of real people⁹¹

Therefore corporations can be perceived as creature of law yet real and powerful. Perhaps the idea of the corporation as real helps enhance its power but more importantly it makes it possible to assert that there are two sides to this coin, that is, that the corporation is a creature of law and therefore can be regulated by law even though within the corporation there lies a contractual arrangement for its members.

However it can appear that the influence and interpretations of these theories is what drives the direction of the governing of the corporation and the range of interests which the corporation will take into account. These are key issues for legitimacy and accountability of corporate power within the corporate law framework.

⁹¹ Teubner Ibid

5.4 Corporate Governance models and theories

Corporate governance theories are derived from theories of corporate personality. It has been pointed out that ‘the problems of “corporate” governance are literally the problems of governing the “corporate” form of business firms.’⁹² Therefore corporate governance debates also reflect the lack of clarity over the corporate objective and this lack of clarity are predicated on debates about the nature and origin of the corporation.⁹³ Questions such as: is the corporation ultimately for its owners and their profit or is it for society and its benefit?

These questions relate to the purpose of the corporation as well as to issues of control or governing and in whose interest. Therefore corporate governance covers how a corporation is run and how it behaves.⁹⁴ The problem of control becomes even more extended in large MNC’s where the managers are distinct from the owners and there is a lack of control because ownership is dispersed and weak.

This problem was identified as early as 1838 in the work of Adam Smith where he identified a problem with joint stock companies having managers of other people’s money and questioned the vigilance with which they would watch over it.⁹⁵ However it is given a full analysis in the seminal work of Berle and Means.⁹⁶

⁹² K Iwai ‘What is a Corporation? – the corporate personality controversy and the fiduciary principle in corporate governance’ in F Cafaggi, A Nicita and U Pagano (eds.) *Legal orderings and Economic Institutions* (London: Routledge, 2007) 243-267

⁹³ Jensen asserts that ‘current global governance debate is a remarkable division of opinion about the fundamental purpose of the corporation. M C Jensen ‘Value Maximisation, Stakeholder Theory and the Corporate Objective Function.’ (2001) 4 *Journal of Applied Corporate Finance* 8-21, 8 Key points out that establishing the objective of the corporation is critical to the formulation of its governance mechanisms Key (n 74)

⁹⁴ Horrigan (n 11) 69

⁹⁵ M Blowfield A Murray *Corporate Responsibility: A Critical Introduction* (OUP, Oxford 2008) 41

⁹⁶ A A Berle G C Means *The Modern Corporation and Private Property* (with a new introduction by

Although the focus of the analysis is on large corporations in the USA, it is a problem that can be extended to large multinational corporations around the world.⁹⁷

Though there is doubt that there is such pronounced separation between ownership and control in nations such as France, Germany, Japan and South Korea where ownership is not so dispersed, but corporate governance is still relevant to issues of how these variant corporate organisations are governed.⁹⁸

There are two major types of corporate system in capitalist states globally namely the shareholder and the block-holder systems⁹⁹ but there are forceful arguments for the emergence of a convergence on a system of corporate governance that prioritises the shareholder.¹⁰⁰ The shareholder model in practice in the US and the UK is characterised by dispersed equity holding, delegation to management to run corporation, supervision via single supervisory boards, deep trading markets and market regulations and the possibility of hostile take-overs.¹⁰¹

Block-holder or stakeholder models are of two major variants the first kind is that found in Germany characterised by large banks as main investors¹⁰² and a two-tier supervisory board structure and employees represented on the boards in line with the co-determination principle.¹⁰³ The second kind is peculiar to Japan and involves a

M. Weidenbaum & M. Jensen)(Transaction Publishers, New Brunswick (USA) 1968, 1991)

⁹⁷ M S Mizruchi 'Berle and Means Revisited: The governance and power of large U.S Corporation' (2004) 33 Theory and Society 579-613

⁹⁸ This was highlighted by the work of R La Porta and others 'Corporate Ownership around the world'(1999) 54(2) Journal of Finance 471- 517 which found that the most common ownership around the globe is family or controlling shareholders

⁹⁹ W W Bratton and J A McCahery "Barriers to Global Cross- Reference" in (J. McCahery ed.) *Corporate Governance Regimes: Convergence and Diversity* (New York, Oxford University Press 2002) This may mask national differences.

¹⁰⁰ Most forceful advocates H Hansmann & R Kraakman, "The end of history for corporate law" in (J N Gordon M J Roe eds.) *Convergence and Persistence in Corporate Governance* (Cambridge University Press, 2004)

¹⁰¹ See Bratton and McCahery (n 99) at 26-27 Where they make a comparison of the elements of market and block-holder systems

¹⁰² Although La Porta et al in their study find that other countries in Europe and the world are dominated by family or even state owned corporations. See La Porta (n 98)

¹⁰³ V D Dinh "Codetermination and Corporate Governance in a Multinational Business Enterprise (1999) 24 Journal of Corporate Law 975-999

network of cross-shareholdings resulting in a very complex network of interwoven groups. Iwai states that Japan has six major corporate groups – Mitsubishi, Mitsui, Sumitomo, Fuyo (Fuji), Sanwa and Daichi-Kangin (DK). Each group is clustered around a main bank and extended over the whole industry¹⁰⁴ connected through intricate cross-shareholdings.¹⁰⁵ The shares held by the banks in each corporation by virtue of anti-monopoly laws cannot surpass five percent but these network of cross-shareholdings and lunch-club meetings of presidents of members of each group result in a substantial element of internal monitoring and control.¹⁰⁶

However there are theoretical issues at the heart of the analysis of Berle and Means which are now relevant to virtually all industrialised capitalist nations regardless of the extent to which they have experienced a separation of ownership from control,¹⁰⁷ These issues go beyond a mere lack of accountability to shareholders and a loss of control to point out questions of accountability to society in general.

As Mizuchi put it

‘Berle & Means concern about separation of ownership from control was not only about managers’ lack of accountability to investors. It was also a concern about managers’ lack of accountability to society in general. Berle and Means thus wrote of a small group, sitting at the head of enormous organizations with the power to build, and destroy communities, to generate great productivity and wealth but also to control the distribution of that wealth, without regard to those who elected them (stockholders) or those who depended on them (the larger public).’¹⁰⁸

Although this assertion of Berle and Means concern for the accountability to the public is somewhat expanded, Mizuchi raises a valid point about the applicability of

¹⁰⁴ Ramsweyer gives the example of Mitsui group which includes two banks , two insurance companies, a trading company, a construction firm, a paper company, an oil company, a steel company, Toshiba, Toyota and a real estate firm. See M. Ramsweyer ‘Cross-shareholdings in Japanese keiretsu ’ in (J McCahery ed.) *Corporate Governance Regimes: Convergence and Diversity* [New York, Oxford University Press 2002)

¹⁰⁵ Iwai (n 92)

¹⁰⁶ Ibid

¹⁰⁷ Mizuchi (n 97) 580

¹⁰⁸ Ibid at 581

Berle and Means governance issues to countries beyond their scope of study which was the USA. This tentative conclusion of the Berle and Mean's work¹⁰⁹ that the loss of control by shareholders may have resulted in a surrendering of rights that the corporation be operated in their sole interests and opened up the way firm wider claims that demand that the corporation should serve all society is the basis for a lot of debate within corporate governance. It is not as far-reaching as Dodd's assertions that society's interests are paramount in the first instance it only acknowledges that there has been significant change in the history of the corporations and that the share-holder oriented model based on the contract theory is failing to capture this change.

Therefore it is possible to derive from the Berle and Means conclusion two theoretical implications. On the one hand, theories repudiating the loss of control by shareholding and re-emphasising mechanisms to achieve shareholder primacy through the agent-principal framework (agency theory)¹¹⁰ or on the other hand those theories taking on the larger challenge of positing an opening up of corporations to wider interests by attempting the challenge to fashion out a more representative system (stakeholder theories).¹¹¹

¹⁰⁹ Berle & Means (n 96) at 312

¹¹⁰ Jensen and Meckling (n 85)

¹¹¹ T Donaldson L Preston 'The stakeholder theory of the corporation: Concepts, evidence and implications' (1995)20 Academy Of Management Review 65- 91

On their own, Berle and Means as a result of this separation suggest that ‘a purely neutral technocracy balancing a variety of claims by various groups in the community and assigning to each a portion of income stream on the basis of public policy rather than private cupidity’.¹¹² Therefore the theories will be analysed in further detail as they are riddled with questions of accountability to diverse interests. The examination will be to examine the potential range of interests and this will help the conclusions on how relevant corporate governance theories can be to the newer set of legitimacy problems posed by multinational corporate power.

¹¹² Berle & Means (n 96)

5.4.1 Separation of Ownership from Control

This theory of separation of ownership from control is sometimes called ‘managerialism’. It originated from the seminal work of Berle and Means titled “The modern corporation and private property” published in 1932.¹¹³ The work examined large corporations in the USA but has since then become of significance to large multinational corporations more generally. Its most enduring theme is that of concentration of power within the ‘managerial’¹¹⁴ class of large corporation and the consequential separation of ownership from control in the large modern corporation.¹¹⁵

Berle and Means studied 200 of the largest US non-financial corporations in 1929 and found that 44 percent by number and 58 percent by wealth were management – controlled.¹¹⁶ By management control they described corporations where the control lay not with the shareholders but with the management because it had become virtually a self-perpetuating body because ownership was sufficiently and significantly sub-divided¹¹⁷.

This was only part of the full picture. They discovered that on full examination of the five major types of control examined; that is, control through almost complete

¹¹³ Berle & Means (n 96) originally published in 1932 by Harcourt, Brace & World, Inc.

¹¹⁴ Interestingly they defined management to include both the senior officers of the corporation and the board of directors; this is dissimilar to contemporary usage of the word which refers to senior officers of the corporation only. Berle & Means *ibid* at 196 “ Management may be defined as that body of men who in law, have formally assumed the duties of exercising domination over the corporate business and assets ...under the American system of law, managers consist of a board of directors and the senior officers of the corporation.”

¹¹⁵ There are several themes raised by Berle and Means in their book because it was written at the depth of the great depression in the United States.

¹¹⁶ Berle & Means (n 96) 109

¹¹⁷ Berle & Means (n 96) 81

ownership, majority control, control through a legal device [such as pyramiding, a special class of voting stock or voting trust], minority control and, management control; 65 percent of the corporations and 80 percent of their combined wealth were controlled by management or by a legal device involving a small proportion of ownership.¹¹⁸

This had resulted from a dispersal of stock ownership which had resulted in passive property ownership. They found several changes in the manner of property ownership¹¹⁹, key for them were the changes from an active to a passive agent¹²⁰; the separation of the spiritual values that formerly went with ownership; the value of wealth is no longer dependant on personal efforts; the value of wealth fluctuates and is constantly appraised; individual wealth had become liquid through organised markets; wealth is less in a form that can be employed directly by owner and the stockholders are left with mere symbols of ownership while the power, the responsibility and the substance, integral to ownership is now transferred to a separate controlling group. These findings strengthened their conclusion that ownership and control had become separable factors.¹²¹

While there have been some criticism of the Berle and Means study, it has been fundamental to the development of corporate governance.¹²² La Porta and others attempted to show that outside of the US and UK, other developed countries because of poor shareholder protection had controlling or block shareholders such as the state

¹¹⁸ Berle and Means (n 96) 110 They concluded that “only 11 percent of the companies and 6 per cent of their wealth involved control by group of individuals owning half or more of the stock interest outstanding”

¹¹⁹ Berle and Means (n 96) 64-65

¹²⁰ They note especially that in place of actual physical properties over which the owner could exercise direction and for which the owner is responsible, the owner now holds a piece of paper representing a set of rights and expectations with respect to an enterprise

¹²¹ In their words, “formerly assumed to be merely a function of ownership, control now appears to be a separate and separable factor” Berle and Means (n 96) 111

¹²² See Introduction by Murray L. Weidenbaum and Mark Jensen in new re-publication of Berle and Means (n 96)

or the family in their largest firms.¹²³ However this is not very relevant for MNC which make full use of the equity markets in the UK and US as well as other large world economies. The crucial issue is not the existence or non-existence of the separation but that the ‘separation implies shortfalls of competence and responsibility.’¹²⁴

An important factor is that the Berle and Means study deals with the corporation from essentially a property rights perspective. This is important because as earlier noted, there appears to be a basic theoretical divide in approaches to analysis of large corporations. The divide between the contractarians and the communitarians¹²⁵; the divide between those who emphasise private property rights as justification for corporations and those who insist that corporations are in essence necessary to the extent that society deems it so. Berle and Means approach their analysis from the private property and contractual rights perspective, only allowing for the possibility of societal demands in the face of weakened passive property rights owners. This means that the Berle and Means analysis begins from a contractual theoretical standpoint.

In their study they trace the evolution of the modern corporate structure within American law from its starting point as inherited from English jurisprudence at the close of the 18th century. At this point they accept that the corporation was seen as a ‘franchise’ with its very existence conditional on a grant from the state. This grant set up a legal person distinct from its associates.¹²⁶ However they note that at the

¹²³ La Porta & others (n 98)

¹²⁴ WW Bratton ‘Berle and Means re-considered at the century’s turn’ (2001) 26 *Journal of Corporate Law* 737-770

¹²⁵ Allen (n 23)

¹²⁶ Berle and Means (n 96) 120 The real privilege which the state grants is that of the corporate entity—the right to maintain business in its own name, to sue and be sued on its behalf irrespective of individuals, to have perpetual succession and from this flowed limited liability” In their view limited liability was not a state granted privilege because a clause could be written into every contract by which the opposite party limited his right to recovery to the common fund.

same time the document of grant, (that is, the charter or its more recent form, the certificate of incorporation) embodied the outline arrangement among associates and therefore was a result of three-fold negotiations involving the state and the combined associates and between the associates as for themselves. Here they conclude it was recognised as a “contract” and has been consistently dealt with as such under the American law.¹²⁷ They remark that although the state enacted protections in the 19th century, many of these protections could have been qualified by contract.¹²⁸ But that the state’s insistence on protecting and supervising the contract resulted in their view to a picture where a group of owners necessarily delegated certain powers of management, were protected by a series of fixed rules under which the management had a relatively limited sphere (an owner-agent situation).

The breakdown in property rights comes into existence with the revolution of the general incorporation laws at the end of the 19th century and what they terms ‘the vanishing of the checks from the general incorporation laws’, with all rigid requirements broken down and in effect letting the originating group able to write its own contract on the broadest terms. Here although every stockholder is bound by the contract, modifications and changes in practice they never even see the documents giving management wide latitude to arrange participation in its own interests. This decline results in a position where they have surrendered a set of definite rights for

¹²⁷ Berle & Means (n 96) 121 They cite Cook on Corporations- “ The charter of a corporation having a capital stock is a contract between 3 parties and form the basis of 3 distinct contracts. The charter is a contract between the state and the corporation, between the corporation and the stockholders and between stockholders and the state 2 cook on corporations, 5th edition, section 492; I clark & marshall, “ Private Corporations” section 271f

¹²⁸ They list the protections as: a. The enterprise was required to be defined and carefully limited in scope [“ultra-vires” doctrine]; b. contributions of capital were rigidly supervised- the corporation was not allowed to commence business until certain shares were paid up. c. a rigid capital structure was set up –with preferred and common stock. They also note common law added further safeguards a. residual control lay in the shareholder or in a specified proportion. b. shareholders had sole rights to invest new monies in the enterprise – foundations of the present “law of pre-emptive rights” c. In general dividends were permitted only out of surplus profits. (ibid)

indefinite expectations¹²⁹ and may thereby have surrendered the right that the corporation be run in their sole interest, probably opening up the claim that wider interests of the society be served.¹³⁰

The Berle and Means proposition seen from this angle can give rise to any variant of two suggestions. Firstly this proposition could mean that a strengthening of the role of shareholders, could correct the imbalance in the power and control relationship and redress the problem of inadequate control of corporate power in the hands of managers. This has given rise to the agency theories which have fought to use market and structural mechanisms that re-instate shareholder primacy or in contrast, where there continues to remain a separation of ownership and management interests then these wider claims may have validity and this is the ground occupied by the stakeholder theories.

Although the argument appears to be shareholder versus other stakeholders, the implication from the conception of separation of ownership and control is that these other interests only gain legitimacy when there is passive property ownership. This is not a satisfactory basis for the question of corporate control. For the multinational corporate power under analysis has much wider implications for the exercise of power than that for shareholders. It is very weak to base the possibility of wider societal claims that the corporation be run in the best interest of society on the very narrow basis of separation of ownership from control and the resulting passive

¹²⁹ By this they refer to the limited reliance on director's duties – a decent amount of attention to the business; fidelity to the interests of the corporation; at least reasonable business prudence see Berle & Means (n 96) at 197

¹³⁰ Berle & Means (n 96) This oft quoted statement is located in p.311 They state that “the owners of private property by surrendering control and responsibility over the active property, have surrendered the right that the corporation should be operated in the sole interest – they have released the community from the obligation to protect them to the full extent implied in the doctrine of strict property rights...the control groups have cleared the way for claims of a group far wider than either the owners or the control. They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society.”

property ownership. There is a wider legitimacy question which is not fully address by corporate governance.

Berle and Means are not totally unaware of this because they accept that:

‘the rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state –economic power versus political power each strong in its own fields, the state seeks in some respect to regulate the corporation while the corporation, steadily becoming more powerful makes every effort to avoid such regulation’.¹³¹

This is even more so in the present time. The difficulty has become how to demonstrate a legitimacy of corporate power to society beyond that owed to the shareholders.

This is captured in the stark contrast that still remains between the Berle and Means tentative possibility that separation of ownership and control may have opened up wider demands that the modern corporation serve society’s interests and Dodd’s bold statement that business is permitted and encouraged by law because of it is of service to the community rather than because it is a source of profit to its owners.¹³² This difference is crucial and is affecting our approach to regulation for social responsibility with corporate law.¹³³

Yet within the scope that the Berle and Means debate affords, relevant theories have arisen which will be analysed. This is because corporate governance is still advocated as covering wider ground. For instance when it is defined as:

‘the whole set of legal, cultural and institutional arrangements that determine what publicly traded corporations can do, who controls them, how that control is exercised and how risks and returns from the activities they undertake are allocated’.¹³⁴

¹³¹ Berle and Means (n 96) at 313

¹³² Dodd (n 77)

¹³³ Voluntary or mandatory

¹³⁴ M M Blair, *Ownership and Control, Rethinking corporate governance for the twenty-first century* (Brookings Institution, Washington, D.C. 1995) 3 contrast this with the definition of corporate governance as ‘the way suppliers of finance assure themselves of getting a return on their investment.’ A Shleifer R W Vishny ‘A Survey of Corporate Governance’ (1997) 52(2) *The Journal of Finance*

5.4.2 Agency Theory

This theory covers a body of work that follow on from the first implication of Berle and Means separation of ownership from control thesis which is that owner and control interests can be reconciled in this agency relationship. It has both law and economic origins. It is the focus of the work of Jensen and Meckling¹³⁵ and the latter work of Fama and Jensen.¹³⁶ The focus is purely a (property rights) contractual view and follows logically from the Berle and Means statement of the problem.¹³⁷

For agency theorists, the relationship between stockholders and managers of the corporation fits the description of a pure agency therefore the issues related to the separation of ownership from control are associated with the general problem of agency costs.¹³⁸ For Jensen and Meckling, the private corporation is seen simply as a legal fiction which serves as ‘a nexus for contractual relationships and which is also characterised by the existence of divisible residual claims on assets and cash flows of the organisation, which can generally be sold without permission of other contracting individuals.’¹³⁹ This notion of stockholders as residual risk bearers is introduced by Fama and Jensen,¹⁴⁰ who argue that the separation of decision and risk-bearing functions observed in large corporations are common and generally indicative of agency problems which arise because contracts are not costlessly written and

737-783

¹³⁵ C Jensen W H Meckling: ‘Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership structure’ (1976) 3 Journal of Financial Economics 305 -360

¹³⁶ E F Fama M C Jensen ‘Separation of Ownership and Control’ (1983) 26(2) Journal of Law and Economics 301 - 325

¹³⁷ This covers even more recent areas of advocacy for institutional shareholders such as pension voice to become more active within corporations. Monks and Minow (n 19)

¹³⁸ Jensen & Meckling (n 135)

¹³⁹ Ibid

¹⁴⁰ Fama and Jensen (n 136) The residual risk – is seen as the the risk of the difference between the stochastic inflows of resources and the promised payments to agents – is borne by those who contract for the rights to net cash flows . the “agents” are called residual risk-bearers

enforced. Agency costs therefore include the cost of structuring, monitoring and bonding a set of contracts among agents with conflicting interests.

Under the Fama and Jensen scheme, a modern multinational will be classed as an open corporation, in this sense the common residual claims of such organisations are unrestricted so that stockholders are not required to have any other role in the organisation and their residual claims are freely alienable. As a result of the unrestricted nature of the residual claims of open corporations, there is almost complete specialisation of decision-management and residual risk bearing.¹⁴¹ The solutions proffered to the problem of agency costs are extremely popular in current corporate governance circles, they include the use of the stock market as visible signals for implications of internal decisions for current and future cash flows; external monitoring through the take-over market and an expert board of directors with inside and outside ‘independent’ members that can effectively limit the decision discretion of management.¹⁴² Therefore the focus is on controls that re-align the interests of the managers (controllers) with the interests of the shareholders or stockholders (owners).

The agency theory is also closely related to a body of work classed as ‘transaction cost economics’. This is mainly based on the economic analysis of Coase in 1937 where he examined the theory of the firm from within.¹⁴³ He saw the rationale for a firm (corporation) to be simply a means of saving market transaction costs. “The operation of the market costs something and by forming an organisation and allowing some authority (an entrepreneur) to direct the resources, certain marketing

¹⁴¹ Fama and Jensen (n 136)

¹⁴² Fama and Jensen (n 136)

¹⁴³ R H Coase The Nature of the Firm (1937) 4 *Economica* 386- 405 at 392 Prior to this neo-classical economists viewed the firm as a black box.

costs are saved.”¹⁴⁴ Therefore for him the firm becomes bigger when additional transactions are organised by the entrepreneur.¹⁴⁵ The transactions they increase would tend to be of different kinds or in different places and this is the reason why efficiency seems to decrease as firms get larger. He therefore suggests that all changes which improve managerial technique will tend to increase the size of the firm”.¹⁴⁶

His work did not dwell on governance but the work of another proponent did. Williamson analysed transaction cost economics as assigning transactions to governance structures in such a way as to accomplish an economising result.¹⁴⁷ For him ‘any issue that can be posed as a *contracting problem* is usefully addressed in *transaction cost economising* terms.’¹⁴⁸ In his analysis of corporate governance he studies a contractual schema couched in terms of relation to the corporation in node A, B or C position. He then argues that in certain relationships representations on the board are unnecessary. Stockholders are located in node B while the atypical lender is usually node C. Customers are mainly located in node A, workers with general knowledge and skill would fall into node A unless they had firm specific investment, suppliers usually in node C and community, a specially grafted node C protection.¹⁴⁹ He concludes that:

‘Representation is unwarranted for constituencies at node A because of negligible exposure to their transaction-specific assets. Moreover their legitimate interests are adequately safeguarded through neo-classical market contracting. Such constituencies have neither informational nor decisional needs to be served through board membership. Constituencies located at node B have exposed assets and will charge a higher price unless safeguards can be

¹⁴⁴ Ibid at 392

¹⁴⁵ Coase (n 143) 393

¹⁴⁶ Coase (n 143) 397-This he actually states in terms of invention to bring the factors of production closer together such as telephone, telegraph and so on

¹⁴⁷ O Williamson, ‘Corporate Governance’ (1984) 93 (7) Yale law Journal 1197-1230 at 1203

¹⁴⁸ Ibid

¹⁴⁹ Williamson (n 147)

devised therefore generalised safeguards through voting board memberships may be warranted and finally those constituencies located in node C have devised a structure of bilateral governance and do not need membership on the boards..¹⁵⁰

This constitutes a highly fascinating economic analytical response to corporate governance but it indicates that both agency and transaction cost economics regard the board of directors, alongside stock markets for the public and specialised contracting for lenders and suppliers as instruments of control for shareholders and investors. The attractiveness of these theories lies in the rather simplistic analysis of relationships within the corporation in terms of contracts, it appears faultless in the picture it paints and is immensely popular. The problem however is not that of a wrong picture but rather an incomplete one. The push for responsibility is coming from society because of the impact which corporate power is having and the focus of this theory is internal and self-interested. The safeguards need to be re-examined and alternative structures suggested.

¹⁵⁰ See Williamson (n 147) at 1205-1215

5.4.3 Stakeholder Theories

In contrast to the position of the agency theory the stakeholder theories cover a body of work that attempts to capture the idea that a corporation should have some social purpose beyond maximising returns to shareholders. In spite of the significant amount of literature on this subject, the theory is not as bold or revolutionary as it first appears.¹⁵¹ In this vein Elhauge suggests that:

‘Managerial discretion to sacrifice profits is both inevitable and affirmatively desirable *however* one cannot expect too much from such discretion. Corporate managers may rarely choose to sacrifice profits given product market competition, future job prospects, stock options and other rewards for making corporate profits. It may also be true that shareholders would rarely allow (or to only a limited degree) allow managers to pursue unprofitable public interest objectives.’¹⁵²

This theory follows from the second implication that may be made from the Berle and Means theory. Therefore the possibility of the consideration of other interests in the face of continued separation of ownership from control. This theme is reflected in the view of the corporation as an institutional arrangement for governing relationships between all parties that contribute firm-specific assets.¹⁵³ This self-imposed limitation on stakeholder theories to try to fashion out a workable mechanism of control in all affected parties interests from within the corporation has

¹⁵¹ Such list of articles would include Blair (n 134), M M Blair and L A Stout ‘A team production theory of company law’ (1999)24 Journal of Corporate Law 751-806 , K E Goodpaster ‘Business Ethics and the Stakeholder Analysis’ (1991) 1(1) Business Ethics Quarterly 53- 73, M Jensen “Value Maximisation, Stakeholder Theory and the Corporate Objective Function (2001) 7 European Financial Management. 297- 317, T Donaldson L Preston ‘The stakeholder theory of the corporation: Concepts, evidence and implications’ (1995)20 Academy Of Management Review 65- 91

¹⁵² E Elhauge ‘Sacrificing corporate profits in the Public Interest’ (2005) 80(3) New York University Law Review 733-869 at 868

¹⁵³ T Clarke *Introduction to Theories of Corporate Governance: the philosophical foundations of corporate governance* (Routledge, London 2004) 11 (quoting Blair)

been its undoing. It has become largely an exercise to appeal to the corporate conscience.¹⁵⁴

This is evident in such statements by stakeholder advocates accepting that “clearly trying to run corporations in the interest of ‘society at large... is an impossible end and in practice a vacuous objective.’¹⁵⁵ However there are different strands of the stakeholder arguments: one strand sees stakeholder theories in terms of manager’s discretion to sacrifice shareholders interests in the short-term for other vital interests that may be justified in the shareholder’s long term interests¹⁵⁶

While other strands are more practically focused on conceiving a workable model that shifts management control from a shareholder to a stakeholder focus. An example of this is the Blair and Stout team-production theory¹⁵⁷, which conceive of a model where rational individuals who hope to profit from team production overcome shirking and rent-seeking by opting out of an internal governance structure and opt instead for a ‘mediating hierarchy’ solution which requires that the team members give up important rights (including property rights over the teams joint outputs and over team inputs such as financial capital and firm-specific human capital to a legal entity created by act of incorporation so corporate assets belong the corporation itself.

The Blair and Stout position of the stakeholder theory is distinctly appealing to a communitarian spirit that may lie within this ‘contractual entity’ and perhaps finding legal ground in the interpretation of director’s duties as being owed to the

¹⁵⁴ To adopt a ‘real entity’ phraseology

¹⁵⁵ Blair (n 134) 14 She however adds that the least we can hope for is that the goals of corporation is in the interests of the larger society.

¹⁵⁶ Allen (n 23) states ‘that the long-term short term distinction preserves a form of stock-holder oriented property theory while permitting in fact a considerable degree of behaviour consistent with the view that sees public corporations as owing social responsibilities ...’ the only problem with this is that it is subject to managerial discretion and the companies’ behest hence entirely voluntary and arbitrary.

¹⁵⁷ Blair (n 134), Blair & Stout (n 151)

corporation.¹⁵⁸ It undoubtedly reflective of co-determination in Germany and the ‘collective’ focus of Japan but in no way implies direct liability to society.¹⁵⁹ Indeed Clarke points out that the stakeholder represents an important step towards corporate citizenship as a mature appreciation of by the corporation of its rights and responsibilities.¹⁶⁰This could form a persuasive basis for acknowledging other interests

In spite of the excellent aspects of this theory, there is a flaw. The focus of the stakeholder theory is ultimately internal to the corporation; it exemplifies corporate response to other stakeholders and therefore largely depends on identifying actors which have a stake in the corporation. There is a more compelling case for identified, efficient and enforceable solutions to the problem posed by large multinational corporate power. This solutions are required by wider society though it may be desirable to have this reflected in corporate law, it seems corporate law has become more oriented with its own internal focus on corporations. It reflects the utilitarian perspective that ‘what’s good for business is good for society.’

¹⁵⁸ See *Re Smith and Fawcett Limited* (1942) where Lord Greene said that directors must exercise their discretion bona fide in what they consider –not what the court may consider- is in the interests of the company”. Statute expressly preserves this consideration of other interests in s. 306, 309 Company Act 1985 United Kingdom. In America see the raft of other constituency statutes –see Blair Ibid, but this only serve to deepen and preserve managerial discretionary power. Indeed in this sense a duty owed to everyone & yet unaccountable to everyone.

¹⁵⁹ Clarke sees this conception of the corporation a a set of relationships rather than a series of transaction in which managers adopt an inclusive concern for all stakeholders as much closer to established European and Asian business values. Clark (n 153) There are two major types of corporate system in capitalist states globally, namely the shareholder and the block-holder systems, although this may mask national differences. Bratton and McCahery (n 99) 23-55. Yet there are forceful arguments for the emergence of a convergence on a system of corporate governance that prioritises the shareholder. Hansmann & Kraakman (n 100) The OECD Corporate governance code also emphasises share-holder primacy with the discretion to consider other interests

¹⁶⁰ Clark (n 153)

The desire to see corporate governance ‘as the design of institutions that induce or force management to internalise the welfare of stakeholders’¹⁶¹ is still some way off, there needs to be a radical re-think of corporate law and structures for this to be done in a fundamental way. It may be necessary for CSR as a more urgent agenda to explore a wider framework of its own.

However this challenge to integrate external facing concerns within company law was addressed in the recent reform of the UK Company law. This reform has been referred to as the best example of an attempt to face the contemporary challenges.¹⁶²

The next section analyses this reform as an example to further illustrate the potential and limitations of this traditional corporate law approach to embracing notions of responsibility and accountability to society as an aspect of corporate legitimacy and control.

¹⁶¹ J Tirole ‘Corporate Governance’ (2001) 69(1) *Econometrica* 1-35

¹⁶² Horrigan (n 11)

5.5 UK Corporate Law Reform as example

The UK in 1998 embarked on a fundamental review of its company law which culminated in the Companies Act 2006. The incentive for this move was stated as follows:

‘The last significant review of company law in the UK took place more than forty years ago. Since then, relevant statute and case law have changed, and there have been major developments in recognised ‘best practice’ in corporate governance, with the result that it is now difficult and time consuming for directors and other interested parties to discover exactly what the law relating to companies is.’¹⁶³

When the company law review was instituted in 1998, it was charged with a framework of company law that ‘encouraged competitiveness as well as improving accountability’.¹⁶⁴ This reflects Hurst’s assertion of the drive for utility and responsibility as the two elements of corporate legitimacy found within corporate law.¹⁶⁵

The opportunity to broaden the agenda of CSR and debate issues proposed by the Company Law Review led to the formation of the non-governmental organisation Corporate Responsibility Coalition (CORE).¹⁶⁶ The aim was to use this as an opportunity to frame the debate of CSR within corporate law. The hope was perhaps

¹⁶³ House of Commons Trade and Industry Committee *The White Paper in Modernising Company Law* Sixth Report of Sessions 2002-03 HC439 (Stationery Office London 2003) 4

¹⁶⁴ Company Law Review Consultative Meeting Note for Record, 21 July 1998, <www.dti.gov.uk> accessed 10 March 2010 see *ibid* at 5

¹⁶⁵ Hurst (n 5)

¹⁶⁶ J Sabapathy, ‘In the dark all cats are grey: corporate responsibility and legal responsibility’ in S Tully (ed.) *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, Cheltenham 2007) 235-253, 239

to achieve a binding definition of corporate responsibility.¹⁶⁷ The resulting Companies Act 2006 came into force in stages with the final sections fully in force by 1st October 2009. While the resulting act was a much larger one, it did not radically depart from the agency theoretical view of the corporation. The relevant aspects which highlight relevant changes made in the reform include: director's duties, company reporting and corporate governance structures.

5.5.1 Director's Duties

The notion of director's duties which was at the heart of the historical debate between Berle and Dodd was also an issue of substantial focus in the reform of UK corporate law.¹⁶⁸ The question of director's duties is at the heart of the debate in corporate law about the role of the corporation and the notion of control towards the interests of affected parties. The purpose of the corporation (corporate objective) will affect the range of interests that the directors need to protect and the persons to whom the directors owe these duties.¹⁶⁹

In the Ministerial statements about the bill prior to the passage of the Companies Act 2006, Darling (then Minister) notes that:

“For the first time, the Bill includes a statutory statement of directors’ general duties. It provides a code of conduct that sets out how directors are expected to behave. That enshrines in statute what the law review called “enlightened shareholder value”. It recognises that directors will be more likely to achieve long term sustainable success for the benefit of their shareholders if their companies pay attention to a wider range of matters...**Directors will be required to promote the success of the company in the collective best interest of the shareholders, but in doing so they**

¹⁶⁷ Ibid

¹⁶⁸ Horrigan (n 11)

¹⁶⁹ A Keay ‘Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s ‘Enlightened Shareholder Value Approach’ 29 Sydney Law Review 577-612

will have to have regard to a wider range of factors, including the interests of employees and the environment”.¹⁷⁰

This codification of director’s or managers fiduciary duties is contained in s.170-177 but the relevant section which adopted this approach is s.172 Companies Act 2006. This section states as follows: s. *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

This section has been heralded as innovative and novel because it incorporates elements of the stakeholder approach¹⁷¹ however on closer scrutiny it represents a mediated position quite similar to the position advocated by ‘enlightened self-interest’ models. This is an attempt to integrate wider considerations within a shareholder wealth maximisation focused model. It does not alter the basic focus of the corporation from a contractual one. It is still self-interested.

¹⁷⁰ Companies Act 2006 *Duties of company directors: Ministerial Statements* DTI June 2007 p.7 (Alistair Darling, Commons Second Reading, 6 June 2006, column 12)

<<http://www.bis.gov.uk/files/file40139.pdf> > accessed 10 March 2010

¹⁷¹ Horrigan (n 11)

However within the Consultation document of the Company Law Steering Group another approach termed the ‘pluralist approach’ was considered. This pluralist approach would involve the notion that: ‘company law should be modified to include other objectives so that a company is required to serve a wider range of interests not subordinate to, or as a means of achieving shareholder value (as envisaged in the enlightened shareholder view) but as valid in their own rights.’¹⁷² This would have involved a radical re-think of director’s duties. It would have endorsed Dodd’s view of the corporation owing duties and serving wider interests in society than that of shareholders as a fuller interpretation of the entity and modified concession theories of the corporation. However this was not adopted.

Yet an extension of director’s duties in this way could have a significant point that would substantially alter the focus of corporations from strict profit-making motive geared towards shareholders and increasing immediate share price to other tangible goals which society deems fit for the corporation. Parkinson had pointed out that:

‘...broadening directors’ discretion to permit them to depart from the requirements of profit maximisation would be a necessary adjustment to create an appropriate legal setting for changes in management behaviour that are the intended consequence of other methods of inducing responsibility. A reformed fiduciary duty might accordingly stipulate that the directors are under an obligation to conduct the business for profit, but that in so doing they must take account of affected interests (which might be specified.)’¹⁷³

The 2006 Act endorsed this limited approach which it termed the ‘enlightened shareholder value’ approach. This approach adopts a shareholder focused model that allows for consideration of other factors which may affect that shareholder value in the long term. It permits the consideration of other ‘stakeholders’ interests but only

¹⁷² *Modern Company Law For a Competitive Economy The Strategic Framework* February 1999 <<http://www.bis.gov.uk/files/file23279.pdf>> accessed 10 December 2011 at 37; This document expressly cites Blair (n 134)

¹⁷³ Parkinson (n 87) 371

as it affects shareholder value and ‘the success of the company’ (profit). Nevertheless it is evident from the ministerial statements about the bill that even this section could have multiple interpretations:

‘There are two ways of looking at the statutory statement of directors’ duties: on the one the hand it simply codifies the existing common law obligations of company directors; on the other – especially in section 172: the duty to act in the interests of the company – it marks a radical departure in articulating the connection between what is good for a company and what is good for society at large.’¹⁷⁴

The effect of this section on the use of corporate power in relation to interests in society will be explored in relevant legal cases that follow but it offers up an example of reform geared at extending directors’ duties.

Recently Arden LJ in *Rolls-Royce Plc v Unite the Union* pointed out in obiter while examining a provision under the Employment Age (Equality) Regulations and comparing to s.172 Companies Act 2006 that ‘the reasonable employer ...might well be expected to be motivated not simply by its narrow financial interest but also by enlightened self-interest and take into account the interests of employees generally as one of the factors to which it should have regard in determining the business need of the undertaking.’¹⁷⁵

The test for corporate law will also be in cross-national comparative reform and the willingness of other states to follow even this limited example. It creates a type of law- tool which can be applied in context. In the 2008 report, the UN Secretary General’s Special Representative on Business and Human Rights cites the new requirement under UK Company Law for directors to take account of such matters as

¹⁷⁴ M Hodge Ministerial statements (n 170)1

¹⁷⁵ (2009) EWCA Civ 387 para.169

community and environmental impact as an example of how countries might engage ‘in re-defining fiduciary duties.’¹⁷⁶

Nevertheless it is important to stress that for many analysts this is a limited approach. Villiers points out that ‘such provisions tend to increase the discretion of the directors and managers, thus giving them a potential defence against challenges from shareholders rather than protecting the non-shareholders.’¹⁷⁷ Others critics also remark on problems in corporate law’s approach to corporate power and responsibility. They point out that in adopting a strict contractual approach to corporate personality that privileges shareholder interests, its fundamental structures permit irresponsibility.¹⁷⁸

The necessity for shareholder focus is not integral to corporate law but has emerged due to political interests utilising influential theories. Hurst again indicates that it is the utilitarian emphasis which politics privileges that holds us back from the demand for corporate power to be structured as to be responsible.¹⁷⁹ Therefore the mediated position of s.172 is unsatisfactory because it does not address this core issue. It falls short of Dodd’s more radical view that ‘business is permitted and encouraged by law because it is of service to the community rather than because it is a source of profit to its owners.’¹⁸⁰ Ireland points out that:

‘While the former entailed important changes to the way in which the corporation was conceptualised (and to the constitution of the corporate legal form), contemporary CSR, with its emphasis on

¹⁷⁶ See comment in Horrigan (n 11) 230

¹⁷⁷ Cited in Ibid at 94

¹⁷⁸ See P Ireland ‘Limited Liability, Shareholder rights and the problem of corporate irresponsibility’ (2010) 34 Cambridge Journal of Economics 837-856, 848 Ireland states that ‘The rigid application of the Salomon principle, coupled with de facto, no-liability shareholding, has thus greatly extended the scope for opportunistic behaviour, further institutionalising corporate irresponsibility. It is not, perhaps, surprising that the leading legal academic Otto Kahn-Freund, writing in 1944 when group structures were beginning to proliferate, described Salomon and its rigid application by the courts as ‘calamitous’.’

¹⁷⁹ Hurst (n 5) 59

¹⁸⁰ Dodd (n 77)

voluntary self-regulation, leaves untouched the shareholder-oriented model of the corporation and the corporate legal form as presently constituted. It is hardly surprising that CSR has been so warmly embraced by so many corporations.’¹⁸¹

These critics simply point to the theoretical debates at the heart of corporate legal theory stressing that the nature of corporate personality as a legal construct with the resultant attribute of limited liability has been explored and utilised in ways which privilege the utility aspect of legitimacy and inadvertently advance and strengthen corporate power giving room for exploitation and irresponsible use of such power. While this section falls short of a radical re-think of the focus of corporate law, it leaves room for compelling evidence that the business society balance is changing and that other factors affect corporate interests more palpably than would otherwise have been admitted in the traditional shareholder focused corporate law.

5.5.2 Company Reporting

The Companies Act also enshrines reporting as a method of evaluating the compliance with s.172. This approach is adopted for large corporations. This requirement can be found in s.417 Companies Act 2006: Contents of directors' report: business review

(1)Unless the company is entitled to the small companies' exemption, the directors' report must contain a business review.

(2)The purpose of the business review is to inform members of the company and help them assess how the directors have performed their duty under section 172 (duty to promote the success of the company).

(3)*The business review must contain—*

(a) a fair review of the company's business, and

(b) a description of the principal risks and uncertainties facing the company.

(4)The review required is a balanced and comprehensive analysis of—

¹⁸¹ Ireland (n 178) 853

- (a) the development and performance of the company's business during the financial year, and*
- (b) the position of the company's business at the end of that year, consistent with the size and complexity of the business.*
- (5) In the case of a quoted company the business review must, to the extent necessary for an understanding of the development, performance or position of the company's business, include—*
 - (a) the main trends and factors likely to affect the future development, performance and position of the company's business; and*
 - (b) information about—*
 - (i) environmental matters (including the impact of the company's business on the environment),*
 - (ii) the company's employees, and*
 - (iii) social and community issues,*

The approach falls short of the Operating and Financial Review (OFR) initially advocated by the UK government.¹⁸² This OFR was to be a detailed report within the annual report. This was to be a mandatory endorsed means of social and environmental reporting.¹⁸³ However the government reversed the decision to make the OFR mandatory and rather adopted this approach stipulated in s.417. This approach is based on the EU Accounts Directive for the adoption of a member-wide business review.¹⁸⁴

The primary audience outlined in s. 417 is the 'members of the company' therefore the shareholders. Therefore the review is shaped to the perceptions of the shareholder and what projects the success of the company. The inclusions of social and environmental issues are only in so far as it affects 'the success of the company.' Horrigan points out that the emphasis is on reporting how the company's internal and external affairs affect the company and its prospects for the future as distinct from reporting on how the company and its affairs affect and otherwise relate to the

¹⁸² J Solomon *Corporate Governance and Accountability* (Wiley, 2007) 169

¹⁸³ Ibid

¹⁸⁴ Ibid

societal landscape around them.¹⁸⁵ Therefore the focus is internal and inward looking, not external or outward facing. Its focus is on how the corporation and its financial position is affected by social or community issues, environmental matters or employees.

In addition, there is a subjectivity in such reporting that may result in anomalies and partial disclosures as it rests with the directors to decide what amounts to ‘an understanding of the development, performance or position of the company’s business’.¹⁸⁶ The use of disclosure as a monitoring mechanism can shape corporate behaviour but there are other critical issues which may deter from its value. The directed users of these reports, the shareholders may not use these reports in the intended fashion. There is evidence that the corporate annual reports are not effectively utilized by shareholders.¹⁸⁷ In addition, the large shareholders, institutional investors have mainly chosen inaction on the issues of CSR. They have largely opted to remain guided by the economic incentive.¹⁸⁸ The drive for socially responsible investors is still in its infancy.¹⁸⁹

Finally the subjective nature of the reporting may lead to selective or incomplete reporting, so that information is selected and tailored to audience. The emphasis of such reporting could then be on the public relations aspect, rather than an integration of such considerations into the business model.¹⁹⁰ This section represents an innovative but limited response incorporated within corporate law.

¹⁸⁵ Horrigan (n 11), 260

¹⁸⁶ S. 417(6) Companies Act 2006 (UK)

¹⁸⁷ C Villiers *Corporate reporting and Company Law* (CUP, Cambridge 2006) 34

¹⁸⁸ L Kurtz ‘Socially responsible Investment and Shareholder Activism’ in in A Crane and others *Oxford Handbook on CSR* (OUP, Oxford 2008) 249-280

¹⁸⁹ *ibid*

¹⁹⁰ Villiers (n 187) 36; C Valor ‘Corporate Social Responsibility and Corporate Citizenship’ (2005) 110(2) *Business and Society Review* 191, C Pedamon ‘Corporate Social responsibility: a new approach to promoting integrity and responsibility’ (2010) 31(6) *Company Lawyer* 172-180

5.5.3 Complementary Corporate Governance reform

Alongside the UK Company review and the Companies Act 2006, the UK has a long and established history of corporate governance reform. It is also acknowledged as a world leader in corporate governance reform.¹⁹¹ However corporate governance in this guise is also focused on structures and the narrow questions of internal control and running of the company.¹⁹² This may also be for reasons of convenience which privilege aspects of utility within legitimacy, aspects which are already accepted within the traditional model. Mitchell points out that this narrow focus has been more rewarding in terms of scholarly attention. He indicates that:

‘unlike the CSR debate per se, the corporate governance debate does repay scholarly attention as a focus of social responsibility defined as it is by the traditional parameters of corporate law and articulated within a well-developed framework of fiduciary duties. Whereas CSR operates free-form and can seem either superfluous or threatening corporate governance issues operate within well-defined and accepted structures.’¹⁹³

However that is not to say that even such narrow corporate governance is settled. It has external effects or more aptly it has been influenced by external events. It is caught in a cycle of reactionary reform prompted by external corporate financial scandals and crisis which reflect the inadequacy of previous reform.

The OECD confirms that ‘pressure on governments and on the business sector to improve corporate governance arrangements has arisen often in the context of the failure of large companies and particularly marked instances of corporate fraud.’¹⁹⁴

¹⁹¹ Solomon (n 182) 49

¹⁹² R Mullerat *International Corporate Social Responsibility: The role of Corporations in the Economic Order of the 21st century* (Kluwer law International, 2010) 49

¹⁹³ L Mitchell ‘The Board as a path toward corporate social responsibility’ in D McBarnet A Voiculescu & T Campbell (eds.) *The new corporate accountability: Corporate Social Responsibility and the law* (CUP, Cambridge 2007) 279-307, 279

¹⁹⁴ OECD *Corporate Governance: A survey of OECD Countries* (OECD 2004) 18

The Cadbury report¹⁹⁵ which is the UK's first major attempt to 'formalise corporate governance best practice'¹⁹⁶ followed on from the failure of Maxwell publishing group and the ensuing scandal after the death of its Chairman and Chief Executive Robert Maxwell in 1991.¹⁹⁷

This report investigated the three traditional aspects of control and ownership and that is the board of directors, the shareholders and the role of auditors. The FRC points out that:

The Cadbury Report addressed issues such as the relationship between the chairman and chief executive, the role of non-executive directors and reporting on internal control and on the company's position. A requirement was added to the Listing Rules of the London Stock Exchange that companies should report whether they had followed the recommendations or, if not, explain why they had not done so (this is known as 'comply or explain').¹⁹⁸

The next report, the Greenbury Report 1995 was in response to excessive executive remuneration and the ensuing scandals. The objective was to 'establish a balance between director's salaries and their performance.'¹⁹⁹ The Hampel report in 1998 took on both aspects as well and recommended a bringing together of both the financial perspectives of corporate governance and the issues of directors remuneration and this led to the combined code 1998. This was followed by the Turnbull report in 1999 which set out best practice of internal control systems for UK listed companies.²⁰⁰

¹⁹⁵ Cadbury *Report of the Committee on the Financial aspects of Corporate Governance* (Gee Publishing, London 1992)

¹⁹⁶ Solomon (n 182) 49 The FRC points out that 'the development of corporate governance in the UK has its roots in a series of corporate collapses and scandals in the late 1980s and early 1990s including the collapse of the BCCI bank and the Robert Maxwell pension funds scandals both in 1991 FRC *The UK Approach to Corporate Governance* November 2006, 3

¹⁹⁷ OECD (n 194) 19

¹⁹⁸ FRC *The UK Approach to Corporate Governance* November 2006, 3

¹⁹⁹ Solomon (n 182) 55

²⁰⁰ FRC (n 198) 4

The fall of Enron in the US prompted re-evaluation of corporate governance system again in the UK but this was not only a UK response. The OECD pointed out that the ‘essential difference between now and the past is the international implications of the problem which have come to light in the US have been marked.’²⁰¹ In this case, questions of corporate governance were directly raised by the allegations of fraud and active cover up and dissimulation by management which precipitated the stunning collapse.²⁰²

Nevertheless the focus of the Higgs report that followed was on the role and effectiveness of non-executive directors (NED) recommending among others that one non-executive director champion shareholder interests,²⁰³ the recurring theme of the reports being a strengthening of the accepted model of owner- control analysis in corporate law (shareholder focus). This also led to the review of the combined code in 2003. The Financial reporting Council was confirmed as having responsibility for publishing and maintaining the code.²⁰⁴

The Financial Reporting Council which is now the UK’s independent regulator for promoting corporate governance and reporting to foster investment adopts a ‘comply or explain’ approach which reflects a kind of policed voluntary approach for listed companies.²⁰⁵ There were some associated reports in 2003 and the include Smith’s report on the role of the audit committee and the DTI commissioned Tyson report on the recruitment and development of NED.²⁰⁶

In predictable fashion, the 2008 financial crisis in the banking industry prompted an independent review of corporate governance in the UK banking industry. The

²⁰¹ OECD (n 194) 18

²⁰² Ibid at 20

²⁰³ Solomon (n 182) 61

²⁰⁴ FRC (n 198) 4

²⁰⁵ FRC (n 198)

²⁰⁶ Solomon (n 182)

resulting Walker report was published in 2009. This report led to wider review by the FRC. The FRC in 2010 then published the new UK corporate governance code replacing the combined code. It also led to the formulation of a stewardship code for institutional investors.

The code adopts the definition of corporate governance given by the Cadbury report:

‘Corporate governance is the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders’ role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company’s strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board’s actions are subject to laws, regulations and the shareholders in general meeting.’²⁰⁷

This area of corporate governance is very active. However again it is focused on narrow internal questions. It falls fully on the side of the contractual agency vision of control tackling questions of legitimacy from a limited internal focus of reconciling the power of directors (managers) to shareholders. The frequency and reactionary nature of the changes leave room for questions on its effectiveness even at the narrow level but its failure from a CSR perspective is that it adopts an unadulterated shareholder and utility focus. It follows the ideology that ownership (shareholder) control and oversight is the primary requirement for governance and accountability, while this is an important aspect, it ignores wider questions the impact of corporate power, which as a result fall within CSR sphere.

²⁰⁷ FRC UK Corporate Governance Code 2010 p.1 <<http://www.frc.org.uk/corporate/ukcgcode.cfm>> accessed 10 December 2011

5.6 Conclusion

To ensure controls, accountability and responsible use of such corporate power is tantamount to devising means by which such power is exercised legitimately, This is particularly important because liberal society requires legitimate use of powers located within it for its proper functioning. The corporation is a very attractive form of business because it is a source of significant wealth but where it becomes a source of unaccountable power, this threatens the very existence of liberal society. It is therefore important to have constraints on the exercise of such power through adequate accountability and regulatory processes.

This chapter therefore explored the traditional legal perspective of corporate law as a potential framework for legitimacy of corporate power. At the onset, it noted the desire expressed by several scholars that fundamental change in the law of corporations to signal wider responsibilities will create an inclusive framework for CSR. However this chapter explored corporate theories and corporate governance theories that inform practice as well as recent reform in the UK to discover that corporate law has imposed upon itself a narrow focus on the shareholder model.

The importance placed within corporate theory on privileging contractual and fictional origins and nature of the corporation, mean that there is a dominance of the shareholder, profit-making model. It strongly adopts a focus on the utility element of corporate legitimacy focused wholly on the success of the corporation.

Hurst is right when he suggests that:

‘Weakness in the demand for responsibility did not derive from the immediate context of that demand but from other undesirable by-products of our utilitarian emphasis. Power continually presented new temptations and shifted into new forms. To structure power for responsibility called for continuing close attention and an investment of resources of mind and energy which we begrudged. We begrudged the investment because we felt that it subtracted from our primary interest in the economy, which was the main area in which we pursued utility.’²⁰⁸

This focus on utility may also be as a result of the nature of traditional state-centred law which is always striving for certainty and tangibility and in some ways, equating that with effectiveness. This quest which the law never fully achieves bearing in mind this is a dynamic ever-changing world. This often leaves legal scholars in a mediated position, sometimes trying to fit traditional old concepts to newer problems and perhaps failing. Perhaps the law needs to evolve and proffer new and more adequate legal solutions to these newer problems. The conclusion therefore seems to be that the core agenda of legal legitimacy cannot be suitably carried out within the current corporate law agenda.²⁰⁹

Yet the problem of law’s role in achieving the legitimacy of corporate power within CSR is still a crucial one and as Villiers points out CSR cannot be left in the hands of the corporation.²¹⁰ This therefore points to the need for states, international organisations, and civil society to explore other frameworks for responsibility. The theoretical underpinnings of corporate law reveal a reluctance to tackle the issues and contestation that have driven a utilitarian perspective and affected the content of corporate law. It also reveals the limitations of the substantive approach. The reform

²⁰⁸ Hurst (n 5) 59

²⁰⁹ The ties in with the Hansmann and Kraakman, pronouncement that: ‘Asserting the primacy of shareholders interests does not imply the interests of stakeholders must and should go unprotected. It merely indicates that the most efficacious legal mechanism for protecting the interests of non-shareholders lie outside corporate law’ Hansmann & Kraakman (n 100) at.43

²¹⁰ Villiers (n 37) 87

process takes time and is not the most efficient. The contestations often result in little change and show the inflexibility and slowness to change sometimes evident in traditional law. It is also driven by the state and the issue of political will becomes paramount. However as shown in Chapter four, law can be viewed from a different perspective. This perspective would ensure that the wider CSR question is addressed by law in a different way. It suggests a shift in focus from searching for legal legitimacy of CSR within traditional laws like corporate law to conceptualising new non-traditional legal perspectives that focus on role-based definitions of legal quality, whilst driving for legitimacy in the form of responsibility.

These newer multi-stakeholder frameworks can still be developed within the law especially if a non-traditional pluralistic perspective is taken on. The next chapter will suggest a novel legal theoretical approach that could lead to a framework for addressing CSR issues in a non-traditional way.

CHAPTER SIX

LEGITIMACY ISSUES II: A SHIFT FROM TRADITIONAL TO NON-TRADITIONAL PERSPECTIVE: PROPOSING A LAW-JOBS APPROACH

*'All three questions- the identification of beneficiaries (fiduciary responsibility), the available mechanisms (corporate governance), the role of law- led to the same need for identifying the social functions of CSR in a broader context...CSR then seems to be one of those decentralised integrative device which place restrictions on economic action in the interest of other subsystems – trees and people included.'*¹

6.1 Introduction

This chapter shifts the perspective of law's legitimating role within CSR to a non-traditional pluralist legal perspective. It addresses law's ability to contribute to legitimising CSR in a non-traditional pluralist way outside of traditional substantive law structures such as corporate law. It examines CSR's legitimating core from a 'role-based' legal perspective which is not based wholly on one form of law. This acknowledges the nature of CSR as a decentralised integrative device which is not anchored on substantive state law alone. This also responds to current demands that other actors in society such as international institutions and civil society have a responsibility within the drive for legitimacy framework that is CSR to create structural processes necessary to ensure legally and socially responsible behaviour by corporations.²

¹ G Teubner 'Corporate Fiduciary Duties and their beneficiaries: A Functional Approach to the Legal Institutionalisation of Corporate Responsibility in K J Hopt and G Teubner (eds.) *Corporate Governance and Directors Liabilities: Legal, Economic and Sociological Analyses of Corporate Social Responsibility* (De Gruyter, Berlin 1984)149-177, 160 &162 (words in brackets are mine)

² C Villiers, 'Corporate law, corporate power and corporate social responsibility' in N Boeger, R Murray and C Villiers (eds.), *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham 2008) 85- 112, 87

This can be seen as a step away from the assessment of law within CSR from a traditional state based substantive law perspective towards a more inclusive, dynamic and pluralistic ‘role-based’ legal perspective. Therefore this perspective utilises the term ‘law’ in the inclusive pluralist sense as earlier identified in chapter four. This application should result in a legal theoretical framework will would allow for examination of law’s potential as legitimacy at different levels and in different context. This could be local, national, cross-national or industry-specific.

The legal theoretical perspective chosen in this chapter to represent this non-traditional view is derived from Llewellyn’s law jobs theory. This theory embodies the flexibility and shift that is seen as necessary to gauge law’s role in legitimising corporate power. This chapter uses the five-fold breakdown of Llewellyn’s law-jobs³ to examine the potential role for law within CSR. The five law-jobs are the disposition of trouble cases; the preventative channelling and the re-orientation of conduct and expectations so as to avoid trouble; the allocation of authority and the arrangement of procedures which legitimise action as authoritative; the net organisation of the group or society as a whole so as to provide direction and incentive and the use of the juristic method.⁴ There are two aspects to this perspective: a basic one which allows for an evaluation of how the jobs could be done and an aspirational one, which allows for how the jobs could be done better.⁵

³ K Llewellyn ‘The Normative, the Legal and the Law Jobs: The Problem of the Juristic Method (1940) 49 *Yale Law Journal* 1355-1400, 1373 There are actually four law-jobs and an advocated method of doing those jobs as a fifth*

⁴ Llewellyn(n 3) 1392 It must be noted that the juristic method is not a law-job per se but an advocated method for the evaluation, reform and upkeep of the law-jobs. It therefore in essence goes to the doing of the law-jobs

⁵ S Taekema ‘The point of Law: the interdependent functionality of state and non-state regulation in H Van Schooten J Verschuuren (eds.) *International governance and Law: state regulation and non-state law* (Edward Elgar, Cheltenham 2008) 56-73, 59 Llewellyn also noted that the law-jobs have a ‘questing’ aspect and a ‘better’ aspect, in other words, an aspect that simply enquires into how these jobs are done and another aspect that examines how they could be done better. Llewellyn (n 3) 1375

In other words, this chapter frames the law's legitimating role in CSR around questions of how the corporate and society relationship in a given CSR context, handles the disposition of trouble cases; the preventative channelling and the re-orientation of conduct and expectations so as to avoid trouble; the allocation of authority and the arrangement of procedures which legitimise action as authoritative; the net organisation of the group or society as a whole so as to provide direction and incentive and its use of the juristic method for the amendment and re-evaluation of processes. The aim is to illustrate that this can be a framework that promotes the use of varied tools, legal structures and processes utilising both traditional and non-traditional law and regulation towards the legitimacy objective. The law-jobs legal theoretical perspective is relevant for the question of assessing CSR's ability to be a legitimizing force for corporate power and indicates the necessity of legal structures in the net organisation and evaluation of CSR. This perspective therefore indicates that law is an important aspect of legitimacy.

Law irrespective of form can be a legitimising force especially where such rules are geared towards performing important legal roles within society. Therefore such a framework should involve open and transparent application, with adequate provisions for re-evaluation. This perspective may not find all the instruments in one document or law, but it takes a holistic view of that context, searching for rules, standards- 'law tools' that may be fulfilling these roles.

This chapter will set out its suggested approach and the applicability of law-jobs to CSR but it does not seek to demonstrate whether the law-jobs are currently done adequately or inadequately. It purely seeks to identify that such perspective holds enormous potential for CSR. This leaves room for further research in future to assess and measure the doing of the law-jobs in given CSR contexts.

Consequently the outline of the chapter is as follows: The next section will outline the background to Llewellyn's Law-jobs thesis. This will be followed by an analysis of law-jobs potential application within CSR using Llewellyn's five-fold framework. Finally the conclusion draws out the unique potential which this shift in focus of perspective of law may afford the drive for legitimacy within CSR in general.

6.2 The Law-Jobs Theoretical perspective

The wider debates about law in chapter four drew our attention to the limited nature in which traditional legal perspectives relate to new phenomenon. Law is often regarded in the formal sense of mandatory legal rules backed by sanctions and this has resulted in almost relegating the significance of law in the study of contemporary concepts arising against the background of globalization such as CSR.

However the law or 'legal' does not consist of only formal legal rules, it can and should be perceived from the perspective of the role it fulfils in society. This is a view shared by the eminent jurisprudential scholar, Llewellyn.

He points out that

'...the formal legal, the law stuff and the law ways, travel paths of their own once they specialise into recognisability, upon them in conflicting sense of particular parts and of the whole, play human interests and normative generalisations which are thrown and followed into the ring by men. All this takes shape, takes body under the eye, if it be set against those law-jobs whose sufficient doing goes to the very continued existence of society as society; of a group as a group.'⁶

Llewellyn proposed the law-jobs perspective as a process of stripping away to the bare bones and conceiving or discovering law from the point of the necessary roles that law can and does perform in society or groups.⁷ This perspective can also be adapted to allow the examination of the law-jobs within the corporate –society relationship. In particular providing a framework for analysing how these law-jobs

⁶ His position was that law or the legal must be set against law-jobs which are essential for the continued functioning of society as society. Llewellyn (n 3) 1373

⁷ Llewellyn (n 3) 1373

could be performed to achieve CSR aims. This will also give the capability for suggestions in future about how these law-jobs could be performed differently. This perspective endorses the view that where one finds (as is currently the case in CSR) a conundrum-the existence of significant societal problems and corresponding activity to demand for social responsibility of corporations, it may be necessary to take a basic skeletal view that seeks out law and law tools from the roles which they can perform in context.

The legal theoretical perspective of law jobs initially propounded by Llewellyn in the 1930's initially to provide a framework for sociological enquiry in the law-ways of the Cheyenne.⁸ Yet it finds relevance today because of its adaptability to global questions asked of law.⁹ Twining points out the strengths of the law-jobs as its inherent simplicity and flexibility. He stresses that it brings together ideas about rules, processes, institutions, arenas, actors, decisions, techniques, co-ordination and conflict¹⁰

The law-jobs can also be used in a sense which renders it devoid of empirical claims in itself and yet useful for analytical purposes.¹¹ The law-jobs perspective identifies law from very crucial angle, which is that of its role, point and purpose but however makes no empirical or functionalist assumptions. It simple provides a tool that can be used to create a framework for analysis of concepts through a law-based lens.

⁸ Llewellyn (n 3) 1355

⁹ W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP, Cambridge 2009); W Twining *Globalisation and Legal Theory* (Cambridge, CUP, 2000)

¹⁰ Twining rightly points out that this inter-dependence is a relative matter W Twining *Globalisation and Legal Scholarship* Montesquieu Lecture Tilburg University 2009

¹¹ Twining 2009 (n 9) 107; CSR is already loaded with initiatives in various context – this will be a useful analytical tool to gauge for roles.

However there are certain limitations to the law-jobs perspectives, some of which are acknowledged by Llewellyn himself. Firstly the proposition is that the law-jobs are performed by law but they are not exclusively jobs for law. There is interplay between law and other social disciplines. Llewellyn points out that:

‘the legal cannot exhaust the whole nature of a culture...those same ways also involve governance, and can be studied with profit, from that angle alone ...there is almost no part of culture which is not also legal in nature, (whatever else it is as well).’¹²

This is the multidisciplinary dimension present in many phenomena on a global scale. Contemporary studies in CSR will have a multidisciplinary elements drawing on notions from various fields with the social sciences and law. They can be studied from a chosen perspective but this does not make it mutually exclusive to that perspective although different perspectives may serve different parts.

Secondly, the only claim made with regard to these jobs is that law can and does do this in society. This is because some of these jobs are also pertinent issues in the social sciences. The validity of this approach is that it will allow for the identification of law-like phenomena and the ability to suggest novel ways to handle the development of these nascent forms of law within CSR. This would also permit law to show its dynamism and relevance when faced with newer challenges. Therefore as Llewellyn puts it ‘so the social disciplines ...discover that modern work in the legal field is not only a market for their product but a rich productive area.’¹³

Llewellyn points out those law-jobs apply to and go to the essence of any group; therefore it can apply to units within society such as the corporations and the local communities in which they operate and this may be seen as a ‘functional’ approach,

¹² Llewellyn (n 3) 1377

¹³ Llewellyn (n 3) 1357

but it is important to highlight that this does not propose that law does these jobs best or even that these jobs are the exclusive preserve of law¹⁴. It only points out that law does fulfil these roles in society, so seeking out how these jobs are done will lead to the discovery of law, law-tools and rules relevant to that context.

This position is also defended by Ehrenberg¹⁵, who argues for methodological space for a functional theory of law that does not commit to a view about the value of that function for society, nor whether law is the best means of accomplishing it but rather provides a conceptual framework for understanding the nature of law. He points out that there is some agreement that law performs some social functions and that the disagreements often lie in description of these social functions and the extent to which law is the best or only tool useful for such functioning.¹⁶

It may be better to replace the word function with ‘role’ or ‘job’ or even ‘point’ as suggested by Twining.¹⁷ This is in an effort to get away from functionalist debates and focus on the utility of the emerging conceptual framework in analysing relevant phenomena.

¹⁴ Twining 2009 (n 9) for an analysis of such criticism; also see K M Ehrenberg ‘Defending the Possibility of a Neutral Functional Theory of Law (2009) 29(1) Oxford Journal of Legal Studies 91-113

¹⁵ Ehrenberg Ibid

¹⁶ Ehrenberg (n 14)

¹⁷ Twining 2009 (n 9) 110

6.3 Applying the Law-jobs perspective to CSR

The next task is to discover if this can be a heuristic device for law within CSR. This section therefore adopts the five-fold law-jobs framework for CSR and examines how law tools in CSR respond to these five law-jobs. These law tools are used in the pluralistic sense to include law and regulation as earlier defined in the broad sense. Taekema points out that the law-jobs have two aspects – basic and aspirational- and that this makes room for judgements of variable achievements of law jobs.¹⁸ Llewellyn himself points out that the law-jobs have a ‘questing’ aspect and a ‘better’ aspect, in other words, an aspect that simply enquires into how these jobs are done and another aspect that examines how they could be done better.¹⁹ The focus here is on setting out an organising framework of how these jobs could be done in CSR, therefore it only tackles the ‘questing’ or basic aspect.

To perform the first ‘law-job’ the CSR law-tool, instrument or mechanism will have to play a role in the adjustment of trouble cases, in the sense of having the ability to eliminate conflict or grievance which has broken out. This ability must be such as to allow for the diffusion of tensions, trouble or potential trouble as well as provide means of handling the trouble cases or CSR violations. This is a job traditionally carried out by the judiciary and the courts but the law-jobs mechanism can also be extended to dispute resolution mechanisms of other kinds. Therefore it could be seen as inclusive of judicial and non-judicial dispute resolution. It could then be applied

¹⁸ Taekema (n 5)

¹⁹ Llewellyn (n 3) 1375

to dispute resolution in the corporate – community context at different levels or even among corporation. This use of alternative dispute resolution would also have to factor in resolution of deviant behaviour of corporations as well as grievances from different interest groups in society.

The next law-job which CSR law-tools should do is the job of channelling preventively people's attitudes and conduct towards the corporation as well as channelling and re-orientating the corporation's attitude towards society. In that sense not only 'channelling overt behaviour, but also channelling of expectations, norms and claims'²⁰. This is an area of central concern already expressed through the proliferation of CSR codes and reports. Some of these codes and other forms of communication such as social and environmental reports attempt to put forward a new ideology for the corporation, defining what it sees as social issues within its sphere. They acquire the status of a law tools as they begin to guide behaviour of both the corporation and the society.

However this law-job of channelling conduct in CSR is not exclusively focused on voluntary codes because substantive environmental, labour, human rights and health and safety laws would have an impact here. It is even probable that certain contexts may desire to draft laws with explicit focus on CSR. There are examples in Mauritius and Denmark of law explicitly focused on CSR.²¹ Some states like UK and Nigeria have debated a CSR bill.²²

²⁰ Llewellyn (n 3)

²¹ Finance Bill (Mauritius) sub-part AD. S. 50k-1 <http://www.nef.mu/csr/finance_bill.php> accessed 10 December 2011. The Danish Financial Statements Act ("Årsregnskabsloven"), cf. Consolidated Act no. 647 of 15 June 2006, as amended by section 5 of Act no. 108 of 7 February 2007, section 63 of Act no. 468 of 17 June 2008 and Act no. 516 of 17 June 2008 <<http://www.csrgov.dk/>> accessed 10 December 2011

²² UK CR bill Copy available online :

<<http://www.publications.parliament.uk/pa/cm200203/cmbills/129/03129.i.html>>

<<http://www.publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf>> accessed 10 December 2011 , Nigeria CSR bill online <http://www.femiamao.com/files/CSR_BILL.pdf> accessed 10 December 2011

The third law-job is the allocation of authority and the arrangement of procedures which legitimise action as authoritative. This is a constitutive function and this refers to the role of allocation of power and to the indication of authoritative persons and procedures. In corporate and society relations, this will deal with identifying responsibility for exercise of power by corporations, identifying forms, procedures and ideologies that limit or direct the exercise of power as well as specifying those responsible for CSR action, policies and procedures. It will also involve the creation of processes that provide for consultation, participation and CSR rule creation. This identifies the stakeholders and the rules of engagement. However this role may be carried out at different levels of society, such as the company level, industry level or even state level. It is necessary that such procedures are identified and that they operate transparently and accountably.

In several ways, CSR action has involved an implicit acknowledgement of spheres of power and therefore the next logical step is the clear allocation of responsibility. Connolly points out that ‘to acknowledge power over others is to implicate oneself in responsibility for certain events and to put oneself in a position where justification for the limits placed on others is expected.’²³ Llewellyn also points out that ‘It is at this point that an imperative system and the net effect and intent of its authoritative staff make necessary contact with justification of themselves’²⁴ For his purposes this was evident in his application to the juristic method and its institutions but for global society. In the context of CSR, the picture is more complex. It is an emerging picture where those who have the ‘say’, the states are no longer sole speakers or power holders and therefore, new entities are emerging large corporations, non-governmental organizations and so on.

²³ W Connolly *The Terms of Political discourse* (3rd ed.) (Blackwell, Oxford 1993) 97

²⁴ Llewellyn (n 3) 1385

Therefore in law-job, CSR instruments should provide for responsibility for exercise of procedures outlined within it. If it is a CSR law then it should spell out all relevant actors including departments with CSR responsibility, Corporations should provide clear lines of responsibility within their departments and relevant non-governmental stakeholders and their responsibilities should also be clearly identified.

Taekema in examining this law-job admits that ‘the law-job of allocating authority is certainly not by definition the state’s prerogative or task. Private institutions are quite capable of making such decisions under the right conditions: the institutions represent multiple interests, be open to public scrutiny and prevent self-interested and lax monitoring.’²⁵ Therefore the key issue becomes could CSR law-tools developed by multi-stakeholders be fulfilling that role of identifying and re-defining who is responsible for what and how such responsibility should be exercised at both micro and macro levels. The role or job becomes one of identifying who has the say and authority and placing limits (explicit or tacitly) on the exercise of that power. These limits and allocation of responsibility go to the crux issue of legitimacy.

The fourth law-job of net organization is a result of the previous three law –jobs and therefore this law-job will involve incentivising, integrating and directing society as a whole. CSR law-tools could be able to play a pivotal role in providing direction and organization on the issues arising from the relationship between society and business. CSR is already developing as a specialist area and may yet develop its own specialist area of law. The application of law-jobs theory to any existing CSR mechanisms permits analysis to consider what these mechanisms currently achieve as well as what they could potentially achieve.

²⁵ Taekema (n 5) 66

Llewellyn stresses that the ‘official-legal and the official political are not the only mechanisms for doing law-jobs.’²⁶ While net organising framework could be CSR law or instruments that allow for an overview. It is important that even where it is not, it is a multi-stakeholder initiative that provides for public scrutiny and future reform. This overall framework should therefore occur in the given context.

Finally CSR should be able to evolve mechanisms that perform the evaluative job of the juristic method. For Llewellyn, these are the ways of handling ‘legal tools for law job ends, and the on-going upkeep and improvement of both the tools and ways.’²⁷

In other words it is possible to decide on a method for achieving the law-jobs and then review to see if this method can be improved upon. The current way for achieving the law-jobs may be ad-hoc and informal but that is not only way. This law-job could be done through monitoring and certification or through regulatory inspections. This final law-job embodies the review and reform element. The inter-linkages between the law jobs mean that re-evaluation may cause changes in the style of law mechanisms or tools used to channel behaviour especially in the face of persistent irresponsibility.

The law-jobs framework is devoid of its own content, so the content can be analysed in context. In this sense it provides an invaluable heuristic device that also allows for re-evaluation, reform and re-organisation. Each of these law-jobs will be examined in more detail in the following sections.

²⁶ Llewellyn (n 3) 1389

²⁷ Llewellyn (n 3) 1392

6.3.1 The Disposition of Trouble Cases

Llewellyn refers to the first part of the law-jobs as the adjustment of the trouble-case that is, offense, grievance, and dispute. This reference is a generic one, which addresses the role of law or law-like phenomena in handling of conflicts or grievances that arise in any social group. This often involves the creation of rules and legal institutions to handle such conflict.

Within the CSR scenario, the major trigger for CSR has been public scandals about corporate action taken on social and environmental issues, therefore one of the objectives of CSR actions, has been to create a means of managing and handling grievances. In our chosen example of the oil industry, the triggers for active engagement with CSR would include the Exxon Valdez oil spill off the coast of Alaska, the Shell Brent Spar incident with Green Peace and the Shell and Ogoni social and human rights crisis in Nigeria.²⁸

These problems have stemmed from environmental and social issues, where blame has been fully or partially apportioned to the multinational corporations. From a legal perspective, there have been two major developments: The attempted use of traditional dispute resolution through the courts in the home states of the MNC and the development of non-judicial dispute resolution mechanisms. These are the specific developments which will be examined below.

²⁸ P Utting K Ives 'The Politics of Corporate Responsibility and the Oil Industry' (2006) 2(1) St Anthony's International Review (STAIR) 11-34

i. Traditional Dispute Resolution (Litigation)

On the one hand, there have been several attempts to use traditional legal instruments to seek redress from grievance. This has been done by recourse to courts in the home states of the MNC, where liability is alleged to lie with the corporations for torts or wrongs, but there have been limitations with the use of this method. They can be found in the notion of the corporate veil and forum non conveniens.

In the case of the MNC, recourse to the parent company is severely restricted by the doctrine of corporate personality and limited liability²⁹. These principles appear to cast a veil over the corporation and place the parent corporation the position of a shareholder. However the veil can be lifted where the parent corporation has sufficient involvement and control in the affairs of the subsidiary. The position in the UK has been recently outlined in the case of *Lubbe v Cape Plc.*³⁰ Lord Bingham states thus:

‘The first segment concerns the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence.’³¹

This endorses a position that where sufficient involvement in the control of the subsidiary is indicated via shareholding and also through other mechanisms of control which show significant involvement in the activities of the subsidiary, then

²⁹ For a summary of problematic issues see: P Muchlinski ‘Limited Liability and Multinational Enterprises: a case for reform?’ (2010) Cambridge Journal of Economics 915 -928

³⁰ (2000) UKHL 41

³¹ At para.20

lifting of the corporate veil is possible with the parent –subsidiary relationship.³²The position in the US is similar as Blumberg points out that the issue of control is crucial but additionally in the US, it is necessary to show that the parent corporation is using the subsidiary as a shelter to accomplish unjust, inequitable or fraudulent behaviour that has caused injury to plaintiff (claimant).³³

Nevertheless even where this link between the parent and subsidiary corporations is shown then other jurisdictional limitations have come sharply into focus. These jurisdictional questions ask if the foreign forum is the proper forum for such litigation. This has become a significant limitation because as Blumberg points out ‘jurisdiction continues to be one of the most litigated areas involving the clash of enterprise and entity’.³⁴

In view of the nature of MNC operating in multiple locations, the litigants have often sought to sue these MNC in their home states. These attempts to access courts in the home states of the MNC have met with limited success. One of the main obstacles has been the notions of ‘forum non conveniens’ (FNC) prevalent in many common-law countries such as the US and the UK which are home states for a major portion of the large MNC.³⁵ This FNC concept raises the question of a better and more convenient forum and often results in remitting the matter back to the courts of the state (country) where the alleged incident occurred.³⁶ This is often not desirable for the litigants as the incidents occur in developing countries, where the legal regime may lack adequate legal mechanisms, penalties or even political will and there may

³² R Meeran ‘The Unveiling of Transnational Corporations: a direct approach’ in M Addo (ed.) *Human Rights Standards and the responsibility of Transnationals* (Kluwer International,1999) 161-170

³³ P I Blumberg ‘Accountability of Multinational Corporations: the barriers presented by the corporate juridical entity’ (2001) 24(3) *Hastings International and Comparative Law Review* 297-320

³⁴ P I Blumberg *The Multinational Challenge to corporations* (Oxford, OUP, 1993) 117

³⁵ Home countries for some of the largest Multinational Corporations such as Exxon and BP

³⁶ *Spiliada Maritime Corporation –v- Cansulex Ltd* [1987] AC 460; *Adams v Cape Industries plc* [1990] Ch 433; *Lubbe v Cape Plc* (2000) UKHL 41; see also S Joseph *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004)

also be considerable limitations in funding of such litigation on the part of the injured party which may be an individual or a community.³⁷

In the United Kingdom, the doctrine of FNC is established by the case of *Spiliada Maritime Corporation v Cansulex*.³⁸ The Spiliada test involved two-parts: it is for the defendant claiming there is an alternative forum to make out a case that the natural foreign forum is better and then the plaintiff (claimant) can show special circumstances that substantial justice cannot be obtained there, to rebut this claim. However the scope of this doctrine has been significantly eroded by the signing of the Brussels convention.³⁹ The Civil Jurisdiction and Judgments Act (1982) as amended by the Civil Jurisdiction and Judgments Act (1991) which adopts this convention specifies in s.49 that ‘Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 Convention.’

This EU position rather adopts the notion of ‘Lis alibi pendens’ which is more prevalent in civil law countries in which states that:⁴⁰

‘(1)Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

(2)Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

³⁷ Joseph (n 36) 11

³⁸ (1972) 3WLR 972

³⁹ This is affirmed by the case of the ECJ cases of *Group Josi Reinsurance Company SA v Compaigne d’Assurances Universal General Insurance Company* (2000) Case C-412/98 & *Owusu v Jackson* (2005) Case C-128/01

⁴⁰ Article 27 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

The ECJ in *Owusu v Jackson*⁴¹ then interpreted the Brussels convention in a way which effectively curtailed the use of FNC in the UK by holding that:

‘the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.’⁴²

While this may end up creating a good weapon for litigation against MNC domiciled in EU countries including England, it has been badly received in England. It was perceived as ‘forcing litigation to take place in inappropriate jurisdiction with greater inconvenience and expense.’⁴³ The courts have already begun limiting the impact of the case as it did not exclude the discretion of the courts to stay proceedings in favour of proceedings in a foreign forum.⁴⁴

In the US (which is the home of a significant number of MNC) the instructive case on FNC is the case of *Piper Alpha v Reyno*⁴⁵. This prescribes a more restricted approach on the basis of FNC. The courts at the outset determine whether there exists an alternative forum and then consider issues of private and public interest. The private interest factors include relative ease of access to evidence and all other practical problems that make the trial expeditious and inexpensive. The public interest factor considers congestion of courts in the US as against the courts in the alternative forum. Therefore the result is often that the US approach is more restrictive on the basis of FNC.

⁴¹ (2005) Case C-128/01; 2 WLR 942 (2005)

⁴² At para.46

⁴³ J Harris ‘The Brussels I Regulation and the Re-emergence of English Common Law’ (2008) 4 European Legal Forum 181-189, 185

⁴⁴ *Konkola Copper Mines plc v Coromin* (2005) 2 Lloyd’s Rep. 555

⁴⁵ (1981) 454 US 235

An instructive example is the Bhopal Union Carbide disaster of 1984 which was unsuccessfully litigated in the US. The Bhopal gas plant, where the gas leak occurred was operated by Union Carbide India Limited, a fifty-one percent affiliate of the parent corporation, Union Carbide Corporation. The US courts concluded that India would be a better forum as it has a stronger regulatory interest.⁴⁶ The MNC Union Carbide Corporation paid a settlement figure to the Indian Government in 1989 of about 470 million dollars⁴⁷ but it was only in 2010 that the Indian courts finally found some Indian ex –executives of Union carbide liable for causing death by negligence and sentenced to two years imprisonment. This may not even spell the end of it as the Indian Supreme court has been asked to re-open the case due to the leniency of the sentences.⁴⁸

Nonetheless in the US, another controversial traditional legal instrument that has emerged to attempt to give access to justice for the victims of wrongful corporate action is the *Alien Tort Statutes*⁴⁹ The Act gives ‘district courts the power to hear civil claims from foreign citizens for injuries caused by action in violation of the law of nations or a treaty of the USA’⁵⁰. The term the ‘law of nations’ can be construed in several ways, for in a literal sense it refers to other sources of international law outside treaty law. However this will include customary international law.

Joseph therefore points out that ‘generally it seems that the US courts are satisfied that Alien Torts Claims Act (ATCA) is activated if the human rights violation at issue breaches customary international law’⁵¹. This casts a wide net and therefore

⁴⁶ *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India*, 634 F.Supp. 842, 844 (SDNY, 1986), aff’d, 809 Fed. Rptr. 2d 195 (2nd Cir., 1987)

⁴⁷ Monks & Minow (n 33) 19

⁴⁸ <<http://www.guardian.co.uk/environment/2010/aug/31/india-reopens-bhopal-case>> accessed 10 September 2011

⁴⁹ 28 U S C § 1350 ATS includes the Aliens Torts Claims Act (ATCA) and the Torture Victim Prevention Act (TVPA). This ATCA was part of the Judiciary Act of 1789

⁵⁰ Ch. 20, §9, 1 Stat. 73, 77 (1789)

⁵¹ Joseph (n 36)

several issues may trigger ATS claims. They include torture, genocide, forced labour, peaceful assembly and association, freedom of political belief opinion and expressions among others, although controversially environmental abuses may not ground a claim⁵².

The important ATS decision was made in the case of *Filartiga v Pena-Irala*⁵³ where the court accepted the extension of universally accepted norms of international human rights law (as a violation of International law) as constituting a violation of domestic law of the United States. Since then there have been several attempts to litigate oil multinational corporations but very few have reached substantive hearing. Cases have been brought against oil multinational corporations for their actions in several countries. Examples include Shell in Nigeria⁵⁴, Chevron in Nigeria⁵⁵, Texaco in Ecuador⁵⁶, and Exxon Mobil in Aceh⁵⁷.

In spite of FNC as a procedural obstacle, ATS remains a major factor as the potential for litigation for human rights violation remains.⁵⁸ The US Supreme Court in the case of *Sosa v Alvarez- Machian*⁵⁹ accepted the use of the Alien Tort Statute in application of ACTA to binding norms of customary international human rights law.⁶⁰ However more recently in September 2010, some doubt was re-introduced with the decision of the second circuit (appeals) US court in the case of *Kiobel v*

⁵² Ibid

⁵³ 630 F.2d 876(2d Cir 1980)

⁵⁴ *Wiwa v Shell Petroleum Development Co.* 532 US 941(2001); *Kiobel v Royal Dutch Petroleum* No.06-4800-cv, 06-4876-cv, 2010WL 3611392 (2d Cir. Sept. 17, 2010)

⁵⁵ *Bowoto v. Chevron Corp.*, No. 09-15641, 2010 WL 3516437 (9th Cir. Sept. 10, 2010);

⁵⁶ *Aguinda v Texaco* 303 F.3d 470 (2d Cir 2002)

⁵⁷ *Doe VIII v. Exxon Mobil Corp.*, No. 09-7125 (D.C. Cir. 2011)

⁵⁸ One of the major procedural obstacles however is the Forum Non Conveniens (FNC) doctrine which allows the courts to dismiss the case if there is a more suitable alternative foreign forum.

⁵⁹ (2004) 542 U.S. 692

⁶⁰ R G Steinhardt, 'Laying one Bankrupt Critique to rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U. S. Courts' (2004) 57(6) Vanderbilt Law Review 2241-2301

*Royal Dutch Shell*⁶¹ which found that the Aliens Torts Statute did not apply to corporations. The court's reasoning was that 'corporations are liable as juridical persons under domestic law, (but that) does not mean they are liable under international law'⁶²This case is now scheduled as a landmark case to be decided by the US Supreme Court to settle the question of corporate liability for human rights violations in the US.⁶³ Therefore there is still a lot of uncertainty surrounding this legal mechanism.

A further limitation of this type of dispute resolution is that even where litigation is within jurisdiction and successful, there can be extreme delay as a result of appeals by either party and this is evidenced by the fact that the 2010 US *Kiobel case* refers to alleged violations of human violations by Shell that occurred in the Niger-Delta region of Nigeria in the period between 1992-1995.

⁶¹ No.06-4800-cv, 06-4876-cv, 2010WL 3611392 (2d Cir. Sept. 17, 2010)

⁶² Ibid; see also C I Keitner '*Kiobel v Royal Dutch Petroleum: Another Round in the Fight Over Corporate Liability Under the Alien Tort Statute*' 14(30) American Society of International Law (ASIL) Insight September 30, 2010. These are cases arising from alleged Shell complicity in the execution of the Nigerian 'Ogoni nine'.

⁶³ *Esther Kiobel (individually and on behalf of her husband) v Royal Dutch Petroleum Co. et al* June 13, 2011 No. 10-491 Supreme Court of the US Substantial amount of amicus curiae has been filed for the case. This involves legal scholars, universities, NGOs, corporations. The case is now set for arguments October 1, 2012.

ii. Non-traditional Dispute Resolution

On the other hand, there is an increasing development of alternative dispute resolution and grievance mechanisms. Ruggie in his role as the special representative of the secretary general on issues of business and human rights has suggested that these mechanisms could be extended to address certain community – company disputes.⁶⁴ In his April 2008 Report, he outlined a three part global framework for allocating human rights responsibilities between States and business: (a) States have the duty to protect individuals and communities from human rights abuses from all sources, including business; (b) business has the responsibility to respect human rights; and (c) those who suffer harm from business activities should have access to remedy, both judicial and non- judicial.”⁶⁵

The reference to the non-judicial method of dispute resolution is an acknowledgement of another way of carrying out this law job that is present within CSR. Some the existing CSR codes of conduct already contain provisions and standards which pertain to the handling of complaints and grievance mechanisms.

A report by the CSR Initiative at the Harvard University examining how integrated conflict management programs can be extended to external stakeholders such as the community, gives an overview of these mechanisms.⁶⁶

⁶⁴ See J Ruggie *Protect, Respect and Remedy: a Framework for Business and Human Rights* Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (April 2008) at 22 He points out with regards to human rights, a major aspect of corporate social responsibility, that ‘effective grievance mechanisms play an important role ...in the corporate responsibility to respect.’ He adds that ‘equally, the corporate responsibility to respect requires a means for those who believe they have been harmed to bring this to the attention of the company and seek remediation....providing access to remedy does not presume that all allegations represent real abuses of bona fide complaints.’ This position is adopted in his final report 2011

⁶⁵ Ibid

⁶⁶ C Rees D Vermijis ‘Mapping Grievance Mechanisms in the Business and Human Rights Arena’ Corporate Social responsibility Initiative Report no 28 Cambridge MA Harvard Kennedy School; Corporate Social Responsibility Initiative, Harvard Kennedy School of Government Governance and Accountability Program: <http://www.hks.harvard.edu/m-rcbg/CSRI/prog_ga.html> accessed 25 October 2010; see also the BASES wiki platform (Business and Society Exploring Solutions- a

This report from the CSR initiative maps out the grievance mechanisms that are in place in the business and human right area outside of the traditional legal. This analysis of mechanisms was done with three key themes: Institutional levels, key functions and types of processes. The different institutional levels analysed were company, industry, multi-industry, national, regional or international. The key functions referred to included standards, access, agents, process, enforcement, outcomes and transparency. The types of processes range from information facilitation, negotiation, mediation, conciliation, arbitration, investigation to even adjudication.

This investigation is novel in many ways but it underpins Llewellyn's point that law can be perceived from the perspective of the jobs. Although these activities are non-judicial; they are capable of handling significant amount of grievance remediation in the absence of other effective remedies. It is however important that recognition of the capabilities of these frameworks must also be coupled with issues of accountability and legitimacy.

To understand how this system works at the company level.⁶⁷ The CSR Initiative study gives the example of the construction of the Baku-Tbilisi-Ceyhan pipeline by an oil consortium led by BP. The process of grievance remediation on this project allowed for affected individuals in the communities to register grievances with community liaison officers appointed by the company. The first level of dispute resolution would involve seeking a negotiated settlement within a short period of time however where this settlement could not be achieved or the matter related to a land dispute, compensation or other primary non-technical issue.

dispute resolution community) <http://baseswiki.org/en/Main_Page> accessed 25 October 2010

⁶⁷ See Rees & Vermijis Ibid at 10

The matter could then be taken to a local NGO, Center for Legal and Economic Education (CLEE) engaged by BP to provide a form of arbitration. This process did not exempt the right to redress in the courts where such rights exist. This was a rights-based approach, with rights derived from domestic law, or voluntary standards adopted by BTC including BP's code of conduct, standards of the IFC and the Voluntary Principles on Security and Human Rights. The process was published on the web as a means of accountability and transparency. These mechanisms have evolved as means of dealing with persistent problems that are thrown up by regulatory gaps.

Another example at a national level can be derived from the use of national contact points under the OECD Guidelines for Multinational Enterprises.⁶⁸ The Guidelines cover employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, competition, taxation and science and technology.⁶⁹ The guidelines have been highlighted as having one of the best coverage of CSR issues.⁷⁰

The national contact points handle complaints against MNC about violations of the guidelines. These violations must however have taken place in an OECD country or a non-OECD adhering country. Any 'interested party' has standing to bring a complaint and this cover a multitude of stakeholders such as individuals, communities, trade unions or other non-governmental organisations. It uses investigation, mediation and conciliation which may result in remediation and conciliation. The national contact points can also produce a publicised statement with recommendations.

⁶⁸ (2000) 40 ILM 237 (2001)

⁶⁹ Ibid

⁷⁰ D Leipziger *The Corporate Responsibility code book* (2nd ed. Greenleaf, Sheffield 2010) 55

There is no formal appeals process however OECD member states or OECD business or trade union advisory bodies (Business and Industry Advisory Committee (BIAC) and Trade Union Advisory Committee (TUAC)) can request the OECD Investment Committee's views on whether an NCP has correctly interpreted the Guidelines' text and implementation procedures.⁷¹ However there have been recommendations that this be extended to a larger role of specific recommendations.⁷²

The OECD also reviews NCP as different states adopt varying mechanisms of compliance. This review allows for comparative analysis of mechanisms towards the the core criteria of visibility, accessibility, transparency and accountability i.e. 'functional equivalence'.⁷³ The 2008 review report points out 'The flexibility embedded in the "functional equivalence" principle constitutes a recognition that the conditions and circumstances upon which various corporate responsibility actors operate may vary from one adherent country to another.'⁷⁴

This analysis suggests that in enhancing a CSR legitimacy framework, this sort of non-judicial mechanisms are newer regulatory tools which can be harnessed in the doing of law-jobs. These mechanisms are also the legitimate concern of law especially because they are an emerging type of law and dispute-resolving mechanism which may in future acquire more relevance to certain communities than

⁷¹ BASES (Business and Society Exploring Solutions) established as part of the Corporate Social Responsibility Initiative, Harvard Kennedy School of Government Governance and Accountability Program < http://baseswiki.org/en/OECD_National_Contact_Points_General_Information> accessed 10 December 2011

⁷² OECD Watch 2008 review of NCP and the implementation of OECD Guidelines June 2008 <http://baseswiki.org/w/images/en/7/7d/OECD_Watch_2008_Review_of_National_Contact_Points_and_the_Implementation_of_the_OECD_Guidelines.pdf> accessed 10 December 2011

⁷³ Review of the NCP Performance: Key findings of the Investment Committee: Background paper for the OECD-ILO Conference on CSR June 2008, OECD, Paris (p.15) <<http://www.oecd.org/dataoecd/34/15/40807797.pdf>> accessed 10 December 2011

⁷⁴ Ibid; the OECD also has annual reports on the Guidelines which review the activity of the past 12 months. The 2010 report is OECD, Annual report on the OECD Guidelines for Multinational Enterprises 2010: Corporate Responsibility: reinforcing a Unique Instrument (OECD, Paris 2010)

traditional legal instruments. Frameworks for non-judicial or alternative dispute mechanisms are often in built within CSR instruments. Where this is studied from the legal perspective, it can also be criticised from that perspective.

6.3.2 Channelling and Re-channelling

The next law-job within this perspective of the CSR legitimacy framework is the channelling and re-channelling of behaviour. This would refer to channelling of overt behaviour as well as the channelling of expectations, norms and claims. In a traditional legal sense, this would refer to law's ability to define expected conduct from actors within the applicable community through legislation and regulation. However within CSR the most visible means of channelling conduct is through the use of non-traditional codes of conduct. This aspect therefore tackles the situation within CSR, where preventative channelling of corporate behaviour towards responsible action is desirable. This can be done in a traditional or non-traditional way.

i. Traditional

Some states have attempted to use traditional laws to reinforce the channelling of corporate behaviour but this attempt has been largely unsuccessful. Two examples are the 2003 UK Corporate Responsibility bill⁷⁵ and the 2008 Nigerian CSR bill⁷⁶. There appears to be a lack of political will, to regulate for CSR especially with the

⁷⁵ Copy available online :
<<http://www.publications.parliament.uk/pa/cm200203/cmbills/129/03129.i.html> >
<<http://www.publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf> > accessed 10 December 2011

⁷⁶ Copy available online <http://www.femiamao.com/files/CSR_BILL.pdf > accessed 10 December 2011

ideological dominance of the voluntaristic perspective. In addition the push for deregulation and the reduction of state capacity have dominated global discourse on the role of the state.⁷⁷

Jenkins points out that although critics of this rather voluntaristic turn raise the objection that such regulation serves as a substitute for statutory legislation and at the same time legitimises the absence of statutory regulations by governments and international bodies but in historical context for globalisation, he accepts there is at present no clear platform for re-regulation.⁷⁸

Notwithstanding this, there is emerging new set of CSR regulation in developing countries that are attempting to link CSR spending with developmental objectives. Mauritius government has instituted a policy that mandates a 2% of profits spend towards CSR programmes.⁷⁹ In Indonesia, a modification to their corporate law was made in 2007 to include a mandatory obligation for corporations in the field of and/or related to natural resources to carry out social and environmental responsibility (SER).⁸⁰ This obligation to carry out CSR is also extended to investors.⁸¹

There are also examples of regulation geared at fostering and facilitating the voluntary framework. The Denmark Law mandating CSR reporting for its large

⁷⁷ World Bank World Development Report 1997 *The State in a changing world* (World Bank/OUP, Washington DC/New York 1997)

⁷⁸ He focuses on labour but the same can be said for other aspects of CSR- social, human rights, environment R Jenkins, R Pearson G Seyfang *Corporate Responsibility and Labour Rights- Codes of Conduct in the Global Economy* (Earthscan, London 2002) 5

⁷⁹ Finance Bill sub-part AD. S. 50k-1 http://www.nef.mu/csr/finance_bill.php This was attempted unsuccessfully in India <http://www.business-standard.com/india/news/2-csr-spend-not-mandatory-for-companies-moily/152054/on>

⁸⁰ Article 74 of Limited Liability Company Law 2007 Article 1 defines SER as ‘the company’s commitment to participate in sustainable economic development in order to improve the quality of life and beneficial environment both for the company itself , the local community and society in general.’ This obligation for CSR is extended to investors see Article 5b of the Investors Investment Law no.25 2007 see details in O Amao *CSR, HR and Law: Multinational Corporations in Developing Countries* (Routledge 2011)

⁸¹ Ibid

corporations⁸², however there is a limitation which is that it remains the prerogative of the corporations to decide if they want to engage with CSR. This Act specifies that ‘CSR shall mean businesses voluntarily include considerations for human rights, societal, environmental and climate conditions as well as combating corruption in their business strategy and corporate activities. Businesses without policies on social responsibility shall disclose this information in their management’s review.’⁸³ This is not dissimilar to the reporting requirement of the UK Companies Act 2006⁸⁴

ii. Non-Traditional

The more prevalent instrument within CSR for channelling conduct is the codes of conduct. These codes of conduct could be classified into five categories: company codes, trade association codes, multi-stakeholder codes, model codes and inter-governmental codes.⁸⁵ Codes of conduct have been defined as ‘written policy or statement of principles intended to serve as a basis of commitment to a particular conduct’⁸⁶ and they have emerged to prescribe expected conduct or behaviour of corporation as well as to channel society’s expectation of corporate action.

This has a two-edged effect. First affecting what society expects of corporations and secondly spelling out the change in the corporate attitudes and behaviour. CSR is the result of changes in societal expectation but also a result of the increasing

⁸² the Danish Financial Statements Act ("Årsregnskabsloven"), cf. Consolidated Act no. 647 of 15 June 2006, as amended by section 5 of Act no. 108 of 7 February 2007, section 63 of Act no. 468 of 17 June 2008 and Act no. 516 of 17 June 2008 <http://www.csrgov.dk/>

⁸³ S. 99(a) Danish Financial Statements Act

⁸⁴ S.417 Companies Act 2006 (UK)

⁸⁵ R Jenkins ‘Corporate Codes of Conduct: Self-Regulation in a Global Economy’ Technology, Business and Society Programme Paper No. 2 (UNRISD, 2001)

⁸⁶ L Dubin ‘The Direct Application of Human Rights Standards to and by Transnational Corporations (1999) 61 Review of the International Commission of Jurists 35-66, 42 cited in A Wawryk ‘Regulating Transnational Corporations through Corporate Codes of Conduct’ in J G Frynas S Pegg *Transnational Corporations and Human Rights* (Palgrave Macmillan, 2003) 53-78

acknowledgment that business significantly affects society. The codes of conduct are playing a legal role by prescribing areas of corporate responsibility and concern not defined in traditional law but now expected from corporations as required conduct. They play an effective channelling role as they prescribe standards of accepted conduct in the relevant areas. This is why Wawryk points out that a code of conduct should not only set out the principles to guide behaviour; it should also establish mechanisms for implementation, monitoring enforcement and review.⁸⁷ This can also be facilitated or reinforced by traditional legislation.

An example of such innovative connexions within codes can be seen in the extractive industries transparency initiative (EITI) which has created a global standard for transparency and publication of oil revenues between oil corporations and governments. This is reinforced in the adopting country by legislation. Candidate countries within this initiative need to develop a work plan for implementation in consultation with stakeholders.

This notion of inter-relationship between self-regulatory instruments and law is not new. Galanter reminds us that:

‘the drafting of the Uniform Commercial Code was a self-conscious attempt (by Karl Llewellyn) to synthesise formal law and commercial usage: the formal law would incorporate the best commercial practice and would in turn serve as a model for refinement and development of that practice. The code’s broadly drafted rules would be accessible to businessmen and would provide a framework for self-regulation which would in turn furnish attentive courts with content for the code’s categories. Thus the code would serve as a vehicle for business communities to evolve law for themselves in dialogues with courts operating not as interpreters of imposed law but as articulators and critics of business usage.’⁸⁸

⁸⁷ Wawryk *ibid* at 53

⁸⁸ M Galanter ‘Justice in Many Rooms’ (1981) 19 *Journal of Legal pluralism* 1 - 47, 29-30

In addition, the code of conducts can also offer up standards by which these companies can be held to account in a traditional legal sense.⁸⁹ An instructive case is the US case of *Kasky v Nike*⁹⁰. The case captured the attention of many corporations as Microsoft, Exxon Mobil and Pfizer are among the corporations that filed amicus curiae briefs. The case hinged on the claims made by Nike in a series of publications about the labour conditions in overseas factories. Kasky alleged that these claims were misleading and sued under California's unfair competition and false advertising law; In 2002 Kasky won the case at the California Supreme Court but Nike appealed to the US Supreme Court. The US Supreme Court failed to give a definitive ruling and instead sent the case down to the trial court. The case was however settled without addressing the issue of whether Nike's assertions could be classed as political speech protected by first amendment or commercial speech which is less protected.

There are two vital points here. This case highlighted the potential for voluntary speech and assertions on social responsibility to have legal and financial consequences and also illustrated rather disappointingly that corporations were making assertions which could be open to attack as false perhaps for marketing and branding reasons.

The potential of such statements to have a legal effect is not limited to the United States. Glinski also highlights this potential from German and EU law especially where the objective is to increase one's sales.⁹¹ She points out that German courts already have a body of case law on environmental advertising. Advertising would include longer texts such as codes of conduct and environmental reports. The EC

⁸⁹ C Glinski 'Corporate codes of conduct: moral or legal obligation' in D McBarnet A Voiculescu & T Campbell (eds.) *The new corporate accountability: Corporate Social Responsibility and the law* (Cambridge University Press (CUP), Cambridge 2007) 119 - 147

⁹⁰ *Kasky v Nike, Inc* 45 P 3d 243 (Cal..2002)

⁹¹ Glinski (n 89) 126

Directive on unfair commercial practices requires firm commitments which can be verified with regard to commercial communication directly connected to promotion, sale or supply of a product to consumers but this is not a right that can be derived by the consumer or individual. They are for application within the member state area and then these states provide mechanisms which may be through public authorities or consumer associations. However the EC in its renewed Strategy for CSR 2011 confirms that this issue of misleading marketing (green washing) will be addressed in the report on the application of the Unfair Commercial Practices Directive in 2012 and it will consider the need for possible specific measures.⁹²

Nevertheless the basic aspect of this law-job is that it transcends the traditional legal perspective and it allows for the examination of the accountability perspective from traditional and non-traditional perspectives. It permits codes of conduct as simple rules channelling conduct to be examined as legal instruments. It allows the examination of such instruments for standards and mechanisms for accountability within those standards. It will also allow for complementary schemes where non-traditional standards can give rise to traditional legal consequences such as litigation or be reinforced by traditional legislation. It is also possible to fashion out effective and transparent reporting mechanisms complemented by legislation. Again form is less relevant, what is crucial is that conduct is channelled effectively.

Therefore within the corporate and society relationship, where CSR performs this channelling and re-channelling function, it is doing a law-job. It can be examined from this perspective and this will allow for more innovative ways of channelling conduct.

⁹² EC A *Renewed Strategy 2011-14 for CSR* Brussels Com (2011) 681 Final p.9

6.3.3 The Say

This aspect of the law- jobs is viewed as a constitutive function. It has been seen as ‘the constitution of groups, concerning the establishment and allocation of authority...establishes the location of legitimate institutional power...’⁹³This is an aspect which needs to be discovered and developed within CSR. In prescribing the processes and procedures within CSR; the initiative and influence driving CSR appears to move from the corporations to co-opting non-governmental organisations. However it is neither the preserve of corporations, nor the preserve of states and non-governmental actors. It should be a multi-stakeholder process. This is why it has been suggested that:

‘The law-job of allocating authority is certainly not by definition the state’s prerogative or task. Private institutions are quite capable of making such decisions under the right conditions: the institutions represent multiple interests, be open to public scrutiny and prevent self-interested and lax monitoring.’⁹⁴

Llewellyn admits that this area more than any other points to the question of the allocation of power rather than rights.⁹⁵ It goes to the question of who defines the CSR rules. He prescribes that ‘to get these matters settled in advance and to get settled also what procedures must be done in order to legitimise a decision and give it standing and what limits are on any person’s authority is a matter of peculiar importance.’⁹⁶ However this law-job especially in the CSR context should also be about choosing or allocating who has the say. It should also be about establishing mechanisms that allow for the decisions on ‘who has the say’. This may be the sense

⁹³ M Feintuck M Varney *Media Regulation ,Public Interest and the Law* (2nd ed. Edinburgh University Press, Edinburgh 2006) 34

⁹⁴ Taekema (n 5) 66-67

⁹⁵ Llewellyn (n 3) at 1383

⁹⁶ Ibid

in which structures are being advocated for taking cognisance of ‘stakeholders’ in decision-making with regards to CSR.⁹⁷

In the EITI example above, one of the challenges has been multi-stakeholder groups defining the process in context, this has created flexibility but it is also novel and each candidate country will work out its own process towards achieving compliance with the general principles, although there is also an independent assessment which reviews the country’s progress and delineates which steps can be taken to improve the process.⁹⁸ The EC Renewed Strategy is also planning to act in this manner by creating a multi-stakeholder CSR platform in a number of relevant industrial sectors to make public commitments relevant to the sector and to be jointly monitored.⁹⁹

The primary task of creating a CSR strategy and ensuring compliance with CSR procedures currently lies with CSR departments and their managers. CSR is becoming a distinct field with its own specialists charged with integrating CSR processes into management. Other key actors are the non-governmental organisation involved in this aspect and the auditors which verify these processes. However this raises larger questions of power, legitimacy and authority and redressing such relationships under the CSR framework.

A first step is to identify this as a key law-job within the relationship. The centrality of power to CSR means that the law-job of the say is very important. The ability to develop participative publicised processes that shape the direction and decision-making processes within CSR in a multi-stakeholder fashion is essential. This would imply the import of principles of participation, transparency and publicity. The legal

⁹⁷ T Donaldson and L Preston ‘The stakeholder theory of the corporation: concepts, evidence and implications’ (1995) 20(1) *Academy of Management Review* 65-91

⁹⁸ Rainbow Insight, *Evaluating the EITI’s Impact on the Transparency of Natural Resource Revenues* 2009 <<http://eiti.org/files/Rainbow%20Insight%20Report.pdf>> accessed 10 December 2011

⁹⁹ This is planned for 2013 see EC Renewed Strategy (n 92) p.9

environment also has to be made conducive and facilitative to the organic development of identified allocation of authority and responsibility.

These debates could also be internal to the company where issues of employee participation in decision-making are raised¹⁰⁰ or external where issues of corporate power and its impact on social responsibility are addressed.¹⁰¹ It is only with the recognition of the allocative function, that there can be a re-allocative function to change 'who has the say'. This law-job is at its most relevant where no one has any idea whose say is to go, as a legal perspective can and should begin to define, direct and limit the exercise of authority. It forms the basis of a relevant legal enquiry.

¹⁰⁰ P Maclagan 'Corporate Social Responsibility as a participative process.' (1999) 8(1) Business Ethics: A European Review 43-49

¹⁰¹ D Lewis S MacLeod 'Transnational Corporations –power, responsibility and influence' (2004) 4 (1) Global Social Policy 77-98

6.3.4 Net Drive

There are many drivers of CSR practice¹⁰²; they include civil society, the consumers, the investment climate or government and the workplace (internal company management or employees).¹⁰³ The civil society¹⁰⁴ especially the non-governmental organisations (NGOs) played a major role in the promotion and popularisation of CSR.¹⁰⁵ NGOs especially international NGOs arose out of the desire to fill the regulatory gap or vacuum left by the uncoordinated regulation by states at both state and international level. They sought to forge alliances with local communities, employees and aggrieved persons in order to publicise their grievances on the global stage.¹⁰⁶ They excelled in the use of media to disseminate information especially through the internet. This is demonstrated by the Greenpeace and Brent Spar campaign which galvanised media and consumer focus on Shell and prompted a change of tactics by the oil corporation.¹⁰⁷

¹⁰² M Haigh M T Jones 'The drivers of corporate social responsibility: a critical review' (2006) 5(2) *The Business Review* Cambridge 1-9, Haigh and Jones identify six sets of influences: 'internal pressures on business managers, pressure from business competitors, investors and consumers and regulatory pressures coming from governments and non-governmental organisations.'

¹⁰³ DFID; DFID and Corporate Social Responsibility issues paper <<http://www.dfid.gov.uk/pubs/files/corporate-social-resp.pdf>> accessed 10 December 2011. These are all factors counter- influenced by globalisation to varying degrees.

¹⁰⁴ LSE Centre for Civil Society defines civil society as referring '*to the arena of un-coerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organisations such as registered charities, development non-governmental organisations, community groups, women's organisations, faith-based organisations, professional associations, trades unions, self-help groups, social movements, business associations, coalitions and advocacy group especially the non-governmental organisations.*' < http://www.lse.ac.uk/collections/CCS/what_is_civil_society.htm> last accessed 10 September 2010

¹⁰⁵ A Lindblom *Non-governmental organisations in International Law* (CUP, Cambridge 2006)

¹⁰⁶ P Newell 'Managing multinationals: The governance of investment for the environment' 13 *Journal of International Development* 907-919; 910

¹⁰⁷ G Jordan *Shell, Greenpeace and Brent Spar* (Palgrave Macmillan, New York, 2001)

These NGOs began to attack corporations directly because of the perception of an inability to govern multinational corporate conduct at an international level. The effectiveness of the NGO attack on transnational corporations was greatly assisted by the speedy and widely available communication networks that now exist under globalisation. There is huge variation in tactics adopted by NGOs: with some NGOs adopting a co-operative stance and forming partnerships with corporations in carrying out and monitoring CSR activities, and others remaining critical and actively advocate for mandatory regulation with support for international initiatives like the UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights.¹⁰⁸ The key question for them is a net drive for CSR on an international level.

The government can also be a driver of CSR either through its action or inaction, through its inaction or omission to provide regulation or laws regarding socially irresponsible conduct thus creating a vacuum which had to be filled by other actors or by actively encouraging CSR practice through the creation of codes and standards. The former is evident in some developing countries where there is inadequate environmental, health safety and torts laws and a lack of enforcement juxtaposed with pressing social needs and requirements the local community which must be addressed by the corporation so as to create a stable and sustainable environment for it to carry out its operations.¹⁰⁹ Conversely, however the government can positively drive the direction of CSR practice through policies, incentives and establishing non codes and systems. Examples can be found in the UK and Australia.¹¹⁰ This may

¹⁰⁸ P Muchlinski 'Multinational Enterprises as Actors in International Law : creating 'soft law' obligations and 'hard law' rights' in M Noortmann, C Ryngaert *Non-State Actor Dynamics in International Law* (Ashgate, England, 2010) 9- 41, 20

¹⁰⁹ W Visser 'Corporate social responsibility in developing countries' in in A Crane, A McWilliams and others (eds) *The Oxford Handbook of CSR* (New York, OUP, 2008) 473-502

¹¹⁰ J Moon *Government as a driver of Corporate social responsibility: The UK in comparative*

arise as an additional scheme within an existing regulatory framework or as an alternative to direct regulation.

Another major driver of corporate social responsibility is the consumer. In this sense it is the perceived consumer effect which may occur as a result of damage to corporate reputation and brand or as a result of adoption of responsible initiatives and strategies. It is often assumed that the result of the increased awareness is an increase in vulnerability of the corporations to consumers and consumer reaction¹¹¹. Consumers may choose to reward a corporation positively by use of a particular brand seen as 'responsible' or negatively by the boycott of a brand seen as 'irresponsible'.

However the specific reaction of consumers to corporate acts is not an exact science because in deep similarity to any analysis of other aspects of human behaviour; the reaction of consumers to behaviour of corporations is largely unpredictable, varying across sectors and changes over time. The vulnerability of corporations in the retail sector may be different from the exposure of corporations in the manufacturing sector. Personal choices may also vary from boom periods in the economy to recession times. For example the choice of buying free trade products or perhaps free range eggs in everyday commodities may vary. Smith points out that

'for any given company-or at any given issue, to take a campaign group perspective- the likelihood of corporate responsibility affecting consumer behaviour vary tremendously. Academic research findings of positive and negative ethical consumerism highlight the heterogeneity and complexity of consumer response.'¹¹²

perspective (2004) No. 20 ICCSR Working Papers Nottingham

¹¹¹ Y Fan Ethical branding and corporate reputation (2005) 10(4) *Corporate communications: An international journal* 341-50

¹¹² N C Smith 'Consumers as Drivers of CSR' in A Crane and others (eds.) *The Oxford Handbook of CSR* (OUP, New York 2008) 281 - 302

Occasionally classed in this group is a slightly different set of consumers. Such consumers are the investors who choose to invest on the basis of CSR. This refers to ethical or socially responsible investors who in theory seek to reward responsible behaviour by investing in corporations with high ethical rating. Swanson points out that

‘Investors and the financial community care about these issues. Share value is much more than just the value of tangible assets. Reputation forms a large part of it, thus companies must respond to these challenges, if for no other reason than to protect their reputation and the financial implication this has.’¹¹³

However ethical investment forms only a low share of all investments¹¹⁴ and this affects their ability to significantly affect the market in favour of social responsibility. Such ethical investment can take varied forms, which include negatively screening out corporations according to an ethical criteria or positively screening for corporations which adopt the best socially responsible performance or using rights as shareholders to encourage corporations to improve their performance.¹¹⁵

Finally managers are important in the implementation of CSR in practice. They have practical control of the resources and can determine the strategy of utilising such resources.¹¹⁶ However this raises a few problems, firstly most managers will examine CSR and its activities through economic notions of competitive advantage or an increase to the financial performance and it is inconclusive that all CSR activities yield higher financial performance.¹¹⁷ If on the other hand, they simply

¹¹³ P I Swanson ‘CSR and the Oil Sector’ (2002) 11(1) CEPMLP Internet Journal
< <http://www.dundee.ac.uk/cepmlp/journal/html/vol11/article11-1.html> > accessed 10 September 2010

¹¹⁴ M Haigh and J Hazelton Financial markets: a tool for social responsibility (2004) 52(1) Journal of Business Ethics 59-71

¹¹⁵ Ibid

¹¹⁶ L Swanson ‘Top Managers a drivers for corporate social responsibility’ in A Crane and others (eds.) *The Oxford Handbook of CSR* (OUP, New York 2008) 227-248

¹¹⁷ C A Adams ‘Internal organizational factors influencing corporate social and ethical reporting:

drive for CSR on the basis of personal values certain agency issues may arise as they are deemed to be acting on behalf of the principal the corporation with primary focus to its interests.¹¹⁸

The nature of CSR with its multiplicity of drivers in any given context means that this law-job of the development of the net effect or overall picture is a crucial one. From a legal perspective therefore this can be seen in the development and organisation of policies and laws pertaining to CSR. This could mean in a given context drafting an explicit CSR law or CSR policy which draws out the overall picture of the interaction of CSR tools to achieve outlined aims or it could evolve in an organic way.¹¹⁹

Llewellyn makes an important point in this area which is relevant to newer concepts like CSR, he points out that ‘in an aspect where from the overall picture not all traditional law is visible then that is a law choice at least...’¹²⁰ It therefore becomes a legal choice to continue in CSR in a non-traditional format. It is pertinent at this point to re-iterate that history of CSR debates can be traced to the Berle-Dodd debate and the fundamental question of society’s view of the role of the corporation.¹²¹ This debate is valid to the choices made in doing this law-job.

It affects the way in which CSR engages with law. This job also contains the overarching effect of ‘goal orientation’. It speaks about the direction that CSR is to take and that law has a role in shaping the future direction of CSR but this remains

beyond current theorising’ (2002) 15(2) *Accounting, Auditing and Accountability* 223-250

¹¹⁸ J Salazar and B W Husted ‘Principals and Agents: Further thoughts on the friedmanite critique of CSR’ in A Crane and others (eds.) *The Oxford Handbook of CSR* (OUP, New York 2008) 137-155

¹¹⁹ The legal notion of written or unwritten constitutions comes to mind. see for example the EC Renewed Strategy (n 92) seeks to promote its own international CSR policy while encouraging policies at the national, regional and local level with a peer review mechanism for national CSR policies see EC Renewed Strategy (n 92) 12

¹²⁰ Llewellyn (n 3) 1388

¹²¹ A A Berle Jr., ‘Corporate Powers as Powers in Trust’ (1931) 44 *Harvard Law Review* 1049-1074 ; E M Dodd, ‘For whom are corporate managers trustees?’ (1932) 45 *Harvard Law Review* 1145-1163; A A Berle Jr., ‘For whom Corporate managers are Trustees: A Note’ (1932) 45 *Harvard Law Review* 1365- 1372

its choice. It can choose to engage more visibly in traditional forms or pluralistic forms. It can also choose to become more facilitative and less visible but that remains a law choice. It can choose to engage with CSR at different levels: local, national, regional or international or it can also do this engagement in variety of forms. This choice for law is expressed through the law-makers who react to given contextual circumstances however this law-job is what informs debates on the future of CSR, its role and importance. It is an important step to acknowledge that this is a relevant law-job, relevant for CSR's core which is legitimising corporate power. This perspective adapted to a given context will allow for dialogue and goal orientation between the many identified drivers of CSR.

6.3.5 Juristic Method

The juristic method may be best described as a law method. The first four jobs need doing and the juristic method refers to the chosen means for the doing of the law-jobs. Llewellyn calls the problem of the juristic method, ‘that of the ways of handling “legal” tools to law-job ends and of the on-going upkeep and improvement of both ways and tools’.¹²² For him, as a legal realist this points to the creation of institutional machinery. However for CSR purposes the focus is on the tools used to achieve law-jobs ends. The relevant point being that within CSR more legal tools may need to be examined or developed in line with the on-going review and improvement which is required of both ways and tools.

With the doing of this law-job, it is important to acknowledge the context of CSR as a struggle for the legitimacy of corporate power, a site for hegemonic and counter-hegemonic struggles at various levels.¹²³ Therefore the on-going review of the ways of handling tools geared at the doing of these law-jobs within the corporate-society relationship is of utmost importance. Rajagopal points out that there is an increasing sensibility that law is a terrain of contestation between different actors including social movements and states and that a theory of law or adjudication that ignores this fact is inadequate.¹²⁴ It may be that there needs to be an established non-judicial remedial system as advocated by some researchers¹²⁵ but on the other hand, it could

¹²² Llewellyn (n 3) 1392

¹²³ B D Santos, *Towards a new legal common sense: Law, Globalization and Emancipation* (Butterworths, London 2002), R Shamir ‘Corporate Social Responsibility: A case of hegemony and counter-hegemony’ in B De Sousa Santos C A Rodriguez-Garavito (eds.), *Law and Globalisation from below – towards a cosmopolitan legality* (CUP, Cambridge 2005) 92-117,95

¹²⁴ B Rajagopal ‘Limits of law in Counter-Hegemonic Globalisation: the Indian Supreme Court and the Narmada Valley Struggle’ in B De Sousa Santos C A Rodriguez-Garavito (eds.), *Law and Globalisation from below – towards a cosmopolitan legality* (CUP, Cambridge 2005) 183 -217 183

¹²⁵ Rees & Vermijis (n 66)

also be that there is the need for the development of a relevant legal framework for CSR. However it remains paramount that there should be the on-going improvement and re-examination of the current tools used in CSR. Where there is strong evidence that the juristic method used is not furthering the doing of the law-jobs, then this becomes the basis for reform and improvement. Therefore if law in CSR appears invisible or if the law-jobs are not being adequately handled, rather than abandon CSR or assert law has little to do with CSR, CSR in that context may need some system type reform.¹²⁶

This often results in the pluralisation of normative opportunities and the earlier analysis of law and regulation is relevant in this regards. Law tools will include the varied use of regulation for social control. It will allow the use of both traditional state law and non-state law towards law-job objectives. In other words regulation is a 'law-tool' in the Llewellyn sense. It is not the only 'law-tool' as there can also be 'juristic' tools but this allows for the examination of self-regulation and regulatory instruments proposed by International organisations, associations and corporations. Such dynamism is necessary for an extended and relevant role for law within CSR regulation and globalisation. It opens up the possibility for various permutations of law, regulation and CSR. Yet its end result is uncertain and unpredictable but necessary in view of the changing and complex context of globalisation.¹²⁷

¹²⁶ This is not the immediate goal of this thesis but reflects a suggestion borne out from the evaluation of the law jobs. The new EC Renewed Strategy (n 92) reflects this point.

¹²⁷ 'The pluralisation of normative opportunities for contestation, the outcomes of social movements engagements with law are highly uncertain in terms of their impact either on law or on the movements themselves...the outcome of the dialectic between law and social movements seem to depend on a number of scripts that are both internal and external to law and seem to depend on particular local and national contexts. These scripts need to be unearthed and examined to properly appreciate the role of law...' Rajagopal (n 124) 183

6.4 Conclusion

The chapter finalises the work of the thesis by revealing the relevance of a novel law-jobs perspective to CSR's core. The law-jobs perspective allows for a neutral framework which can be applied to different context to discover and examine how the role of law in legitimising corporate power is being performed. Therefore an adaptation of the law-jobs perspective can provide that legal theoretical basis that allows for the broad overview of law's potential roles within CSR.

The chosen perspective of law-jobs presents a neutral legal perspective that will allow for flexibility in the form of law used but certainty in the roles which it can play in corporate-society relationships. The law-jobs framework will therefore allow for further analysis and research into areas of trouble disposition or dispute resolution in CSR, where there are instruments existing or in need of being drafted, to handle channelling or orientation of behaviour. The law-jobs perspective will also engender analysis and debate over the allocation of authority in matters pertaining to the relationships within CSR. It can provide an umbrella for the net direction which CSR so desperately needs. Finally it also provides for the examination and re-evaluation of law's tools for doing the jobs. This will lead to aspirational perspectives that raise questions of how they could be done better.

This perspective provides a general universal CSR legal framework focused towards the legitimacy objective which gains content and expression in context. This context can then be industry, geographic or even between specific parties in the corporate – society relationship.

CHAPTER SEVEN

CONCLUSION

‘What is emerging in the arena of CSR is a complex interaction between government, business, civil society, private, state regulation, at national and international levels, with social, legal, ethical and market pressures all being brought to bear in ways that cut across traditional pigeon-holes.’¹

7.1 Introduction

This concluding chapter provides a summative assessment of the extent to which law and the law-jobs perspective can contribute to CSR. The thesis demonstrates that traditional pigeon-holes need not apply in deciphering a necessary and novel legal approach to CSR especially in view of its core which is centred on legitimacy of corporate power. The justification for this research can be found in the contestations about CSR’s meaning and value as well as the contestation about the role of law within CSR. This must then be set against a background of critical incidents that have shown corporate irresponsibility and raised doubts about the value of an undefined concept. Horrigan points out that:

‘A grand CSR is unfolding world-wide...this grand global CSR project remains a 21st work-in-progress. Constructing tools for this grand CSR project at its highest levels of philosophical abstraction (e.g. theorising about corporate legitimacy) and collective effort (e.g. undertaking CSR-sensitive law reform across jurisdictions) is as important as discovering what works on the ground to embed CSR within individual companies and industry sectors (e.g. integrating CSR within standards business models).’²

¹ D McBarnet ‘Corporate social responsibility beyond law, through law, for law: the new corporate accountability’ in D McBarnet et al (eds.) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge CUP, 2007) 45- 56, 55

² B Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, Cheltenham 2010) 339

The aspiration of this research is that it will have contributed to constructing tools that contribute to both theorising about corporate legitimacy and framing legal perspectives that may shape future collective effort within CSR. The analysis within the research revealed the complexity within CSR.

Yet by analysing from the perspective of an essentially contested concept, the thesis was able to identify a core for CSR which lies in drive for legitimacy of corporate power in the face of the changing relationship between corporations and society in the context of globalisation. This globalised context is characterised by the emergence of various actors such as civil society, business groups, and local communities. This pluralisation of actors within the CSR area also appeared coupled with a de-emphasis on the role of law within CSR because of the fluidity of the concept. However the question after CSR's core is revealed becomes do law and legal perspectives hold any potential for this core?

The research revealed that the meaning of CSR centred on increasing corporate power and the consequential search for its legitimacy would lead to an exploration for legal perspectives capable of addressing this core. The relevance of law to contemporary concepts such as this would depend on law's ability to adapt to concepts which cut across 'traditional pigeon-holes'.³

Therefore the examination of legal perspectives contrasted a traditional legal perspective from corporate law with non-traditional legal theoretical perspective of law in 'law-jobs', to indicate that law can be viewed from both traditional and non-traditional perspectives and to propose that the law-jobs perspective would allow for broader overview of the role that law is capable of playing in the CSR relationship in order to legitimise power.

³ McBarnet (n 1) 55

Through this the thesis has been able to gain novel insights into the relevant relationship between CSR and law. In this regard the thesis discovered two underlying premises. Firstly, that the extensions of law and its role are best and firstly conceived theoretically and secondly, that this shift to a role based pluralistic perspective will allow for pluralisation of normative opportunities and the proper appreciation of the role of law under globalisation conditions. This thesis therefore suggests the law-jobs perspective can provide such a view of law that could help address CSR's core which is the legitimacy of corporate power by addressing the key areas of dispute resolution, channelling conduct, allocating authority and net organisation.

This concluding chapter will highlight the key themes of the thesis by drawing out and highlighting conclusions made in each chapter towards addressing the research issues. It then outlines the key findings and the contextual implications. Finally directions for further study are identified.

7.2 Key Themes of the Thesis

The thesis addressed the research question, redefining CSR as a legitimising force for corporate power: to what extent can law and a law-jobs perspective contribute to CSR? The thesis addressed this question in two parts. Firstly to establish the main exemplar of CSR as the legitimacy of power and then secondly to examine what contribution law and a law-jobs perspective could bring. The first part covered in chapters two and three examined the defining CSR and the notion of corporate power, one as a consequence of the other.

Chapter two explored the meaning of CSR. The chapter explored the various theories that have arisen within CSR. This could be broadly divided into five groups: instrumental, integrative, ethical, and political and accountability theories. The analysis revealed a high level of contestation about its meaning and role that placed CSR in the position of being an essentially contested concept (ECC). Gallie proposes the ECC as concepts ‘the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.’⁴ Using Gallie’s criteria this chapter revealed that contestations of CSR centred on the role of the corporation in society provoked by perceptions of increasing corporate power. These were questions of responsibility for corporate power, responsibility to whom and for what. Therefore its core exemplar is the legitimacy of corporate power.

Chapter three then explores this central notion of power especially power as applied to MNC. Firstly this chapter examines power as a concept using perspectives from Lukes’ exposition of power. Power is then identified as the capacity to affect others

⁴ W B Gallie, ‘Essentially Contested Concepts’ (1958) 56 *Proceedings of the Aristotelian Society* 167-198 reprinted in M. Black(ed.), *The Importance of Language* (Prentice-Hall, Englewood Cliffs 1962) 121- 146

stressing that this may or may not be exercised.⁵ Secondly when the analysis on power is then applied to MNC, it reveals structural power which includes control of foreign direct investment, control of trade, influence over states and hegemonic ideological influence. It also reveals agency power such as direct participation and action in International affairs and the use of lobbying and funding. To indicate the relevance to CSR this chapter examines the example of oil industry MNCs to reveal how critical incidents stemming from use, abuse or non-use of corporate power triggered the demands for an active CSR agenda.

The second part of the thesis in chapter four to six examines what law could contribute to this identified CSR core (i.e. legitimacy of corporate power). It proceeded on the premise that re-conceiving law's role in addressing CSR's core was necessary. This was a result of the following issues arising from the CSR and law relationship: the deliberate attempt to exclude law from the purview of CSR, the challenge that concepts resulting from globalisation such as CSR posed for traditional conceptions of law and finally the need for novel and coherent ways of analysing law's pluralistic role in CSR.

On this basis Chapter four examines the notion of legitimacy of corporate power from a legal perspective. This examines general debates about role of law in legitimacy, the varied perspectives of law itself and its relationship with regulation. The chapter endorses Beetham's view of legitimacy as limited power.⁶ This view of legitimacy focuses not just on people's beliefs but on such power being 'justified in terms of their beliefs.'⁷ The focus is therefore justification which implies accountability and responsibility. Therefore the search for legitimacy of corporate power is a valid subject of law as law can contribute to accountability.

⁵ S. Lukes *Power: A Radical View* (2nd ed.) (Palgrave Macmillan Great Britain 2005)

⁶ D Beetham *The Legitimation of Power* (Palgrave, Hampshire, 1991) 35

⁷ *Ibid* at 11

However law itself also has to be better nuanced when engaging in this legitimacy objective of CSR because it is a concept occurring at some many levels in global society. Therefore if law is defined as only state-centred and traditional it becomes self-limiting in its relevance. There are many perspectives of law that could have relevance to global concepts such as CSR and chapter four addresses the general classifications of traditional state-centred law and the emerging pluralist non-traditional view of law, hard law and soft law and law and regulation.

The thesis then in chapters five and six examines two such perspectives of law that are relevant to legitimacy of corporate power. A traditional view of law from corporate law which is the basic law that frames and forms the corporation and then a non-traditional extended 'law-jobs' perspective which does not prescribe a particular substance or form but identifies key inter-relational roles for law which can then be borne out in context.

Chapter five focuses on the traditional corporate law perspective. Initially this chapter examines corporate legal theory as influential to the way in which corporate law regulates corporate power. It finds a focus on utility as a legitimising concept to the detriment of responsibility. This results in concepts within corporate law and corporate governance, that are share-holder oriented and there is only limited recognition of stakeholders. The chapter then examines the UK Company law as the best example of corporate reform geared at CSR but discovers that there is still an internal focus. The limitations which are placed by separate legal personality and limited liability as concepts for the benefit of the share-holder still remain. The acknowledgement of the 'enlightened shareholder value' is a symbolic step but still prioritises the shareholder. The chapter also reveals the limitations of this type of state law as reform processes take a long time and require political will.

This chapter concludes that to examine law relevant to CSR and to capture its full potential, another perspective of law allowing for pluralist viewpoints may be able to form an embryonic framework for identifying law's role in CSR beyond traditional substantive law including corporate law.

Chapter six proposes such a potential framework derived from an extension of Llewellyn's law-jobs theory.⁸ These spells out a potential framework for CSR that addresses jobs of dispute resolution, channelling and re-channelling of conduct, the allocation of authority (the say), the net organisation and the use of law tools in achieving these law-jobs (the juristic method). Twining supports the adaptability of this theory to concepts emerging from globalisation. This would also provide a useful frame of enquiry on broader conceptions of the role of law embracing state law and non-state law focused around the doing of the law-jobs.⁹

This shifts the focus of law's role in CSR from a substantive to a role-based one. This better captures the role law can play. It does not stress that only law can fulfil these roles but that laws of various kinds are arising and should be developed within CSR to achieve these roles. This would also allow for flexibility and contextualisation necessary in CSR as the law-jobs have a questing element and an aspirational element that is one aspect that asks how they can be done and another that pushes for how they could be done better.

Kerr points out that CSR is not a fixed concept because it is based on changing perceptions and attitudes and this also means that it is unsuited to a stagnant perspective of law.¹⁰ In the extended conceptual sense from a law-jobs perspective,

⁸ K Llewellyn, 'The Normative, the Legal and the Law Jobs: The Problem of the Juristic Method' (1940) 49 *Yale Law Journal* 1355-1400

⁹ W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP, Cambridge 2009)

¹⁰ M Kerr, R Janda and C Pitts, *Corporate Social Responsibility –A Legal Analysis* (LexisNexis, Canada 2009)5

law reveals the potential to play a broader role in legitimising corporate power by developing a variety of accountability mechanisms in context to do relevant jobs.

7.3 Key Findings of the Thesis

The research from the thesis makes some of the following significant and original contributions.

Firstly that CSR can be re-defined around its core which is identified as legitimacy of corporate power. This should be seen in light of changing relationships between corporations and society in the context of globalisation. The issues of legitimacy of corporate power raise questions about accountability and limitations on abuse of power as well as beneficial uses of corporate power. With the unearthing of this core the necessity for legal perspectives within CSR becomes more obvious as law is relevant when analysing issues of legitimacy of corporate power.

However there are various ways of conceiving law therefore another key finding of the thesis is that the relevance of law can be conceived more broadly when pluralistic forms of law emerging under globalisation are taken into account. This pushes for a perspective of law that is less focused on 'form' but rather focuses on 'roles' or 'jobs'. Therefore in the relationship between law and CSR, the limitations placed on the role of law are not inherent to law or CSR, they are reflections of narrow and limited definitions of both concepts.

Nevertheless even within the narrow confines of traditional state centred law, corporate law exemplifies law's relevance to legitimising corporate power but it also reveals the limitations of this traditional perspective. Legal theory allows us to apply

broader conceptions and shift focus from substantive law to broader 'role-based' perspectives. This perspective of law as exemplified by law-jobs will help us capture and visualise wider role for law within CSR. This change in the view of law can lead to a framework that prompts key questions to be asked in a CSR relationship. These questions include issues of dispute resolution, channelling conduct, allocating the authority or say, providing a net framework or organisation as well as widening the range of law tools that can be used in the 'juristic method'. The answers and the ability for change and reform through the juristic method will contribute towards accountability aspect of legitimacy.

This novel legal perspective of the law- jobs CSR framework opens up potential for legal analysis in context between multi-stakeholders about the extent to which their current CSR instruments achieve the law jobs roles towards the legitimising goal. It will allow the actors to engage in questions of dispute resolution and the adequacy of mechanisms, channelling conduct, the allocation of authority, net organisation and review. The potential is that where they discover that the existing CSR instruments are not suitable for these roles it will lead to the choice of alternative instruments (traditional or non-traditional legal tools). This frame will allow for future tools in CSR to be developed in context and this does not exclude the future development of CSR law.

Importantly the findings here suggest that law has a major role in legitimising corporate power from a responsibility and accountability perspective. It can provide crucial frameworks even at this embryonic stage of law in CSR that utilise varied legal forms. This suggested perspective of law reveals that law can throw up crucial questions that constrain the use of corporate power and throw up fundamental questions which must be answered in the corporate society relationship.

7.4 Contextual Implications

The thesis in proposing an exemplar for CSR as legitimacy of power seeks to provide a platform to frame and analyse the debates which have shaped CSR so far. This exemplar is also the platform that identifies the necessity for legal perspectives and the suggestion of the law-jobs framework as a preferred legal perspective.

The CSR law-jobs framework provides systems based analysis for anyone contemplating CSR law in context. It is inclusive of traditional law perspectives but transforms the questions to a 'role-based one.' Therefore it is possible to examine in a local context, how these roles in the corporate- society relationship under CSR are being carried out and then whether they could be done better. This is the sense in which Llewellyn comments that there is a questing aspect and a bettering aspect.¹¹ It responds to the need for a framework that is capable of giving structure to the role of law within CSR but it also gives flexibility because of the absence of its own content only allowing for roles which should be performed.

The substantive topics within CSR such as human rights, environment, labour and social issues can then be flexibly identified in each context towards adopted goals in that context so that if more categories are identified then the structure of law-jobs is still unaltered. This also does not detract from attempts to set universal standards on specific topics such as human rights because these rules will not affect the framework. They will only go to clarify the desired conduct for orientation.

In a way the law-jobs analysis may force the question of standards to the fore when an analysis is carried out and it is discovered that in channelling conduct, the tools and instruments are weak or inadequate. It may also reveal that where the standards

¹¹ Llewellyn (n 8)

(for example: codes of conduct) are not re-orienting conduct of corporations then perhaps other tools (such as regulation) can be explored. The juristic method will allow for reform, re-evaluation and the potential for development of other law tools that could do the law-jobs in a better way.

This perspective provides a platform for more contextual examination of CSR law. It allows a country, community or corporation to assess how the law-jobs in CSR are being done and to explore other law tools that could be used to achieve better doing of the law-jobs which then contribute to ensuring that such corporate power is exercised in an accountable and legitimate manner. This responds to on-going issues of legitimacy and accountability by proposing a more nuanced role for law beyond the 'traditional legal' role. This inter-relational perspective allows room for stock-taking and review.

7.5 Conclusion and Further research opportunities

This thesis establishes that CSR is centred on the legitimacy of corporate power and that this drive for legitimacy indicates the relevance of law.

It examines the potential contribution of law from two perspectives: firstly a traditional corporate law perspective because corporate law is seen as home of laws for the corporations and reflect some universal legal notions about the corporate form. It discovers important limitations from corporate theory that prevent corporate law from achieving the responsibility element of legitimacy. It then suggests a shift in focus within law from 'form' that is traditional substantive state law to broader perspective that address questions of 'role'. The law-jobs perspective is then suggested as a heuristic device that throws up fundamental question within CSR relevant to the responsibility and accountability element of legitimacy.

The analysis within the thesis represents a chosen perspective of examining law's role in CSR there are other perspectives which could continue to explore the desirability of International or global laws or to push for even more radical reform of corporate laws or even propose the irrelevance of law. This work does not detract from these legitimate research aims which could be carried out in future. Rather by re-defining CSR and exploring the law-jobs it also provides a platform and wider framework for enquiries of law within CSR

This research will therefore provide a useful framework for further analysis in contextual circumstances. For example exploring how these law-jobs are currently handled in the CSR sphere within specific countries or sectors. This type of research can be validly carried out from a legal CSR perspective applying the law-jobs framework. This would highlight if and how the relationship is currently handling such jobs within CSR and could then go further to suggest a different or better way of handling the jobs. Finally future research building on the work in the thesis, could examine if the 'law-jobs' framework is a heuristic step that will ultimately lead to a body of CSR law that involves a mixture of state and non-state law linked through an enabling CSR framework.

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