



**CORPORATE SOCIAL RESPONSIBILITY IN NIGERIA:**

**An exploration of the efficacy of legal regulation.**

**A Thesis submitted for the award of the Degree of Doctor of Philosophy in Law**

**By**

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## **Abstract**

The social responsibility of corporations has become a topical issue. This is particularly so in relation to the ways and means of achieving harmony and congruency with social expectations. With the growing importance that corporations now place on meeting contemporary demands for extra-commercial engagement placed on them by society, regulating corporate activity in this area has come under intense public and legal scrutiny.

In what can be described as a departure from the norm, the use of legislation to mandate and govern corporate social responsibility (CSR) is becoming increasingly perceived as an effective regulatory method in emerging economies. India, Mauritius, Indonesia and the Philippines have adopted legislation with regard to CSR. In Nigeria, however, several attempts at legislating on CSR have failed. This study shows that a multiplicity of factors is responsible for this development. This thesis posits that while the adoption of international CSR standards is encouraged through various international activities, only an autochthonous approach which recognises the peculiarities of the Nigerian state can promote the desired legislative objective on mandating CSR.

This study explores the prospects of mandating CSR by legislation in Nigeria and suggests reforms deemed necessary for achieving the objective of mandatory CSR.

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### **Bibliography**

## **Declaration**

I declare that the work presented in this thesis is my own except where it is stated otherwise.

## **Abbreviations Used**

AU	-	African Union
CSO	-	Civil Society Organisation
CSR	-	Corporate Social Responsibility
ECOWAS	-	Economic Community of West African States
EEA	-	European Economic Agreement
EEC	-	European Economic Community
EITI	-	Extractive Industry Transparency Initiative
ESCS	-	European Coal and Seal Community
EU	-	European Union
FDI	-	Foreign Direct Investment
IMF	-	International Monetary Fund
IOC	-	International Oil Company
IoT	-	Internet of Things
OECD	-	Organisation for Economic Cooperation and Development
ODI	-	Overseas Development Institute
MSME	-	Micro Small and Medium Enterprises
NESREA	-	National Environmental Standards and Regulations Enforcement Agency
TTIP	-	Transatlantic Investment Trade Partnership
UN	-	United Nations
WTO	-	World Trade Organisation



## Table of Cases

*Ashby v White* (1703) 92 ER 126

*Bowoto v Chevron Corporation* 557 F. Supp. 2d 1080 (N.D. Cal. 2008).

*Dodge v. Ford Motor Company* 170 NW 668 (Mich 1919)

*Donoghue v Stevenson* [1932] UKHL 100.s

*Hughes v Weiss & Iuvus Ltd* [2012] EWCH 2363 (Ch)

*IT Human Resources Plc v Land* [2014] EWHC 3812 (Ch)

*Khan v Miah* [2000] 1 WLR 2123

*Lubbe v. Cape Plc.*, [2000] UKHL 41

*Ron Obey v West African Examination Council* [2000] 2 WRN 130; 2 NPILR 106.

*Salomon v Salomon & Co Ltd* [1897] AC 22

*SERAP v Federal Republic of Nigeria & Ors.* ECW/CCJ/APP/08/09 (JUDGMENT N°  
ECW/CCJ/JUD/18/12)

*Stimpson & Ors. v Southern Landlords Association & Ors* [2009] All ER (D) 193 (May)

## **Table of Legislation and Other Materials**

### **Nigerian Statutes**

Education Tax Act, 2004

Education Trust Fund Act 2003.

Financial Reporting Council of Nigeria Act 2011

Freedom of Information Act 2011

Independent Corrupt Practices and Other Related Offences Commission Act 2000

National Environmental Standards and Regulations Enforcement Agency (Establishment) Act  
2007

Nigeria Extractive Industry Transparency Initiative Act 2007

Nigerian Oil and Gas Industry Content Development Act 2010

National Oil Spills Detection and Response Agency (Establishment) Act 2006

Tertiary Education Trust Fund Act 2011

### **UK Statute**

Bribery Act 2010

Companies Act 2006

Joint Stock Companies Act 1844

Limited Partnership Act 1907

### **Other Legislation**

USA - Accounting Industry Reform Act 2002

USA - Alien Tort Claims Act (ACTA), 28 USC§1350

India - Companies Act 2013

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## CHAPTER ONE

### Introduction

#### 1.1 Preamble to the research issue

In the past decade, corporate social responsibility (CSR) has been receiving wide attention all over the world. This attention is mostly due to the global economic crisis that was stimulated by the financial crisis that began 2007 – 2008. A study soon after the global financial crisis occurred showed that the impact on Nigeria was “enormous and widespread”<sup>1</sup> Other events such as the British Petroleum (BP) oil spill in the Gulf of Mexico in 2010<sup>2</sup> in the Gulf of Mexico and growing effects of climate change around the world have led many to question the role of business in society and the ways to manage their perceived responsibilities beyond their self-interest of making profits. In most economic and many non-economic fora, ‘corporate social responsibility’ has been receiving increased and substantial attention.<sup>3</sup> Public media has been agog with publications on the perceived causal factors of the global crisis and suggestions about whom and/or what is to blame is still rife. Corporations have received substantial scrutiny; the banking sector and other big corporations whose operations cause environmental or social damage are being investigated. Byeong-Joon Moon, suggests there are “two different types of corporate associations: one focusses on the corporation’s

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<sup>1</sup> See Olu Ajakaiye and Tayo Fakiyesi, “Global Financial Crisis Discussion Series - Paper 8: Nigeria” (Overseas Development Institute (ODI) London, 2009)

<sup>2</sup> This oil spill occurred between 20 April 2010 and 15 July 2010 lasting 87 days. Eleven persons went missing and never recovered following an explosion and sinking of an oil rig operated by *Deepwater Horizon* for British Petroleum (BP). It has been regarded as the largest accidental marine oil spill in the history of petroleum exploration.

<sup>3</sup> For a dissenting view on the relevance of the relevance of CSR see, Robert B. Reich, ‘The Case Against Corporate Social Responsibility’ *Goldman School Working Paper Series* (2008).

capability to produce quality products and another on the corporation's engagement in social responsibility".<sup>4</sup> It is with the latter that this study is concerned.

Particularly, the effects of corporate behaviour towards human resources and the environment has been adjudged as being devoid of social considerations. This indictment has been levelled against corporations mostly in the Western economies but extends to multinational corporations (MNCs) that operate in developing countries such as India, China and Nigeria. Our case study - Nigeria – not being exempt from the impact of the global economic crisis, sought to ameliorate its effects. Accordingly, corporations, states, multilateral governmental, non-governmental organisations and civil society organisations in developed and developing countries alike, have demonstrated intensified interest in achieving ways of ensuring that corporations give consideration to social impact imperatives of doing business. CSR seems to be one the key ways of achieving this objective. As part of its closing remarks in the Conclusions of the Financial Crisis Inquiry Commission, the Commission warned that the “greatest tragedy would be to accept the refrain that no one could have seen this coming and thus nothing could have been done ... this is our collective responsibility. It falls to us to make different choices if we want different results”.<sup>5</sup> Clearly, moral turpitude and greed on the part of corporate managers has not escaped mentioning in the discussion of what led to the global economic crisis.<sup>6</sup> On the other hand, states were lambasted for allowing unfettered latitude of corporate governance. Nonetheless, some have suggested that the problems leading to the crisis are inherent in society. This study is an investigation of the emerging

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<sup>4</sup> Byeong-Joon Moon, Lee W. Lee and Chang Hoon Oh, "The Impact of CSR on Consumer-Corporate Connection and Brand Loyalty", (2015) 32 International Marketing Review 518, 519.

<sup>5</sup> The Conclusion of the Financial Crisis Inquiry Commission, The Financial Crisis Commission Report (2010) xxviii

<sup>6</sup> See Aliza D. Racelis, 'Examining the Global Financial Crisis from a Virtue Theory Lens' (2014) 14(2) Asia-Pacific Social Science Review 23-38. This study concentrated on the moral question in relation to the financial crisis of 2008 with reference to Philippines.

trend in and the prospects of legally mandating CSR in Nigeria particularly. It also – more generally – considers contemporary legislative responses globally drawing examples from developing countries like India and Mauritius.<sup>7</sup> This study seeks to identify the factors influencing legally mandating CSR in developing states and attempts to forecast the prospects of legislating mandatory CSR in Nigeria.<sup>8</sup>

Professionals of various backgrounds have contributed to the debate on the social responsibility of business. Economists, social scientists, lawyers, managerial scientists and academics of various disciplines and shades of opinion have argued diversely on the subject of CSR.<sup>9</sup> In academia, the subject of corporate responsibility has presented opportunities for economic, social science and legal research into understanding the role of business in society and how to manage them.<sup>10</sup> The corporations involved have not been silent; they have pressed their position in this debate. The public (organised and unorganised) has also reacted in several ways to steer the argument on corporate social responsibility. States have also reacted to the present global challenges on the basis of their individual circumstances by advocating solutions that depict their political economic posture.<sup>11</sup>

The solutions proffered for achieving greater responsiveness by corporations to social expectations following the worldwide economic downturn that followed the recent financial

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<sup>7</sup> Olufemi Amao, 'Emergent State Practice on the Creation and Practice of Standards on Corporate Social Responsibility' (2014) 1(1) State Practice and International Law Journal (SPILJ) 117

<sup>8</sup> The various attempts at legislating CSR in Nigeria between 2004 and 2015 is discussed further in Chapter 6.

<sup>9</sup> See generally: David Henderson, 'Misguided Corporate Virtue: The Case Against CSR and True Role of Business Today' Institute of Economic Affairs (Journal Compilation, Blackwell Publishing 2009); Robert B. Reich, 'The Case Against Corporate Social Responsibility' *Goldman School Working Paper Series* (2008)

<sup>10</sup> A Crane, D Matten, and L Spence, *Corporate Social Responsibility: Readings and Cases in Global Context* (Routledge London, 2008)

<sup>11</sup> Although some governments are subtler than others in exhibiting their political philosophies, most states are influenced by their politics as much as they are by their economic circumstances.

crisis have been contradictory in the least. Some solutions demanded corporations to act independently of the state in investigating the crisis and to come up with internal structures under self-regulatory mechanisms. Others argued that states should act by introducing measures through the instrumentality of legislative regulation to control possible corporate contraventions of their social responsibilities. Some others argued that society must act communally, to minimise the probability of the recurrence of a global crisis through collective societal reorientation. Underlying the various demands is the notion that corporations need to be more responsive to and responsible for negative social effects of their operations beyond the fundamental objective of making a profit and keeping the law.<sup>12</sup> A solution which will accommodate the preoccupation of business while meeting social needs will achieve the seemingly desired and desirable but yet elusive common agreeability.

Expectedly, the effect and dimension of the global economic crisis of 2008 – 2009 reverberated beyond the shores of the two major developed countries that represented the epicentre of the crisis – the UK and US. It affected the economies of developed and developing states in all regions of the world. The global impact of the crisis evoked the legitimate interest of international law scholars. The interest lies in investigating the possibilities of applying international law to the imbroglio. Due to the immaturity of international corporate law, a fragmented approach can be discerned in the international arena. In this regard, continental, sub-continental and several national initiatives have been developed. The various initiatives, it appears, represent particular economic views supported by particular political ideology.

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<sup>12</sup> Milton Friedman, 'The Social Responsibility of Business is to increase its profits' *New York Times*, (New York, 13 September 1970) 32. David Henderson, former chief economist at the Organization for Economic Cooperation and Development (OECD) has supported this position in a book *Misguided Virtue: False Notions of Corporate Social Responsibility* (The Institute of Economic Affairs 2001).

Accordingly, in the developed countries there is no want of proponents of deregulation and fundamental free market economic principles. Therefore, the capitalist notion that the ‘invisible hand’ of market is best suited for achieving distribution of economic resources which has pervaded Western economies persists after the crisis. Conversely, in developing countries like Nigeria, the dominant view tends to support more regulation of corporations. The state of The arguments on the appropriate regulatory framework for corporations has polarised CSR scholars. This thesis focuses on the legislative developments in Nigeria as a case study for understanding the perspective of legislating CSR in developing countries. Some reference will be made to the laws of other jurisdictions like India, Mauritius and Philippines where appropriate. In examining the desirability of a regulatory framework in Nigeria, the Western European and American notion of corporate self-regulation will be the departure point in this research.

## **1.2 Research Background**

This study concerns the regulation of MNCs in Nigeria in particular. It investigates generally the international influences shaping the CSR policy, practice and legislative landscape. It identifies principal regulatory tools and analyses their effectiveness. The effects of socio-cultural, economic and political forces on attempts at the regulation CSR for MNCs are identified and evaluated. In particular, the question of whether corporations should undertake further responsibility in society beyond the keeping of the law is considered against Nigeria’s several failed attempts at legislating mandatory CSR. This study is contextualised geographically. As Okoye correctly notes, ‘CSR is more specifically definable in context’.<sup>13</sup>

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<sup>13</sup> Adaye Okoye, ‘Exploring the relationship between corporate social responsibility, law and development in an African context’, (2012) 54 (5) International Journal of Law and Management 364,



This study also highlights the most recent international and domestic circumstances that determine the relevance of CSR in contemporary Nigeria, despite the opposition of business. The tenability of the argument canvassed on behalf of business that mandating CSR will inevitably lead to fettering innovation, production efficiency, and increases transactional costs and effectiveness is evaluated.

The focus on Nigeria is predicated by the failure of its attempt to join the few nations of the world – all of which are emerging economies – that have successfully mandated CSR through legislation. This development is interesting because of the successes registered by Philippines, India, Indonesia and Mauritius (all to varying degrees and specifications) to passing national legislation on CSR. This study itself is motivated by the interest generated from the ostensibly emerging trend of legally mandating CSR other developing countries. This study suggested that developing countries broadly share similar economic characteristics that makes the extrapolation of the findings of this study relevant in all emerging market jurisdictions.<sup>14</sup> It is from the description above that the relationship between business and society is interrogated. The pertinent question asked is; concerning corporate social responsibility in emerging economies like Nigeria, what is the value of mandating compliance in law and does the matter of the social responsibility of business go beyond the law? In answering this question, the potential value and efficacy of CSR legislation in emerging economies will be examined with Nigeria providing the contextual background. The prevalent conceptualisation and practice of CSR in Nigeria receives is examined to identify any theoretical underpinnings. Additionally, the relationship between national and

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367. This is the justification for contextualising this study in terms of (Nigeria) geography and (definition) description.

<sup>14</sup> There are various indices for determining whether a country is developed and developing; low per capita income, poor political institutions and high unemployment are some of them. However, it is agreed that all African countries and most southern hemisphere countries are “developing”.

international efforts at grappling with the mutable concerns brought about by globalisation and the transnational nature of multinational business is examined also. Additionally, the outcomes from legislating on CSR in India and Mauritius, will be examined to understand what prospects mandating CSR portends for Nigeria. The value of legislating on CSR is interrogated vis-à-vis the obligations of developing countries in domesticating relevant provisions of applicable international instruments.<sup>15</sup> The ultimate question contemplated in this thesis relates, therefore, to clarifying whether there are benefits of legislating CSR in developing countries like Nigeria. Put another way - is legislation a useful tool in regulating CSR activities of companies in developing countries?

Considering the dearth of research on the practice and prospects of CSR in developing countries, this thesis highlights the importance of understanding the probable value and basis of achieving partnership between business, society and the state in promoting CSR programmes. It will also consider the strategies that may be adopted in achieving cooperative participation of the three parties given the common socio-economic objectives. Recommendations concerning structured participation of corporations in, and coordination by states, of CSR programmes benchmarked in legislation to meet societal demands will be proffered. As already mentioned, the ongoing financial crisis and the attempts of business, state and society generally to grapple with what can be considered as cyclical corporate collapses, have captured the interest of the *entire world*. The financial and economic consequence of the recent global financial crisis having been global, its effects have not been lost to both corporations and governments worldwide.<sup>16</sup> It has led to a global recession. Stijn

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<sup>15</sup> Nigeria is a signatory to several regional, continental and global Conventions that impact business operations.

<sup>16</sup> For an outlook on the future of emerging economies following the last global recession see generally: Claudio M. Loser, 'Emerging Market Economies: Out of Favor But Not Out of Steam' (2014) 6 (2) Global Journal of Emerging Market Economies 97. He argues that emerging economies

Claessens and M. Ayhan suggest that “there is no official definition of recession, but there is general recognition that the term refers to a period of decline in economic activity”<sup>17</sup>.

In developed and developing economies, state officials and civil society activists continue to seize every opportunity to remind the world of the unsavoury effects of the global financial crisis while promoting the desirability of their proposals. Invariably, business has been urging the relaxation of regulation and legal bureaucracies while the opposition claim that more regulation of business is advantageous to forestall a repeat of the financial crisis. Some vehemently oppose the mainstream arguments advancing what could be considered ‘middle ground’ or ‘consensus’ approach. The aim of this thesis is, therefore, to provide an overview of the various arguments and the contemporary issues giving rise to the trending preponderance of legal provisioning of CSR in the corporate law of developing countries.

Recognising that there is a wide range of economic and legal theories engaged in the study of contemporary conceptualisations and practise of CSR, some legal theories are explored in this study to explain the proposition that legal mandation of CSR can be advantageous in developing societies.<sup>18</sup> Mention is made of economic theories with this study taking a utilitarian view of law in support of the contention on the applicability of legal mandation of CSR in developing economies such as Nigeria. A cosmopolitan view is adopted to investigate and propose the conceptualization of contemporary CSR in the international arena given that internationalisation is a result of globalisation and an inescapable outcome of international

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face challenges but a positive economic outlook in the medium-to-long-term following the recent global downturn.

<sup>17</sup> Stijn Claessens & M. Ayhan, ‘What Is a Recession?’ (2009) 46 (1) Finance & Development. Finance & Development is a quarterly publication of the International Monetary Fund (IMF). The period generally accepted is two consecutive quarters.

<sup>18</sup> The suggestions made in this regard are of particular relevance to Nigeria and developing countries. The distinction with developed countries is made on the basis that there is a difference in perceptions of the value of legislating CSR or to use it as a tool for development.

law.<sup>19</sup> The social contract theory will be applied to justify the expectation of society from government and business. An application of this theory will be in rationalising the free market or capitalist economic considerations that define the contemporary corporate social responsibility practises.<sup>20</sup> Lastly, as far as the benefit of CSR is concerned, utilitarianism and corporate citizenship theories will be adopted in arguing the imperativeness of using law in achieving the desirable outcome of implementing CSR laws in the context of developing or emerging economies.<sup>21</sup> A further application of the adopted legal theory in the examination of the role of law in the formulation of a regulatory regime in emerging markets with Nigeria as a case study.

On theorising to contextualise a study, Phillips Shively, regarding longitudinal and cross-sectional research imperatives noted that;

“It is quite possible, for instance, that economic development could be positively related to openness of government when we compare across states but be negatively related across local subunits within one state. Anticipating such variations in process across levels of analysis often requires subtle theorizing, and it is awfully easy for investigators to skip the theorizing and simply assume parallelism”.<sup>22</sup>

Firstly, therefore, a discussion of the various legal theories alluded heretofore will be followed secondarily, by reviewing globalisation and the dispersal of free market economic

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<sup>19</sup> The idea here is to identify cosmopolitanism as supporting the view that globalisation is the result of the international legal framework.

<sup>20</sup> In other words, on what theory can societal expectations of state and business be hinged?

<sup>21</sup> In this regard, it is posited that legislation is the only acceptable social construct that can be used as a vehicle to deliver social engineering, change and cohesion.

<sup>22</sup> Phillips W. Shiveley, ‘Designing Social Inquiry: Scientific Inference in Social Research’ (1995) 57 (4) *The Journal of Politics*, 1192. The book referred to is: Gary King, Robert O. Keohane and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Social Research* (Princeton University Press, 1994).

principles and the practise of corporate social responsibility which has been embraced by business in most developing countries. Lastly, the experience of the emerging markets or developing countries such as Nigeria is of particular interest in this thesis. Given that the financial crisis originated from the developed economies from which the developing economies are importing their financial and market economy framework, a look at the peculiarities of this group is desirable. When dealing with the theories of CSR, I attempt a reconceptualisation of the subject and proffer a definition. In analysing the ways in which it is practised, various regulatory tools both legislative and non-legislative will be identified. Taking from the example of India, which recently passed CSR legislation, it appears that legal prescription which has often been overlooked in the arsenal of potential tools for regulating CSR is becoming common.

As much as the leading discussants of CSR cannot be ignored, the dominant dichotomy suggests that on one side are neoliberal capitalists; prominent amongst whom are Friedman<sup>23</sup> and Freeman,<sup>24</sup> who opposed each other vehemently. The scope of this research is not limited to the extant notions of CSR but also of contemporary fringe developments such as climate change and global emissions levels that are increasing in impetus and importance. The once-upon-a-time peripheral and marginal issues regarding the purpose of business and its reasonable responsibilities to society have now become more visible in arguments on business ethics and CSR. Issues such as climate change and the environment, privacy and security concerns and internet marketing are pushing the frontiers of CSR discourse among

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<sup>23</sup> See generally: Milton Friedman, 'Capitalism and Freedom' (University of Chicago Press, 1962). But perhaps the writing that best characterise the position of Friedman with direct relevance to CSR is self-evident from this piece: Milton Friedman, 'The Social Responsibility of Business is to increase its profits' *New York Times*, (New York, 13 September 1970) 32. R. E. Freeman, *Strategic Management: A Stakeholder Approach* (Pitman, Boston 1984)

<sup>24</sup> R. E. Freeman, *Strategic Management: A Stakeholder Approach* (Pitman, Boston 1984) is a much-quoted work of Freeman in which he makes the case for pluralist corporate objectives.

stakeholder theorists.<sup>25</sup> Although there is controversy surrounding a universal definition of CSR, what is incontrovertible is its rise to prominence.

Academic scholars are not the only interested party in understanding and shaping the future of CSR. Business, civil society organisations, governmental and non-governmental organisations and individuals, en-masse have all subscribed to interacting on the subject. CSR compliance and certification organisations are springing up with others dishing out awards for “compliance” and “performance” to their “deserving companies”. This has given rise to the emergence of “experts” and “consultants” in this field of study and practice. Rating and assessment agencies are also observed to be proliferating.<sup>26</sup>

Although corporate philanthropy is still being practised, other forms of corporate–societal engagement is trending globally due to apparent changes in the international political, legal, social and natural environment in which corporations now operate. This thesis, therefore, does not support the isolation of any one of the “triple bottom line” (as propounded by John Elkington),<sup>27</sup> neither of the three main factors of CSR participation to wit corporations, state and society. The notorious cases of China’s children’s milk scandal which sickened about 600,000 children in 2008, the exposure of child labour and poor condition of Nike workers in Indonesia in 1991<sup>28</sup>, the Bhopal gas disaster in India in 1984<sup>29</sup> in which negligent workers

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<sup>25</sup> I argue that CSR as a subject is engaging issues of natural resource sustainability and international climate change concerns in a way not before seen, thereby expanding the boundaries of the subject. Although CR has been viewed with national bias, its international bias is further brought into prominence by sustainability and ‘global warming’ issues.

<sup>26</sup> Steven Scalet and Thomas F. Kelly, ‘CSR Rating Agencies: What is Their Global Impact?’ (2010) 94 (1) *Journal of Business Ethics* 69, 70.

<sup>27</sup> J. Elkington, *Cannibals with Forks: The Triple Bottom Line of the 21st Century Business* (Capstone, 1997).

<sup>28</sup> This is discussed later in this study.

<sup>29</sup> This incident was regarded as the world’s largest industrial disaster when 40 tonnes of poisonous gases leaked from a Union Carbide factory on 3 December 1984. 8 persons were convicted for

were sentenced to two years' imprisonment<sup>30</sup>, Ogoniland<sup>31</sup> and relatively more recently Bangladesh workers, seems to suggest a preponderance of CSR issues in developing countries.<sup>32</sup> The United Nations (UN) found that since "1994, the world's population has grown from 5.7 to 7.2 billion, with three quarters of that growth occurring in Asia and Africa" and that projections "suggest that the world's population will continue to increase and could reach 9.6 billion by mid-century".<sup>33</sup> With the location of abundant natural resources and cheap labour informing the relocation of many western corporations to developing countries, the interaction between the large corporations in their host communities becomes a matter of social interest.

Lately, Nigeria has been tagged the largest economy in Africa following a recent rebasing of certain sectors of its economy.<sup>34</sup> The economy of Nigeria since the discovery of crude oil in 1957 has been influenced greatly by multinational corporations from the West. Many influences have shaped the practise of CSR in Nigeria. This research is an attempt at understanding the contemporary CSR policy, law and practise prevalent in Nigeria. As Nigeria is an important emerging economy in Africa and indeed the world, it is imperative that research is done in this area.

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negligence leading to the deaths in 2010. 3,500 deaths were reported as a direct result of the incident and 15,000 other deaths were linked to it within 6 years. The leak affected over 500,000 residents of the immediate environment. In 1989, the sum of \$470 million was paid as compensation to the Indian Government.

<sup>30</sup> 'Bhopal trial: Eight Convicted over India gas disaster' *BBC News* (London, 7 June 2010) <[http://news.bbc.co.uk/1/hi/world/south\\_asia/8725140.stm](http://news.bbc.co.uk/1/hi/world/south_asia/8725140.stm)> accessed 12 January 2016.

<sup>31</sup> This is one of the most well-known and is relevant to Nigeria in particular. It is discussed more in this study.

<sup>32</sup> It is not suggested that industrial disasters and corporate scandals do not occur in developing world, what is posited is that the ramifications and scale of these events are more widespread and of greater socio-economic consequences in developing countries. The reasons for this view are explained in succeeding chapters.

<sup>33</sup> Concise Report on the World Population Situation in 2014 (New York, 2014) 29

<sup>34</sup> Africa's Biggest Economy, (2014) *Africa Research Bulletin*, 20340

### 1.3 Research Questions and Objectives

The aim of this research, therefore, is to identifying corporate objectives and their relevance to the pursuit of credible social responsibility programmes by corporations. It will further investigate the significance of legal regulation in the face of the apparent ineffectual self-regulation by corporations. Relying on findings in previous research (though scanty), this study will aim to illuminate the challenges and prospects of mandating CSR by legislation in Nigeria as is currently proposed.<sup>35</sup>

The aim of this research, therefore, is to identify the justifications for the use of law as an effective regulatory tool in international commercial law. It further seeks to identify and sensitively harmonise the interest of business and society in a complementary manner. This thesis will, therefore, be of interest to all who seek to use the law as a tool amongst the many others available in achieving sustainability of financial stability through long-term corporate existence.

Drawing from the examinations of historical and recent developments in understanding the role of law in framing CSR regulation, the developmental impact of CSR will also be construed. The issues for interrogate in particular are;

- (i) The justification for mandating CSR through legislation as a regulatory tool in Nigeria considering the context of its development; and
- (ii) The impact of legal regulation of CSR on corporate objectives in Nigeria as a developing country?

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<sup>35</sup> The reintroduction of the Petroleum Industry Bill 2008 in 2012 and again in 2015 to restructure the petroleum industry and the reintroduction of the Corporate Social Responsibility Bill 2008 as the Corporate Social Responsibility Bill 2015 will be examined to elucidate the issues associated with this development.



In consequence, this study will (a) evaluate the policy and legal provisions on CSR in Nigeria, (b) examine the prospect of legal mandation of CSR in Nigeria and (c) make recommendations for the effective practice of CSR in Nigeria.

#### **1.4 Research Significance: Originality and Value**

The significance and value of the research are in its novel approach and the importance of the subject matter – the legal mandation of CSR in emerging economies and Nigeria in particular. Recently, the Chief Economist of the World Bank noted that the rebasing of the Nigeria's Gross Domestic Product (GDP) has exposed the country's investment potentials to the world and identified its fast-growing economy as investment-driven.<sup>36</sup> This research provides an exciting opportunity to advance our knowledge of the possible use of legislation as a regulatory tool for CSR. Particularly of interest is the fact that the economic growth experienced by the emerging economies is at subject to global pressures one of which is the viability of the developed economies of the western nations. The dearth of literature in this regard is apparent upon a cursory review of available scholarly publications on *developing* countries relative to the *developed* countries. Frynas are clear that “developing economies are different from developed ones, and require particular attention”.<sup>37</sup>

Additionally, this research questions the normative and conventional discussions on law and CSR. Building on the premise that law is a tool for social engineering and notions of social

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<sup>36</sup> See Ndubisi Francis, ‘W’Bank: Rebased GDP Has exposed Nigeria to Global Investors’ (*THISDAY LIVE*, 13 April 2014) <<http://www.thisdaylive.com/articles/wbank-rebased-gdp-has-exposed-nigeria-to-global-investors/176037/>> accessed 12 July 2014

<sup>37</sup> A perfunctory comparison of the availability of literature on developed and developing countries will find a vast gap in favour of developed countries. See generally: Michael Blowfield and Jędrzej G Frynas, ‘Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in the Developing World’ (2005) 81 (3) *International Affairs* 499, 499.

contract and corporate citizenship with moral obligations, arguments are developed to rationalise and legitimise the corresponding responsibilities which corporations should be expected to undertake in society. It utilises the notion of “corporate citizenship” and theory of social contract to rationalise legitimising legislation of CSR although remaining agnostic till the very end.

As an insignificant body of research exists in this area on Nigeria and developing countries, this thesis is perhaps, the first attempt at a comprehensive investigation of the legal mandation perspective of CSR in Nigeria, in a major research work outside of the short papers and suggestions that can be gleaned from currently available material. The originality of this work is obvious as the first extensive exploratory study exposing the challenges and prospects of the mandatory legal regulation of CSR in Nigeria. Other studies have examined the fundamental theoretical and human rights issues as the seminal work of Olufemi Amao<sup>38</sup> on CSR in developing countries. The paucity of research in this area with particular reference to Nigeria has been widely acknowledged as only a few authoritative writings exist.<sup>39</sup> This study is forward looking and novel by exploring the ramifications of the emerging use of law and mandatory CSR as a means of attaining developmental objectives.

In the final analysis, this thesis posits that there is a greater role for law and governments both nationally and internationally to engage with business to develop mutually complementary regulatory systems. As will be shown, although globalisation set the scene for an

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<sup>38</sup> Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law Multinational Corporations in Developing Countries* (Routledge 2011). This book has a wider appeal for all developing countries although its Chapter 4 was dedicated to Nigeria.

<sup>39</sup> Emmanuel Franklyne and Onyemaechi Ogbunwezeh, *Towards an Ethical-Ecological Assessment of Companies in Nigeria* (Peter Lang 2012). This book focused critically on the effects of ‘disappearing’ and ineffectual CSR programs of IOCs in the Nigeria Delta region of Nigeria.

international approach to resolving the perceived conflict between society and business, national laws can be effective in engage the autochthonous issues for common benefit of state, business and society generally.

This work will be useful in social policy formation legal reform and legislative drafting thereby being of interest to lawyers and social policy students alike and can be considered a socioeconomic-legal research. The justification of this study is in the need to examine a thorough examination of the considerations for legal mandation of CSR in Nigeria and developing countries akin to it. This study will be beneficial for the consideration of the many aspects that are likely to impact one way or the other the legal mandation of CSR generally and in developing countries in particular.

## **1.5 Research Scope, Limitations and Methodology**

### ***1.5.1 Scope***

It is not intended in this thesis to enumerate and critically examine all the theories of law. It is only intended that a perfunctory review is undertaken to highlight the various theories of law in order to understand the reason behind the choices I have made in adopting the theories that are applied thematically in this thesis. Additionally, this research propitiously demonstrates the interdisciplinarity between law and economics. It also draws attention to the for home-grown CSR models for developing countries in general and Nigeria in particular.

### ***1.5.2 Limitations***

Due to practical constraints this research is not empirical in nature. The reader should bear in mind that it is not meant to discuss exhaustively financial or economic theories. This research

does not engage at any depth economic theories or social policy analytics.<sup>40</sup> As much as practicable, reliance has been placed on empirical studies of authors considered credible although this research in itself is not an empirical research. The constraints of time and resources have therefore limited its focus to qualitative analysis. As this is not an empirical study relatively, insubstantial quantitative values are employed. Further research, particularly of an empirical nature may need to be undertaken to test the outcomes of this research on one of the other well-known developing countries.<sup>41</sup> In future research, it will be interesting to use quantitative or mixed qualitative-and-quantitative approach to investigate the effect on business of legal mandation of CSR especially of India's experimental legislation.

### ***1.5.3 Methodology***

The methodology adopted in this research is indicative of a reflective approach to an exploratory venture. As at the date of completion of this research, Nigeria had not passed the Corporate Social Responsibility Bill 2015 into law. This is a doctrinal research interrogating the theoretical underpinnings of corporate law theories. Reliance is placed on scholastic publications for theoretical exploration, comparative. Beginning with a broad review of the purpose and function of law in society and international law in particular. Then discussions are honed in on CSR and its implications in emerging economies with Nigeria as a case study. The benefit of the case study approach in this research is to achieve robust and in-depth consideration of CSR issues in the particular context of Nigeria. An examination of case law in this area an empirical matter and implication of the theoretical conclusions is then

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<sup>40</sup> The common understanding of concepts of macroeconomics, psychology and sociology have deliberately been used without any profound elucidations. Such assignation is left for the subjects' experts.

<sup>41</sup> Brazil will be an interest case on account of its perceived social inequality, large extractive industry and challenges in human and environmental sustainability. CSR is not legislated in Brazil but most notable companies have subscribed to the ETHOS Institute social responsibility principles which was developed by Brazilian managers and entrepreneurs in 1998.

undertaken. As much is relevant to this study, a blending of some empirical data, relevant theories, historical and contemporary commentaries are used. It is an explorative using direct observation and reliance on primary and secondary sources, especially published materials of experts and outcomes of empirical research. In this study, though the methodological approach taken was primarily qualitative and interpretative, due regard must be given to the use of quantitative material to appreciate its full purport. This thesis has been deliberately organised starting with the most general subject of the law and international law. It then tapers to discuss in particular the general issues of corporate law of which CSR is a specific and detailed subdiscipline. This is an exploratory investigation into the prospects of legislating CSR in Nigeria.

## **1.6 Thesis Structure**

This research has been divided into five parts with eight chapters, including the introduction and concluding remarks that merely provide a preface and the culminating thoughts of the thesis.

### ***1.6.1 Part I – General Introduction***

In the introduction chapter of this study, the entire thesis is overviewed with the intention of setting out the motivation for this study, the theoretical and substantive lines of enquiries and ultimate objectives of this research. The introduction is meant to be a condensation of the main themes of the thesis, demonstrating how they interact and result in the substance of this thesis. Relating to this research, it is important to point out that, it has been carried out “in context” of the developing countries generally (and Nigeria in particular) and should be viewed within this preconception.

### ***1.6.2 Part Two - Theories and Principles of Law, Capitalism and CSR***

The second and third chapters are the beginning of the enquiry into my hypothesis. It commences with a brief history of corporations and corporate law (including the vague concept of ‘international corporate law’). It inquires into the value of in contemporary global society and its application in the CSR debate. a closer attention is paid to the rise of the modern corporation. A brief outline is set out of the historical development of the law of corporations and its impact on the modern global economy. Attention is also given to the nature and characteristics of the modern corporation and how the subject of CSR has come to take its place in the study of modern commercial, investment and corporate law. An inquiry into the development of CSR and its contemporary meaning and acceptance will be undertaken. The prevalent concepts of CSR and the models developed will be identified. The international dimensions of the operations of the big corporations will be highlighted. Importantly, the theories of CSR will be identified and critically examined. This part consists of two chapters that discuss both the development of the corporate accountability movement law and its application in modern society.

### ***1.6.3 Part Three: CSR and Regulations and Developing Countries***

The concept of ‘responsibility’ and the various efforts to regulate “corporate responsibility” of corporations internationally will be examined. The role of law in shaping CSR will be defined in historical perspective. Accordingly, a critical view will be taken, of the utility of CSR in the present discourse. Relevant historical and contemporary international efforts developments will be highlighted, for example, the *UN Guiding Principles on Business and Human Rights* is reviewed here. There is also an examination of the practices of CSR in emerging economies. The various applications of CSR and the peculiarities of its

development vis-à-vis the developed economies is outlined. This part consists of the third and fourth chapters.

#### ***1.6.4 Part Four: Legislating CSR in Nigeria; Challenges and Opportunities***

A chapter is devoted to the recommendations and positions that are informed by this research with particular reference to Nigeria. Some suggestions on jurisprudential, institutional and practical issues to facilitate the efficacy of legislation of CSR norms will be made. In particular, an attempt will be made to answer the question of whether CSR represents a threat or an opportunity in developing countries given the “business case” argument for CSR.

#### ***1.6.5 Part Five: Future Trends – Summation and Recommendations***

This chapter concretises and the findings and speaks to the hypothesis. It constitutes a conspectus of the entire thesis and my prognostications. It outlines the thesis and recommendations arising from it.

It is my sincere hope and desire that this study brings illumination to the uncharted areas of the developing trends in developing countries by highlighting the apparent increasing use of legislation to mandate the practice of CSR.

## CHAPTER TWO

### Corporate History, Objective and Law

#### 2.1 Introduction

In this chapter, this study is contextualised by noting the nexus between the main concepts engaged in it. It starts with the historical development of corporate entities from its unsophisticated early forms, to the emergence of the transnational corporations that characterise big business as presented in contemporary business. An attempt is made to answer the question; what's a business for?<sup>42</sup> This question is at the heart of this research, for only when it is answered in the international and domestic context can the role of corporate law be considered.

Accordingly, the rationale behind the creation of the modern company is investigated to identify, in particular, its social benefits. Other purposes for the creation of the modern company will be identified including making profit and creation of wealth, as these purposes also form the fundamental objectives of the corporation. The claim of corporate social responsibility as a subdiscipline is, that the objectives of business are wider than those conveniently admitted by business; there are social responsibilities beyond keeping the law and making profits. The dichotomy between the social and legal objectives of business was popularised by an open debate between Adolph Berle and Merrick Dodd.<sup>43</sup> Berle contended

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<sup>42</sup> Charles Handy, 'What is a business for?' in *Harvard Business Review on Corporate Responsibility* (Harvard Business School Press, 2003).

<sup>43</sup> This debate elicited erstwhile benign issues in corporate law to relative prominence in the early-to-mid 20<sup>th</sup> century. One of the foremost commentators who articulated the public interest or quasi-



that corporate managers should be protected in their activities which should be only to promote the interest of the owners of the company being the shareholders.<sup>44</sup> Dodd on the other hand maintained that corporations are a product of the society who may demand that corporations conduct themselves in the public interest.<sup>45</sup> The question that arises is; should corporate managers be required by law to assume greater fiduciary responsibilities beyond that of making profits for their shareholders? International law and indeed domestic law of states, therefore, seeks to delineate the question of what purposes corporations serve in modern society and how to legalise them? The incursion of law into the arena of corporate objectives and the wider social responsibility of business has been opposed by business. It is observed that the influence of law has been ubiquitous when considering the history and development of corporations despite the contention of business. In international commerce, the globalisation of corporate operations and the increase in the importance of the multinational companies has inevitably brought this issue to the fore. Consequently, three issues are examined principally in this chapter and will be noted as prelude to the introduction to the formative principles of corporate responsibility and corporate accountability ideologies in the next chapter.

The final context in which this research is framed is the circumstances of developing countries and Nigeria in particular. Although, this is more fully covered in Chapters 5 and Chapter 6. Nigeria is the jurisdiction in which the theories and ideologies noted in this research will be firmly located. Inescapably, this study will reflect the apparent characteristics of the Anglo-American free market economic model otherwise called capitalism. This business model has been particularly exemplified by the vibrant pursuits of the modern

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public status of corporations are A.A. Berle and G.C. Means, *the Modern Corporation and Private Property* (Harcourt, Brace & World, Inc. 1968, first published 1932).

<sup>44</sup> A.A. Berle, 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* 1049

<sup>45</sup> E.M. Dodd, 'For Whom Are Managers Trustees' (1932) 45 *Harvard Law Review* 1145.

corporations. In the final analysis, the role of the law in shaping CSR is investigated to identify whether it is promoting or otherwise of corporate objectives. The history of the modern corporation will be followed by an examination of the objectives of the corporation, especially in the modern era. Finally, a brief mention will be made of corporate theory. As Dennis Patterson put it, “[i]t would be simplistic to see the work of contemporary law and economics scholars as a single-minded focus on the empirical”.<sup>46</sup>

## **2.2 The Modern Corporation and Corporate Law**

An incorporated business is essentially a person or persons who invests capital for profit. The earlier forms of business organisations were fundamentally cooperative human endeavours such as group hunting, farming, and the “joint and several” appropriation of communal resources in primitive times. It was the desire to increase the capacity and ability to increase production by the pooling of talent and capital that brought about the formation of more complex arrangements. The beginning of the modern corporations that are now unmistakably notorious around the world, is traceable to business organisations of 16<sup>th</sup> and 17<sup>th</sup> Century Europe. Jem Bendell points out that some European governments created chartered “corporations were invented at the end of the sixteenth century as a means of managing colonial trade... to undertake activities that the governors determined to be in the interests of the state”.<sup>47</sup> However, private promotion of corporations is the dominant characteristic of the world-pervasive Anglo-American model of corporations. The origin of the US free market oriented corporate law is rooted particularly in the UK.<sup>48</sup> In turn, the UK corporations’

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<sup>46</sup> D Patterson, ‘Introduction’ (eds) *Philosophy of Law and Legal Theory* (Blackwell, 2003) 4

<sup>47</sup> J Bendell, ‘Barricades and Boardrooms- A Contemporary History of the Corporate Accountability Movement’ (2004) UNRISD Technology, Business and Society Programme Paper No. 13, 7

<sup>48</sup> Douglas Beets in ‘Critical Events in the Ethics of US Corporate History’ *Journal of Business Ethics* (2011) notes that the early British settlers who founded the United States of America imported the form of business organisation called ‘corporations’. He implied that the economic prosperity of

predecessors have been traced to as far back as in ancient Greece about the 11<sup>th</sup> century, in trading communities made up of mainly peasants and sole traders.<sup>49</sup> In essence, the modern corporation was prefigured by the sole trader then by private joint enterprise and this development was guided by law.<sup>50</sup> The Partnership Act 1890 presumed ‘persons carrying on a business in common with a view of profit’ to have formed a partnership<sup>51</sup> except the provisions of that law was expressly excluded by agreement. Effectively, the risk and liability invariably reside with the business owner who can be held liable upon his personal guarantees. The Limited Partnership Act 1907 and the Limited Liability Partnership Act 2000 allow for the ‘limited liability’ of partnerships. An advantage of a sole trader or partnership business - both which are remarkable for embodying personal services – is the inevitable rapport between the business owners and the community they serve thereby informally providing socially responsible services to them. Where there are conflicts or the need to address poor service delivery, an owner who is well-known in the community will probably react to it, to the satisfaction or otherwise of the customer. The direct impact of customer dissatisfaction and risk of reputational damage in a close-knit community would invariably inform palliative measures on the part of the business owner.<sup>52</sup> A further enterprise predicated on collective venture and known called joint stock companies were formalised into corporate bodies first in the UK in the 19<sup>th</sup> century. The turn of the 19<sup>th</sup> century marked the joint venturing and the doing of business beyond individualistic endeavour. The pooling of

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European corporations was one of the interests of those who explored the continent of North America in the 16<sup>th</sup> and 17<sup>th</sup> century.

<sup>49</sup> See N Eberstadt, ‘What History Tells us about Corporate Responsibility’ (Autumn 1973) 7 Business and Society Review/Innovation 73, 77.

<sup>50</sup> Section 7(1) of the Companies Act 2006 ‘one or more persons’ can form a private or public company, most of the large multinational corporations are formed by several individuals (natural or artificial) by pooling capital to promote the objects of the company.

<sup>51</sup> s. 1, The Partnership Act 1890. See *Khan v Miah* [2000] 1 WLR 2123 where the court confirmed a partnership existed even one of the parties does not acknowledge its existence formally. Partnerships can be formed of unlimited number of partners who are owners of the assets of the partnership.

<sup>52</sup> See *n31*, 77

resources to develop the railroad companies that adopted the newly developed steam engine locomotives gave impetus to the rampant organising of business through collective economic pursuits through a nexus of agreements.<sup>53</sup> This led to the incorporation of companies by registration, a provision made under the Joint Stock Companies Act 1844.<sup>54</sup> The incorporation of companies for joint enterprise has continued to be recognised under the current equivalent law in the UK – the UK Companies Act 2006 - having undergone some major reforms over the intervening years. Around this newly established way of organising private business venture grew an economic theory that expounded on the peculiar benefits of shareholding in the incorporated companies. The theory called ‘capitalism’ was urgently espoused; with it was the notion of proportionate ‘dividends’ being the benefit from the pooled ‘capital’. Two factors were and still are explicatory of their position; first is the increase in efficiency in the use of factors of production<sup>55</sup> and the second is an adjunct to the first, being the freedom to divert resources to whatever enterprise brought the greater profit for the capital owners.<sup>56</sup> It was further claimed that by adhering to the two tenets i.e. efficiency in production through pooling of resources and freedom to employ resources based on the need (supply and demand), that increased production could be achieved with less resources thereby creating more wealth in the society. John Armour et al. contend that there

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<sup>53</sup> M. Jensen and W. Meckling, ‘Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure’ (1976) 3 *Journal of Financial Economics* 305.

<sup>54</sup> For a comprehensive account of company law evolution in the UK see R.R. Formoy, *Historical Foundations of Modern Company Law* (1923, Sweet & Maxwell). His account begins from 1600 and finishes with an introduction of the Companies Act 1908.

<sup>55</sup> It is firmly rooted in the study of transactional economics that the benefit of forming business ventures by more than one individual is to reduce the cost of transacting business. See Ronald Coase, ‘The Nature of the Firm’ (1937) Reproduced in O. Williamson and S. Winter, *The Nature of the Firm: Origins Evolution and Development* (Oxford University Press, 1993).

<sup>56</sup> This is more relevant to the modern large corporations which are not managed by a family but rather a wide range of shareholders as collective owners who have delegated management of the company to professionals who act on their behalf.

are some characteristics “underlying uniformity of the corporate form”<sup>57</sup>. According to them, “[t]hey are: legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership”<sup>58</sup> which together “make the corporation uniquely attractive for organizing productive activity”.<sup>59</sup>

The early incorporated businesses were family run businesses which influenced by the communal culture and social expectation to ensure that business was conducted in socially acceptable manner. However, the modern forms of national and multinational corporation are characterised by more complex and varied ownership structures, and the international economic landscape is dotted with various types of corporations reflecting cultural idiosyncrasies. Granting that all free market economies share common traits, some differences can be observed in the forms of corporations existing in Asia, Western and Eastern Europe and the US. The point of difference is usually found in the form of corporate governance structures although the fundamental characteristics of profit maximisation remains which reflect the extent to which local cultures succumbed to the Anglo-American model of capitalism.<sup>60</sup> It is noted that business has evolved from simple entities to complex and global phenomenon. Unsurprisingly, the precursors of the large modern multinational corporation differed in nature and characteristics to contemporary organisations but still shared some fundamental objectives such as profit making and economic efficiency.

Since the Limited Partnership Act 1907, legal corporate entities have become indispensable features of a modern economy and their various forms have become pertinent in organising

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<sup>57</sup> (n 18)1. An extensive discussion was attempted in this book of the so called ‘agency issues’ comprising of transactional relationship between corporate managers and shareholders, intra-shareholders’ conflict and shareholders and third parties’ interactions.

<sup>58</sup> Ibid. Although the writers refrain from arguing for or against convergence of corporate law globally, their identification of these five common characteristic may be pointing towards some form of structural commonality that supports the argument of internationalisation of corporate law.

<sup>59</sup> (n 21) 6.

<sup>60</sup> Christine A. Mallin, *Corporate Governance* (Third Edition, OUP 2010) 44.

economic cooperation for profit and not-for-profit purposes.<sup>61</sup> As the uses of corporations have increased, so have the forms and styles of corporations increased. Moreover, the sizes of corporations have also increased with the large modern corporation fulfilling an indelible role in the ever-expanding globalised economy. Corporations now lead in innovations and technological breakthroughs forcing changes in the way people live and do business. From a much simpler corporate form based on a small number of owners, the modern multinational corporation have developed into very complex organisations playing various economic, social and political roles. The real or perceived roles of large modern businesses has shaped ideologies and influenced the shaping of modern corporate law. Thus, corporate theories have not escaped the interest of politicians and social policy makers. The intractable conundrum posed by the modern big business is identifying its role and the beneficiaries of its existence in society. As will be seen, it is simplistic to assume that only shareholder-investors are interested in the operations of corporations as legitimate beneficiaries. It has now become fashionable (especially in developing countries) to argue that there are other ‘stakeholders’ who may have equally important interest in the operation of corporations. The consideration of the purpose of corporations, the economic, social and political implications of corporations in domestically and internationally in societies marked by growing world population, influences of technological advancement and creative corporate financialisation.

However, the issues of corporate law, has extended beyond the traditional preoccupation of defining the parameters of corporate formation and governance to the wider issues of human rights, ecological preservation, business ethics and social responsibility. At some point – perhaps about the 1950s – more serious consideration was given to the relationship between business (especially large business) and society generally. Fundamentally, the tension

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<sup>61</sup> For the various forms of corporate associations and their uses, see: Paul Davies and Sarah Worthington, *Gower & Davies’ Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012) 4 – 8.

between corporate law and ethics was subsumed by the wider ideological conflict between conservative and liberal economists. Since the formation of corporations to their metamorphosed presentations today, corporate law has evolved with it. The formation and development of corporate law though largely a matter for national jurisdictions has been surreptitiously amassing credibility for international relevance. This is largely due to the implications of globalisation and the transnational operation of MNCs. The spread and dominance of capitalism as a form of economic ideology has required the oversight of supranational organisation such as the International Monetary Fund (IMF) among others. History is replete with various debates in which the resilience of these ideologies has been tested. These two philosophies around which corporate law theories have developed, dominate corporate law jurisprudence today. Consequently, contemporary domestic law and international commercial law studies has developed the characteristic legal construction of the corporate identity. Law has been employed functionally in regulating for the role of business in society, taking into account the purpose and relevance of corporations in the modern capitalist economy. While legal issues simpliciter may be easily identified and located in ‘company law’, CSR may be seen as the discipline interested in the wider moral issues of business and its contemporary social importance – issues conventionally relevant social policy and business management. Through legal provisions, the fundamental utility of corporate law has been to legislate on the constitution, powers and administration of managers. In doing so corporate law has affected the evolution of various kinds of corporations in most jurisdictions.

In contemporary business, sole traders and micro, small and medium enterprises (MSMEs) still constitute the majority of businesses in developing and developed countries. They are commonly financed by personal savings, managed personally by the owner with little or no formal legal requirements. This is not new; prior to the advent of corporations and corporate

law, natural resources in the UK (and many other societies) vested in feudal lords and sovereigns who appropriated property assets on behalf of the Crown.<sup>62</sup> Many modern states enjoyed identical monopolistic or quasi-monopolistic management of endowments of natural resources through state-owned corporations as is evidenced in the management of natural material assets in most states which are exploited under licence of the states as communal assets. Many developing countries have a form of natural resources from which economic gain accrues and are thus managed on behalf of the state by state-owned corporations.<sup>63</sup>

### **2.3 Multinational Corporations and the Global Economy**

The access to wider capital markets by MNCs has provided big corporations opportunities for transnational expansions and production efficiencies. The sole trader and partnership forms of business organisation were and now are still grossly inadequate to cope with the requirement for greater capital and diverse skills. Smaller business organisations also lack the sophisticated managerial abilities needed to run the more complex operations occasioned by the technological advancement and socio-political complexities that characterised industrial scale production since the late 20<sup>th</sup> century. Taking the early 20<sup>th</sup> century as a departure point for modern corporate history, some notable historical events resulting in transnational corporate operations can be noted. Most notable are the two World Wars and the resultant globalisation following the formation of global political institutions that had facilitation of trade and international commerce as cardinal tenets. This deliberate political endeavour to

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<sup>62</sup> Presently, should a company be dissolved in the UK, the assets of the company vest in the Crown, Duchies of Cornwall or Lancaster as *bona vacantia* under section 1012 of the Companies Act 2006.

<sup>63</sup> The governments of Nigeria, Ghana, Equatorial Guinea, Trinidad and Tobago among others all have incorporated state-owned companies that manage natural resources located in their jurisdiction. It is common for states to retain and exercise the right of compulsory acquisition of land in the public interest. In Nigeria, the Land Use Act 1978 vests land in the various states in the Governors of those states who may issue 'Certificates of Occupancy' only.



achieve peaceful and cooperative existence has been majorly responsible for the expansion of corporations worldwide in as a deliberate objective for the establishment of the League of Nations, thereafter the UN, and later the European Coal and Steel Community<sup>64</sup>. Following the reduction of war in Europe, other factors in the second half of the 20<sup>th</sup> century have buoyed large corporations. These factors include technological advancement, increased world population with the attendant increase in demand necessitating supply, the emergence of the world-wide web and increased availability of funds through proliferated capital markets.

Of all the factors, however, the ramification of what has been described as the ‘fourth industrial revolution’<sup>65</sup> seems to have the farthest reaching consequences and has shaped the formation of more intricate production methods.<sup>66</sup> Furthermore, the formation of the stock market offered companies the ability to raise practically unlimited amounts of money to pursue its interests while maintaining their ‘limited liability’ status. This meant that the success of companies was generally gauged through their share value. Accordingly, the diverse ownership structure of firms led to the necessary separation of managerial duties from shareholders. This evolution in turn has led to the rise of the power and importance of corporate managers in whom the ‘conscience’ of the corporate entity resides, who now display their influence internationally.

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<sup>64</sup> The European Coal and Steel Community (ECSC) was formed in 1951 after World War II as supranational organisation. Its original members who signed its establishing Treaty of Paris in 1951 were Belgium, France, West Germany, Italy, the Netherlands and Luxembourg. This organisation changed and expanded in shape and purpose to become the foundation for the formation of the European Economic Community (EEC) and the European Union (EU). There were other regional economic blocs formed around the world within a few decades of the formation of the UN.

<sup>65</sup> The “fourth industrial revolution” - also known as Industry 4.0 - refers to the cyber-physical technological advancement in the methods of production. The first was the use of steam power, the second electric power and the third the use of computerisation in production processes.

<sup>66</sup> Despite controversies regarding the nomenclature to be ascribed to the new technological era, it is agreed by most commentators that it brings in its wake monumental opportunities for mass production and how people will live in communities around worldwide.

Since the institution of first major legislations like the Limited Liability Partnership Act 1907 dealing with the formation of limited liability firms, several variations of corporate entities have been invented to meet various other purposes. Entities that do not have investing members and thus not-for-profit now exist to protect special interests such as social welfare, religious and other altruistic purposes.<sup>67</sup> Invariably, the constitution, purposes and objectives of the not-for-profit organisations are mainly altruistic and different from the profit maximising orientation of for-profit corporations in most market oriented economies. Although the large multinational profit-making corporations are the subject of this research, the not-for-profit organisations have constituted themselves into a formidable stakeholder group and advocate vehemently seeking to influence corporate law and practice in socially responsible paths.

Since the era of the first industrial revolution when steam energy transformed the world in the 18<sup>th</sup> century, corporate activity has been further characterised by a large number of mergers, acquisitions and formation of new large corporations. These corporations have been inspired by the prospects of large capital to seek monopolistic profits and production efficiencies through deployment of greater use of technology in large-scale production.<sup>68</sup> Although the national and global commercial setting of the 20<sup>th</sup> and 21<sup>st</sup> century is different from that of the 17<sup>th</sup> to 19<sup>th</sup> century when incorporation legislations first came into existence, some fundamentals remain truism of both eras; profit making, agency control of corporate management and the supremacy of shareholder interest. In both developed and emerging economies, the ratio of MNCs generally, and large corporations generally to smaller domestic

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<sup>67</sup> These are companies formed for charitable purposes under company law legislation but have special status with different reporting standards from profit-making companies.

<sup>68</sup> See generally *The Rise of the Corporate Economy* Leslie Hannah (The John Hopkins University Press, 1976) for a full account of the growth of big business in the UK. This book traces corporate history from early times until early 1970s when it was published. Further reading is recommended for the period post the date of the book review.

companies is significant.<sup>69</sup> However, when put together, the domestic companies employ far greater numbers of employees, etc. than all the MNCs put together and so cannot be absolved from the discourse. In US and UK, they are acknowledged as significant contributors to the economy but do not enjoy the same political clout of big business except when constituted into cooperative entities like the Chamber of Commerce.

The ownership structure of corporations may be playing a part in how the goals of the corporation are framed; small businesses are closer to their customer base than big multinationals whose ownership base is invariably diverse and somewhat detached.<sup>70</sup> In terms of their legal persona - by operation of legislation - many notions ascribed to natural persons have been attributed to incorporated entities. Frank Tuzzolino and Barry Armadi have suggested that corporations have a hierarchy of needs like natural persons.<sup>71</sup> Corporations have other features and rights such as “the right to an indefinite life, the right to absorb other corporations, the right to sell ownership in itself, and the right to combine with other corporations to form a larger corporation”<sup>72</sup> could not be enjoyed by humans. With the capability to sue and be sued, albeit it as an unnatural ‘person’, it has been argued that the burden of responsibilities for social amenities cannot be left to states alone. Consequent to the legal persona status of the corporation were the rise of certain expectations of corporations to fulfil its ‘social contract’.

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<sup>69</sup> In UK, small businesses turned employed 60% of all private sector employment with annual turnover of £1.8 trillion or 47% of all private sector turnover in 2015. Also, 99.3% of all private sector businesses were small or medium-sized (SMEs). It should be presumed that this sector includes the micro businesses hence micro, small and medium-sized (MSMEs) are constituted by sole traders, small family-owned and run businesses and medium-sized corporations. In Nigeria, the National Bureau of Statistics confirmed the existence of about 37 million MSMEs employing over 60% of employees in the private sector.

<sup>70</sup> In this regard allusion is being made to the fact that shareholders often are unaware of the decisions of corporate managers who invest capital on their behalf and so ‘invincible’ to those they service.

<sup>71</sup> Frank Tuzzolino and Barry Armadi, “A Need-Hierarchy Framework for Assessing Corporate Social Responsibility” *Academy of Management Review* (1981) 21

<sup>72</sup> See (n 42) 1

A notable argument canvassed in this vein is that many corporations have in their control more financial resources than some states of the developing world. So, when big corporations operate in the developing countries, it brings into sharp focus the need for scrutinising the appropriateness of their activities. Notwithstanding the perceived positive prospects of injecting Foreign Direct Investments (FDIs) in developing countries, the analysis of any excesses of foreign investors by corporate social responsibility advocates is not inconspicuous. One of the tools used by CSR advocates are CSR indices which are often not mandatory legislation but soft law instruments with global appeal.<sup>73</sup>

In the contemporary technologically- driven and fast-paced global economy, the expanding international frontiers presented by the Internet of Things (IoT) has extended the frontiers of trade across international borders unconstrained and unrestrained. Previous national and regional economic boundaries have been blurred by globalised technologically-aided trading platforms. Concerning academics and policy makers worldwide Jan Scholte notes on the availability of interconnectivity that ‘transworld economic governance networks have provided key channels not only to spread neoliberalism across the planet in the first place but subsequently also to provide continual reinforcement of the doctrine.’<sup>74</sup> The history of UK corporations in the 20th century according to Leslie Hannah clearly portrays remarkable “rationalisation” through mergers and the “competitive elimination of rivals” which characterised the post-war years of the 1920s and 1950s.<sup>75</sup> He further contrasted the preponderance of small private concerns of the Victorian era with the larger corporations of the 20th century affirming that “industry has witnessed transformation from a disaggregated

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<sup>73</sup> CSR indices are used to measure corporate activity against certain moral and social parameters in terms of their investment or other corporate behaviour. The FSTSE4Good launched in 2001 is one of the most popular indices developed and operational in US, Europe, and Global and in Japan in 2004.

<sup>74</sup> Jan Aart Scholte, ‘The Sources of Neoliberal Globalization’ (2005) Overarching Concerns Programme Paper No. 8 (UNRISD, Geneva) 23

<sup>75</sup> Leslie Hannah, *The Rise of the Corporate Economy*, (Methuen & Co., 1976) 1.

structure, of predominantly small, competing firms to a concentrated structure dominated by large, and often monopolistic, corporations” spurred by “economic growth based on electricity, the motor cars and chemicals rather than steam, railways and textiles”.<sup>76</sup> The part that technology has played in the growth of MNCs can scarcely be overexaggerated.

## **2.4 Multinational Corporations and International Corporate History**

The desirability for international corporate law was determined by the conspiracy of global trade and capitalism. With the increase in the number and truly global extent of the operations of the modern MNCs, the traditional argument in favour of shareholder primacy waned. In its place, canvassers of capitalism point out that “efficiency” for the benefit of the entire society - through the unmanipulated market for the means of production - as the principal argument for promoting the Anglo-American model of capitalism. Many states (and regional economic blocs) around the world seem to subscribe to the Anglo-American capitalist model with limited adaptations necessitated by changing capitalist fundamentals and domestic realities.<sup>77</sup> It is important not ignore the far-reaching spread of MNCs as an aftermath of the post-World War II Bretton Woods Conference on globalisation and international trade. Although the spread of global corporate entities is undeniable, there cannot be said to be an international monitoring framework.<sup>78</sup> In exploring internationally acceptable standards, globalisation has been regarded a key factor in its acceptability and application. The importance of globalisation

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<sup>76</sup> *ibid*

<sup>77</sup> See Frank J. Garcia. “The Moral Hazard Problem in Global Economic Regulation.” Presented at the IALS Conference on The Law of International Business Transactions: A Global Perspective, Bucerius Law School, Hamburg, Germany, April 10-12, 2008. He argues that capitalism is changing around the world and that ‘social costs’ which should not be externalised are imperatives for the modern MNC.

<sup>78</sup> See Olufemi Amao, “The Foundation for a Global Company Law for Multinational Corporations” *International Company and Commercial Law Review* (2010) 275-288. He analyses the convergent factors that have emerged towards a global solution for the regulation of MNCs.

in this context is underscored by the need to identify norms that are entrenched in practices of business across international boundaries. The serious implications for a global CSR concept lies in the different manifestations of capitalism from state to state. It also brings to attention the value of achieving some convergence of thought, purpose and expected outcomes when applying CSR models internationally. The further establishment of international trade organisations such as the WTO<sup>79</sup> and other multilateral international financial institutions formed the basis for the integration of states in the international sphere.

At the continental, sub-continental level or other regional and sub-regional level, there is now a discernible economic organisational model. In Europe there is now a distinct “EC Company Law”, denoting the emergence of a body of corporate law peculiar to the members of the European Union (EU)<sup>80</sup> states. This occurrence is not limited to Europe as several regional economic blocs that now litter the international commercial realm have actively pursued harmonisation programmes in the last century. In Africa, a continent-wide economic cooperation bloc – The African Union (AU) - was formed originally in 1963 and rebirthed in 2001.<sup>81</sup> The African Union (AU) recognises certain regional economic blocs which are deemed foundational organisations that constitute the subscribing states to the economic policies under the initiative known as New Partnership for Africa’s Development (NEPAD).<sup>82</sup> As corporations have overreached national boundaries operating internationally,

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<sup>79</sup> The World Trade Organisation (WTO) was formed on January 1, 1995 as a modernised framework incorporating modifications to the General Agreement on Trade and Tariffs (GATT) which was signed in Geneva on October 30, 1947 and came into force on January 1, 1948.

<sup>80</sup> In 1994, under a renewed economic integration framework, 15 countries formed an internal market under the European Economic Agreement (EEA) treaty to promote free trade among its members.

<sup>81</sup> The AU was preceded by the Organisation of African Unity (OAU) which was established on 25 May 1963 in Addis Ababa, Ethiopia with 32 signatory states. Currently, all African States are members except Morocco that exited upon the recognition of their rival neighbouring state the Sahrawi Arab Democratic Republic.

<sup>82</sup> The following Regional Economic Communities (RECs) are established under separate regional treaties and recognized by the AU; Arab Maghreb Union (UMA), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD), East African

institutions and organisations with an interest in global development and international business practices have immersed themselves in the quest for an internationally acceptable model for business regulation including CSR issues. Efforts at internationalising the regulation of corporations can be categorised along the lines of a state's economic ideologies and social realities. By extension, as economic and social problems that arise from the operations of large MNCs traverse national boundaries and become more internationally widespread, "[t]oo often, CSR is regarded as the panacea which will solve the global poverty gap, social exclusion and environmental degradation" of the concerned territories.<sup>83</sup> Although many argue that international corporate law has not evolved, it may be argued that certain remarkable events could have the impact of precipitating this outcome sooner than later. The pace at which corporations have come under concerted efforts aimed at their regulation will be the focus in Chapter 4.

In short, from fairly uncomplicated entities and partnerships, today corporations have grown into gargantuan transnational organisations wielding not only economic power but substantial political influence also. Although business invariably comprise of a conglomeration of small trading entities and larger corporations both private and public, it is the MNCs that have appropriated much political and financial clout. Despite meaningful contributions of small and medium enterprises to overall global business, their influence remains largely localised.

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Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD), Southern African Development Community (SADC).

<sup>83</sup> Marcel van Marrewijk, 'Concepts and Definitions of CSR and Corporate Sustainability; Between Agency and Communion' *Journal of Business Ethics*, 44 (2003), 96

Contrariwise, MNCs wield influence beyond their home borders thus leading to an identifiable “foundation for a global company law for multinational corporations”.<sup>84</sup>

## **2.5. For Who and for What do Corporations Exist?**

Having identified that corporations are formed by individuals or other corporations for the purpose of making profit, any claim by other interest groups to benefits from corporations in which they have committed no capital demands investigation. Incontrovertible, private for-profit corporations should be run for the benefit of their owners (the shareholders). However, other entities – being affected by corporate activities – now make demands of corporations beyond the keeping of extant laws and making legitimate profits. The arguments identifying beneficiaries for corporate activities have also suggested the purposes for their existence. Two vexed questions are therefore inescapable; “who is business for” and “what is business for”. The first is an important question the answer of which may become clearer, should the second question be answered in favour of shareholders or society at large.

### **2.5.1 *The beneficiaries of corporate existence***

The claim by this group is argued on the basis of wider social responsibilities of corporations. Those making these claims are shareholders on one hand and the wider society on the other. The claim that shareholders are entitled to the “fruits of their labour” is hardly arguable. What is increasingly indefensible is the notion that shareholders have exclusive entitlement to the benefits of corporations because of their investment. However, due to various impacts of corporate activities, the ‘supremacy’ of shareholder consideration is being challenged by the

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<sup>84</sup> See Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law* (Routledge 2011) Chapter 8 for arguments on the probable issues that may enable the formulation of international company law.



need to consider wider social ramifications of corporate operations for which corporations should be accountable. So, for whom should corporate operations subsist; the shareholders, the society or both?

Clearly, the identified corporate objective of profit-making does not seem to have changed since the inception of the corporation. Although the forms of corporate organisations have grown hanged from sole traders and small partnerships to gigantic international business organisations, the objective of the corporation has remained primarily the same – to return profit for capital owners. Secondly however, stakeholder interests have emerged as equally important. While stakeholder theorists claim that fulfilling wider social demands is in the interest of corporate sustainability, however, neoliberals posit that social responsibilities are beyond the interest of corporations. Nonetheless, some have proposed a reinvention of capitalism for the benefit of both shareholders and stakeholders in what has been described as ‘creating shared value’.<sup>85</sup> Whatever the persuasion, it would seem that corporate law is interested in documenting identified norms and conventions. Where rights, duties or obligations arise, the objective of corporate law legislation should be to facilitate its protection and observance though recognising that corporate law can only facilitate accepted corporate objectives.

It has also been canvassed that corporations should be responsive to social needs because they are memes of the society having attained legal personality by operation of societal approval through the instrumentality of legislation. Corporations are thus seen as corporate citizens. Upon this basis, ‘corporate citizenship’ is equated with natural citizenship with the attendant obligation to be a responsible member of the society. In this vein, corporations are

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<sup>85</sup> See Michael E. Porter and Mark R. Kramer, ‘Creating shared Value’ *Harvard Business Review* January – February 2011. Creating Shared Value (CSV) was distinguished in this article. It is posited that the distinction made at best can be described as inconsequential to the definition and purposes of CSR that they are accepted as interchangeable in this study.

expected to do all they can to further societal objectives rather than selfish corporate interests. This view is based on the premise that the corporations should not be allowed to operate in a way that is counterproductive by causing environmental and other social havoc without extracting some benefit from it.

Advocates of CSR seemingly impute on businesses the ability and obligation of taking decisions based on moral conscientiousness; accordingly, the conscience of business being directed towards doing good in society is imperative. It is clearly claimed that business has ‘conscience’. This notion clearly engages the idea that morality and ethics in business has become an issue – an idea which is not refutable in contemporary society. It is on this basis that business is urged to give proper attention to the propagation of ethical practice. Ethics in business is now more than a fashionable shibboleth. Though the nature of business is that of an incorporeal entity, its promoters and managers are natural persons.<sup>86</sup> Also, in corporate criminal liability suits, individuals may be held liable for actions carried out in the name of the corporation. To this extent natural persons behind corporations can be held accountable for the actions of the corporation; because they enjoy the benefits of forming corporations, they cannot be exempt from any resulting detriments. The idea of corporate personality developed to protect corporations or assets owned by jointly by shareholders from creditors of individual investors. A corporation could thus sue and be sued in its name without exposing liability to its members. This notion prevails except in the case where the ‘veil’ of a corporation is broken to pursue individual investors for damages beyond their limited interest in the corporation. Where this occurs - it should be noted that this is the exception rather than the rule – it is possible on the basis that corporate liability should be visited vicariously on the

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<sup>86</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22. The principle of a separate corporate identity of companies from their owners (shareholders) has been reinforced in many judgements for over a century. For recent cases see; *Adams v Cape Industries plc* [1998] BCLC 44 and *MacDonald, Dickens and Macklin v Costello* [2011] 3 WLR 1341. In *Prest v Petrodel Resources Limited* [2013] UKSC 34, the U.K. Supreme Court discussed the concept of “piercing” the corporate veil extensively.

investor for an act or omission that could be regarded as being in the personal interest rather than corporate interest even though done in the guise of the corporation. It is not beyond argument, therefore that corporations are artificial device for the organisation of private capital for economic production. However, the fundamental aim of corporations to create wealth for its shareholders was established in *Dodge v. Ford Motor Company*.<sup>87</sup> Classical capitalists support this position that has not been diminished much in Anglo-American jurisdictions. This position can be classified as disciples of the Darwinian theory etched with the principles of demand and supply that determines the distribution of resources according to the distribution of benefits from the proceeds of production efforts allocated according to contributions towards production.

### ***2.5.2 The purpose of the corporation***

Having identified that both corporations and the society have legitimate expectations to share in the benefits of corporate activities, Porter and Kramer went ahead to posit that “the purpose of the corporation must be redefined as creating shared value, and not profit per se”.<sup>88</sup> This proposition acknowledges that the interactions of corporations in the course of production create effects to both the human community and the physical environment. This attracts the interest of society in the way in which corporations use resources and how their by-products are disposed.

As earlier mentioned, with the astronomical increase in corporate power – both financial and political – the influence of corporations in matters which are beyond economic considerations have continued to grow. It will seem that corporations have chosen to extend their interest into social issues. Corporations have done this by innovating and leading research and

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<sup>87</sup> *Dodge v. Ford Motor Company*, 204 Mich. 459, 170 N.W. 668 (1919). However, the remark of the court that “an incidental humanitarian expenditure for the benefit of the employees” is permissible is not often emphasised.

<sup>88</sup> *Ibid* n? 4.

advancement in creating new cultures and social possibilities through medical and cyber-physical inventions. Social responsiveness is therefore being urged of corporation in several areas involving human genetics, renewable energy and artificial intelligence for example. So, should corporations continue unabated exploration to chart new frontiers of human existence without the restraint of being socially responsible; should the opportunity of profit making determine their objectives or should social sensitivities? Do private and public law conflict with regard to the objectives of corporations? Corporations it must be said have maintained their dominant position in these arguments by deflecting opposition views and lobbying against the promulgation of legislation against them.<sup>89</sup> The nuanced, but yet easily-decipherable implication for corporate law in the argument on corporate objective, is the seeming dominance of capitalist ideology aimed at promoting to the exclusion of social imperatives, an “enabling environment” for business while the ‘invisible hand’ of the forces of demand and supply determine the deployment of capital for production.

Law has always “caught up” with corporate practice. This reactive rather than proactive policy strategy of the state at the governance of corporate practice is not anticipatory of the relevance of corporate objectives. Otherwise, law would rather be directive rather than reactionary to corporate excesses. Underlying the transformations of corporate law have been the opposing ideologies of the free market and deregulation of economic enterprise on one hand and the requirement for controlling the ever-mutating nature of commercial enterprise and the attendant difficulties posed. The establishment of corporations with the consequential

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<sup>89</sup> Some social and political issues have gained notoriety for being volatile in the same way as corporations are protective of their rights to provide goods and services, even against the preponderance of evidence showing their products are hugely inimical to human existence. The gun control and gun rights arguments continue as the US and European firearms industry continue to meet the demand for firearms. The tobacco industry worldwide also continues to produce despite documented hazards of nicotine consumption and cancer. In the production of antiretroviral medicine, certain pharmaceutical corporations were indicted in the social media for not making their products available for the treatment and cure of mostly poor African HIV sufferers.

legal rights accorded to them did not come easy. It was the necessary outcome of the need to organise business to meet certain societal challenges not limited to more efficient ways of production. The classical economist like Adam Smith<sup>90</sup> propounded theories of efficient production based on the pursuit of private interest which he believed was the best way of serving society. As for the objective of a private investor he contended that private enterprise promotes the common public good in an environment with the least state control or inhibition. The role of the big financial corporations in stabilising the world economy if previously unappreciated was well-established by the prompt rescue of failing banks in the western countries.<sup>91</sup> Only in January 2016, the British and Dutch governments received the last tranche of reimbursement valued at billions from Iceland for indemnifying British depositors.<sup>92</sup>

The recent financial crisis at the turn of the century therefore required substantial state financial bailout. The immediate aftermath of the downturn in the economy being low demand levels, classical Keynesian economists supported state support for ailing banks through quantitative easing measure. They argued that for the economy to recover, the growth of the economy was crucial by stimulating a healthy demand for goods and services and the injection of the crucial but lacking financial means of production. This transformative

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<sup>90</sup> Adam Smith, *An Enquiry into Nature and Causes of the Wealth of Nations* (1776)

<sup>91</sup> The government of Iceland resorted to an IMF loan of over \$5 billion to finance a budget debt of 2009 and took control of the three largest private commercial banks (Kaupthing Bank, Landsbanki and Glitnir) guaranteeing deposits as part of efforts to stave off the total failure of its these banks. See 'Cracks in the crust' *The Economist* (Reykjavik, 11 December 2008) <http://www.economist.com/node/12762027>.

<sup>92</sup> 'After Eight Years, Iceland Reimburses Britain for Icesave Collapse' *The Telegraph* (London, 12 January 2016)

<<http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/12096153/After-eight-years-Iceland-reimburses-Britain-for-Icesave-collapse.html>> accessed 30 March 2016. This matter was heavily debated in Iceland and led to two referenda in which the public rejected the proposal to repay British and Dutch depositors out of Icelandic public funds. Icesave, a private bank collapsed following the financial crisis in 2008 with many foreign nationals including British and Dutch losing their deposits.

policy was used by the Anglo-American states as a strategy of halting the slowdown of their economies and for stimulating the market.

The response by states revealed the part which the society as a whole through state institutions can play, in supporting private enterprise in the interest of public good. As the international community seems to be exploring the ways and means of addressing the obvious predicament the financial crisis and what has been described as “the longest recession in history”, the critical examination of the characteristics of neocapitalism is rampant. The current representation of capitalism has been attacked in the face of serial allegations of corporate managers’ complicity in several high profile corporate collapses. Some cynics view the current Anglo-American democratic system as being in an immoral alliance to maintain dominance over the privileged class. This I view of an extremist Marxist though accepting of that one of the premises of this thesis is accepting of the legitimate pursuit of wealth through free market structures promoting private enterprise. What is contestable and indeed challenged in this study is the extent of the role of the law in determining the boundaries of private and public interest in corporations in respect of their social responsibilities.

Other reasons than public interest in economic failure aversion has been made in support of corporations operating for the benefit of society. Another reason is the inadequacy of state resources when compared with the vast opportunities afforded by corporate financial profile. Corporations are being asked to step up where states fail or are inadequate financial to provide social services. The social and environmental effects of business in conjunction with the economic impact has been described as the “triple bottom line” of business by John

Elkington.<sup>93</sup> He advocated the calculation of business outcomes not only in terms of economic value of production but the social and environmental also.

Theodore Levitt writing in 1958 stated that the functions of the government and business are different in that “government’s job is not business, and business’s job is not government” and concluded that social welfare consideration are fundamentally under the purview of states.<sup>94</sup> Milton Friedman also advocating neoclassical capitalist opinion berated supporters of CSR in his popular treatise and called them ‘unwitting puppets of the intellectual forces that have been undermining the basis of a free society’, thereby supporting Elkington.<sup>95</sup> Levitt and Friedman’s perspectives regarding the creation and distribution of wealth through corporate enterprise and the promotion of shareholder primacy is now not uncommon. The acclaimed success of the Anglo-American capitalist model that became prominent after the World War II supported the wide-spread domination and eventual supremacy of the free market economic ideology. This fundamentally libertarian rudiments remain visible in most modern economies. The creation of private wealth they argue will lead to the creation of further wealth.

## **2.6 What has law got to do with it?**

The contention in respect of the contrasting opinions regarding the purpose of corporations is sharpened when the issue of its social responsibility is debated in view of the formation of

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<sup>93</sup> J. Elkington, *Cannibals with Forks: The Triple Bottom Line of the 21st Century Business* (Capstone, 1997). A wide variety of adaptations can be observed in the use of the principle of the ‘triple bottom line’ in several studies. In short it portends the calculation of business profit or loss not only in terms of financial calculations but by considering environmental and social values also.

<sup>94</sup> Theodore Levitt, ‘*The Dangers of Social Responsibility*’ (1958) 36(5) *Harvard Business Review* 41, 47. Levitt was vociferous in his condemnation of social responsibility of business seeing it as business going beyond its core mandate and distorting corporate objective.

<sup>95</sup> Milton Friedman, ‘The Social Responsibility of Business is to Increase Its Profits’ *New York Times Magazine* (New York 13 September 1970) 32-33

legal corporate principles and legislation. Perhaps the division is explicable given the moral or ethical questions that separates the classical naturalist and positivist legal theorists. The inclinations of these two groups to well established legal theories disclose their dispositions on the role of law in corporate matters. The arguments posited by the two main factions argue over law and its role in wealth creation, social welfare and distributive justice.

### ***2.6.1 The Foundation Principle of Modern Corporate Law***

The two schools of thought have shaped the development of corporate law, especially in Anglo-American jurisdictions. On the one hand corporate law is seen to be purely interventionist to confirm the outcomes of corporate interactions under a free market situation. On the other hand, the law is considered an instrument of social engineering capable of bringing desired social outcomes. Of course, these principles reflect the shareholder supremacy and stakeholder approach to corporate law and CSR.

Noting the concentration of vast wealth in a few multinational corporations and individuals in the past century, by the late 20th century, the redistribution of wealth is seen as a major national and international issue. The global financial market has allowed investors or “rentiers” to be able to invest in corporations of their choosing in many countries of the world outside of their country of origin with increased facility for international residence and mobility.<sup>96</sup> The modern shareholders of corporations are pension fund administrators or private investors of capital who are divorced from the day-to-day running of the corporation which often highly paid hired managers do on their behalf. By this development the investors and corporate managers are further alienated from each other. The exercise of social

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<sup>96</sup> In Bulgaria, non-EU nationals may obtain resident status under Art. 25, Para 1, items 6 or 7, of Foreigners in Republic of Bulgaria Act. Spain, Malta, United Arab Emirates (UAE), UK, US, Australia, Canada and many other countries have similar provisions. It is instructive also that economic blocs like the EU all propose free movement of goods, services and personnel within their respective countries to boost trade, investment and international cooperation.



considerations in the management of corporations by corporate managers has been handicapped by shareholders' expectation of increasing the share value of the corporation. Shareholder value therefore is the primary consideration of corporate managers and not social or environment effects of their operations especially if outside the mandatory fulfilment of legislation or other compulsory regulation. However, with the undeniable impact of corporations on the social and physical environment, delineating and apportionment of responsibilities to it with regard to environmental and social issues understandable. One of the principles shaping corporate law and by extension the subject of CSR is the notion of 'responsibility' itself. This notion will be examined in fuller detail in the next chapter.

It is not a coincidence that the boundaries of the private law of tort was redrawn positively in favour of one's 'neighbour' in the case of *Donoghue v Stevenson*<sup>97</sup> in the early part of the 20<sup>th</sup> century during the time when the full effects of the great depression was being felt. I suggest this principle is akin to the stakeholder principle of corporate law and supports the concept of corporate social responsibility. The neighbor principle in corporate law can be construed as a foundational principle because it parallels the idea of being responsible for one's actions in so far as they affect others. Corporate law delineates duties, obligations, responsibilities and rights to a myriad of corporate actors; financiers, suppliers, creditors, financial reporters, corporate governors, customers, shareholders and the state are all considered relevant participants. This is reflected in corporate law and forms the its objective of ensuring harmonisation of the various interests for the greater public good. If this principle is purged from corporate law, what would remain is a draconian and unbalanced regulation of business relations. Indeed, the fundamental principles of contemporary capitalism is being challenged on the basis that it is devoid of sufficient accommodation of the 'neighbour principle'.

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<sup>97</sup> [1932] UKHL 100. Delivered on 26 May 1932, this case established the now well-entrenched 'neighbour principle' in tort law. It places the responsibility of doing an act or an omission on a person who does or otherwise an act that may affect another person.

Although this case was determined between a consumer and product manufacturer, it has been extended to many other cases where similar relationship and the ‘duty of care’ existed. In the final analysis, it is suggested that corporations owe society a duty to care for not only its owners but also its stakeholders.

### **2.6.2 *International Corporate Law?***

It is clear from the inception of corporate entities in capitalist economies, that law has played a midwifery role. Whether it is by design or default, this role has been to provide a legal and lawful framework for the conduct of business among the many interest groups interacting in production cycles – and even beyond. The concept of the modern company is invariably a legal one and demonstrable by the attainment of legal statuses - ‘private’, ‘public’ or ‘limited liability’ – by meeting well laid down legal requirements.<sup>98</sup> These laws differ from jurisdiction-to-jurisdiction. This is principally due to the fact that corporations have identities in law in which they can sue and can be sued. Corporations are also initiated upon the issuance of a certificate of incorporation by the jurisdictional authority of the ‘home state’ in which they are incorporated. Once duly registered corporations can operate in a ‘host state’ thereby operating transnationally. An American company can therefore do business in another country.<sup>99</sup> It has been proposed that MNCs should be designated status of international citizenship such as are borne by domestic corporations to make them more

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<sup>98</sup> For example, The Companies Act 1907 that applied in England and Wales was the first to make a distinction between ‘private’ and ‘public’ companies. Prior to this time, all companies were registered with limited liability under the Companies Act 1862 -1900. See Denis Fox and Michael Bowen, *The Law of Private Companies* (Sweet and Maxwell 1991) 1.

<sup>99</sup> It is not uncommon to find states to subject corporations in excepted sectors of the economy to conform to further set of rules. Publicly quoted companies are subject to further corporate governance regulations which small private companies may not be required to comply with. Specialised businesses such as in oil and gas, engineering or medical fields may be subject to professional certifications.

suitably ductile to an international regulatory regime, this suggestion has not materialised.<sup>100</sup> This is because, non-state parties are usually unrecognised in international law although it is based on the principle of the 'comity of nations' and reciprocity. The development of international law where corporate entities will be parties thereto is in direct conflict with the traditional international law principles.

Notwithstanding the rise in the number of companies that are engaged in cross-border transactions, there is no international registry of companies and no international authority multilateral agency that issues or maintains a register of international companies. In this regard, companies are like natural persons; they are 'born' or incorporated with a national identity but can transact internationally. Without a central international authority, states have developed domestic corporate law to suit their national needs. There is therefore, no international corporate law.

However, in the international sphere the desirability for an international body or regulation authority has been gradually converging. A body of rules and regulations have been developing out of international business norms. The norms in turn were the result of shared prospects and challenges of doing international business. In the case of large corporations, there seemed to be no shortage of finance and influence required to propagate their interests in international forums.

The utility of law as a tool for the development of international corporate law is in its value for articulating emerging norms. The evolution of public international law was supported principally by the organs of the United Nations after World War II. John Ruggie noted in his Report to the Human Rights Council of the U.N. that;

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<sup>100</sup> Amapo (n 2) 274.

The issue of business and human rights became permanently implanted on the global policy agenda in the 1990s, reflecting the dramatic worldwide expansion of the private sector at the time, coupled with a corresponding rise in transnational economic activity. These developments heightened social awareness of businesses' impact on human rights and also attracted the attention of the United Nations.<sup>101</sup>

This report confirmed a new dimension in corporate law studies; the entwining of human rights issues with corporate behaviour. Issues regarding land acquisition, workers' health and safety rights, cultural rights etc. have been engaged in conjunction with corporate activity especially on the global arena.

As a means of finding inventive ways to hold corporations to account internationally, there is a growing influence and usage of the principle of 'extraterritoriality'. When invoked, this principle allows national courts to adjudicate over issues beyond its shores or over foreign citizens under international law. In US, the extraterritoriality principle is provisioned in the Alien Tort Claims Act (ACTA).<sup>102</sup> ACTA has been used in a few US cases with limited success. The flexibility and versatility of this system has disclosed some potential for its wide adoption. This is a welcome development for human rights activists but is arguably against the conventional international law principles of territorial integrity and the sovereignty of independent states. With increased outsourcing of production processes by companies and complex transitional activities, framing widely- accepted international regulation may be an elusive task. Extraterritoriality affords states a means of holding MNCs accountable for human rights and other violations outside their territories.

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<sup>101</sup> John Ruggie was appointed the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises in 2005. His work culminated in the 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' published in 2011.

<sup>102</sup> Alien Tort Claims Act (ACTA), 28 USC§1350

The corporate law of states though well-established generally, often contain ‘default provisions’.<sup>103</sup> These provisions outline general terms and clauses which are required to create the minimum content of provisions to qualify application for registration. It is usually up to applicant and company promoters to adopt or adapt these provisions. The variations in these provisions is a source of divergence for the collation of generic international law regulations. Furthermore, a substantial number of business transactions are left unregulated and subject to private contractual preferences. Despite the peculiarities of different legal systems, certain characteristics are universal to big multinational corporations.

## **2.7 Theories of Corporate Law**

Generally, ‘dualism’ and ‘monism’ have been identified as theories of international law when faced with national law.<sup>104</sup> Dualism emphasises the difference between international law and national law and accentuates their difference. On the basis of this doctrine, international law and national law are different. Monism on the other hand, “postulates that national and international law form one single legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent”.<sup>105</sup> In view of the increasing subscription of nations to international treaties in order to achieve cooperation in all spheres of life, not the least in economic cooperation, through many economic treaties, a convergence of national and international can be observed. States are constantly under pressure by others to adopt “international best practice” in economic and financial activities. The transaction of business using “international” currencies like the US dollar and British pound sterling influence this convergence. Similarly, the influence of “international” ratings agencies such

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<sup>103</sup> Reinner Kraakman et al. *The Anatomy of Corporate Law* (2<sup>nd</sup> edn, OUP 2009) 20

<sup>104</sup> James Crawford, *Public International Law* (8<sup>th</sup> edn Oxford, 2012) 48

<sup>105</sup> Ibid.

as Moody, Fitch and Standard and Poor's<sup>106</sup> portend standardisation in international financial markets and the global economy.

Philosophically, some legal theories can be identified as influencing the development of international law as far as the regulation of corporations are concerned. The doctrines of natural law as expressed in human rights law is gaining importance in discussions on international corporate law. Although human rights law is predominantly enforced nationally, the rights of people whether as individuals or collectively as non-political groups is gaining significance. Theories of political economy have also become relevant in international law discuss. Since the two World Wars in the first half of the 20<sup>th</sup> century, a technological race distinctively marked by the space programmes of Western and Eastern powers has led to the factionalisation of global politics into two major camps with competing economic ideologies. The Western powers championed the capitalist system while the eastern ideology was socialism. In what can be termed “soft power diplomacy” the Western ideology was exported to the English-speaking countries that gained independence from Great Britain mainly. The Anglo-American model of business organisation was easily extendable to the new states who maintained close trade, diplomatic and cultural ties with their colonisers. The political lines drawn then are largely maintained today with insubstantial deviations.<sup>107</sup> Invariably, international law is being dominated still by these economic inclinations which is influencing in turn the development of international law. The sphere of international corporate law is no

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<sup>106</sup> These three (called the “big three”) control about 95% of the markets, dictating the credit worthiness of companies, debt instrument issuers, states and their financial instruments by scoring them against set parameters. Organisations and other states take the ratings into account when deciding the how to interact with the relevant companies or state in financial dealings.

<sup>107</sup> The political influence of the UK and US today over English-speaking West African and some Caribbean states on the one hand and that of France over the French-speaking states. The French colonial – and later foreign and international relations - policy with post-colonial nations is based on ‘assimilation’, tending towards a global French cooperative cultural bloc. The British colonial policy was based on the principle of ‘association’ that guaranteed eventual autonomy.

exception; consequentially, politico-economic theories of corporate law have developed along capitalist and communist ideologies as typified by the teachings of Adam Smith and Karl Marx.<sup>108</sup>

Despite the polarisation, new issues such as climate change, international human rights and international money markets are forcing a convergence of ideologies. The suggestion that the sole function of corporate law is to provide the legal platform for those who provide the capital for corporate venture to realise their dividends and that for corporate law to do otherwise will be to defeat the purpose of corporate existence is simplistic.<sup>109</sup> This is because, there are many issues that traverse national boundaries which implicate corporations transnationally and in an environment of many constituents. Corporate law should represent different interests and objectives despite their universal interest in the sustainable existence of the corporation from which they all segments of society derive their benefits.

## 2.8 Summary

It is apparent that a circuitous argument emanates upon the consideration of the intertwining relationship between the society and corporations. At least, it is clear that corporations were established by legislation as having special artificial legal persona. This means it is a state creation. On the other hand, corporations having evolved into the most significant instruments for productive activities under the auspices of the free market economy ideology have sought to maintain independence of regulation whilst increasingly have effect on human

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<sup>108</sup> Karl Marx argued that states should be run in the interest of all and not as he argued – was being run in the interest of the upper class. He contended in his well-known book *The Communist Manifesto* (1848) that the upper class controlled all the means of productions and did not operate in the interest of the society but were motivated by selfish interests.

<sup>109</sup> Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (New Edition, Harvard University Press, 1996)

existence socially and environmentally, on a global scale. As the global practices of corporations have international import, questions have been asked of corporations and how they can be regulated both national and internationally. That while this was not evident during its emergent stages, as now constituted corporations and the free market principles that now exist serves as the main engine for economic growth and wealth creation. I submit that the constituent actors in international corporate operations are interdependent beneficiaries. They depend on each other for corporate existence while pursuing their interests.

Finally, it can be observed that it is the relationship between the various actors of corporate transaction that corporate law seeks to serve. This will be the point of departure for investigating the issue of corporate ethics in governance and the related demand for accountability. Therefore, with an understanding of the historical development of corporations, the socio-economic objectives of corporations in modern business and the response in corporate law, in the next chapter, focus will be on the development of CSR as a discipline in law. The discussion will also be on the contemporary issues giving rise to CSR models.



## **CHAPTER THREE**

### **Corporate Social Responsibility and Accountability**

#### **3.1 Introduction**

Having considered in the previous chapter the history of corporate law and the theories developed around the modern corporation, in this chapter, the modern historical map of the corporate accountability movement will be discussed. The modern beginnings of the demand for the moral responsibility of corporations will be identified from its inchoate and incoherent beginnings to the organised movement that it has become.

Of course, the various actors and factors that have influenced the development of CSR as it is today will receive due and appropriate mention in identifying the ways in which corporations are being held ‘accountable’. In this regard, different nomenclatures have emerged in the development of CSR. Some have gained more prominence than others leading to the adoption of some over others. In adopting changing names and capricious descriptions of the issues within the purview of the subject, some confusion has arisen in respect of a consensus definition of CSR. So, different nomenclatures have been ascribed to different overlapping notions of corporate-societal engagement in terms of liability for yet indefinite issues.

This chapter is also dedicated to the historical developments leading to the construction of the subject – Corporate Social Responsibility. Although there is hardly a field of the humanities, arts or social sciences that has only one definition for social concepts, the paradigm of definitions encountered in the study of CSR is very wide indeed. Votaw is reputed to have said “The term [corporate social responsibility] is a brilliant one; it means something, but not

always the same thing, to everybody”.<sup>110</sup> In the study of CSR, therefore, the words “responsibility”, “sustainability” and “accountability” have been very visible and receives attention in this chapter. In some subtle way, each has earned separate implications, but yet in a subtler way, they disclose allusion to a common assertion.

One feature that has biased the definition of CSR is the Anglo-American free market system in which it was first studied. It presupposed that CSR is mainly a philanthropic gesture by big corporations and so outside the legitimate pursuit of established legal order and certainly beyond legislation. With the legislation of CSR and the mandatory requirements imposed by law, there is apparently a need to reconceptualise and redefine the subject. I therefore attempt a definition of my own in this chapter.

### **3.2 The Corporate Accountability Movement – the beginning?**

A doctrine immanent in classical economic theory as enunciated by Adam Smith is that corporations are organised to make a profit for the owners.<sup>111</sup> In making profit, modern corporations seek the most efficient way of producing their goods and services with shareholder value a priority. A corporation that does not make profit eventually folds up. These objectives (profit making and continuous corporate existence) are not disagreeable to states or the citizens who depend on corporations principally for tax revenues and employment respectively. It follows that even in neoliberal societies, the interest of corporations, the state and citizens correspond as far as the continuous existence of

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<sup>110</sup> D. Votaw, ‘Genius Became Rare: A Comment on the Doctrine of Social Responsibility Pt. 1’ (1972) 15(2) California Management Review 25, 25.

<sup>111</sup> Andrew Skinner (ed), Adam Smith, *The Wealth of Nations Books I – III* (Penguin 1999). This is a contemporary edition of the classical work providing modern day perspectives to the archaic context prevalent at the time of the writing of the original text. Of course, this edition also retains all the original text in the period language used in writing it.

corporations are concerned. In the search for the cheapest cost of production and profit maximisation, corporations have indulged in many acts which call into question whether they serve a wider public interest or not. Questions also arose about the boundaries of corporate responsibility and whether it goes beyond keeping the law or not.

Beginning from the 20<sup>th</sup> century as a departure point, questions regarding the extension of corporate responsibility to wider societal issues became rampant as a result of some notable case involving big corporations in US. The accountability movement responded to the clamour for greater regulation of corporate activity by advocating holding companies to sanctionable standards for activities capable of debilitating human rights, social development, economic growth and the environment. This movement advocated for standards and measures against defaulting companies through regulations. This group focused heavily on environmental issues arguing that conservation of the earth and its resources was vital to the sustainability of the planet and needed to be preserved from the destructive activities of increasing economic activities.

In the last few decades, several corporate scandals have increased public interest in CSR. The case of Nike, a major US corporation producing clothes and shoes in Asia brought the matter to the fore in the late 1990s.<sup>112</sup> Nike was reportedly operating production facilities (popularly called sweatshops) since the 1970s. It has been alleged that corporations (such as Nike) moved from China and Taiwan to Bangladesh and other Southeast Asian countries when the cost of labour and regulation increased, in a bid to find cheaper cost of labour and weak regulatory environment. The question has not gone away and is more pertinent today with

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<sup>112</sup> Simon Birch, 'How Activism Forced Nike to Change its Ethical Game' *The Guardian* (London, 6 July 2012) Nike was the bestselling sportswear company in the 1990s was considered to be in its ascendancy before the revelations of poor conditions overseas emerged. Nike denied the early report but had to retract the denials and accept responsibility when coverage of its activities increased. <<https://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike>> accessed 15 January 2016.

2013 headlines reading “Bangladesh factory building collapse kills nearly 100”<sup>113</sup> Furthermore, the vigorous exploitation and commodification of natural resources in oil rich developing countries by large multinationals also led to the exertion of corporate power in newly emergent states such as Brazil, Venezuela, Nigeria, Angola and Equatorial Guinea. A string of unfavourable consequences for the host communities trail the explorative and exploitative activities of IOCs which often destabilised the host communities socially and economically. Over many decades of operations, the impact of the oil companies cannot now be discussed in isolation from the wellbeing of their host communities. These events among other led to a consistent call for stricter state regulation of corporation despite the firm entrenchment of capitalism. The argument that corporate objective would not be compromised by further regulation of business began to be mooted. Considering, therefore, the issues leading to the corporate accountability movement as veridical and not merely illusory, the perspective of stakeholders is appreciable. A mantra which could have demonstrated the mood of early stakeholder theorists was “if it is good for society, it is good for business and if it is good for business it is good for society” – a marriage of convenience between societal and business objective had to be developed. The conceptual arrangement that had been called by many names came to be known as corporate social responsibility.

It is imperative to bear in mind that the progression of the theories and models of CSR have evolved and continue to evolve from its antecedent forms to the contemporary theories and practices will be explored. Nicholas Eberstadt maintained that the “full significance of the corporate responsibility movement cannot be seen without reviewing history”.<sup>114</sup> This is important because the different actors, such as corporate managers and civil society

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<sup>113</sup> Serajul Quadir and Ruma Paul, ‘Bangladesh factory building collapse kills nearly 100’ Reuters (Dhaka, 24 April 2013) <<http://www.reuters.com/article/us-bangladesh-building-idUSBRE93N06P20130424>> accessed 13 October 2015.

<sup>114</sup> Nicholas Eberstadt, ‘What History tells us about Corporate Social Responsibilities’ (1973) 7 *Business and Society Review* 76, 77.

organisations (CSOs), have presented changing concepts of CSR in the course of time. Accordingly, special mention is intended of the contribution of Civil Society Organisations (CSOs<sup>115</sup>) in the corporate accountability ‘movement’ especially in developing countries later.<sup>116</sup> It is trite to say that the contemporary CSR ideology of corporate accountability has been championed mainly by CSOs and non-state actors around the world. These organisations have become critical actors in the CSR debate. Often, they are voluntary first responders in emergency situations.<sup>117</sup> Before setting out the historical development of CSR and its changing moulds, it is important to define of corporate responsibility and its scope.

### **3.3 The Historical Development of Modern CSR**

In the contemporary study, however, events such as the Depression of the early 20<sup>th</sup> century and the attendant global financial meltdown prompted the development of various theories in economics, political economy and social justice. In the recovery that followed, there emerged greater financial dynamism and intense merging of corporations into transnational entities. Several theories also emerged aimed at explaining the phenomenon whereby business met other obligations outside of profiteering began to proliferate. As corporations developed from simple partnerships into complex multinational and transnational conglomerates that exist nowadays, the prominent theories and models have been developed in parallel.<sup>118</sup> Taking

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<sup>115</sup> This term is used interchangeably with Non-Governmental Organisations (NGOs) as all CSOs are invariably NGOs and *vice versa*.

<sup>116</sup> In general, any advocacy for holding business answerable can be called an “accountability movement”, thus ‘corporate social responsibility’ is one of the ‘accountability’ movements.

<sup>117</sup> An example of this is the recent oil spillage in the World Heritage Site in Bangladesh. See news report on the World Heritage Convention news page: ‘Serious concern for oil spill in the Sundarbans, Bangladesh’ 18 December 2014, <<http://whc.unesco.org/en/news/1209/>> accessed 20 January 2016.

<sup>118</sup> Many contributors to CSR literature have taken a historical approach in understanding the developmental stages of the concept and issues associated with it. See Archie Carroll, (*n6*), Crane et al., *The Oxford Handbook of Corporate Social Responsibility* (OUP, 2006), Nicholas Eberstadt,

1950 as a departure point, the historical development of contemporary CSR is examined below.<sup>119</sup>

### **3.3.1 Pre-1950 history**

Although Nicholas Eberstadt has traced CSR practices farther back and to be as “old as our civilization”.<sup>120</sup> He further observed that punishments like ostracism existed for “immoral business practices” but that “social pressure, however, rather than the threat of punishment, seems to have directed the businessman”.<sup>121</sup> He concluded that “[t]here was no doubt in the Greek citizen’s mind that business existed to serve the public”.<sup>122</sup> Eberstadt made similar assertions regarding what he termed “The Medieval Period, 1000–1500A.D.”, “The Mercantile Period, 1500-1800” and “The Industrial Period, 1800-1930”.<sup>123</sup>

However, from the 1950s, the definitions of CSR contemporary CSR has been described by many as “old wine in new bottles”; it is seen as an old concept that is taking on new names and descriptions.<sup>124</sup>

### **3.3.2 1950s – Embryonic development of concepts**

Although academic writings on the subject of CSR date back earlier than the 1950s, this period is regarded as marking the genesis or embryonic stage of the production of CSR

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‘What History tells us about Corporate Social Responsibilities’ (1973) 7 *Business and Society Review* 76.

<sup>119</sup> See generally: Rosamaria C. Moura-Leite & Robert C. Padgett, ‘Historical background of corporate social responsibility’, (2011) 7 (4) *Social Responsibility Journal* 528, for a historical perspective on the development of CSR from the 1950s. See also Archie Carroll, ‘Corporate Social Responsibility: Evolution of a Definitional Construct’ [1999] *Business and Society* 268.

<sup>120</sup> Eberstadt, (n7) 77

<sup>121</sup> *Ibid*

<sup>122</sup> *Ibid*

<sup>123</sup> *Ibid*, 78

<sup>124</sup> Denise Baden and Ian Harwood, ‘Terminology Matters: A Critical exploration of Corporate Social Responsibility Terms’ *Journal of Business Ethics* (2013) 615, 616. In this paper, they suggest that any future terminologies proposed in relation to “ethical/socially responsible/sustainable business” should have certain attributes. See *ibid*, 624.

literature in terms of a distinct subject. The book *Social Responsibilities of the Businessman* by Howard R. Bowen in 1953<sup>125</sup> has been regarded as the seminal literature in the study of the modern concept of CSR by Carroll who opined that Bowen should be designated the “Father of Corporate Social Responsibility”.<sup>126</sup> The history of the social responsibilities of business in the course of their “business” dates far before the work of Bowen. Some scholars have argued that corporate social responsibility (CSR) was birthed in the United States in the 19<sup>th</sup> century with John D. Rockefeller, John Cadbury, John H. Patterson and Dale Carnegie notably the early practitioners. The activities were mainly centred around employee welfare and philanthropic gestures to the local communities in which their successful businesses operated. Peter Drucker, writing in 1954 maintained that public good (during this period) was a legitimate consideration for business – again sustaining the presumption of voluntarism and self-imposed limitations by corporations on their social activities.<sup>127</sup>

Carroll having identified United States of America (US) as the epicentre of the social responsibility movement due to it having the most developed free market capitalist economy identified major developmental milestones in the study of contemporary CSR.<sup>128</sup> Carroll’s interrogation of the epistemology of the definition and nomenclature of CSR notes the influences that have come to bear on the discipline. The terminology used during this period was simply ‘social responsibility’ of business. Carroll also observed that the book of Morrell Heald titled *The Social Responsibilities of Business: Company and Community, 1900-1960*<sup>129</sup> covering this period as providing “an interesting and provocative discussion on the theory

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<sup>125</sup> H.R. Bowen, *Social Responsibilities of the Businessman* (Harper and Row, New York, 1953)

<sup>126</sup> Archie Carroll, ‘Corporate Social Responsibility: Evolution of a Definitional Construct’ [1999] *Business and Society* 268, 270.

<sup>127</sup> Peter Drucker, *The Practice of Management* (Harper and Row, New York, 1954)

<sup>128</sup> Archie Carroll, (n5)

<sup>129</sup> See Morrell Heald, *The Social Responsibilities of Business: Company and Community, 1900-1960* (Case Western University Press, 1970).

and practice of CSR during the first half of the twentieth century”.<sup>130</sup> This period was rather investigative of the acts of business and the identified practices which were developing with theoretical explanations. This can be described as the early stage of the study and inquiry of modern CSR.

### **3.3.3 1960s – *Defining the boundaries.***

During this period, it would seem the boundaries of expectations of business required demarcation. Carroll mentioned Keith Davis as a prolific writer on the subject who attempted to define “social responsibility” “more accurately” mainly from the managerial perspective as “business decision and actions taken for reasons at least partially beyond the firm’s direct economic or technical interest”.<sup>131</sup> Carroll further cited the work of William C. Fredrick who wrote;

Social responsibility in the final analysis implies a public posture toward society’s economic and human resources and a willingness to see that those resources are used for broad social ends and not simply for the narrowly circumscribed interests of private persons and firms.<sup>132</sup>

Frederick’s definition is important in that it acknowledges inherently that the purpose of business was a common good and a matter of public interest. It identifies the objective of business as “broad social ends” while social responsible is at least one of the means of achieving it.

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<sup>130</sup> Archie Carroll, (n5), 270

<sup>131</sup> Archie Carroll, (n5), 271 citing Keith Davis, “Can business afford to ignore social responsibilities?” *California Management Review* 2 (1960) 70-76, 70. Davis argued that business can benefit profitably in the long run from socially responsible behaviour when they deploy their “social power”

<sup>132</sup> Archie Carroll, (n5) citing William Frederick, “The growing concern over business responsibility” *California Management Review* 2 (1960) 54-61, 60



Carroll then regurgitated the definition of Clarence Walton in *Corporate Social Responsibilities*.<sup>133</sup> Walton commented that voluntarism and not conversion was essential to businessmen maintaining social responsibility agenda and concluded that;

In short, the new concept of social responsibility recognises the intimacy of the relationships between the corporation and society and realises that such relationships must be kept in mind by top managers as the corporation and the related groups pursue their respective goals.<sup>134</sup>

From the foregoing some limitations can be observed when compared with the practice of CSR today; voluntarism and self-motivation are distinctive characteristics of this era.

#### **3.3.4 1970s – Multiplication of definitions but CSR dominates**

Attempts at defining CSR increased in intensity in the 1970s though largely following the theme of the previous decade. A considerable volume of publications can be found in this period. In one of his short but influential publications Dow Votaw in 1972 wrote, suggesting the ongoing solidification of the subject without possible reversion by stating that social responsibility for business was “more than a superficial reaction to temporary social pressure”.<sup>135</sup> Carroll also noted the works of Harold Johnson who presented various definitions.<sup>136</sup> Some research conducted in this period influenced understanding of the state of knowledge, acceptance and practices of business in the 1970s.<sup>137</sup> It would seem that it was in this period that the term “Corporate Social Responsibility” supplanted other competing notions of the subject.

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<sup>133</sup> Clarence Walton, *Corporate Social Responsibilities* (Wadsworth) 1967

<sup>134</sup> Archie Carroll, (n5) 272 citing Clarence Walton, *Corporate Social Responsibilities* (Wadsworth) 1967, 18

<sup>135</sup> D. Votaw, (n1), 28

<sup>136</sup> Archie Carroll, (n5) 273-275 citing Harold Johnson who in his book *Business in the Contemporary Society: Framework and Issues* (Belmont, CA, Wordsworth 1971) formulated the four definitions he termed “conventional wisdom”, “long-run profit maximisation”, “utility maximisation” and lexicographic view of social responsibility”.

<sup>137</sup> The *Opinion Research Corporation*

Carroll presented further the contributions of Sethi, which followed Votaw, to the debate in the mid-1970s.<sup>138</sup> Sethi in 1975 tried to distinguish “social obligation”, “social responsibility” and “social responsiveness” and the range of corporate social performance. He maintained that while social obligation required companies to do what was beyond the law and economic imperatives, social responsibility imposes normative values that companies are expected to respect. He opined that social responsiveness is either preventive or anticipatory corporate behaviour to social needs.

The research of Bowman and Haire published in 1975 focused on the practices of companies that could be termed as socially responsible without suggesting a definition.<sup>139</sup> The attempt by Preston and Post on the other hand to substitute the word “social responsibility” with “public responsibility” to stress the wider public policy process instead of the limiting concept of individual ethical standard failed.<sup>140</sup> In 1976, Sandra Holmes without suggesting a definition of CSR delved into corporate managerial perceptions of CSR and the financial implications of their activities.<sup>141</sup> In 1979, a research of the disclosures contained in the annual reports of *Fortune 500* companies by Abbott and Monsen experimented at rating corporations according to their performances in a “social involvement disclosure”.<sup>142</sup> Again, the credibility of this research is dwindled by its bias in not balancing the perspective of those serviced.

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<sup>138</sup> Archie Carroll, (n5) 279 - 280

<sup>139</sup> E. H. Bowman and M. Haire, “A Strategic Posture Towards Corporate Social Responsibility” [1975] 18 California Management Review 45.

<sup>140</sup> L. E. Preston and J. E. Post, *Private Management and Public Policy: The Principle of Public Responsibility* (Englewood Cliffs, NJ, 1975) 102

<sup>141</sup> S. L. Holmes, “Executive Perceptions of Corporate Social Responsibility” *Business Horizons* (1976) 34

<sup>142</sup> See W.F. Abbott and R.J. Monsen, “On the Measurement of Corporate Responsibility: Self-reported Disclosures as a Method of measuring Corporate Social Involvement” (1979) 22 Academy of Management Journal 501.

Carroll added his voice to the debate at the close of that decade when he stated that CSR comprised of “the economic, legal, ethical and discretionary expectations that society has of organisations at a given point in time”.<sup>143</sup>

Nevertheless, the writing of this period has not escaped criticisms for being mostly interpretative of the managerial view. Some definitions constructed in this period perceiving CSR to be business’ attempt at solving social problems caused wholly or partly in the course of doing business are unacceptable for being too narrow.<sup>144</sup> Business does not only need to be solving problems that are related directly or indirectly to its activities. Any act of business centred on meeting normative expectations of society should pass as socially responsible. Further to this, philanthropy and voluntarism characterised corporate activities with beneficiaries having little more than an expectation from business. Businesses were seen as “untouchables” that needed to be appeased by the government at all times. It is rare to find literature arguing legal prescription of CSR activities in this period.

### ***3.3.5 1980s – Research proliferation and ownership struggles***

With business managers and scholars coming to terms with the concept of CSR, the 1980s witnessed the struggles to ‘own’ the subject. Thus, management scholars signified their position by reinforcing their claiming based on the largely unchallenged authority of corporate managers to deploy resources for CSR activities whimsically. The voluntary submission of corporate managers to CSR objectives was still held sacrosanct by dominant capital economists who emphasised the imperative of refraining from shackling business.

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<sup>143</sup> Archie Carroll, “A three-dimensional Conceptual Model of Corporate social performance” *Academy of Management Review* 4 (1979) 497

<sup>144</sup> See Gordon H. Fitch, “Achieving Corporate social responsibility” *Academy of Management Review* (1976) 38

Thomas Jones maintained that CSR was a process and ‘the obligation must be voluntarily adopted’.<sup>145</sup> This notion still excluded any impetus on business to act for the common good.

On the contrary, pressure groups sought higher regulation of business activities and greater commitment to social issues by formulating a “win-win” formula that portends profitability for business while pursuing CSR objectives. The possibility of socially responsible firms operating with financial profitability was explored in some scholars like Peter Drucker argued that business should see social engagement as an opportunity to make profits rather than philanthropy and linked profitability with responsibility.<sup>146</sup> Others undertook empirical studies given the growing interest at the time on operationalising CSR which led to the use of a reputation index to measure CSR. Some scholars developed denominative measurements and models for assessing CSR engagement of firms and possible financial gains<sup>147</sup> while others developed definitions that admitted of the expected responsiveness of business to social issues. Therefore, Edwin Epstein in 1987 proposed that;

Corporate Social Responsibility relates primarily to achieving outcomes from organizational decisions concerning specific issues or problems that (by some normative standard) have

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<sup>145</sup> See Archie Carroll (n6) 284 citing Thomas Jones, “Corporate Social Responsibility; Revisited, Redefined” *California Management Review* (1980) 59

<sup>146</sup> Peter Drucker, “The New Meaning of Corporate Social Responsibility” *California Management Review* 26 (1984) 53, 62.

<sup>147</sup> P. L. Cochran and R. A. Wood, “Corporate Social Responsibility and Financial Performance”, *Academy of Management Journal* 27 (1984) 42. This particularly interesting in that it would serve a highly persuasive factor to corporate managers of the capitalist orientation to ‘invest’ in CSR programs should spending in this regard be termed “profitable”. This will then become justification for ‘spending’ which is pursuant to the profit-making goals of the corporation. See also, K. Aupperle, A Carroll and J. Hatfield, “An empirical investigation of the relationship between Corporate Social Responsibility and Profitability” *Academy of Management Journal* 28 (1985) 446

beneficial rather than adverse effects on pertinent corporate stakeholders. The normative correctness of corporate action has been the main focus of corporate social responsibility.<sup>148</sup>

The interesting aspect of CSR in this era is the allusion that corporate responsiveness is directed by social issues or problems. This has now become a common feature of contemporary CSR – corporations take direction from public interest in issues which need corporate involvement. In short public opinion became much more important during the 1980s.

### **3.3.6 1990s – *More varieties of the same?***

Increasing information and communication technology (ICT) advancements played a huge role during this period. It enabled more “voices” to be heard on the debate. The newly emergent social media sites have been appropriated to expand the extent of reach for groups and individuals wanting to partake in the debate alike. With various brands of CSR and extrapolations having been considered in previous years, the 1990s lacked any substantially novel idea in defining CSR.

The work of notable scholars built on premises identified in previous works.<sup>149</sup> One idea that developed with some acceptance in this period was ‘corporate citizenship’.<sup>150</sup> By the end of this period in 2000, the concept of global corporate citizenship was well defined assigning social responsibility to corporations akin to natural persons. Post was an influential writer who stated that:

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<sup>148</sup> Archie Carroll, (n6) 288 citing Edwin Epstein, “The Corporate Social Policy Process: beyond Business Ethics, Corporate Social Responsibility, and Corporate Social Responsiveness”. *California Management Review* 29 (1987) 99, 104.

<sup>149</sup> See Archie Carroll (n6) 289-290

<sup>150</sup> For a discussion on corporate citizenship see: Grahame F. Thompson, ‘Global Corporate Citizenship: What Does It Mean?’ (2005) 9 (2) *Competition and Change* 131

Businesses are citizens, whether or not they want to be, and global companies are global corporate citizens. Firms *can* choose to be active or passive in their behaviour, and constructive or destructive in their relationship to society. Whatever course their leaders chart, corporations will be judged for what they do and how they do it.<sup>151</sup>

This term is not being used as frequently as CSR but interchangeably. On 10 September 2015, President Marie Louise Coleiro Preca of Malta while launching the Corporate Citizenship for Responsible Enterprises Association, noted that, ‘In general, a new code of conduct is emerging, based on collaboration, tolerance and respect of diversity, which ascertains the limits of market mechanisms based on free competition’.<sup>152</sup>

Clearly, this period witnessed a clearer and broader definition of CSR with the popular acceptance that the responsibility of business goes over and beyond making profits and obeying the law. Corporate objectives were more aligned to social objectives generally.

### **3.3.7 2000 – *present*: A New CSR ideology?**

By the beginning of the present century, the volume of academic literature on CSR had grown ‘far beyond the capacity of anyone to absorb’.<sup>153</sup> With the passage of time and the changes brought about through social media and electronically-enhanced global economic activity, attempts at redefining CSR in line with the new trends have persisted. Contributions to the subject have traversed a wide range of disciplines including but not limited to economics, human resource management, business administration, international law and

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<sup>151</sup> Ibid, 134 quoting J. E. Post, ‘Meeting the Challenge of Global Corporate Citizenship’ (2000) Boston College Centre for Corporate Community Relations, Carroll School of Management, 8.

<sup>152</sup> Speech by H.E. Marie Louise Coleiro Preca, President of Malta, at the Launch of the (Corporate Citizenship for Responsible Enterprises) CORE Platform at San Anton Palace, Valetta, Malta on 10 September 2015. Available at: <<http://president.gov.mt/wp-content/uploads/2015/09/CORE-SPeech.pdf>> accessed 22 June 2016.

<sup>153</sup> See David Vogel, *The Market for Virtue – The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press, Washington DC, 2005) x.

social policy.<sup>154</sup> Many more have been canvassed since then but “corporate social responsibility” has come to prominence. In academic literature from other disciplines, various words and phrases have been used to describe the perceived obligations of business to society. It is therefore not uncommon to find phrases like ‘business ethics’, ‘sustainable business’ and ‘corporate accountability’ when describing the responsibility of business to society. Many have been used interchangeably in various texts. As far as notoriety is concerned, the term ‘corporate social responsibility’ seems to have “won the battle” of terminology, dominating the other terms that are also commonly used.<sup>155</sup> Having gained notoriety, CSR ideology started to concretise since the turn of this century. A word that has recurred in consistent use is ‘sustainability’ and it has permeated and affected the tenor of current debates. This may be due to the heightened interest in global environmental issues, the looming fears of possible corporate collapse and uncharted boundaries of innovative technologies.

An unmistakeable phenomenon at the turn of the twenty-first century has been the unmitigated spread of social media platforms. These platforms such as Twitter and Facebook have revolutionised information and communication technology (ICT) companies. Due to its free or otherwise low cost to join most of them their expansion has been extraordinary. This phenomenon has enabled otherwise remote citizens of all states in the world to be au courant with developments relating to business-society issues. The possibility of individual citizens organising mass protests speedily and at low cost has created an active class of vociferous stakeholders, with broadcasting and narrowcasting abilities; whilst conversely enabling corporations to “better manage their reputation”, “monitor their external environment”,

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<sup>154</sup> Somewhat remote disciplines in health and natural sciences make claims of interest in CSR also.

<sup>155</sup> *Ibid.*

“better understand/engage with stakeholders” and “improve the management of corporate crisis”.<sup>156</sup>

Corporate governance has received its fair share of attention following the global financial crisis of 2008 – 2009. The importance of corporate governance codes which were loosely worded to accommodate capitalist tendencies, received new impetus; focus moved to the constitution of corporate boards, their functions and reporting regulations. As custodians of financial, economic and political power, corporations are under unprecedented scrutiny by both the state and the society. With the economy of states linked in more practical terms through international trade, it seems there is no limitations placed on the international social responsibility of business as business, the state and society continue to seeks for ways of harnessing benefits from corporate involvement in social development. At the national level, states have become more involved in CSR. There has been states-supported CSR and corporate governance standards initiatives such as with the OECD, state-sponsored legislation such as the new section 172 of UK Companies Act 2006, section 135 of Companies Act 2013 in India and other countries.<sup>157</sup> Have argued that Adam Smith admits that corporate responsibility can be legislated, supporting this with quotes from his lesser known work:

There is, however, another virtue, of which the observance is not left to the freedom of our own wills, which may be extorted by force, and of which the

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<sup>156</sup> Glen Whelan *et al.*, (n8) 779

<sup>157</sup> It seems that developing countries such as The Philippines, Nigeria, South Africa, Kenya, Indonesia have also increased scrutiny of corporate behaviour through legislation or mandatory reporting requirements contained in corporate governance codes.



violation exposes to resentment, and consequently to punishment. The virtue is justice: the violation of justice is injury....<sup>158</sup>

Keeping government out of business may be rather difficult.<sup>159</sup> Ed Miliband the Labour Party leader while campaigning for office in the British general election of 2015 alleging rapacious profiteering by energy companies, promised consumers “a fairer deal” as bills “remained high even when wholesale prices have been falling”<sup>160</sup>.

More radical views are emerging, John Elkington has argued that corporations should be tasked with sustainability based on ‘zero-sum’ waste as their social responsibility because the ‘sustainability agenda is ultimately about the long-term survival and health not only of individual companies or value chains, but of our civilization and planetary biosphere’.<sup>161</sup> He argues that profit-making and human development should not be mutually exclusive objectives of business and promotes the idea that companies should endeavour to achieve zero waste of water and carbon production methods, zero accidents, zero corruption, zero human rights violations and zero labour infringements should define companies practicing “best standards” today. Visser and Kymal have suggested corporations should do more than

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<sup>158</sup> Jill A Brown and William R Foster, ‘CSR and Stakeholder Theory: A Tale of Adam Smith’ (2013) 112 J Bus Ethics 301, 3014 quoting from Adam Smith, *The Theory of Moral Sentiments* (1759)

<sup>159</sup> Ed Miliband, Prime Ministerial candidate for the Labour Party in UK promised to freeze energy bills if elected to power in 2015 in what can be seen as ‘regulating’ social responsibility of corporations. Jim Pickard, ‘Miliband Holds Out Promise to Cut Energy Bills by 10%’, *Financial Times* (London, 12 March 2015) <<http://www.ft.com/cms/s/0/fa356652-c8dl-1le4-bc64-001feab7de.html#axzz4FvetrCCd>> accessed 30 May 2015.

<sup>160</sup> James Ashton, ‘Which is worse, ripping off nations or the customers?’ *Evening Standard* (London, 12 June 2014) 14.

<sup>161</sup> See John Elkington, *The Zeronauts* (Routledge 2014) 24

create shared value but create integrated value which suggests an increasing foray of CSR in business-society discuss.<sup>162</sup>

### **3.4 Theories and Models of CSR**

As the definitions of CSR have changed over time, so has the associated theories transformed. The various ideological frictions on the subject of CSR has not led to an absolute convergence and like many areas of social science may never. The theories that have gained prominence at the expense of others seem to have expanded the borders of corporate objective beyond short-termism into environmentality, sustainability and long-termism. The proliferation of theories has followed the proliferation of articles and academic papers on the notion of CSR since the 1950s to date. The models developed have shaped aspects of business in governance regulation, ethical investment, ethical marketing and advertising.

#### **3.4.1 Shareholder Value Theory**

The most notable corporate law theory developed in the middle of the 20<sup>th</sup> century promoted the primacy of shareholder interest. One of the notable proponents of the shareholder theory was Milton Friedman who remarked that the “social responsibility of business is to increase its profits”.<sup>163</sup> The proponents of this theory maintained that social welfare was the responsibility of government. The government in meeting its social responsibility to citizens will be required to provide social amenities while business meets the obligation of expanding

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<sup>162</sup> Wayne Visser and Chad Kymal, ‘Integrated Value Creation (IVC): Beyond Corporate Social Responsibility (CSR) and Creating Shared Value (CSV)’ (2015) 8 (1) *Journal of International Business Ethics* 29.

<sup>163</sup> Milton Friedman, ‘The Social Responsibility of Business is to Increase Its Profits’, *The New York Times Magazine* (New York, 13 September 1970). See also, Milton Friedman, *Capitalism and Freedom* (40<sup>th</sup> Anniversary edn, University of Chicago Press 1962) especially Chapter 8 titled ‘Monopoly and the Social Responsibility of Business and Labor’ an early work on which the latter article was based.

production and creating employment. Milton saw the involvement of government in business as meddlesomeness ‘forcing people to act against their own interest’ and to ‘substitute the values of outsiders for the values of participants’ in the free market economy.<sup>164</sup>

Another feature of this theory was the dependency on the “invisible hand” of demand and supply as the moderator and determinant of the distribution of rewards for the application of economic resources. The economic realities of a state they insist follows the fairness appropriated by the ‘invincible hand’ and works for the benefit of all.<sup>165</sup> The opposition to “the invisible hand” was seen as “the hand of government” or the manipulation of the economy by government regulation.

This theory became popular after the industrial revolution. With industrialisation came the intricate web of suppliers and demanders who yearned for a greater variety of goods. As corporations enlarged in ownership, the inevitable designation of corporate managers with the task of running corporations on behalf of their shareholders who held shares as stock, led to the separation of ownership from management. Shareholders or investors required returns from their managers. Managers were mandated to achieve share value. Consequently, corporations’ objective has been characterised by the supremacy of shareholder interest in a free market economy known as Capitalism. By the 20<sup>th</sup> century, the principles of stock-market capitalism had become entrenched in the Western economy as an ideal. Although most critics did not advocate the abolition of the free market economy or capitalism, arguments for a closer regulation of how corporations carried out business were rife. The history the evolution of corporations shows that corporate collapses have invariably been brought about by weaknesses inherent within it. The various global economic crisis since the

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<sup>164</sup> Milton Friedman, *Capitalism and Freedom* (40<sup>th</sup> Anniversary edn, University of Chicago Press 1962) 200.

<sup>165</sup> See (n 111)

great Depression of 1929, the recession of the 1980s and the 2008/2009 financial crisis have all resulted from explosions arising from internal pressures and not the result of legislative or regulatory constraints. The shareholder theorists have not rejected CSR but rather embraced it on their own terms. This is changing as states take opportunity of financial and economic crisis to increase regulations.

### 3.4.2 *Stakeholder Theory*

The shareholder primacy idea was countered by the stakeholder theory about the mid-twentieth century. In the context of business ethics, the stakeholder theory appears to have transpired to counter the claim of corporate managers after The Great Depression.<sup>166</sup> In contemporary business today, companies invariably do not produce all they require in the course of making products or services. They rely on other companies - perhaps smaller and diverse - to supply them. These suppliers are referred to as stakeholders. The definition of stakeholders is however wide than that covering employees, consumers of products and all other entities that have contact with corporations in the production process. It has been extended to include those far away who do not have direct but indirect contacts also. Hummels note that the stakeholder idea “presupposes the ability of managers to recognize and respond effectively to persons, groups, institutions, organizations, societies and even the natural environment”.<sup>167</sup>

Edward Freeman has been credited with popularising the stakeholder concept of CSR.<sup>168</sup> Freeman’s book *Strategic Management; A Stakeholder Approach*<sup>169</sup> which projected CSR from a management perspective has been widely cited. It attempted to “put a face” to the

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<sup>166</sup> Harry Hummels, ‘Organizing Ethics: A Stakeholder Debate’ (1998) 17 Journal of Business Ethics 1403, 1406.

<sup>167</sup> Harry Hummels, op cit, 1407.

<sup>168</sup> Archie Carroll, (n6) 290

<sup>169</sup> R. E. Freeman, *Strategic Management: A Stakeholder Approach* (Pitman, Boston 1984)

seemingly vague and largely improperly named and an unexhaustive list of groups to which business should cater. This approach can be criticised today for trying to limit the scope of CSR by naming and identifying specific groups for engagement with business. It is accepted that particular businesses would be best suited to solving issues arising in their industry, but collectively and subject to the highly interactive social environment of the modern world, this categorisation is hardly required except in fashioning industry- or company-specific CSR programs.

The stakeholder idea holds much promise, in my view, for CSOs because it is akin to the cherished legal neighbour principle enunciated in the well-known case *Donoghue v Stevenson*<sup>170</sup> – a locus classicus – that established the doctrine of the duty of care in negligent torts. This case is somewhat fortuitously relevant, in that it defines the duty owed by a manufacture of product to a member of the public.<sup>171</sup>

Lord Atkin's famous dictum is worthy of copious quotation where he stated inter alia;

The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take

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<sup>170</sup> *Donoghue v Stevenson*" [1932] UKHL 100.

<sup>171</sup> The contention here is that the stakeholder theory should project the 'foreseeability' of corporate behaviour to apportion the notion of responsibility.

reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.<sup>172</sup> (sic)

The Stakeholder theory of corporate law answered the “neighbour principle” question concerning corporations. In short, what other entities interact with corporations whom they need to have reasonably in contemplation when doing their business; society, individuals, states and the environment should all be had in contemplation by business.

This case was determined by the House of Lords settling the overall principles applicable in cases where one person may owe another a duty of care. This case is also known as the “snail in a bottle case” because the plaintiff Mrs Donoghue discovered a snail while drinking a bottle of ginger beer in a café which subsequently made her ill. She sued the beer maker Mr Stevenson for breach of a duty of care – an argument the House of Lords thus upheld. The court reasoned the act or omission on the part of the manufacture being capable of injury was foreseeable. This case extended liability for person injury beyond a direct or indirect physical impact. The foreseeability of the impact of corporations is the point of nexus with this case.

Business in the 21<sup>st</sup> Century has been reshaped when considered with that of the previous century by developments in information technology and expansion of cross-border trade facilitated by e-commerce and greater financial mobility. Chang and Ha have identified what they considered to be the main factors that affect business in a globalised economy in this

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<sup>172</sup> per Lord Atkin in *Donoghue v Stevenson* op cit.

century.<sup>173</sup> The position of business required recalibration in order to align with novel societal demands. Business was being demanded to respond to various responsibilities that arose out of their direct and indirect consequences of their behaviour. As Hummel notes, “There is still sufficient reason to pay attention to the interests of the shareholder, because the rights of the financiers are legitimate. But they are not absolute”<sup>174</sup>

The stakeholder theory in addition to the rights and interests of shareholders merely recognises in addition to those rights and interests those of other groups that are or can be affected when the interests of the corporation is being pursued. I propose therefore that there are two level, at least of stakeholders; the primary stakeholders of which included employees and customers, and secondary stakeholders that included the larger society and civil society groups. Stakeholder theory critics say that those who constitute the are amorphous and their claims so diverse that corporations should not be burdened with the responsibility of their demands. In this regard, business has taken an instrumental approach to stakeholder theory by selectively engaging with stakeholders only in cases that promote business interest.<sup>175</sup>

However, stakeholder theory has also gained provenance due to the activism of non-business agents and has become pivotal in CSR discuss. As the influence and the impact of business on the environment and welfare of various sectors of the society grows, non-business actors have emerged to claim a position of influence in the direction of business management and the process of decision making. In *Bowoto v Chevron Corporation*<sup>176</sup> a protester’s family

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<sup>173</sup> S.J. Chang and Daesung Ha, “Corporate Governance in the Twenty-First Century: New Managerial Concepts for Supranational Corporations” (2001) American Business Review 32. In this article the increasing power of transnational corporations was also highlighted. They observed that the revenue of many corporations is bigger than that of most countries.

<sup>174</sup> Harry Hummels, op cit, 1406

<sup>175</sup> K. Bondy, J. Moon and D. Matten, “An Institution of Corporate Social Responsibility (CSR) in Multi-National Corporations (MNCs): Form and Implications” Journal of Business Ethic (2012)

<sup>176</sup> *Bowoto v Chevron Corporation*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008). See generally ‘Developments in Law: Extraterritoriality’, [2011] 124 Harvard Law Review 1226

brought a suit against the parent company of a Nigerian subsidiary claiming complicity with Nigerian state agents for the death of the victim. Although *Bowoto* failed for lack of jurisdiction, there has been an increased use of the principle of extraterritoriality at least in the US Courts by stakeholders of corporations to demand redress as far as Nigeria is concerned in cases concerning the IOCs operating in the Niger Delta.<sup>177</sup>

Jensen notes that the arguments for CSR that has centred around providing justification for business and its interests in shareholder value, has shaped the language of the discus whilst shifting focus from the issue of the ethical rationale for justifying business decisions and behaviour.<sup>178</sup> This theory is important because it highlights the basis for the interaction of other disciplines and influences on business. It suggests that business ought to consider stakeholders as being of existential importance rather than a remote factor. It elevates stakeholders to a level of importance which shareholder theorists do not accord it but one which cannot be easily

### ***3.4.3 Corporate Sustainability or Sustainable Development Theory***

Since the concepts of ‘global warming’ and climate change gained exponential popularity in 2006 following the documentary by AL Gore the former American Vice-President.<sup>179</sup> Of course, campaigners had long linked corporate sustainability to environmental issues, but the global awareness raised by Al Gore propelled the concept. The idea of corporate sustainability focused on business development and longevity in a stable social environment. This concept underscores the importance for business to support the process of economic growth and the future of the environment in particular and other social benefits derived from

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<sup>177</sup> See generally on the *Bowoto* case: David Horton, ‘Illuminating the Pat of Aliens’ Judicial Discourse: Preventing another *Bowoto v Chevron* by Congressional Legislation’ (2010-2011) 27 (10) *Appalachian J.L.* 27

<sup>178</sup> M. C. Jensen, (n15)

<sup>179</sup> The documentary titled ‘The Inconvenient Truth’ was aired in 2006 and led to Al Gore receiving the Nobel Peace Prize in 2007 for climate change.



doing business.<sup>180</sup> Socially responsible investing (SRI) has been proposed in consonance with this idea.

The sustainability idea was drawn from the literal meaning of “sustain” being “to endure” and is often used when discussions about the methods used in the extractive industry is discussed. In discussions about fossil fuels, the idea of sustainability is often mooted in the context of business developing alternative sources of energy in order to strategically preserve the finite energy resources and replace them with infinite resources such as wind, solar power and tidal wave energy production technology. It falls within the purview of strategic and developmental CSR to align corporate economic interests with long-term social imperatives. It has been suggested by a former chairman of the Dutch Employers Association that “there is no standard recipe: corporate sustainability is a custom-made process”; each corporation will need to formulate processes that will best realise the corporate objective.<sup>181</sup> However, Jensen has proposed that the stakeholder theory is consistent with business long-term value maximisation.<sup>182</sup>

#### ***3.4.4. Corporate Social Performance Theory***

This theory hints at the purposeful activities of business carried out without compulsion but voluntarily to achieve social objectives beyond its legal and economic gain. It concedes that other groups in society ought to benefit from its philanthropy while its main focus is profit making. Corporate reputation is seen as the main motivation for business adopting this idea, as its consumers’ perception is closely monitored with the output of its altruistic activity to gauge societal acceptance of the firm. This is a popular view of CSR in the twenty-first century. It admits CSR is relevant but upholds shareholder value.

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<sup>180</sup> See Baden and Harwood (*n 124*)

<sup>181</sup> Ibid (*n15*) 96

<sup>182</sup> M.C. Jensen, ‘Value Maximisation, Stakeholder Theory, and the Corporate Objective Function’ *Business Ethics Quarterly* 12 (2002) 235 - 256

This concept has been criticised for lacking engagement with ethical considerations. In 1995, Kenule ‘Ken’ Saro-Wiwa a non-violent environmental activist from Ogoniland in the Niger Delta region of Nigeria who was hanged by the Nigeria Government for protesting against the environmental degradation caused by the operations of Royal Dutch Shell Corporation (Shell). The case was reportedly settled out of court in 1995 in a bid maintain corporation reputation as it did not accept liability.<sup>183</sup> The management of Shell refused to be drawn into public condemnation of the atrocities reported in the Niger Delta and attributed to the Federal Military Government of Nigeria, then under the leadership of General Sani Abacha a military dictator.

Handy writing at the turn of the 21<sup>st</sup> century proposed that “good business is a community with a purpose, not a piece of property”.<sup>184</sup> He further commented that “to turn shareholders’ needs into a purpose is to be guilty of a logical confusion, to mistake a necessary condition for a sufficient one.”<sup>185</sup> Corporations by their pervasive nature are now intricately part of every society. Beets has observed that; “[f]or many humans, corporations largely determine their occupations, where they live, what they consume, what they wear, how they spend their leisure time.”<sup>186</sup>

### ***3.4.5 Corporate Citizenship Theory***

On the international stage a “global citizenship theory” is emerging. This theory seeks to subject corporations to international regulation by recognising them as ‘citizens’ or legal

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<sup>183</sup> The family of Ken Saro-Wiwa and eight others were paid compensation for his death in the sum of \$15.5m. The case did not therefore get to trial but is still indicative of Shell’s liability by implication. ‘Shell Settles Nigerian Death Cases’, *BBC News* (London 9 June 2009) <<http://news.bbc.co.uk/1/hi/world/africa/8090493.stm>> accessed 24 May 2015.

<sup>184</sup> Charles Handy, ‘What’s a Business For?’ *Harvard Business Review on Corporate Social Responsibility* (2003) 65, 66

<sup>185</sup> Handy op cit 72

<sup>186</sup> Beets op cit 194

persons as they are duly accorded that appellation in national law already. This concept denotes the use of the notions of “right and wrong”, “corporate conscience” and the legal status of “corporate personality” to define business entities. The mobility businesses like persons internationally also subscribes to corporations the ability to engage in “cross-border” mobility like natural persons. With fewer bases to different natural and corporate activity in international commercial law, the concept of global “corporate citizenship” is gaining grounds.

As Thompson points out that there is no “constituted polity of which companies are the citizens”, the difficulty of the “introduction of a taxation regime on corporations” where corporations “have shown no great commitment to pay for the privileges claimed of their citizenship”, debunk this theory.<sup>187</sup> As already pointed out, on the other hand, states have collaborated at an international level to play important roles in steering the international CSR debate on the basis that business ought to contribute to the development of society.

### ***3.4.6 Corporate Theory Convergence?***

Are the various theories of CSR converging? Maybe, through the adoption of global best practice guidelines and corporate governance codes. Some studies suggest that there are benefits for developing countries adopting international corporate governance codes and that there is a pattern of global convergence of regulatory practices regardless of legal origin or tradition.<sup>188</sup> However, not all international standard and reports should be given the same

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<sup>187</sup> Grahame F. Thompson op cit, 148

<sup>188</sup> Dionysia Katelouzou & Mathias Siems, ‘Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990–2013’ (2015) 15(1) Journal of Corporate Law Studies 127; Ihsan Aytekin, Michael Miles and Saban Esen, Corporate Governance: A Comparative Study of Practices in Turkey and Canada’ (2013) XII (2) The IUP Journal of Corporate Governance 7. Although the work of Katelouzou & Siems covered 30 countries only one African country – south Africa – was studied and the work of Aytekin et al. focused on Turkey and Canada, extrapolations and deductions can be made for other countries.

credibility for affecting uniformity in CSR norms. For example, the widely-referenced *Doing Business Report 2016* confirmed it “covers a limited number of regulatory constraints” not measuring “measure many aspects of the business environment that matter to firms, investors and the overall economy”.<sup>189</sup>

This apparent inclination towards convergence is not exclusive to international commercial and corporate law. It is emerging in media law which may in turn influence business due to the possible convergence of marketing and public relations management strategies.<sup>190</sup> The adoption of similar Codes for the surreptitious delivery of mandatory CSR is leading to convergence. Most businesses are adopting stakeholder engagement for reputational enhancement.<sup>191</sup> The statement of Mark Carney with respect to the virtues of “inclusive capitalism” points in the direction of some convergence.<sup>192</sup> Carney reiterated that ‘The Bank of England’s mission “to promote the good of the people of the UK by maintaining monetary and financial stability” suggests that central banks have an important role to play in supporting social welfare’.<sup>193</sup> Hummels further observed that a slant of capitalism advocated by – Kantian Capitalism – recognises the “inalienable rights” of stakeholders “to participate in the process of discussing the organi[s]ational practices, policies, and action.”<sup>194</sup> Capitalism

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<sup>189</sup> *Doing Business; Measuring Regulatory Quality and Efficiency 2016*, (World Bank Group, 2016) v.

<sup>190</sup> Douglas W Vick, ‘Regulatory Convergence?’ (2006) 26 (1) *Legal Studies* 26, identifies convergence of the two dominant media law models; the ‘market liberal model’ and the ‘social liberal model’.

<sup>191</sup> Sports promotions and ethical considerations are clearly demonstrable when considering the response of business to public opinion in respect of their brand ambassadors and sponsored sports persons. *Nike* stopped sponsorship deals with tiger Woods following reported indiscretion in his private life. See [http://espn.go.com/golf/story/\\_/id/9336698/tiger-woods-close-signing-new-deal-remain-nike](http://espn.go.com/golf/story/_/id/9336698/tiger-woods-close-signing-new-deal-remain-nike) accessed 17 June 2014.

<sup>192</sup> Mark Carney, ‘Inclusive Capitalism: Creating a Sense of the Systemic’ (London 27 May 2014) - a speech given by Mark Carney, Governor of the Bank of England at the Conference on Inclusive Capitalism. Copy available at: <<http://www.bankofengland.co.uk/publications/Documents/speeches/2014/speech731.pdf>> accessed 1 August 2015.

<sup>193</sup> Mark Carney op cit, 4.

<sup>194</sup> Harry Hummels, (*n23*) 1408

is now accepting of ‘stakeholder’ ideas; if this is not convergence in the making, it is imminent.

### **3.5 What is Corporate Social Responsibility?**

In the study of CSR, a definitional construct is important; this is because a definition will suggest inherently the confines of the subject. This has not been an easy task for students of CSR because there are many connotations of what responsibilities corporations can be subjected to. The concept of the word ‘responsibility’ has been rightly examined by various authors and needs clarification in order for a clear understanding of what constitutes CSR, and indeed what it does not. In this regard, a critical evaluation of the sense in which the word ‘responsibility’ has been used relative to the subject ‘corporate social responsibility’ is relevant.

When the concept of responsibility is applied to government or individuals, it is somewhat less difficult to define. However, when ‘responsibility’ is applied to corporations, it possesses a challenge. This is because, the concept of responsibility inherently defines the context in which corporations can be obligated to society. In short, the context of the ‘responsibility’ of business has been far more contentious.

#### ***3.5.1 The concepts of “responsibility”: before, during and after the fact***

Although a widely acceptable definition is being synthesised through many academic and public debates, the responsibilities of individuals and governments seemed to have rather concretised through democratic legislative processes. Goodpaster and Matthews note that the concept of “responsibility” can be used in either the ‘casual sense’ as in ‘holding to account for past actions’, ‘rule-following sense’ as in ‘following social and legal norms’, or ‘decision-

making sense'.<sup>195</sup> I suggest that this explanation covers 'responsibility' as a concept that can be applied before, during and after actions are taken. It can be mean, as before an event (by giving consideration to the outcome of corporate decisions), or during the taking of an action or event (like a benevolent or philanthropic attitude by the application of ethics) or ex post facto<sup>196</sup> (such as to engage the consequences of decisions taken).

Conventionally, the concept of responsibility is applied to natural persons in all three senses, because human beings are capable and expected to apply ethics conscientiously before an act of commission or omission. The implication for artificial persons – corporations – is that they are not perceived to have a conscience like natural persons and so should not be expected to apply moral judgements when transacting and operating. Goodpaster and Matthews disagree with this notion, contending that 'just as the moral responsibility displayed by an individual develops over time from infancy to adulthood, so too we may expect to find stages of development in organisational character'.<sup>197</sup>

Therefore, the regulatory approach is to impute a conscience to business by evaluating their decisions and the process of decision-making. The perceivable shift in thinking is the refocusing of emphasis from the making of profits to the wider considerations in justifying the choice of a transactional path. Modern CSR is not limited to responsibility arising after the fact but rather investigates the influences of decision making and engages the rationale of corporate behaviour throughout corporate transactions. Corporations can make decisions before transactions - because it engages the question of the objective of its actions, during - as it engages the connectivity with the producers of goods and services such as the staff and raw

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<sup>195</sup> Kenneth E Goodpaster and John B Matthews, Jr., 'Can a Corporation Have a Conscience?' *Harvard Business Review on Corporate Social Responsibility* (Harvard Business Press 2003) 131, 135.

<sup>196</sup> Ex post facto means 'after the fact', i.e. an action done after an event or fact is determined.

<sup>197</sup> Insert quote

materials and lastly a projection of the future value of the various elements engaged in the process of production. The business case for CSR which accommodates rather than precludes law as a regulatory tool may be acceptable to business, if its implementation does not impinge upon corporate profit making and entrepreneurship and innovative abilities.

### **3.5.2 Definitions of CSR**

Increasing public interest is fuelling debates and research in CSR by the academia. The many areas that the study of CSR engages have necessitated interdisciplinary collaborations in various aspects of corporate law and corporate governance. The increasing number of research on this subject is producing a steady body of data and theses. In defining CSR, the adage *quot homines, tot sententiae*<sup>198</sup> is trite but a legal context will be assumed for the purposes of this study.

Accordingly, the episteme of CSR as a distinct field of study reveals that there has been various definition, each one being relevant to an historical era. The main concepts that have led to the development of CSR as a subject is often relative to identifiable global circumstances. There has been palpable friction between academics in managerial sciences, economics and law regarding the appropriate contextualization of the “responsibility” of corporations. This is because of the distinct purports and nuances of CSR when located in each particular field of study. In law, responsibility is viewed in a much more functional way to recognise the existence of a corresponding obligation. The confusion posed by the myriad, and often conflating perspectives of these perspectives leads to a misunderstanding of CSR; so, defining CSR in legal terms is a tedious task. There is no universally adopted definition of

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<sup>198</sup> The adage translated literally means “there are as many opinions as there are men”.

CSR. Okoye considered that CSR is an “essentially contested concept” that is subject to continuous debate but requiring congruency.<sup>199</sup>

As for the word ‘social’ in ‘corporate social responsibility’, its ordinary meaning will suffice as no special connotation seems to have been attached to what can be considered social and what is not than to ascribe it to what affects people or the society in general. However, ‘society’ it is often contextualised with reference to a particular group, community, state, or the international community such as to say the ‘Nigerian society’. Regarding the concepts of ‘corporate’ in the phrase ‘Corporate Social Responsibility’ is not as controversial in the context in which it has been used and understood – it refers to generally to registered companies.

The word ‘responsibility’, however, has various connotations and is the subject of greater scrutiny.<sup>200</sup> In the ordinary meaning of the phrase ‘socially responsible’, individuals are morally obligated to act in the interest of the whole community or society and not despite it. But for corporations, their unique legal characteristic of being mystical raises the question whether it can be ‘responsible in the same way as a natural person. Christine Parker queries the possibility for the law “to make companies accountable for going beyond the law” and attempts to answer it by stating that corporate “[l]aw attempts to constitute corporate ‘consciences’ – getting companies ‘to want to do what they should do’ – not just legally compliant outputs or actions”.<sup>201</sup>

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<sup>199</sup> A. Okoye, ‘Theorising corporate social responsibility as an essentially contested concept: is a definition necessary?’ *Journal of Business Ethics* 89(4) (2009) 613-627, where CSR is analysed in accordance with the “essentially contested concepts” theory by Walter B. Gallie, a renowned philosopher. See generally; Walter B. Gallie, “Essentially Contested Concepts” (1956) 56 *Proceedings of the Aristotelian Society* 167.

<sup>200</sup> See *n* two above

<sup>201</sup> Christine Parker, ‘Meta-Regulation: Legal Accountability for Corporate Social Responsibility?’ in D McBarnet, A Voiculescu and T Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, Cambridge 2008) Chapter 8. An



In every field of study, the definition of the terms applicable is useful in determining the meaning, context and scope of its nomenclature. The history of CSR has been tortuous; there have been several characteristic variations of corporate practices defining various times in its history. In the case of CSR, its meaning has been the subject of much debate. This may be partly attributable to the contemporary dispensation of globalised business interactions energised especially by multinational corporations (MNCs) with operations transcending international barriers. This is because; the study of CSR has become important internationally and subject to a myriad of applications. In developing countries, the adverse impact of MNCs has come under intense scrutiny with the worldwide publication of corporate mismanagement, human rights abuse and environmental issues. Although CSR issues are raised worldwide, perspectives across economic, managerial and cultural spheres vary. The prominence of CSR has been noted by Doreen McBarnet who remarked that '[i]t is difficult to open a newspaper these days without coming across some reference to [CSR]'.<sup>202</sup> Further, ethical questions are being asked of how business conducts its "business" and what responsibilities they should undertake in society. The questions asked of business, and their answers vary across politico-economic theory paradigms.

Despite the apparent transformation of the concept of social responsibility of business, the principal notion at the core of the study of business relationship with society has endured. However, businesspeople and the corporate vehicles they formed in order to advance their economic interest have not always been as complex and global in nature as it is today. This is not to suggest that business was not done internationally between states and people. However, the advent of mechanisation, industrialisation and increase in global population has

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earlier copy is available at: <[https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/dae-library/meta-regulation\\_legal\\_accountability\\_for\\_corporate\\_social\\_responsibility.pdf](https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/dae-library/meta-regulation_legal_accountability_for_corporate_social_responsibility.pdf)> accessed 24 May 2015

<sup>202</sup> ibid 9

heralded more complex human interactions in many ways, not the least in financial transactions and mechanised methods of production of goods and services. External and internal factors, therefore, have led to changing definitions and concepts in the study of CSR. There have been many definitions in scholarly works from the 1950s to the end of the last century as Carroll points out.<sup>203</sup> According to McGuire “[t]he idea of social responsibilities supposes that the corporation has not only economic and legal obligations but also certain responsibilities to society which extend beyond these obligations”.<sup>204</sup>

When business as done by sole traders and simple partnerships (such as were run by families), the social responsibility of the individual businessman was a personal responsibility and so was in very close focus.<sup>205</sup> As businesses became incorporated this responsibility was located in the modern corporation and renamed CSR. The difficulty in imputing a ‘conscience’ and moral responsibility to business is due to its artificial character. Whatever the difficulty, it has not deterred the progression of the corporate accountability movement in seeking to hold corporations accountable in every way possible.

### **3.5.3 *Reconceptualising CSR***

Clearly, CSR seeks to elevate moral commitments from companies to the same pedestal as legal ones or higher. Additionally, not only have the concepts associated with the ethical behaviour of business been subject of diverse connotations and definitions, the way in which corporations and society have communicated their interests to one another have been equally

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<sup>203</sup> See for the crystallisation of definitions between the 1950s and 1990s Archie B. Carroll, ‘Corporate Social Responsibility: Evolution of a Definitional Construct’ [1999] *Business and Society* 268. A copy is obtainable at: <[https://www.academia.edu/419517/Corporate\\_Social\\_Responsibility\\_Evolution\\_of\\_a\\_Definitional\\_Construct](https://www.academia.edu/419517/Corporate_Social_Responsibility_Evolution_of_a_Definitional_Construct)> accessed 24 July 2015.

<sup>204</sup> J. McGuire, *Business and Society* (McGraw-Hill, New York, 1963) 144)

<sup>205</sup> Carroll op cit.

confused.<sup>206</sup> Some scholars continue to advocate for new definitions or terminologies.<sup>207</sup> This is evident from the demand on corporations to go beyond the law to meet social expectations. For example, the sale of BHS<sup>208</sup> - a popular and long-established UK retail chain – evoked CSR and corporate law issues. The main shareholder of BHS Sir Philip Green was allegedly benefited from corporate law loopholes to ‘strip’ BHS of assets legally while selling the company for a nominal £1.00 to a retail novice and leaving thousands of its workers without employment and pensions. This case educes questions about the responsibility of corporations and shareholders going beyond the law to act in the best interest of society at large. Not surprisingly, this case led to a parliamentary inquiry in which the Chair of the House of Commons Committee on Business, Innovation and Skills commented on the ambit of their enquiry thus:

"The collapse of BHS brings misery and uncertainty for thousands of workers and also places a potentially significant burden on the taxpayer in the form of pension liabilities. The sale and acquisition of BHS raises real questions about whether directors acted in the best long-term interests of the company and their employees. Is there too much of an incentive in the system for owners to asset-strip, take out vast sums for personal gain, and then dump and run leaving the taxpayer to pick up the tab when the company fails, rather than create value for the long-term? In this inquiry we'll want to question the role of advisers – the lawyers, bankers,

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<sup>206</sup> Itziar Castelló, Mette Morsing and Friederike Schultz, ‘Communicative Dynamics and Polyphony of Corporate Social Responsibility in the Network Society’ *Journal of Business Ethics* 118 (2013) 683 – 694. They base their idea on the plurality and different constructs of reality that is obtainable as a result of perspectives influenced by the available technologically advanced multimedia.

<sup>207</sup> Marcel van Marrewijk, ‘Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion’ *Journal of Business Ethics* (2003) 44: 95 – 105, 101

<sup>208</sup> BHS was a popular high street retail outlet brand that traded for 88 years until its winding up in 2016. It was owned by Sir Philip Green from 2000 until 2015 when he sold it for £1.00. At the time it went into administration and eventual collapse, it had up to 11,000 workers employed in 164 stores nationwide. 20,000 workers were also affected due to a £571million pension deficit contributing to a cost of £1.3billion to its diverse creditors.

auditors and others who advised on the sale and purchase of BHS – and examine the legal obligations of company directors in this process."<sup>209</sup>

The above comment clearly indicates a subtle but apparent supposition that corporations and their owners ought to act in the interest of the society at large.<sup>210</sup> The terms of reference further expanded the enquiry to the issue of business ethics and corporate law provisions. The terms of reference questions among other things “the role of external advisers during the sale and acquisition process, particularly bankers, lawyers, accountants and auditors conducting due diligence checks”, whether “the regulatory framework incentivise or mitigate moral hazard”, if the directors acted “as best they could to fulfil their statutory duties” if “the statutory duties on directors regarding the sale or purchase of businesses or subsidiaries, and the potential consequences of breaching these, sufficient”.<sup>211</sup> Though deontology is a fixture of professional training and education of most legal, accounting and financial professions their involvement in corporate scandals has not received greater scrutiny.

The sense in which a company is responsible outside the law is by noting the consequential social denouncement of a particular corporate act or omission and responding to it. Criticism of unsocial corporate acts often goes beyond mere verbal condemnation; society often stage product boycotts or excoriation in the media leading to negative reputation. It is important that the sense of responsibility goes beyond the law. For this reason, I maintain CSR should be cover responsibilities in keeping the law and beyond the law in a society but what the responsibilities are should be standardised and not left to conjecture. This will help to provide

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<sup>209</sup> See the UK Parliament website:

<<http://www.parliament.uk/business/committees/committees-a-z/commons-select/business-innovation-and-skills/news-parliament-2015/the-sale-and-acquisition-of-bhs-terms-of-reference-15-16/>> Accessed 23 June 2016.

<sup>210</sup> It is accepted that due to the UK being a ‘welfare state’ the implication for state pension pay-outs make the loss of employment for the many

<sup>211</sup> Ibid *n*7

the definition, and determine the scope, of the social expectations on corporations in the society.

Given that there are various definitions of the term ‘Corporate Social Responsibility’ (CSR), it is not pragmatic to iterate them; a working definition is rather adopted in this study. The purpose of a definition is to focus the study and provide an ideological benchmark for this research. Antonio Vives has defined CSR as;

The practices of the corporation that, as part of their corporate strategy, complementary and in support of the main business activities, explicitly seek to avoid damage and promote the well-being of stakeholders (clients, suppliers, employees, financial resource providers, community, government and the environment) by complying with current rules and regulations and voluntarily going beyond those requirements.<sup>212</sup>

The ingredients of this definition reveal certain generally accepted attributes when considering the purpose of CSR.<sup>213</sup> Firstly, it suggests that CSR activities are conducted in the ordinary course of business transactions. If this is so, it provides reason for investigating the purpose of corporations in society. It also incidentally acquiesces to the stakeholder theory of corporate law. This position accedes to, and recognises that, there are ancillary issues other than the legitimate pursuit of profits that require corporate involvement. Secondly, this definition assumes that CSR is a voluntary activity by corporations and should be not subject to mandatory compliance. This suggestion cannot be sustained in view of the many mandatory regulatory schemes imbedded in both corporate governance codes and legislation – as will be seen in the next chapter. In contemporary national corporate law at

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<sup>212</sup> Ibid at 45.

<sup>213</sup> Marcel van Marrewijk ‘*Concepts and Definitions of CSR and Corporate Sustainability; Between Agency and Communion*’ 44 *Journal of Business Ethics* 2003, 95 – 105, 96 describes the problems associated with a definition of CSR. This is basically, the dichotomy that exists in deciphering the nature of relationship between corporations and society.

least, the inclusion of law is nor a foregone conclusion. Pressure by state and non-state actors has ensured that corporations do not dictate exclusively what is and is not socially responsible activities. To the contrary, CSR cannot now be conceived to be driven mainly by corporations, but by the strong will of society expressed in many ways, the least not being brand boycotts and damaging corporate reputation. In some instances, governments are then forced to act in public interest and in line with societal demands. Thirdly, CSR transcends national boundaries and has become a global phenomenon. The transnational nature of business – whether small or big – has made CSR issues more conspicuous on the international stage. A discussion on contemporary CSR practices invariably reveals considerations that are global due to the interdependence of economic activities through the financial markets, e-commerce and climate change. CSR issues are, being shaped by global developments which are now indispensable considerations in national and international corporate law. Indeed, all the above notions inherent or otherwise in the definition adopted by Antonio Vives evoke many debatable issues surrounding the theory, practise and purpose of CSR.<sup>214</sup>

I conclude that a definition of CSR need not exclude the consideration of corporate interest beyond the making of profit and the observance of extant laws. A definition confining CSR to observing the laws and making profit can be associated with classical capitalism and neoliberalism. Indeed, things which were historically considered to be voluntary philanthropy such as the provision of the availability of flexible working hours, the provision of maternity pay and health and safety issues are now entrenched in contemporary corporate practice through the instrumentality of relevant legislation. Therefore, CSR can be defined as: *All*

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<sup>214</sup> See generally on CSR: Crane et al., *The Oxford Handbook of Corporate Social Responsibility* (OUP, Oxford 2008) Chapter 3.

*other objectives of a corporation which may be considered as secondary and beyond the primary objective of making profits that promotes social development.*

The above definition relates to the major interest of corporate governors who, for example, adopt CSR to gain customer acceptance and reduce the incidences of shareholder activism being expressed via proxy fights.<sup>215</sup> Although corporate managers are not required to do so, they still adopt CSR as an indispensable tool to acquire social acceptance. It is accepted that the ineradicable and primary objective of corporations is to make profit and this is not going to change in the foreseeable future. However, corporations have a firm interest in meeting their secondary objectives - which has been thrust upon it by society – to cater to social issues that arise out of its operations or which are manifest in its operating environment whether created by it or not. It is insufficient for a corporation to do only what is necessary in law to remain operative. A corporation with a solely shareholder supremacy orientation will not be sustainable in contemporary business. This is not to dismiss the ever-present influence of the Anglo-American model of capitalism and the assumption of free market economic principles exemplified in the doctrine of the distribution of resources according to ‘market forces’ of demand and supply.

### **3.6 The Scope of CSR**

A discussion that seems to continue is the extent to which business is expected to embrace the plethora of responsibilities which society is calling for it to take in respect of its activities. So far, CSR has been identified as encompassing issues in human rights, employment, ecological environment, the internet, marketing, banking, etc. making the scope of CSR difficult to

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<sup>215</sup> Christian Pieter Hoffmann, Peggy Simcic Brønn and Christian Fieseler, ‘A Good Reputation: Protection against Shareholder Activism’ (2016) 19 Corporate Reputation Review 35.

define with exactness.<sup>216</sup> This is not surprising considering the ever-increasing and changing social issues associated with corporations, especially the MNCs.

All activities that business engages in outside of its operations have been dubbed CSR. The response of business after Hurricane Katrina in New Orleans, US in August 2005 is an example of this phenomenon.<sup>217</sup> In a report produced by an NGO – Corporate Research Centre – Walmart one of the world’s biggest retail companies was praised for taking opportunity of the disaster to improve its own image through involvement in the rehabilitation and redevelopment of affected people in the devastated areas. The success of Walmart led to the establishment of a public-private “clearing house” for disaster management called the National Business Emergency Operation Centre (NBEOC). Companies receiving public approval and employees taking pride in their companies are some of the benefits corporations earn by responding to disasters. There seems to be a conventional scope of CSR and newly developing frontiers.

### **3.6.1 *Conventional Scope and Limitations***

The conventional scope of CSR is characterised by corporations being philanthropic and determining the projects and how much they spend and when on social issues. Conventional CSR was practices in the US after the Great Depression of 1929 by large corporations like Ford by catering to the welfare needs of its employees. CSR as practiced was indicative of the presumption that CSR is an objective pursued *after* business has made profits;

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<sup>216</sup> Various texts have included and categorised case studies from these different areas of social interaction and more. See for example, Andrew Crane, Dirk Matten and Laura J. Spence, ‘Corporate Social Responsibility Readings and Cases in a Global Context’ (eds) (Second edition, Routledge 2014) v-vii. See also Thomas Donaldson and Al Gini, ‘Case Studies in Business Ethics’(eds) (Fourth edition, Prentice-Hall 1996) v-x.

<sup>217</sup> See the article How Hurricane Katrina changed Corporate Social Responsibility’ Huffington Post 26 august 2014 at <[http://www.huffingtonpost.com/ryan-scott/how-hurricane-katrina-cha\\_b\\_8043692.html](http://www.huffingtonpost.com/ryan-scott/how-hurricane-katrina-cha_b_8043692.html)> accessed 16 September 2015.



shareholder interest was regarded as primarily – often exclusively to that of any third party or stakeholder. CSR in this fashion could only be practiced by the very large corporations or those influenced by altruistic motive alone. It was also not thematically adopted throughout the corporation but was a matter left for the whims of the directors.

It is difficult grasping the boundaries of CSR. It seems to be all that is not legislated presently. Most corporations in the world now issue CSR reports for public consumption. Though used in assessing marketing and reputational standing CSR is now being directed by the society and driven by public interest. As most companies would benefit from this favourable public perception, CSR has become a useful tool for meeting society's expectations of business. The question to ask of CSR boundaries may be; what is not covered by CSR rather than what is? It is harder to find exclusions by business of the extent to which they could relate their CSR agenda.

Nowadays, the extent of the social responsibility of business extends to bribery and corruption, human rights, the environment and climate change, ethical investment. The reasons corporations embark on CSR has been stratified by David Vogel<sup>218</sup>. Pillay also identifies that CSR has been implemented by companies for among other things, philanthropic and ameliorative purposes at a cost to business.<sup>219</sup>

### **3.6.2 (Re)Constructing Contemporary CSR**

The justifications for adopting CSR by business should reside in the values enunciated by society; this is where the interest of business, the state and society are in conjunction. It is posited that debates in contemporary CSR should be informed principally by needs of society, with business being only a component part - howbeit, a very important one. It is

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<sup>218</sup> David Vogel, *The Market for Virtue* (Washington DC: Brookings Institution Press, 2005)

<sup>219</sup> Renginee Pillay, 'The Changing Ideas of Corporate Social Responsibility, CSR and Development in Context: The Case of Mauritius', (DPhil thesis, University of Kent 2009)

further posited that the interest of business is not at variance with those of society as a whole. The identification of mutuality of interest is, therefore, vital to eliminating, if not eradicating the conflict observed in the current debate. The import here is that business was made for society and not society for business. Business although a natural development from human interaction since the days of trade by barter, the modern corporation is a contraption conceived for societal benefits. It ought to, therefore, promote activities, not at variance with social norms and ethical standards.

An important limitation of the extent of business' pandering to social issues needs be clarified since it has been argued detrimentally to primary corporate objective of making profit, that society's interest should be pursued by business even if it is unprofitable.<sup>220</sup> It is argued that should this be the case, no business will exist to serve the interest of others and not itself. The primary motivation to form corporations is a common interest of individuals and/or corporations that desire to invest their capital for the returns of profits. Where corporations pursue primarily this objective and not the intrinsic interest of making profit.

Importantly, for example, some environmental and labour issues that caused concerns in society regarding business activities have been ultimately legislated. Issues relating to gender discrimination, employment of minors, working environment in factories, racial discrimination and product safety invariably received the attention of society's disapproval before being passed into law. This is one benefit of CSR, it uncovers social issues and changes with the times faster than corporations or government can.

Also, the rising profile of CSR in business and management studies, has informed the growth of an industry that services corporations and other institutions on compliance and regulatory

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<sup>220</sup> See Archie B. Carroll, (n6) 275 noting 'a public survey conducted by Opinion Research Corporation in 1970 in which two thirds of the respondents believe business had a moral obligation to help other major institutions to achieve social progress, even at the expense of profitability'.

issues. Corporate managers who engage this growing sector actively may earn comparative advantage over its competitors by delivering social benefits with its core corporate mandate of making profits. In developing countries with less regulation, corporate managers still determine whether or not - and how far - they can undertake socially responsible projects. The decision on CSR is often made as a business decision requiring a “business case” justification. CSR presently cannot ignore business considerations in the process of corporate law reform, but until CSR laws are enacted in most jurisdictions, social responsibility will be ‘regulated’ by the conscience of corporate managers.

### **3.7 Criticisms of CSR**

CSR has been widely adopted by companies with a survey of the UK and US Fortune 500 companies revealing about \$15 billion being spent annually on it.<sup>221</sup> Regardless of the widespread adoption of CSR values it has been criticised mainly by shareholder value theorists. CSR has also been under severe condemnation as the excerpt from a newspaper article will reveal regarding the activities of Volkswagen the German automobile maker embroiled in corporate scandal in 2015 for falsifying emission test results in its vehicles. The article reads in part as follows;

Its annual report was packed full of lovingly described projects it backed and charities it supported. It was a “thought leader” on dozens of different weighty issues, and a “change agent” for improving society. Globally, it was ranked as the 11th best company in the world for its corporate social responsibility work. What that surely tells us is that CSR has become a racket

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<sup>221</sup> Alison Smith, ‘Fortune 500 Companies spend more than \$15bn on Corporate Responsibility’ *Financial Times* (12 October 2014) Available online at: <<http://www.ft.com/cms/s/0/95239a6e-4fe0-11e4-a0a4-00144feab7de.html#axzz4GBF7GVjS>> accessed 2 August 2015.

– and a dangerous one. It allows companies to parade their virtue, and look good, while internal standards are allowed to slip. In fact, the social responsibility of companies is very simple – to make good products, to honour their contracts and to pay their staff and suppliers on time. Everything else is just a smokescreen.”<sup>222</sup>

The argument against CSR is that, demanding that companies do more than making good products and meeting legal requirements is unwarranted. State-regulation of business-society relations is perceived as government being ‘paternalistic’. However, the Volkswagen case, in my view, supports the case for institutionalised CSR rather than discarding it. The deliberate and systemic falsification of corporate data is one of the issues CSR seeks to tackle – and it does not cost money but takes moral astuteness.

It can be argued that this friction is an extension of the libertarian versus totalitarian view of social organisation; libertarianism exalts the freedom to make individual choices as against regulatory dictations. This notion still makes the rounds but not with the same fervour as it once did. A more contemporary view of CSR suggests that it is being considered as the panacea to the short-term outlook of business for a more enduring focus on ‘sustainability’. The display of corporate aggrandisement against mass poverty, lack of transparency and poor auditing and reporting practises in accounting that are often published when corporations are being ‘bailed out’ by states as in the global financial crisis of 2008 – 2009 legitimises public participation in corporate governance discuss.

Another criticism that CSR distorts “economic efficiency” when profits are diverted to “non-profit-maximising purposes” has been rejected by Manne who argues that philanthropic

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<sup>222</sup> Matthew Lynn, ‘Corporate Social Responsibility Has Become A Racket – And A Dangerous One’, *The Telegraph* (London, 28 September 2015).

<http://www.telegraph.co.uk/finance/newsbysector/industry/11896546/Corporate-Social-Responsibility-has-become-a-racket-and-a-dangerous-one.html> Accessed 2 October 2015

causes of business are – as they were wont to be in the 1950s and 1960s - “likely to constitute business expenditures than true charity”.<sup>223</sup> It should be noted that some fallouts of business do not require the expenditure of funds if the ‘do no harm’ principle is adhered to. Also, what is the cost of human loss as in the *Bowoto* case when life is irreplaceable. The essentialisation of cost in defining CSR, limits its application to practices or activities in which corporations are required to fund from their profits. Where corporations make ethical choices in the choice of suppliers or answer to demands for explanation of its behaviour, should qualify as CSR activities and so acknowledged in the definition. CSR activities should not be defined in fiduciary terms only; curbing rapacious profiteering is also CSR. Contemporary CSR offers business the opportunity to enforce moral codes that have been largely unsuccessful and led to increased corporate moral hazards.

### **3.8 Summary**

The relevance of CSR becoming clearer as more companies embrace it and corporate accountability is setting norms for corporate managers and the notion of the responsibility owed to society is gaining better definition. Long-term rather than short-term objectives are being considered for corporate, social and environmental sustainability. The social responsibility of corporations as previously widely-conceived to be the obeying of law is seemingly proving inadequate to meet growing global social challenges giving rise to demands for action beyond compliance with legal rules. It can be seen also that the changing times has led to changes in the accountability agenda and has opened CSR up to reconceptualisation in definition and scope. The criticisms of CSR are being drowned by

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<sup>223</sup> Henry Manne, ‘The “Higher Criticism” of the Modern Corporation’ (1962) 3 Columbia Law Review 399, 416 - 417.

developmental demands of corporations and regulation is being considered with calls for new ‘inclusive capitalism’.

In view of the developments of CSR, especially the emphasis on curbing corporate excesses, the next chapter is devoted to examining the various regulatory regimes that have been used to extract the commitment of corporations to CSR. In the next chapter, the formal and informal framework for regulating CSR will be considered. In particular, the relevance of the various legal and non-legal instruments - both at national and international levels – will be given careful consideration.

Despite the many criticisms of CSR, corporations have embraced it somewhat ‘half-heartedly’ out of social compulsion and committing more to rhetoric than action. Votaw noting that a reversal to a world without CSR is not probable, has predicted that “action, not words, are the goal”<sup>224</sup> of the CSR movement. To attain corporate cooperation or compliance with CSR, regulation has taken many forms which are examined next.

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<sup>224</sup> D Votaw, ‘Genius Became Rare: A Comment on the Doctrine of Social Responsibility Pt. II’ (1973) 15(3) *California Management Review* 5, 8

## **CHAPTER FOUR**

### **Regulating CSR: The challenge for law**

#### **4.1 Introduction**

As discussed in the previous chapter, the various notions that have honed business-society relations have referenced the concepts of accountability, responsibility, and sustainability. Following from the identification of the various concepts of CSR, is the vexed issue of the appropriate methods and means of regulating CSR. This chapter focuses on the main themes by which the regulation of CSR is presented in corporate law.

The generation of the rules and their enforcement regimes are quite different. So, as some rules are made by business and its affiliate organisations, some are made by external organisations who seek to extract compliance. Internally generated regulations are entirely whimsical and mostly philanthropic gestures of corporations. The external regulations are mainly guidelines and codes which tend to be broader in scope and require the making of reports for public consumption. Several means are employed in assessing and evaluating adherence to the regulations with ratings and certifications becoming importance in evaluating corporate response to social responsibility.

Regarding the regulation of the social responsibility of business, law has been relegated as a regulatory tool but is becoming fashionable, especially in developing countries. This trend is examined to understand the utility of the law in business-society relations. As the utility of law is being touted by some, critics have not been devoid of criticism also. In the final analysis, is law desirable as a regulatory tool in the context of developing countries to regulate business' interaction with society? There seems to be both a 'business case' and

‘public good’ argument for this proposition. Amongst the external regulatory influences are mandatory standards, principles, guidelines or codes that state agencies or the law have set for corporations such as listing requirements under stock exchange bye-laws. In some countries as we will see, legislation has been passed to compel compliance with CSR regulations, of course, with legal sanction for non-compliance. Bantekas has identified four sources of CSR as public international CSR instruments, NGO guidelines on CSR, corporate codes of conduct and regulation of CSR through domestic legislation<sup>225</sup> but its practice differs from country to country and may differ within the same corporations in two countries.<sup>226</sup>

The development of soft law and hard law in relation to the regulation of CSR globally is examined in this chapter. That new ways are being sought to regulate corporations is not in controversy. What is in contention is the form and means of achieving it. The paradigm of binding and non-binding regulatory schemes that have been employed in the regulation of corporations is constantly being stress-tested. A balance is constantly being sought between the means of achieving regulation in public interest without damaging the confidence of individuals to engage in productive and profitable enterprise. The shades and permutations of regulatory schemes can be endless. For this study, however, it suffices to look at the major regulatory schemes for corporate social responsibility; self-regulation, state regulation and non-binding voluntary codes of international institutions. The challenges that corporate law faces in being instrumental in the regulation of CSR will be examined by evaluating the utility of law in a corporate environment in which ‘a viable business case’ is prioritised and equated to the public interest – and sometimes above it.

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<sup>225</sup> Ilias Bantekas, ‘Corporate Social Responsibility in International Law’ (2003) Boston UILLJ 309, 317 - 325.

<sup>226</sup> Michael Blowfield and Jędrzej George Frynas. ‘Editorial: Setting New Agendas – Critical Perspectives on Corporate Social Responsibility in the Developing World’ (2005) 81 (3) International Affairs 499, 502.



## 4.2 What is regulation?

According to the Merriam-Webster Dictionary ‘regulation’ refers to ‘an official rule or law that says how something should be done’ or ‘the act of regulating something’.<sup>227</sup> The dictionary and legal sense in which the word is used is not different. It suffices to state that regulation refers to both binding and non-binding rules, and that it can be legal and non-legal.<sup>228</sup> Osuji states that regulation is ‘a method of stipulating responsibility by indicating the existence and sanctions for breach of rules’.<sup>229</sup> The Organisation for Economic Cooperation and Development (OECD) defines “regulation” as the “imposition of rules by government, backed by the use of penalties that are intended specifically to modify the economic behaviour of individuals and firms in the private sector”.<sup>230</sup> The latter definition presumes the presence of sanctions for not complying with regulations. This definition takes for granted that in self-regulated environments the regulator and the regulated may be one and the same, so that consequences may follow but sanctions may not. The meaning of regulation in the context of this study must therefore be the first definition which identifies the presence of the rules simpliciter. It is another matter whether there is sanction for breaching it or not.

The development of regulations can be endogenous by being developed and supported from within the corporation or exogenous by being imposed from outside authorities. Corporations have therefore developed regulatory schemes individually and collectively – mostly at the national level. Most regulations for corporations, however, are imposed by outside forces, chief among them being the state. Other international organisations though voluntary and non-

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<sup>227</sup> See the Merriam-Webster Online Dictionary meaning of ‘regulation’: <<http://www.merriam-webster.com/dictionary/regulation>> accessed 27 June 2016.

<sup>228</sup> Legal rules here refer to legislation or quasi-legislative instruments that have the force of law.

<sup>229</sup> Onyeka Osuji, ‘Fluidity of Regulation-CSR Nexus: The Multinational Corporate Corruption Example’ (2011) 103 *Journal of Business Ethics* 31, 46.

<sup>230</sup> See the definition of ‘regulation’ in the Glossary of Statistical Terms on the OECD website: <<https://stats.oecd.org/glossary/detail.asp?ID=3295>> accessed 8 December 2015.

governmental have also influenced business in such a way that not to join them may result in loss of credibility by a corporation.

Internationally, the best efforts at producing a globally accepted set of regulations has been made by the UN organs. The main benefit of the UN-sponsored regulatory schemes is the fact that states subscribe to them. The widespread coverage of UN schemes also gives it the ‘universality’ quality i.e. of having a universal appeal, since it is emanating from the apex comity of nations organisation. As will be seen, international norms acknowledged by UN-sponsored regulations often incite the creation of legislative instruments and some issues having global importance.

A major debate in corporate law is the sufficiency or otherwise of existing regulations to balance the much-talked-about ‘loop holes’ in corporate law. Since the last global financial crisis, a debate between the introduction of a ‘tsunami’ or ‘sprinkler’ system of regulation continues.<sup>231</sup> In whatever form regulation is adopted, the challenge of formulating CSR laws lies in its acceptability.

The compliance with any regulation whether endogenous or exogenous depends on its acceptability. The acceptability of a regulation turns on how such regulation is motivated; is it fair, in the public interest and reflecting of the philosophies of the regulated. Clearly, the self-regulatory scheme of business is in tandem with the philosophy of shareholder primacy. On the other hand, a stakeholder view is reflected in regulations issued by institutions – state or non-state – representing a wider constituency. For example, the social contract theory of corporate law supports a stakeholder approach to regulations. This view is promotive of the corporate citizenship theory and a social objective for corporate existence. This pluralist view

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<sup>231</sup> The regulatory ‘tsunami’ refers to the use of all necessary regulatory tools including legislation to control business, and the ‘sprinkler’ system refers to using regulation as sparingly as possible. It is clear this represents both the stakeholder theory and the shareholder value theory of corporate law.

of corporate objectives, in the current era of expanding globalisation can be instrumental in achieving the concretised, thematic and systemic imbuelement of corporate social responsibility and ethical values norms in international law. Conversely, transnational and national regulatory instruments are converging due to international standards that have been gaining relevance globally. In most jurisdictions, the tendency is for corporations to be sensitive to and not otherwise. As political debates touch on this issue, the wheel of democratic processes continue to move closer to synthesising social norms to churn out legislative regulation of business.

Where legislation, statutes or other legal impositions are made, it is argued that some theoretical underpinning can be identified. The theories which underpin and influence the making of international and national law about business can be economic, social, political or a combination of any of these factors. In other words, theoretical and philosophical ascription are made when discussing the motive for making international and national laws regulations on CSR.

### **4.3 Self-Regulation**

The idea of self-regulation of business refers to the prerogative of companies in fashioning a set of rules themselves or adopting one already developed voluntarily. In its early years - predominantly before the 1950 when the stakeholder philosophy was gaining momentum – CSR was totally self-regulated. CSR activities were either designed by, or adopted for, the corporation under the control of management; consideration of externalities did not inform decisions. The champions of CSR claim reasonably, that corporate breaches infringe on the enjoyment of social, economic and cultural rights and sometimes border on criminalities. It is apparent that in the absence of a unified global position on how to rein in corporate power,

the self-regulatory regime established through the dominance of Anglo-American capitalism has gained primacy.<sup>232</sup> The value of corporate law in shaping this trend has been much debated.

The functions and purpose of the law is to determine the allocation of rights, obligations and duties and benefits through a fair and just means whilst tapping into the conscience of the society in which the law is to operate. In the modern world, the explosion of web-based businesses and transactions require strong socially-sensitive regulation and some sanity can come through CSR. The impact of different world cultures on a single global platform could be challenging to harmonise, however, the universality of it also provides a basis for common regulation. This is where international law can be useful and developed according to the common interest of the community of nations.

As we have seen in the previous chapter, the norms laid down through standards and codes adopted by business have been liberal. The ultimate compliance of business to the relevant provisions could not be compelled and noncompliance was not sanctioned. The force of compliance depended on peer pressure. In short, they can be adjudged inadequate. The mere fact that so many have been produced lend credence to this assertion. The introduction of legislation does not normally attract the same lackadaisical or pretentious compliance, simply because of the ever present “threat” of sanction even in the cases of ‘recklessness’ or ‘negligence’. Once norms become law, they are transformed from aspirational objectives to mundane expectations and are no longer negotiable. This certainty is good for business and society. It becomes an unwavering standard and a common code not subject to whimsical variableness. The opportunity provided by the regulatory Codes of quasi-governmental and supra-national institutions such as the Organisation for Economic Cooperation and

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<sup>232</sup> Historically, business was not in a position to dictate the mode of regulation but as they grew in the capitalist economies in the early 20<sup>th</sup> century this position was secured by sheer

Development (OECD) and the Extractive Industry Transparency Initiative (EITI) is some degree of harmonisation and certain expectation of business. Some multinational institutions have been lauded for driving progress by “bringing together disparate and often rival parties to agree on common frameworks and standards for achieving more systemic and transformational change”.<sup>233</sup> The codes offered business for its voluntary subscription has an inherent flaw or downside - its ‘comply or explain’ feature.

As already discussed, corporations since the Great Depression started responding to social needs by identifying and resolving employee issues that threatened workers’ productivity or that simply encouraged workers’ loyalty. Individually, companies determined the needs and spent as much as they wanted within self-accounting processes; no reporting of their actions was demanded nor required. However, as industry began to develop around certain trades or productions lines such as in automobile and aviation, corporations devised means of collective action. Industry standards were thus introduced by corporations to regulate their respective specialties.

As public interest grew in corporate practices, the need to respond to wider social concerns required the presentation of rationale and justification for corporate behaviour. Companies therefore responded to employee issues through the adoption of charters codes, assessment or rating profiles and certifications that advanced international norms. Companies therefore sought to adopt so-called ‘best practice’ models. Nationally and internationally codes, standards, ratings and certifications were developed by non-governmental organisations who took opportunity to service industry. Legislations is also emerging in developing countries but not in international law.

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<sup>233</sup> Jane Wilson, ‘Corporate Social Responsibility: Emerging Good Practice for a New Era’ *OECD Observer* (Q2 2014) Published online and available at: <[http://www.oecdobserver.org/news/fullstory.php/aid/4369/Corporate\\_Social\\_Responsibility:\\_Emerging\\_good\\_practice\\_for\\_a\\_new\\_era.html](http://www.oecdobserver.org/news/fullstory.php/aid/4369/Corporate_Social_Responsibility:_Emerging_good_practice_for_a_new_era.html)> accessed 02 August 2015.

#### **4.3.1 CSR Standards and Codes**

As the accountability movement demanded greater responsiveness to social issues, several Codes were issued for corporate consumption and implementation. Most of the early Codes emanated from non-governmental institutions and had two distinctive features; they were not mandatory and when adopted had no penalties attached for con-compliance. The ICC's "Guidelines for International Investment" (ICC Guidelines) published in 1972 expressly declared that its rules, which set out guidelines for investors and their host and home countries, were not to be considered a "rigid code of conduct".<sup>234</sup> They were to be regarded merely as recommendations and without binding effect.

Notably, these standards and codes were in accordance with stakeholder theory of corporate law and admitting of wider corporate objectives than the unitary interest in shareholder value. Ultimately, business has surreptitiously owned the responsibility of doing all it can to be socially responsible by undertaking social projects in the communities in which they operate. When pressure has been brought to bear on them, they have responded with some degree of responsibility. I argue, however, that the inadequacies of the current system call for a more radical solution given the inflexible position of business. The CSR standards being proclaimed by business are always tainted and laced with the notion of impunity: there is usually no recourse to an independent assessment mechanism or fault finding and blaming scheme. It is all done internally and has to be accepted as demonstrated by business.

The competition amongst business has been the bane of the self-regulatory system. As one company attempts to be 'straight' an advantage may open to the other. The drive for individual success often means that companies will use whatever means they can employ to achieve success. At this point, ethical considerations can be stretched to breaking point - and

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<sup>234</sup> Introduction, International Chamber of Commerce, Guidelines for International Investment (1972)

are often broken - to achieve a corporate objective. In a self-regulatory environment, the counterbalancing force is often efficient institutions of state or a vigilant civil society as was demonstrated in the case of was again demonstrated in a case concerning Shell in the UK in 1995 where public opinion swayed corporate action.<sup>235</sup>

The popularity of standards and codes is maintained by the benefits of corporations being 'branded' or certified. Although certifications costs business money which they are not wont to throw away, negative corporate reputation may cost far more. Consumers in the developed countries are ordinarily making financial decisions based on ethical considerations. At individual and corporate levels this can be easily confirmed through packaging information. For example, FairTrade labels on products gives consumers confidence as they develop an ethical conception of the producer. Therefore, corporations that, for example, only use recycled paper ensure to inscribe their letterheads accordingly.

#### **4.3.2 Ratings**

Many rating agencies have emerged in the last few decades with commanding positions and influence in the business world globally. Scalet and Kelly note that the "CSR movement has progressed over the decades from analysing a concept of responsibility to developing specific measurement tools for accessing responsibility"<sup>236</sup>. They further classified a rating agency as "any organisation that rates or assesses corporations according to a standard of social and environmental performance that is at least in part based on non-financial data"<sup>237</sup>. Notable among the rating agencies are FTSE4Good Index Series, Dow Jones Sustainability Index

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<sup>235</sup> A furore developed in 1995, when the British government requested a proposal from Shell to dispose a storage facility considered economically unviable in the North Sea. Greenpeace activists protested for weeks spearheading a boycott of Shell service outlets in Germany and elsewhere forcing the safe dismantling of the facility in Norway according to the demands of the protesters.

<sup>236</sup> Steven Scalet and Thomas F. Kelly, 'CSR Rating Agencies: What is Their Global Impact?' (2010) 94 (1) Journal of Business Ethics 69, 70

<sup>237</sup> *ibid*

which are subsidiaries of larger proprietary stock exchanges. Kinder, Lydenberg, Domini Research & Analytics (KLD) and Innovest Strategic Value Advisors and Standard Ethics<sup>238</sup> are private, independent and non-proprietary.

Ratings agencies have gained importance by assessing corporations for the risks associated with the implementation of CSR. The findings of the ratings agencies provide qualifying data for the insurance industry. This is not rampant but is gaining momentum. However, as claims against corporations due to indiscretion rise, the role of insurers in covering the risk of business against possible claims will rightly gain relevance. States often pool funds to cover the risk of industrial disasters in addition to the efforts of business to provide indemnity for operational hazards. The U.S. Hazardous Substances Trust Fund<sup>239</sup>, which pools from taxes levied on petrochemical companies, is used to clean up toxic wastes associated with their activities. It provides ready fund in the eventuality of a spillage or other hazardous disaster.

Aaron K. Chatterji et al., have attempted to measure the efficacy of rating agencies and concluded that despite the “substantial resources” utilised by one of the foremost rating agencies, obtaining reliable data of companies’ environmental management systems “is difficult to do well”.<sup>240</sup> This does not undermine the credibility or value of rating agencies but underscores the difficulties being encountered in the process of data collection. The greater challenge for rating agencies seems to be the use of varies rating criteria and the lack of a standardised format of data assessment due to their varied specialties and interests.

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<sup>238</sup> Standard Ethics is a rating agency that reports on sustainability, corporate social responsibility (CSR), socially responsible investing (SRI) and corporate governance. It is based in Brussels and London and actively promotes the guidelines and codes of the UN, OECD and EU.

<sup>239</sup> The U.S. Hazardous Substances Trust Fund was set up under the 26 U.S. Code § 9507 - Hazardous Substance Superfund.

<sup>240</sup> Aaron K. Chatterji, David I. Levine and Michael W. Toffel, “Do Corporate Social Responsibility Ratings Predict Corporate Social Performance?” (2009) 18 (1) *Journal of Economics & Management Strategy* 125.



### **4.3.3 Certifications**

There are many CSR certifications available with some gaining international recognition. Prominent among them are the OHSAS 18001<sup>241</sup> for occupational health and safety, ISO 14001 for environmental management and ISO 26000<sup>242</sup> for social responsibility. According to ISO, standardisation can promote “technological, economic and societal benefits” and “help to harmonize technical specifications of products and services making industry more efficient and breaking down barriers to international trade”.<sup>243</sup> Fair Trade certification also focus on “better prices, decent working conditions and fair terms of trade for farmers and workers”.<sup>244</sup>

## **4.4 Legal Regulation**

Regulation more widely connotes the existence of rules and the use of appropriate determinable sanctions against non-compliers. In its raw form, legislation is the ultimate legal regulation. It can be found in primary legislation or secondary legislation.<sup>245</sup> Primary legislation. Legislation usually is enforceable by organs of state and are subject to judicial

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<sup>241</sup> OHSAS stands for Occupational Health and Safety Assessment Specification. It is an internationally accredited management system and has been adopted by a large number of corporations in the oil and gas industry.

<sup>242</sup> ISO stands for International Organisation for Standardisation. It has developed many internationally recognised certifications in most areas of corporate management, health and safety and sustainability.

<sup>243</sup> See ISO website: <<http://www.iso.org/iso/home/about/iso-and-developing-countries.htm>> accessed 10 November 2015.

<sup>244</sup> FairTrade Foundation is dedicated to fair conditions for workers especially in developing countries. See: <<http://www.fairtrade.org.uk/en/what-is-fairtrade/what-fairtrade-does>> accessed 17 August 2015.

<sup>245</sup> Primary legislation refers to laws made by the parliament of a state or through democratic processes. Secondary legislation is also called delegated legislation and is usually made by the executive arm of government exercising laws granted under a primary legislation. Secondary legislation may need to be ratified by the parliament but where it is not, it makes for the quick passage of supplementary laws by officials who have in-depth knowledge by reason of a position or commission.

interpretation when contested in courts of competent jurisdiction but not always. The legal maxim *ubi societas, ibi jus*<sup>246</sup> is an acknowledgement that every society has laws or rules that bind them. The modern society is so complex that laws exist for many private and public issues to define the boundaries of private-public law, civil-criminal law, national-international law. Business has so far advocated for the exclusion of CSR from legal regulation and has succeeded to evade legislative capture in many developed nations due to their capitalist orientation.

The frequent occurrence of corporate imprudence - especially when it has global consequences - has made the legal maxim *ubi jus, ibi remedium*<sup>247</sup> appealing to advocates demanding tighter regulation of business generally and CSR in particular. The principle that wrongs require remedy was well settled by the approval of the reasoning of Lord Holt CJ by the House of Lords in *Ashby v White*<sup>248</sup> when he pronounced in that case:

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and, indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.<sup>249</sup>

Although the social responsibility of business is identifiable, the same cannot often be said of the attainment of appropriate remedy. This is because, the mostly available forms of business regulation are either self-regulatory schemes or soft law instruments. Hard law exists but barely when compared with the preponderance of non-binding rules.

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<sup>246</sup> This is a Latin legal maxim meaning 'where there is society, there is law'.

<sup>247</sup> This is a Latin legal maxim meaning 'meaning where there is a right infringed, the law provides a remedy'.

<sup>248</sup> *Ashby v White* (1703) 92 ER 126

<sup>249</sup> It is accepted that this case turned on the pre-existence of legal rights it is posited that in cases where social, cultural or other human rights are infringed injury requires remedying.

#### **4.4.1 Soft Law**

Soft law is often a rule that reflects the statement of an accepted norm. The standards and codes produced by international organisations are considered soft law.<sup>250</sup> Soft laws are widely subscribed but invariably don't have the sanction of law. The production of a set of standards or codes is invariably an indication of an accepted rule or a proposed best practice guideline. It is usually only instructional and advisory but not enforceable. The response of business by the adoption of soft law instruments was in tandem with business expectations. The development of soft law instruments was in response to business apprehension of the effects of mandating CSR – a matter of convenience for business before the last global financial crisis. Tanusree Jain et al. though contend that studies based in emerging countries find that 'exposure to institutional pressures from international markets, inter-governmental organizations, and parent companies are important drivers of managerial motivations behind corporate responsibility'<sup>251</sup> Several international organisations have developed 'codes', 'guidelines', 'principles', 'regulations', and 'standards' to motivate MNCs of their members. Amongst the first attempts at proffering a CSR standard came in 1977 with the Global Sullivan Principles of corporate social responsibility which enjoyed some acceptance in the U.S.<sup>252</sup> Other standards such as ISO 26000. These documents largely considered as "soft law", are invariably crafted as admonishments.

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<sup>250</sup> See generally for discussion on soft law and hard law; C. M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 (4) *International and Comparative Law Quarterly* 850. Also, Tanusree Jain, Ruth V. Aguilera and Dima Jamali, 'Corporate Stakeholder Orientation in an Emerging Country Context: A Longitudinal Cross Industry Analysis' (2016) *Journal of Business Ethics* 1

<sup>251</sup> Tanusree Jain et al., *op cit*

<sup>252</sup> Rev. Leon Sullivan produced a newer version of his principles which were endorsed by UN Secretary General Kofi Anan in 1999 urging companies around the world to adopt his 8-point principles which were aimed principally at supporting "economic, social and political justice by companies where they do business".

See: [https://www.heartland.org/sites/all/modules/custom/heartland\\_migration/files/pdfs/6789.pdf](https://www.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/6789.pdf)

The varying degrees of accomplishments recorded by corporations in adopting CSR principles can be explained by the lack of sanction for not complying with the codes that are considered soft law instruments. Chinkin has contended, however, that the impotency of soft law instruments is not always due to the lack of enforceability, but for lack of political will by contracting states.<sup>253</sup> Notwithstanding the lack of sanctions, organisations such as the OECD, Transparency International (TI) and EITI have gained substantial membership from both government and business that have subscribed to achieve international ‘best practice’ and standardisation. Despite a plethora of criticisms, they have been hailed as useful and filling the lacuna created by the absence of formal regulatory instruments with the power of sanction.

The concerns that were raised sequel to the irreverent operations of big business in the mid-1900s were not only economic but also political. This position is arguable given their enhanced political influence arising from their increased wealth. As economic solutions were being sought to the issues relating to the financial crisis, political considerations were deliberated upon in tandem.<sup>254</sup> The effect of globalisation and the imperativeness of international efforts regarding CSR. The need for a concerted effort stems from the “common social consciousness”<sup>255</sup> that permeates the discussion on CSR. Brierley argued that “the strength of any legal system is proportionate to the strength of such sentiment”.<sup>256</sup>

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<sup>253</sup> C. M. Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 (4) *International and Comparative Law Quarterly* 850. This study however accepted that soft law is often a confirmation of established norms.

<sup>254</sup> Chinkin op cit. This study maintains that political will is an influential factor when considering the implementation of any international regulation adopted by state; whether binding or non-binding, lack of political will can determine the level of acceptability.

<sup>255</sup> DJ Harris, *The Law of Nations Cases and Material in International Law* (6<sup>th</sup> edn, Sweet and Maxwell 2004) 4

<sup>256</sup> *nl supra*

The global nature of the issues raised in CSR discuss has made the need for an international response impervious. The forte of any ‘international corporate law’ developed in response to the global requirement for corporations to consider social issues may be limited primarily to decarbonisation and climate change. This scenario is predictable considering the cross-border impact of corporate activities and the transcendence of climatic conditions.

#### **4.4.2 *Hard Law***

The development of hard law in regard to CSR regulation is a much recent development. National laws seem to have taken the lead in this respect with the first debates surrounding Section 172 of the UK Companies Act 2006. Most literature canvassing that states introduce legislation mandating CSR are considered iconoclastic by classical economic theorists who contend that CSR (in a free market economy) should be left to the caprices of business owners who can do with their profits whatever they wish. This argument has been overtaken by a growing body of research showing that CSR can be beneficial to corporations.

Another jurisprudential contention emerges concerning the right philosophical approach of law to CSR, especially in international law. One of the foremost legal theorists Immanuel Kant predicted international law union will be formed in 1887 when he described a “universal right of mankind” and posited that interactions of mankind required a community of nations to protect global interest;

Nature has enclosed them altogether within definite boundaries, in virtue of the spherical form of their abode as a *globus terraqueus*; and the possession of the soil upon which an inhabitant of the earth may live, can only be

regarded as possession of a part of a, limited whole, and consequently as a part to which everyone has originally a Right.<sup>257</sup>

This notion has been echoed more recently by Philip Allott who has argued that the global community share a “common interest” which should be legislated in international law.<sup>258</sup> The ideological rigidity of capitalists is waning internationally by virtue of the various calls to modify capitalism and CSR may be used for that purpose.

Gráinne de Búrca has explained the propensity of law to achieve a popular appeal in international law due its applicability as (a) an “enabling force” to compel compliance, (b) a “restraining force” to prevent an unwholesome act, (c) it “structures the parameters within which its interlocutors operate – courts being amongst the most authoritative but legislators, executives, administrators and other social actors being also included”, and (d) it has a “symbolic dimension” which “entails the invocation of a claim to legitimacy”.<sup>259</sup> The form of international law has been perceived in various ways including as a “bourgeois imperialist” international law in criticism of the status quo.<sup>260</sup> However, a comprehensive review of the international law theory of Hugo Grotius<sup>261</sup> by John T Parry, and the more contemporary cultivation of it by Hersch Lauterpacht<sup>262</sup> adjudge the present situation the outcome of the “moral necessity of international law”.<sup>263</sup> Rhys Jenkins has linked the recent “wave of

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<sup>257</sup> Immanuel Kant (trs), *The Philosophy of Law* (T & T Clark 1887) 226. The Latin expression ‘*globus terraqueus*’ means the ‘world globe’ and has Spanish origin (*globo terráqueo*).

<sup>258</sup> P Allot, 1989 Josephine Onoh Lecture, ‘International Law and International Revolution: Re-conceiving the World’ reprinted in P Allott, *The Health of Nations* (Cambridge, Cambridge University Press 2005) 399

<sup>259</sup> Gráinne de Búrca, ‘Rethinking Law in Neofunctionalist Theory’ (2005) 12 *Journal of European Public Policy* 310, 319-320.

<sup>260</sup> B S Chimni, ‘An Outline of a Marxist Course on Public International Law’ (2004) 17 *Leiden Journal of International Law* 1-30, 1.

<sup>261</sup> Hugo Grotius is recognised as the founding modern international law.

<sup>262</sup> Hersch Lauterpacht, ‘The Grotian Tradition in International Law’ (1946) 23 *Brit. YB Int’l L.* 1

<sup>263</sup> John T Parry, ‘Grotian Tradition in International Law’ (2013) 35 *U. Pa. J. Int’l L.* 299

regulations” to the corporate collapses witnessed since the turn of this century.<sup>264</sup> This supports the position that state intervention is inevitable for achieving some sanity in the financial sector in the event of corporate indiscretion or the forestalling of the same. The import of section 172 of the Companies Act 2006 is a welcome ‘soft touch’ approach in comparison with the judicial ‘hard touch’ in Indonesia.<sup>265</sup> The idea of state regulation of CSR through legislation is not in sync with the free market economic model practiced in Anglo-American and other jurisdictions where the state’s role is providing the “suitable environment’ for business and not regulating the participants in the economy. Traditionally, businesses have self-governed its interaction with society, and this led to a wide range of voluntary CSR models. Considered collectively, corporations did not harmonise their activities and often did not sustain them beyond their convenience. In this circumstances, especially when considering developing countries and their social needs sporadic and uncoordinated approach to corporate-societal engagement was largely incoherent. Therefore, one of the possible benefits of mandating CSR is the ability to coordinate and predict the results and impact of corporate responses to social issues.

Internationally, no agreement of treaty status has been made, only ‘guidelines’ exist. Fassbender has exposed the transformative development of the UN Charter towards greater solidity while noting the abetment of international law scholars in this regard.<sup>266</sup> The UN has advocated and agreed several Conventions on development, political, social and economic rights. The continental, regional, sub-regional and other overlapping multilateral efforts seem

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<sup>264</sup> Rhys Jenkins, ‘Globalization, Corporate Social Responsibility and poverty’ (2005) 81(3) *International Affairs* 525, 526 for a historical perspective on attempts to regulate business in the last century.

<sup>265</sup> Patricia Waagstein advocates a mixed approach in her paper ‘The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications’ 98 *Journal of Business Ethics* (2011) 455 – 466, 461

<sup>266</sup> B. Fassbender, ‘The UN Charter as the Constitution of the International Community’ (1998) 34 *Columbia Journal of Transnational Law* 529.

to have led to a convoluted international law environment of competing developing norms or “contending global metaprinciples of legal authority”.<sup>267</sup>

The soft law instruments that abound have at the least inspired the emerging legislation on CSR. The first international attempts at producing a document with global adjuration are the UN Global Compact 1999 and the OECD Guidelines for Multinational Enterprises which were “voluntary corporate responsibility initiatives” drawn “on international standards enjoying widespread consensus”.<sup>268</sup> The introduction of the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises in 2003<sup>269</sup> did not ‘seem to be as influential as any of its other counterparts; business organizations have objected to its somewhat unrealistically broad scope and binding references’<sup>270</sup>. The OECD guidelines were improved and relaunched in 2011, the same year in which John Ruggie published the culmination of his six-year research into business-society relations called the UN Guiding Principles on Business and Human Rights. Several spin-off and collateral agreements were reached under the auspices of the major efforts addressing specific issues

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<sup>267</sup> Neil Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ (2008) 6 (3-4) *Int. J. Constitutional Law* 373, 386.

<sup>268</sup> ‘The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions’ a document by the UN Global Compact Office and the OECD Secretariat, has been developed as an input to the OECD Investment Committee's work on the implementation of the OECD Guidelines for Multinational Enterprises date 26 April 2005, 1. The Reverend Leon H. Sullivan proposed ‘The Sullivan Global Principles of Corporate Social Responsibility’ in 1999 to promote social, economic and political contribution by all corporations. This work did not gain notoriety but largely incorporated CSR all popular principles.

<sup>269</sup> Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, (2003) U.N. ESCOR C.H.R., 55th Sess., 22nd mtg., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2.

<sup>270</sup> Ilias Bantekas, ‘Corporate Social Responsibility in International Law’ (2003) *Boston UILLJ* 309, 319



such as corruption and environmental degradation.<sup>271</sup> CSR toolkits have also been produced by many international organisations which are mainly geared at transnational corporations.

Generally, all the quasi-governmental international financial institutions and multilateral organisations have developed CSR principles that they actively tout as international benchmarks. The World Bank and IMF have adopted internal CSR guidelines including publishing reports aimed at displaying ethical and transparency standards. International Labour Organisation (ILO) Tripartite Declaration Concerning Multinational Enterprises and Social Policy (the ‘ILO Tripartite Declaration’) 1977, which was amended in 2006 invited “governments of States Members of the ILO, the employers' and workers' organizations concerned and the multinational enterprises operating in their territories to observe the principles embodied therein”.<sup>272</sup> All of the early ‘guidelines’ were to be voluntarily adopted and member states of international organisations such as the ILO only “invited” governments to apply the guidelines. Though without the sanction of penalties, the inclination to international convergence and the development of norms cannot be overlooked.

The United Nations Conference on Environment and Development (UNCED)<sup>273</sup> which held in 1992 and more recently the United Nations Conference on Sustainable Development in 2012<sup>274</sup> both promote the ideals of a standardised regulation of CSR albeit on soft law basis. The Sustainable Development Goals (SDGs) has reinvigorated development workers globally and providing one more tool for achieving the elusive developmental targets in deprived areas of the world. The new SDG incorporates the cooperation of business in achieving all the

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<sup>271</sup> United Nations Conferences on Trade and Development (UNCTAD) and the New Partnership for Africa’s Development (NEPAD)

<sup>272</sup> Preamble to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 2006.

<sup>273</sup> This conference is popularly called the Earth Conference or the Rio Summit. It held in Rio de Janeiro, Brazil from 3 to 14 June 1992.

<sup>274</sup> This summit commonly called the Rio Earth Summit 2012 was held from 13 to 22 June.

SDGs as proffered. The document urges states to be mindful of the role of business in meeting the SDGs and states:

Private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation. We acknowledge the diversity of the private sector, ranging from micro-enterprises to cooperatives to multinationals. We call on all businesses to apply their creativity and innovation to solving sustainable development challenges. We will foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other on-going initiatives in this regard, such as the Guiding Principles on Business and Human Rights and the labour standards of ILO, the Convention on the Rights of the Child and key multilateral environmental agreements, for parties to those agreements.<sup>275</sup>

The importance of this statement lies in the deliberate attention to the UN instruments as a means of achieving a global standardised perspective, action plan and outcome expectations through the SDGs.<sup>276</sup> Although this document is not a ‘regulation’ but its relevance in global economic decisions and its subsequent impact on social and economic policy cannot be ignored.

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<sup>275</sup> Paragraph 67 of the letter dated 12 August 2015 of the President of the UN Assembly to all the Representatives of states of the UN on the outcome document following the UN summit on the adoption of the SDGs dated 12 following the adoption of the SDGs.

<sup>276</sup> It is arguable that the explanations proffered for achieving each of the ‘goals’ has underpinning economic philosophies which is perpetuating of the current dominant free market system but seeking sustainable means of doing it. The preamble to the outcome document reads in part: ‘We are determined to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations.’ n47 supra

#### **4.4.3 *The Utility of Law***

The utility of law in mandating CSR has not been obvious to many considering that it is a contemporary phenomenon. In corporate governance, law has been instrumental in shaping the behaviour of corporate managers and focusing them on the need to meet social concerns – primarily its shareholders – through primary and subsidiary legislation issued, for instance, under listing requirements in stock exchanges.

##### *Law and Corporate Governance legislation*

CSR can hardly be discussed without noting the role of those who manage corporations. Therefore, there is an intertwining relationship between corporate governance and CSR. While corporate governance deals with the rules concerning the appointment and operation of corporate boards, CSR deals with the strategies used by corporations in responding to social issues of which require moral judgements. The dividing line between these two subjects is increasingly blurring, albeit, not to the extent of either losing identity. Kenya's Code of Corporate Governance Practices for Issuers of Securities to the Public 2015<sup>277</sup> is an example of this. The Code lists "communication with stakeholders", "consistent shareholder and stakeholders' value enhancement" and "corporate social responsibility and investment" as part of mandatory annual audits issues to be reported by listed and unlisted public companies.<sup>278</sup> The declared intendment of the new Code is "the adoption of standards that go beyond the minimum prescribed by legislation" and the transformation "from the "Comply or Explain" approach to "Apply or Explain".<sup>279</sup> Arguably, this is an attempt to regulate the social responsibility of corporations through the agency of corporate governance mechanisms. Corporate governance codes can therefore be used furtively as proxy for

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<sup>277</sup> This Code replaces the Corporate Governance Guidelines 2012

<sup>278</sup> Clause 2.11.1 of the Code of Corporate Governance Practices for Issuers of Securities to the Public 2015

<sup>279</sup> Ibid

mandating on the social responsibility of corporations and the use of “apply or explain” rules in newly formulated or reformed codes is growing.<sup>280</sup>

Legislation has also been used in extracting conformity from corporate managers regarding their fiduciary duties. Section 172 of the Companies Act 2006 has been considered in the determination of the breach of the fiduciary duty of a company director in cases where the “duty to promote the success” of companies is involved.<sup>281</sup> In almost every case where corporations have faced social responsibility issues, it has been the judgement or character of the corporate managers that has been called into question. Regarding this, it means that corporate managers cannot be left to their own devices. Mallin observed that “following directly from the financial scandals of Enron, WorldCom, and Global Crossing, in which it was perceived that the close relationship between companies and their external auditors was largely to blame”<sup>282</sup>, the Accounting Industry Reform Act 2002 popular known as the ‘Sarbanes-Oxley Act’ was passed. This legislation was aimed at addressing the composition and operation of corporate boards and their relationship with external reporting agents whose independence was to be better assured.

#### *Law and corporate sanctions*

The enormity of corporate governance decisions and the potential large scale or critical implication of the same requires the guiding hand of the law. All too often, the ‘invisible hand’ does not wield the ‘stick’ that can ‘beat’ the managers into “conscientious responsibility”. The Volkswagen case is a clear indication that conventional business principles can be pursued in tandem with social responsibility ideals. The fact that an

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<sup>280</sup> For example, the “apply or explain” methodology was used in the King Code of Governance for South Africa.

<sup>281</sup> See: *IT Human Resources Plc v Land*, [2014] EWHC 3812 (Ch); *Hughes v Weiss & Iuvus Ltd*, [2012] EWHC 2363 (Ch); *Stimpson & Ors. v Southern Landlords Association and Ors*, [2009] All ER (D) 193 (May)

<sup>282</sup> Christine A. Mallin, *Corporate Governance* (3rd edn, OUP 2010) 44.

“insider” was used to replace the head has generated some criticism. It has been argued that a clean sweep of the management was required to restore consumer confidence in part. Since corporate managers who are not necessarily owners now have the control and management of corporations, the liability for corporate breaches are now falling upon them in an invigorated resurgence of corporate civil and criminal liability. Civilly, the remuneration of corporate managers is being regulated and criminally, they are being prosecuted for mismanagement with criminal penalties. This turn of events ought to arouse the interest of corporate managers who must now act in such a way as to avoid what could be costly penalties in civil and criminal prosecutions. More and more fines are now being placed on corporate managers rather than faceless companies.

Furthermore, where CSR is adopted and adapted thematically into corporate operations, corporate managers would exercise discretion in matters before CSR issues are raised. Some examples will be in the case of Exxon Mobil USA, Rana, Foxconn, World Com, etc. In each of these cases, the involvement of corporate managers potentially could have led to a different outcome. Human capacity failure rather than equipment or mechanical failure usually leads to catastrophic consequences for both people and the environment.

The recruitment of high profile personnel into clearly designated CSR job roles such as “Director of Corporate Social Responsibility” underscores the importance now being placed by big corporations and especially MNCs on CSR. Christine Bader the former head of UN business and human rights was recently recruited by Amazon to as its director of corporate social responsibility who will be reporting to the director of sustainability.<sup>283</sup>

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<sup>283</sup> The paper noted that “Amazon has come under fire over the years for parsimonious corporate giving, an unforgiving workplace environment and a lack of diversity in its hiring. Environmental groups also have given the company low marks for the level of its clean-energy use in its data centres.” See <<http://www.seattletimes.com/business/amazon/amazon-taps-former-un-adviser-to-guide-corporate-responsibility/>> last accessed 11 September 2015.

### *Law and harmonisation of social policy*

Increasingly, corporate managers are seeking to fulfil multiple – and sometimes conflicting – imperatives; short-term objectives and long-term sustainability objectives, business and social objectives, shareholder interests and stakeholder interests.<sup>284</sup> The essence of CSR is to ensure that business does not disregard social issues by applying minimalism. CSR does not negate the making of profit, but it seeks to highlight any threat to the society as a result of corporate behaviour.

Importantly, the EU has launched a non-binding and non-financial reporting requirement for large “public-interest companies” pursuant to Council Directive 2014/95/EU and in particular its Clauses 2 and 3 states the objectives of the regulation to be the following;

(2) The need to improve undertakings' disclosure of social and environmental information, by presenting a legislative proposal in this field, was reiterated in the Commission communication entitled '*A renewed EU strategy 2011-14 for Corporate Social Responsibility*', adopted on 25 October 2011.

(3) In its resolutions of 6 February 2013 on, respectively, 'Corporate Social Responsibility: accountable, transparent and responsible business behaviour and sustainable growth' and 'Corporate Social Responsibility: *promoting society's interests and a route to sustainable and inclusive recovery*', the European Parliament acknowledged the importance of businesses divulging information on sustainability such as social and environmental factors, with a view to *identifying sustainability risks and increasing investor and*

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<sup>284</sup> Do a graph or chart for this whereby the interacting sectors can be clearly depicted as overlaying each other.

*consumer trust*. Indeed, disclosure of non-financial information is vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection. In this context, disclosure of non-financial information helps the *measuring, monitoring and managing of undertakings' performance and their impact on society*. Thus, the European Parliament called on the Commission to bring forward a legislative proposal on the disclosure of non-financial information by undertakings allowing for high flexibility of action, in order to *take account of the multidimensional nature of corporate social responsibility* (CSR) and the diversity of the CSR policies implemented by businesses *matched by a sufficient level of comparability to meet the needs of investors and other stakeholders* as well as the need to provide consumers with easy access to information on *the impact of businesses on society*.<sup>285</sup>

The objective of this legislation coming into law on 1 January 2017, was to homogenise the mandatory reporting of CSR issues in the 27 European Union's member states.<sup>286</sup> It was also expected to deliver “sustainable and inclusive recovery” after the financial crisis.<sup>287</sup> In this regard, it is opined that this measure is a departure from the non-mandatory regulatory regime characteristic of capitalist economies but a necessary response in view of the apparent weakness due to the non-interference of the state in regulating private corporation objectives.

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<sup>285</sup> Council Directive 2014/95/EU of 15 November 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups OJ L330. The emphases are mine.

<sup>286</sup> It is supposed that the UK will give effect to the result of the national referendum of 23 June 2016 whereby the country voted to leave the EU. It will be interesting to note whether there a ‘deal’ between EU and UK on trade will extend lead to keeping common corporate governance structures such as expressed in Council Directive/2014/95/EU.

<sup>287</sup> Clause 3, Directive 2014/95/EU.

*Law as instrument of curbing corporate power and impunity*

Another utility of law regarding CSR is in its exclusive ability to curb corporate power. Deregulation has often been seen as being “business friendly” and creative of an “enabling environment” – until it leads to some form of financial crisis. States that have little or no restriction on business is seen to be more receptive of corporations. It is not surprising that most countries with the least restrictive legislation are developing countries from which periodic news emanates of corporate indiscretion. The introduction of section 172 has been generously credited to investor activism rather than societal pressures by Clark and Knight.<sup>288</sup> This law “recognises interests of those other than stakeholders as legitimate concerns of the board, but ignores any fundamental conflict between that position and shareholder value”<sup>289</sup> and has been dubbed an “enlightened shareholder value”<sup>290</sup> approach.<sup>291</sup> Who was part of the team that formulated the Company Law Reform Bill which precursored the Company Act 2006 noted they maintained the “traditional shareholder-centred philosophy of British company law, but advocated a modernised version”.<sup>292</sup> The use of the law, I suggest, was the

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<sup>288</sup> Gordon L. Clark & Eric R. W. Knight, ‘Implications of the UK Companies Act 2006 for institutional investors and the corporate social responsibility movement’ (2009) 11 (2) University of Pennsylvania Journal of Business Law 249. This position portrays shareholders as being responsive to social issues prior the global financial crisis of 2008 – 2009. It is arguable also that the government of UK foresaw the need to constrain corporate managers to act in public interest.

<[http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=eric\\_knight](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=eric_knight)> (accessed 22 February 2011)

<sup>289</sup> Janet Williamson, Ciaran Driver and Peter Kenway, ‘Introduction’ in Janet Williamson, Ciaran Driver and Peter Kenway (eds), *Beyond Shareholder Value* (TUC 2014) 14.

<sup>290</sup> Frances O’Grady, ‘Workers’ Voice in Corporate Governance’ in Janet Williamson, Ciaran Driver and Peter Kenway (eds), *Beyond Shareholder Value* (TUC 2014), 70.

<sup>291</sup> For a fuller discussion on enlightened shareholder value and its origins into British Company Law see; Paul L Davies, ‘Enlightened Shareholder Value and the New Responsibilities of Directors’ in Lecture delivered at the University of Melbourne Law School (the inaugural WE Hearn Lecture) 4 October 2005. A copy is available at:

<[http://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0014/1710014/94-Enlightened\\_Shareholder\\_Value\\_and\\_the\\_New\\_Responsibilities\\_of\\_Directors1.pdf](http://law.unimelb.edu.au/__data/assets/pdf_file/0014/1710014/94-Enlightened_Shareholder_Value_and_the_New_Responsibilities_of_Directors1.pdf)> accessed 3 July 2016.

<sup>292</sup> *ibid* 3



only means of bringing to the fore matter issue of curbing corporate power which business would have rather left relegated. There are other issues such as corporate remuneration in large public and private organisations which are gathering public interest.<sup>293</sup> Challenges to corporate power more often has been from CSOs and not from government. In some cases, states have been accused of being complicit in unethical dealings.<sup>294</sup> Through law the attainment of social cohesion instead of anarchy is achievable.

### *Law and social value of jurisprudence*

It is necessary to understand how law is conceptualised by the various persuasions and thus applied to societal issues and, in particular, the present subject of CSR.<sup>295</sup> Freeman posits that “the close relationship of law and the social structure inevitably brings into prominence the ideological context of legal theory”.<sup>296</sup> This is because, law can also influence democratic processes through the advancement of philosophies which when accepted become norms. Dennis Patterson stated in the introduction of his composition on legal theory contained in his book *Philosophy of Law and Legal Theory* that legal and economic scholarship can be classified along “three lines of endeavor”; first is the substantive evaluation of law, secondly the search for the “ideal purpose of the law” and finally the shared positivist approach by

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<sup>293</sup> In the UK the Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013 required annual reporting of directors’ remuneration and subjected the same to shareholder voting. In the U.S., section 108 of the Jumpstart Our Business Startups Act of 2012 (JOBS Act) mandates the Securities and Exchange Commission (SEC) to review Regulation S-K, which contains reporting requirements on executive remuneration among other things.

<sup>294</sup> In the case of Ken Saro-Wiwa for example, the Nigerian Government was firmly accused of complicity and the use of agents of state coercion to achieve repression of peaceful demonstration. The complicity of the state and corporate power combined effectively to silence the opposition through the hanging of nine protesters in 1995 by the orders of the government of Nigeria.

<sup>295</sup> See R. Cryer, T. Harvey and B. Sokli-Bulley with A. Bohm, *Research Methodologies in EU and International Law* (Hart, 2011). They posit that a particular jurisprudential conviction may determine the questions pose in legal research. In this research, it is accepted that the adopted legal theory or jurisprudence would ultimately define the research approach and hence may determine this thesis.

<sup>296</sup> M.D.A. Freeman (ed), *Lloyd’s Introduction to Jurisprudence* (8<sup>th</sup> edn, Sweet & Maxwell 2008) 1

querying law as it is found.<sup>297</sup> Freeman argues incontrovertibly, that law need to be observed in the context of the “place and time” to which it pertains.<sup>298</sup> This is so because law must pertain to a determinable community, and in the context of a period of history. Law will, therefore, be subject to the social context and time. It is arguable that law is evolutionary due to changing social factors whether sectional or collective within the society law applies. As law has permeated all aspects of human existence, it is perhaps natural that the fundamentals of classical natural law theory are rooted in political and social theories such as democracy and social contract respectively. The principles of human rights based on the natural law theory is now immanent in CSR discuss. Also, principles of mercantile law preceded the modern international commercial law. In the making of laws, the demand for the contemporaneous study of the characteristics of the subject of its preoccupation is increasing. Thus, it can be easily observed that in contemporary legal discourse, incursion into other disciplines is rampant giving legislation through democratic means universal acceptance of which norms do not enjoy being subject to disagreeableness.

In business, law has played a key part, through democratic means, in formulating the acceptable norms of society so as to bring conformity by business with social norms. Beyond the legitimate pursuit of financial profit from business, employment rights for minority and disabled groups, reduction of pollution levels, health and safety at work and other programs aimed at improving the quality of life of the worker was made possible by law. Law has been the means by which societal expectation become predictable. This enables social cohesion on one hand and the pursuit of personal ambitions on the other. Law is an integral part of any democratisation process seeking to synthesis societal conflicts. Votaw with appropriate reason in my view, commented that;

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<sup>297</sup> Dennis Patterson (n1) *ibid*.

<sup>298</sup> *ibid* 1

The needs, demands and pressures of society can be communicated to business in a non-mandatory fashion at first, leaving room for response through the mechanisms of social responsibility. If the response is inadequate, inappropriate or not forthcoming, society may communicate its wishes in the form of mandates.”<sup>299</sup>

*Law as interpreted by judges as custos morum*<sup>300</sup>

The general tenets of law tend to establish the sense of what is fair and just for all members of a society. In international law, this principle remains logical. Law in other words, upholds what is considered the ‘overriding public interest’ which when ignored may lead to consequences impact the polity negatively. When laws are made, judicial officers interpret it by declaring impartially and independently the mind of the society.

From the early works of Aristotle, Kant, Aquinas and Hegel, adumbrations of many modern legal theories and nuances of social and economic philosophies can be gleaned. The two schools of thought that can be considered dominant in international law jurisprudence are natural law and legal positivism, and both exhibit peculiar presuppositions and characteristic arguments.<sup>301</sup> I suppose that natural law theory provides a haven for CSR not least because moral issues are irrevocably engaged in its discourse although it is commonly criticised for its subjectivity and rarely objective standards. Social rights are a collective of individual human rights and the nature of humans portrays the reasons for a natural law approach to CSR. Although natural law theorists often rely on its religious connotations I do not make this

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<sup>299</sup> Dow Votaw, ‘Genius Became Rare: A Comment on the Doctrine of Social Responsibility Pt. II’ (1973) 15(3) California Management Review 5, 5.

<sup>300</sup> *Custos morum* means the ‘custodian or guardian of morals’.

<sup>301</sup> It is accepted by most scholars that modern variations or “extension” now abound. See Cryer et al. op cit 10, who have identified ‘modern’ and ‘critical’ approaches like liberalism, Marxism, feminism and constitutionalism with extensions to the main stream theories such as ‘law and economics’ as established theories in modern jurisprudential enquiry. The difference between natural theorists and the positivists is based on whether law is a product of deliberate human intellectual application as positivists claim or, the indelible function of morality as claimed by natural law theorists.

reliance.<sup>302</sup> Darbney Marshall exposed the arguments of the two sides in his bid to “formulate a true definition of municipal law and to show its aim and essence”.<sup>303</sup> Before expounding his idea, Marshall dismissing natural law and legal positivist arguments and submitted that not all laws are morally right and not all morally right things are law but that;

While the State is absolute and can enact whatever laws it pleases, and is in no way bound to make law and morality synonymous, and has frequently in the past divorced them as wide as the poles, yet it is only laws which are in accord with morality that produce happiness and prosperity to the nation as a whole, and for this reason the State is induced by self-interest and the preservation of the nation to enact laws more and more in accord with right; for to say a thing is right, is to say it promotes the welfare of the race, and to say it promotes the welfare of the race is to say it is right.<sup>304</sup>

In contemporary literature, issues like feminism, neoliberalism and post-colonialism have ‘advanced’ the archaic theories. Also, some negations of classical jurisprudence can be observed with novel suggestions being gratuitously expressed in modern legal literature; critical theory,<sup>305</sup> and governance theory are interesting.<sup>306</sup>

Although this thesis engages in a critical evaluation of the contemporary notion of CSR, an overall eclectic approach is necessary in view of the multidisciplinary engagements of this subject with many others, and the issue off morality. Noting the fundamental premise inherent in the CSR debate that corporations ought to operate ethically exhumes the famous

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<sup>302</sup> The notions of deism, morality and universality natural laws are often associated with this theory.

<sup>303</sup> T. Dabney Marshall, ‘What is Law?’ (1893) 27 *American Law Review* 540.

<sup>304</sup> T Dabney Marshall op cit 546

<sup>305</sup> See for the rambunctious essay of Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* (Princeton University Press, 2005)

<sup>306</sup> C Möllers, ‘European Governance: Meaning and Value of a Concept’ (2006) 43 *Common Market Law Review* 313

debate in 1957 between two eminent jurists H.L.A Hart and Lon Fuller on the relationship between law and morality.<sup>307</sup> Richard Branson is quoted as saying that ‘while the government of the day sets the laws, morality is down to the chief executive’.<sup>308</sup> John Mackie has suggested that the notion that law and morality are not incompatible could aptly be described as “a third theory of law” saying it is an attempted bridge of the chasm between the dichotomy of positivism and naturalism.<sup>309</sup>

#### **4.4.4 Regulation CSR in international law**

Article 38 (1) of the Statute of International Court of Justice empowers the International Court of Justice (ICJ) to hear cases and decide them ‘in accordance with international law’.<sup>310</sup> The court shall apply ‘international conventions, whether general or particular, establishing rules expressly recognized by the contesting states’ or ‘international custom, as evidence of a general practice accepted as law’ or ‘the general principles of law recognized by civilized nations’.<sup>311</sup> However, the applicability of international law to CSR is curtailed by two issues; corporations are not state parties to which international law applies, and if a state vicariously pursues a case on behalf of its citizens – natural or corporate – the case still needs to be based on international law formed in one of the acceptable ways such as international conventions or acceptable international custom or general practices regarded as law. CSR has not gained the consensus to be enshrined in any international convention, nor gained such patronage to be an accepted general custom nor practiced as generally accepted law. The failure to

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<sup>307</sup> H.L.A Hart was a Professor of Jurisprudence, University of Oxford and Lon Fuller a Professor of General Jurisprudence at Harvard University. Hart was an avowed legal positivist who advocated the “separation” of law and morality. Fuller on the other hand opposed the projection of law as lacking moral intuition.

<sup>308</sup> James Ashton, “Which is Worse, Ripping Off Nations or the Customers?” Evening Standard 12 June 2014 ,14

<sup>309</sup> John Mackie, ‘The Third Theory of Law’ (1977) 7 (1) Philosophy & Public Affairs 3

<sup>310</sup> Article 38(1) Statute of the International Court of Justice

<sup>311</sup> *ibid*

overcome these constraints has led CSR to be articulated in international guidelines that do not have the force of sanction being developed outside the ambit of Article 26 of the Vienna Convention on the Law of Treaties.<sup>312</sup> Hartmut Hillgenberg has observed that states that enter into non-treaty agreements avoid the implication of the '*pacta sunt servanda* principle, and therefore also the legal consequences arising from non-fulfilment' of arising commitments.<sup>313</sup> This makes the international law regime concerning the regulation of MNCs is fraught with some challenges. One of the challenges is the ever-increasing corporate power and the further entrenchment of capitalist orientation worldwide. Ilias Bantekas underestimated the entrenchment of capitalist orientation in the U.K. when he assumed concerning the Corporate Responsibility Bill 2003 that its "adoption is almost certain".<sup>314</sup> Brierley has attributed the lack of a "common social consciousness" and a "shared responsibility" for a "common life" limits the development of international law.<sup>315</sup> Additionally, Brierly commented that "the character of the law of nations is necessarily determined by that of the society within which it operates, and neither can be understood with the other".<sup>316</sup> The International Court of Justice's (ICJ) issued guidance on its website confirming that only state parties may bring actions before it, but states may initiate action vicariously on behalf of its citizens or other

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<sup>312</sup> The short Article simply states the *pacta sunt servanda* principle: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". Article 26 of the United Nations *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <<http://www.refworld.org/docid/3ae6b3a10.html>> accessed 02 August 2015. *Pacta sunt servanda* means 'agreements must be kept'.

<sup>313</sup> Hartmut Hillgenberg, 'A Fresh Look at Soft Law', (1999) 10 (3) *European Journal of International Law* 499, 513.

<sup>314</sup> Ilias Bantekas, 'CSR in International Law' (2003) *Boston UJILJ* 309, 326. Up until 2015 the U.K. did not pass any law of equivalent import save the insertion of section 172 of the Companies Act 2006 and other regulations by secondary legislation to do with further reporting requirements mainly of publicly listed U.K. companies.

<sup>315</sup> J. L. Brierly, *Brierley: The Law of Nations* (6<sup>th</sup> ed 1963) 41

<sup>316</sup> n5 *ibid*

organisations within its jurisdiction against another state for breaches of treaty and convention obligations.<sup>317</sup>

Many international and multilateral organisations have sprung up over the last century. These organisations have gained extensive notoriety and have grown in influence. The influence of these organisations materialise as their principles are adopted globally by states and other organisations. An example is Nigeria's legislation of the principles of the Extractive Industry Transparency Initiative (EITI) via the Nigeria Extractive Industries Transparency Initiative (NEITI).<sup>318</sup> Other organisations produce indices and reports that have become influential in gaining perspective on doing international business and cannot be ignored.<sup>319</sup>

The issue of jurisdictional conceptualisation in international law, in view of the transnational operations of big corporations poses a challenging problem for International corporate law and CSR in particular. However, MNCs are deemed not subject to international rules and redress against them can only be effectively brought in the national courts. It is not surprising that states have resorted to urging businesses to do more in the communities they operate. In the UK, it was reported recently that government minister urged "large businesses" to use their influence to "engage" in the campaign disabusing the crime of female genital mutilation (FGM) abroad and on other social issues.<sup>320</sup> This step yields some results.

Through the use of regulatory instruments such as legislation, states have extended their influence over how businesses interact with society. Business does not always receive

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<sup>317</sup> See Q2 'Who Can Submit Cases to the Court' Frequently Asked Questions on ICJ website: <<http://www.icj-cij.org/information/index.php?p1=7&p2=2#2>> accessed 02 August 2015.

<sup>318</sup> The Nigerian Extractive Industries Transparency Initiative (NEITI) Act 2007

<sup>319</sup> The Corruption Perceptive Index, Human Rights Abuse reports of Amnesty International, have all become relevant and gained persuasive value.

<sup>320</sup> Martin Bentham, "Join the fight against FGM, minister urges businesses" Evening Standard (London, 16 July 2014) 10. On page 14 the editorial of the paper captioned "How to fight FGM" the following is stated: "In Britain, the battle against FGM starts with the police, doctors and teachers on the front line. But the whole of society can act – and has a duty to do so."

regulatory impositions without some resistance in a bid to regain ‘freedom’ from the state. Most sectors of business – even those in fierce commercial contest – unite for the purpose of maintaining less state intervention in business.

Business continues to demand less state regulation despite a widespread view that several corporate collapses are rooted in unethical behaviours including overambitious risk-taking and corporate greed. Corporations have also been accused of knowingly leveraging assets beyond indemnification thereby exposing investors funds to uninsured risks. Furthermore, executive remuneration reached points which were generally considered disproportionate while corporations declaring untrue financial reports. The combined effects of the foregoing have individually and collectively been considered responsible for the global financial crisis of 2008 – 2009 making some question how the free market economy and capitalism has escaped without serious damage although some calls for transforming capitalism has been aired. Jan Scholte summarised this reaction when he stated that;

Dissatisfaction with the harms and omissions of neoliberalism also has of late generated greater interest in transformist approaches to globalisation. For example, radical socialists have seen the contradictions of neoliberalism as an opportunity to transcend capitalism. “Dark green” environmentalists have promoted eco-centric alternatives to neoliberal economists. Religious revivalists have offered spiritual renewal as an antidote to the cultural voids that privatisation, liberalisation and deregulation are not designed to fill. However, the transformist ideas of these kinds have extended little beyond



fringe movements that remain very far removed from the core regimes that govern the global economy.<sup>321</sup>

This sentiment, I suggest, is not a call for the outright rejection of capitalism but the reform of business from extreme or exclusive capitalism and the induction of social values in the way business is done. Porter and Kramer have said, and I agree that “capitalism is under siege” but still remains the irreplaceable and “unparalleled vehicle for meeting human needs, improving efficiency, creating jobs and building wealth”.<sup>322</sup> By whatever lens the relevance and importance of capitalism is viewed, their continued existence supports government social and financial objectives. As Jem Bendell has posited, participation, cooperation and partnership are frequently occurring concepts in debates regarding corporate objective, social needs and development.<sup>323</sup>

Corporations have advocated for independence from state regulation to realise social objectives without their activities being mandated. Business claims that as they interact with stakeholders – suppliers, employers, community - what is good for business will ultimately be good and beneficial for those they interact with. In the same vein, legislation, it has been argued will increase transactional costs that are inevitably transmitted to the consumer of products. The increasing costs will deter new entrants into business who will consider any claim on profits for social good as veiled taxation and a controlling tool by which the state determines ‘how’ private funds should be used for ‘public good’. Since business accepts that ‘doing good’ is worthwhile and would engage voluntarily in CSR activity, it has been

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<sup>321</sup> Jan Aart Scholte, ‘The Sources of Neoliberal Globalization’ (2005) Overarching Concerns Programme Paper No. 8 (UNRISD, Geneva)23

<sup>322</sup> M Porter and M Kramer Creating Shared Value Harvard Business Review, January – February 2011, 4

<sup>323</sup> Jem Bendell ‘In whose name? Accountability of Corporate Social Responsibility’ Development in Practice, Vol. 15 3 & 4 (2005), 363

suggested that legislation can help business “focus” efforts appropriately without being inhibitive of business.<sup>324</sup>

Utting and Marques are correct of the view that the global financial crisis of 2008 – 2009 exposed ‘a narrow focus on aspects of development related to particularly visible forms of environmental degradation, eco-efficiency, occupational health and safety in TNC affiliates and top-tier suppliers, child labour in the supply chain, and community assistance’ by CSR advocates’ to the detriment of the financial sector.<sup>325</sup>

Predictably, several efforts actions have been made to discuss and resolve global economic and financial issues. The UN in its preamble declared the interest of its members; “to employ international machinery for the promotion of the economic and social advancement of all peoples”.<sup>326</sup> It further declared as part of its purposes the achievement of “international cooperation in solving international problems of an economic...character”<sup>327</sup> and “harmoni[s]ing the actions of nations in the attainment of these common ends”<sup>328</sup>. Besides the obvious interest in ensuring the maintenance of “international peace and security”<sup>329</sup> and the benefits of a war-free community, the enjoyment of political stability seems to be measurable to the extent of the enjoyment of social cohesion and economic independence of the citizens of the world.

However, Horn has traced the origins of multilateral efforts at regulating multinational enterprises (MNEs) as arising from the complaint of Chile to the Economic and Social

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<sup>324</sup> Roger L. Martin, ‘The Virtue Matrix: Calculating the Return on Corporate Responsibility’ Harvard Business Review on Corporate Responsibility (2003) 86-90

<sup>325</sup> Peter Utting and José Carlos Marques, ‘Introduction: The Intellectual Crisis of CSR’ in Peter Utting and José Carlos Marques (eds) *Corporate Social Responsibility and Regulatory Governance* (UNRISD and Palgrave Macmillan 2010) 2

<sup>326</sup> Preamble to the Charter of the United Nations (UN Charter)

<sup>327</sup> Chapter 1, Article 1(3) UN Charter

<sup>328</sup> Chapter 1, Article 1 (4) UN Charter

<sup>329</sup> Chapter 1, Article 1 (1) UN Charter

Council of the UN in respect of ITT in 1972 that led to the first UN-mandated study on the role of multinationals corporations on development.<sup>330</sup> Another of such efforts was convened on 3 June 1977 between “the Group Eight” (the G8) industrialised nations and the “Third World” countries was the Conference on International Economic Cooperation (CIEC). Reporting on the outcome of the conference, Jahangir Amuzegar noted that, “a continued dialogue between the industrial countries and the developing nations is ... a matter of global welfare, if not survival. An appropriate and convenient forum for such a discussion is surely within the United Nations”.<sup>331</sup> The impact of multinational corporations has since then, not escaped the attention of the UN. In May 2011, the UN Special Representative for Business and Human Rights, Professor John Ruggie, published the much-awaited UN Principles for Business and Human Rights.<sup>332</sup> The new principles were commended to business as a complement to efforts of UN Secretary-General Kofi Anan that resulted in the production of the Global Compact (1999/2000). As MNCs in particular grow in financial and political power the focus of international organisations at providing an ‘international’ regulatory scheme has not concretised but is not without foundation with the emergence of UN guidelines and codes. It is noteworthy that the so-called ‘Ruggie Principles’ was reported six years after it was commissioned.<sup>333</sup> This document is titled the *United Nations Principles for*

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<sup>330</sup> Norbert Horn, ‘International Rules for Multinational Enterprises: The ICC, OECD, and ILO initiatives’ (1981) 30 *The American Law Review* 923, 923.

<sup>331</sup> Jahangir Amuzegar, *A Requiem for the North South Conference Foreign Affairs* (pre-1986) 1977 1992. Amuzegar was an Executive Director of the International Monetary Fund (IMF).

<sup>332</sup> The United Nations Principles for Business and Human rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework now popularly referred to as “The Ruggie Principles” (2011) Report No. A/HRC/17/31 dated 23 May 2011.

<<http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx>> Last accessed 28 May 2015.

<sup>333</sup> John Ruggie was commissioned in 2005 and he delivered his report and the guidelines in 2011. In a fast-paced global environment intervening factors such as the global financial crisis potentially distort the findings as a result of emergent novel business practices or other developments.

*Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* was published in 2011.

Regarding the environment and operational disasters, consumer groups have clearly that impact the environment and employees. Notwithstanding the efforts of business at reducing or remediating impacts to the environment, the voluntary endeavour of business often does not equate what is commensurate to repair damages to the environment and communities which are resultant from their activities.<sup>334</sup> Recently the UK Parliamentary Committee on Business, innovation and Skills published a report condemning working conditions in Sports Direct, a company that was brought to the spotlight due to incessant workers' and trade union complaints. The Committee chair stated that Sports Direct "working practices are closer to that of a Victorian workhouse than that of a modern, reputable high street retailer".<sup>335</sup> In holding corporations accountable in international law, no international statute has developed enough teeth to compensate for breaches perhaps the weaknesses of the individual states cannot translate to strength in the international forum.

#### **4.4.5 Criticisms of legal regulation of CSR**

Some criticisms levied against CSR can be debunked somewhat easily by pleading social good or overall public interest. If it is however, accepted that CSR is useful, the means of achieving it through legislation has attracted greater criticism despite the benefits of legislating CSR.

The main criticism is that it usurps the 'freedom' the market enjoys to determine the use of the resources for production. This is not entirely correct. CSR only determines the rationale

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<sup>334</sup> Rhys Jenkins, 'Globalization, Corporate Social Responsibility and Poverty' (2005) 81(3) *International Affairs* 525, 525 quoting Oxfam, *Trading Away Our Rights: Women Working in Global Supply Chains* (Oxford: Oxfam International, 2004).

<sup>335</sup> 'Sports Direct staff 'not treated as humans', says MPs' report' *BBC News* (Derby, 22 July 2016) <<http://www.bbc.co.uk/news/uk-england-derbyshire-36855374>> accessed 22 July 2016.

behind business decisions and does not seek to limit it by the giving of consideration to wider issues. This in itself should be an advantage for business for in the consideration of all risk factors such as loss of business from reputational damage, business is ensuring a safer investment.

It is correct that business have been confounded with many rules to observe and doing business in different countries may mean adopting different standards. This also increases the cost of compliance. Corporate managers have the task of balancing shareholder value considerations with social needs that they are encouraged to be averted to and once adopted standards need to be embedded for effectiveness. This criticism is not tenable in modern business due to the availability of a growing stream of CSR ‘practitioners’ can implement standards for companies. At this time, there is no dearth of availability of ‘experts’ except in developing countries – a case that is fast changing. In the long run, business will adapt to the new laws just as it has to labour, gender, disability, health and safety as legislation brings clarity and certainty business operations.<sup>336</sup>

The state, the corporations and business can benefit from the proper regulation of CSR. States can achieve harmonisation and standardisation of corporate activities with state objectives. In this regard, a systemic and formalised regulatory regime can be achieved through the enactment of regulations that promote development activities. I call this the ‘development case’ for CSR. On the part of business, having set rules will promote calculated risk taking by providing certainty of the investment climate. Society, in turn, will have recourse to democratic processes of providing regulation for business.

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<sup>336</sup> Wayne Visser and Chad Kymal, ‘Integrated Value Creation (IVC): Beyond Corporate Social Responsibility (CSR) and Creating Shared Value (CSV)’ (2015) 8 (1) *Journal of International Business Ethics* 29.

A major criticism of legislating CSR is that its mandation will be inhibitive of innovation, creativity and efficiency in business. This criticism is not justified in view of some research into the benefits of CSR to corporations. In the first instance, a company that does not imbibe CSR principles will likely risk reputational damage and comparative advantage. Profit making is not abhorred by society but the seeming rapaciousness involved in corporate activities. Antitrust laws made to engender competition and monopolistic mergers and acquisitions is usually done in the public interest to mitigate the likely unfavourable consequences of human greed. CSR costs when borne by all companies is not likely to expose any particular companies to adverse profit making as costs are usually passed on to consumers who research have shown will likely shun cheaper products if produced unethically; this is in line with the widening debate about ethical consumption.

Visser and Kymal insist that CSR and business profitability is compatible if firms adopt “a methodology for turning the proliferation of societal aspirations and stakeholder expectations, including numerous global guidelines, codes, and standards covering the social, ethical, and environmental responsibilities of business, into a credible corporate response without undermining the viability of the business”.<sup>337</sup>

The transaction cost argument against CSR and especially its mandation seems to be losing steam. Recent empirical evidence suggests that CSR practices can yield both immediate and long-term benefits for corporations. With an established “business case” for CSR, corporations could be saddled with moral imputation and sanction imposed on corporations for defaulting any legal standards imposed on them. Legal standards will be viewed as “risk” by corporations who must compute the cost of “accidental” default. It is argued therefore that where business cannot compute the cost of default it may be restricted from investments.

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<sup>337</sup> Wayne Visser and Chad Kymal op cit 29. The authors have proposed a methodology for this purpose which integrates CSR, sustainability, and Creating Shared Value (CSV) concepts.

Declaring business requirements by legislation reduces the risk and makes by making it identifiable and so more 'calculable' for business.

One of the main criticisms against mandating CSR is that states apply it as surreptitious taxation. In a case where taxation is net of profits, a company may consider the CSR 'tax' impinging on profits. This argument can be countered easily since business passes any taxation in this way as 'costs' to the consumer.

A thematic adoption of CSR best practice could, therefore, be in the long-term survivability of corporations through the employment of managers who will accept and assume the role of the "conscience" of the corporation. CSR should not only aim at the physical issues of the environment and stakeholder engagement but first with the reorientation of corporate governors who should be encouraged to imbibe tenets of socially responsible operations rather than meeting legal necessities.

#### **4.5 The business case for CSR and regulation**

The business case for CSR merits further mention because it is the most touted criticism against legislating CSR. It is also important because CSR can be more widely accepted by business if a conviction as to its compatibility with business can be shown to some degree of certitude. Eberstadt has argued correctly, that CSR has been practised for well over 2,500 years and is only today a contemporary manifestation of archaic custom now being promoted actively by CSOs.<sup>338</sup> He posits that business operations has historically been focused on

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<sup>338</sup> Nicholas N. Eberstadt 'What History Tells us about Corporate Responsibility' (Autumn 1973) 7 Business and Society Review/Innovation 73

looking after its customers as much as its recourses allow while pursuing its main interest.<sup>339</sup>

With the formalisation through legislation of business relations between corporations and its many contracting parties, laws have been developed on labour relations, human rights and the environment. All these laws and others have impelled corporations to align towards achieving socially responsible conduct. Husted and Salazar point out that stakeholder groups have used several means including coercion in making corporations accede to CSR.<sup>340</sup>

One may ask if any business in any free market economy today can ignore CSR in its dealings with its customers? Should business be self-regulating? In the case of large corporations especially those that operate transitionally the answer will most probably be in the negative to both questions. In view of this and without rehearsing the benefits of CSR, the impact of legislation in reference to the business case of CSR and as a means of regulation is explored further.

Firstly, I posit that the introduction of CSR as a strategy for meeting social concerns does not negate the viability of corporations. The reasons are that CSR is in the interest of business. This I suggest is one of the reasons it is being carried out. Corporations started with philanthropism but are now through CSR being urged to direct their activities in a more directional and cohesive way. CSR has been embraced by a large amount of business and is not likely to be banished as a means of strategic business management.

It is accepted that law must account for the golden rule of profit making and give it due regard without granting an injurious largesse to business. In finding the right approach to the question of administering normative CSR objectives the issue of governance rears its head. What is the best approach to take in order to achieve enthusiastic participation of all

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<sup>339</sup> M Porter and M Kramer 'The competitive advantage of corporate Philanthropy' Harvard Business Review on Corporate Responsibility (2003) 30.

<sup>340</sup> Crane and others, The Oxford Handbook of Corporate Social Responsibility (OUP, Oxford 2008) 349



interested CSR actors – corporations, state and civil society – in regulating CSR? Surely, not self-regulation which cannot thrive in the modern world without the delimitation of boundaries based on the acknowledgement and protection of rights, the respect for environmental concerns and remedying breaches when they occur. That function is best served by law not norms set by business for society but one made in the wider interest of society as a whole.<sup>341</sup>

Not all business-led social responsibility projects can be dismissed as unsatisfactory. The joint government, civil society and industry initiative on certifying diamonds to ensure those from conflict regions are not sold to finance wars was successful. It led to the development of a set of procedures which became known as the Kimberley Process Certification Scheme.<sup>342</sup> Industry is also engaging with government and civil society in other industries such as oil and gas, renewable energy, agricultural products and technology.<sup>343</sup> There are still unresolved issues; the vigorously campaign against the use of elephant tusks to make ornaments and local artefacts in Southeast Asia. Ivory from elephants attract a high value in Asian countries where the trade in illicit trade in elephant ivory is nearly resulting in the extinction of the African elephants. However, it seemed that self-regulatory norms can precipitate into law.

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<sup>341</sup> The regulation of CSR by the state or other independent institution such as a UN body or the OECD does not guarantee compliance. Indeed, the indicted management of Volkswagen and Enron and other collapsed corporations that institutionalised unethical practices contrived their machinations in a regulated environment. It is however argued that the regulatory environment was not robust enough. In the case of the U.S. the passage of the Public Company Accounting Reform and Investor Protection Act 2002 (also called the Oxley-Barnes Act 2002) in reaction to the collapse of WorldCom and Enron testifies to this.

<sup>342</sup> This scheme was sanctioned by the United Nations General Assembly Resolution 55/56 in 2003

<sup>343</sup> FairTrade is popular for engaging business in agricultural sector. Greenpeace UK concentrates on the natural world and environmental issues.

David Kershaw has demonstrated the path of self-regulatory schemes which later become normalised and then entrenched into law.<sup>344</sup>

In the U.S., shareholders' interest has always been advocated and further made sure in the case of *Dodge v. Ford Motor Company* when it was said that:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.<sup>345</sup>

This position which contradicts the compatibility of business objective and social objectives, as adjudicated in 1919 is hardly tenable. What should preoccupy legal jurists and reformers is how best law can serve the purpose of both business and society.

Secondly, therefore, I suggest that the importance of regulating CSR is underscored by the need to meet two seemingly opposing and contentious socio-economic objectives. The first is the creation of an enabling environment for business to thrive to maintain economic stability and growth nationally and internationally. As early noted, in capitalist economies the popular stance is to deregulate the economy and relinquish any 'state control' to the forces of demand and supply of the free market. The second objective is to ensure that in the process of economic activity, societal and environmental needs are met, with the inclusion of profit

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<sup>344</sup> David Kershaw, 'Corporate Law and Self-Regulation' (2015) LSE, Law, Society and Economy Working Papers 5/2015 <[https://www.lse.ac.uk/collections/law/wps/WPS2015-05\\_Kershaw.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2015-05_Kershaw.pdf)> accessed 20 October 2015. This treatise on the UK Takeover Code and Panel shows the path from self-regulation to market-controlled regulation to state regulation via Sections 952-956 Companies Act 2006.

<sup>345</sup> *Dodge v. Ford Motor Company* 170 NW 668 (Mich 1919)

making as the foremost and fundamental corporate objective and motivator. The crux of the main debate of CSR is how best to meet these opposing but mutually dependent views. Apart from corporations, CSR is of importance to states seeking ways of moderating between society and business while pursuing its developmental objectives.

The question that faces states, especially those that have embraced free market principles is; to what extent should the government (through legislation) intervene in the private pursuit of profit? The purpose of the law as determined by various schools of thought will be considered in this chapter. Some legal theories relevant to this research will be adopted as tools for investigating the viability of the proposal on mandating CSR in view of various national and international factors.

Although the factors and issues that are considered by the international community in the regulation of CSR apply to states *mutatis mutandis*, it is not far-fetched to conclude that states face identical issues. After all, the concerns of states are raised primarily when CSR issues emerge under their jurisdictional. A growing practice can be observed, as CSR issues take global dimensions on account of the fact that those involved usually transact transnationally thereby giving rise to interest at not only state level but at regional and global levels.

A unique advantage of law over self-regulation is in its speed to command public interest, and the legitimate expectation of the complains of those affected by it. A legislation on CSR will bring even greater focus to ensuring the alignment of conscience of business to society's needs. Once a law is passed, its enforcement is expected. This expectation creates the common consciousness required to ignite condemnation for its breach by society and legitimises sanction.

The objective of regulation, at least in CSR is to identify and designate corporate behaviour that is in the interest of society as a whole and urge business to adhere. In international law,

the same is true save for the fact that there are issues that are peculiarly global such as climate change and resource sustainability. Invariably, CSR identifies these issues which coincidentally are also developmental issues. CSR can therefore be used to align business-society priorities for the ultimate objective of a sustainable global environment. The recent policy of charging 5 pence for non-biodegradable shopping bags in UK is not an economic decision as it is of ecological considerations.<sup>346</sup>

Steven Ratner has identified some “shortcomings of placing human rights duties solely on states, the primary holders of international legal obligations”.<sup>347</sup> He further suggested that corporate civil and criminal liability principles in domestic law can be relied on in international law so that “if a corporation's internal decision making process results in morally irresponsible behavior, the corporation may be blameworthy, either civilly or criminally”.<sup>348</sup>

There is no pure form of capitalism or socialism as practiced around the world; states have some elements of both philosophies in their socio-political and economic realities. Interactions between the state and the society or components thereof (such as business) leads to the formation of norms and regulations to delimit acceptable behaviour. These interactions in the contemporary world is extremely complex, not the least due to the high volume of innovations and inventions that threaten the status quo constantly demanding the reformulation of social and economic policies. The paradigm of the socio-economic environment can best be described as constantly evolving and mutating.

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<sup>346</sup> From 5 October 2015 the UK Government introduced a charge for single-use carrier bags for big retailers. It reduced considerably the size of non-biodegradable compounds and led to the implementation of other social projects. See generally the Department for Environment, Food and Rural Affairs website: <https://www.gov.uk/guidance/carrier-bag-charges-retailers-responsibilities>

<sup>347</sup> Steven R. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 Yale Law Journal 443, 461.

<sup>348</sup> *ibid* 474.

Taken together, recent developments point towards the convergence of the two opposing sides regarding regulation of CSR. Some issues forcing a convergence of thought and action towards greater regulation of corporate activities in the sphere of their social responsibilities include increasing notions of neocapitalism, climate change and the ease of social mobilisation as a result of advancement of information technology. These issues are forcing a consensus of opinion towards state or international regulation of issues now commonly associated with business-society relations.

In the absence of an 'international corporate law framework, national courts and not an international court administers and interpret the law concerning corporations.<sup>349</sup> The boundaries and influences peddled by non-state actors in international law (often representing regional interests) are increasingly blurring. Regional courts and other multinational organisations have set the pace for national courts where there is reluctance due to political pressures.<sup>350</sup> The ICJ has no jurisdiction in corporate matters except in cases sponsored by member states. In this scenario, although it cannot be stated that there is definite international corporate law, one may say with some alacrity that convergence is foreseeable.

#### **4.6 Summary**

The conclusions which can be reached with regards to regulations shows that nationally and internationally, the behaviour of business has kindled the development of the CSR concept. The response of business through philanthropic self-regulatory schemes have been usurped by society's robust engagement with arguments for more stringent state-regulation.

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<sup>349</sup> Eyal Benvesti and George W. Downs, 'National Courts, Domestic Democracy and the Evolution of International Law' [2009] EJIL 59

<sup>350</sup> *SERAP v Federal Republic of Nigeria and Ors.* ECW/CCJ/APP/08/09 (JUDGMENT N° ECW/CCJ/JUD/18/12) delivered 14 December 2012.

Underlying philosophical and economic arguments based on ideological assumptions have also emerged; at the heart of the issue being whether CSR serves to promote business or not. The use of codes and other assessment tools is becoming popular with business. There is also some shift from voluntary reporting to mandatory reporting requirements. Tracey Rembert has identified three factors that has instigated the use of mandatory reporting schemes for business.<sup>351</sup> She includes an “increasing global demand by investors for inclusion of sustainability data in company reporting”. The “relentless increase in environmental and social risks” and “the very proliferation and success of voluntary initiatives” whose competition has led to “continuous improvement” in corporate reporting despite a “reporting fatigue”.<sup>352</sup> All these factors have raised the relevance of CSR beyond the interest of states alone to that the international community.

A thorny issue still remains; the use of legislation for regulating CSR for business. I suggest against a prevalent opinion that the utility of law confirms the desirability of firmly rooting CSR in national and international law. Corporate law can serve the purpose of defining CSR in alignment with corporate objectives. The effective enforcement of standards can upturn the assumption that the law inhibits rather than furthers economic growth and social development. In suppose that in the final analysis law can serve to balance the interest of the unequally disposed society from an increasingly powerful corporate world.

Although the future is opaque or at best vague, a prediction can still be made following from the observation of the trend of legal reform that has followed the fervid demands for change in areas such as racial, sex, and minority discrimination, and more recently corporate

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<sup>351</sup> Tracey Rembert, ‘The ‘M’ Word: No, not Materiality’, *Ethical Boardroom* (Spring 2006) 103. The ‘M’ word alluded to in the article is ‘Mandatory’. See; <[https://issuu.com/ethicalboardroom/docs/ethical\\_boardroom\\_spring\\_2016\\_editi?e=14762375/35393074](https://issuu.com/ethicalboardroom/docs/ethical_boardroom_spring_2016_editi?e=14762375/35393074)> accessed 5 July 2016.

<sup>352</sup> *ibid*

remuneration in the banking sector etc. It is important to note that corporate law, traditionally, determined the adjectival and not the substantive issues of companies; it dealt with the processes and not the objectives of corporations. Corporations were established by promoters who determined the use to which to employ their private resources for risked returns. Contemporary CSR, however, seeks to determine how and to what end corporations should be run by requiring new obligations to meet certain social needs, though one thing that cannot be regulated on is the conscience of corporate managers.<sup>353</sup> As discussed one of the most contested issues of CSR is the manner in which and to what extent corporations should be regulated as business protects jealously their licence on profit-making while society demands greater consideration from business. Business while seeking to maximise profit are always looking for ways to reduce costs, so that a CSR regulatory model which will promote a business case is more likely to receive the approval of business.

Having discussed the generality of regulating CSR, developing countries face peculiar problems that challenge and buoy the prospects of CSR and these will now be examined in the next chapter.

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<sup>353</sup> On how, by introducing socially responsible was of investing capital and determining the outcome of corporate endeavour by imposing the use of corporate income on social projects in the public interest.

## CHAPTER FIVE

### CSR and Development in Emerging Economies

#### 5.1 Introduction

In the last chapter, the various regulatory instruments and environment in which corporations operate nationally and internationally was generally discussed. However, the economic environment and regulatory regimes of developing countries reveal some peculiarities that make CSR relevant. In terms of their development, emerging economies face daunting challenges. The socio-cultural influences on the economy, immaturity of political institutions and relatively poor economic production highlights the chasm between with developed countries.

Although the differences between development and underdeveloped countries is visible, “there is no criterion (either grounded in theory or based on an objective benchmark) that is generally accepted”.<sup>354</sup> Despite the United Nation Development Programme (UNDP), the World Bank, and the International Monetary Fund (IMF) approaching the issue of classifying the countries in terms of development “very differently” they all “designate about 20–25 percent of countries as developed”.<sup>355</sup> The Gross National Income of countries per capita is commonly used to measure the development of nations. The Human Development Indices (HDI) was developed and used by the U.N. to stress that human impact rather than economic growth should be used. Whichever index is used the dichotomy between nations north and

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<sup>354</sup> Lynge Nielsen, ‘Classifications of Countries Based on Their Level of Development: How it is Done and How it Could be Done’ (2011) IMF Working Paper WP/11/31, 4. <<https://www.imf.org/external/pubs/ft/wp/2011/wp1131.pdf>> accessed 12 August 2015.

<sup>355</sup> *ibid* 41



south, industrialised and unindustrialised elucidates the notion that many more countries are developing rather than developed.

In developing countries, issues of corruption, susceptibility to foreign influence, human rights abuse and impotent political institutions are rampant. MNCs and large corporations in the developing countries are powerful in an environment where the social implication of corporate activities are constantly being scrutinised. As most developing countries – especially those on the African continent - are “consumer nations” they are exploring the availability of a wide selection of products to impose ethical standards on corporations, and corporations are respond accordingly to the rhetoric of “political correctness” of consumers exploitatively in the same manner.<sup>356</sup>

This chapter focuses on the enactment of legislation governing CSR is India and Mauritius among other countries.<sup>357</sup> This trend is examined as a growing phenomenon noting similar attempts in Indonesia, The Philippines and Nigeria. The relevance of legislating CSR in developing countries is examined further. The conflicting ideological camps in the regulation debate – identified as the socio-cultural differences of individualism and collectivism – are discussed also. I disagree with Okoye that there are ‘still unsettled debates about whether and how CSR should have a role in development’.<sup>358</sup> I posit that the question of ‘whether’ CSR has a role in development has been answered by business itself engaging profusely in socially

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<sup>356</sup> Political correctness refers to the exhibition of corporations by public relations strategies that are merely cosmetic in response to calls for social responsibility. See Clive Barnett, Paul Cloke, Nick Clarke and Alice Malpass, *Globalising Responsibility* (Wiley-Blackwell 2011). This book discusses the political implication of moralised consumerism. It examines the evolution of global ethical consumption and is useful for rationalising the interest of the society (as consumers) in the CSR debate by evaluating their purchasing choices as a bargaining tool in creating new social responsibility norms.

<sup>357</sup> This refers to the provisions of section 135 of the Companies Act 2013 of the laws of India which is discussed in greater detail below.

<sup>358</sup> Adaeze Okoye, ‘Exploring the Relationship between Corporate Social Responsibility, Law and Development in an African Context’ (2012) 54 (5) IJLMA 364, 365.

responsible activities and agenda.<sup>359</sup> The question of ‘how’ is however, the subject of this thesis and remains much unresolved. The debate is centred mainly on whether corporations should carry out this role voluntarily or obligatorily.

## **5.2 The challenges of development**

In Africa development has posed an intractable issue.<sup>360</sup> Article 3(2) of the United Nations Declaration on the Right to Development provides that;

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.<sup>361</sup>

There are various levels of development between countries grouped together as ‘developing’. This is due to the differences in technological advancement, nearness to coastal resources, natural resources endowment, and affiliations to developed countries. The large corporations of foreign investment partners, the foreign countries themselves and global economic factors therefore plays a huge role in shaping the social responsibility of developing countries. As

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<sup>359</sup> Moon Seop Kim, Dong Tae Kim and Jae Il Kim, ‘CSR for Sustainable Development: CSR Beneficiary Positioning and Impression Management Motivation’ (2014) Corporate Social Responsibility and Environmental Management Corp. Soc. Responsib. Environ. Mgmt. 14

<sup>360</sup> The UNDP HDI categorises all sub-Saharan states as developing. See generally the Human Development Report 2015 (UNDP 2015) <[http://hdr.undp.org/sites/default/files/2015\\_human\\_development\\_report.pdf](http://hdr.undp.org/sites/default/files/2015_human_development_report.pdf)> accessed 12 August 2015

<sup>361</sup> The UN Declaration on the Right to Development was adopted by General Assembly resolution 41/128 of 4 December 1986.

developing countries try to meet developmental challenges in cooperation with business, the role that CSR plays in development become clearer.

Clearly, the duty of states as depicted in the UN Declaration on the Right to Development indicates that states have a duty to ensure the promotion of social welfare and equitable participation and achievement of self-development. Interestingly, the concept of development has evolved to ‘sustainable development’ rhyming with the essence and principles of CSR. Robert Kates et al. elucidating on the concept of sustainable development observed that entire planet, its endowments and cultures needs to be sustained while developing people and their economies in the communities they live.<sup>362</sup> They also noted that the ‘success of many former colonies in attaining national independence was followed by a focus on economic development to provide basic necessities’.<sup>363</sup> The World Bank has adopted the new concept observed that previously, economic ‘growth was achieved at the cost of greater inequity, higher unemployment, weakened democracy, loss of cultural identity, or overconsumption of resources needed by future generations’, a trend which that was unsustainable. Development indicators include security, health, education and economic performance and are all at low levels in developing countries.<sup>364</sup> Accordingly, by definition, sustainable development ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’.<sup>365</sup> Most international organisations have the contribution to or attainment of developmental goals as one, if not their major objective. The Preamble to the UN Charter states that the organisation is ‘determined ... to promote social progress and better standards

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<sup>362</sup> Robert W. Kates, Thomas M. Parris, and Anthony A. Leiserowitz, ‘What is Sustainable development?’ (2005) 47 (3) *Environment: Science and Policy for Sustainable Development* 8

<sup>363</sup> *Ibid* 10

<sup>364</sup> Robert W. Kates *op cit* 14

<sup>365</sup> World Commission on Environment and Development’s (the Brundtland Commission) Report ‘*Our Common Future*’ (Oxford University Press, 1987) [27] <<http://www.un-documents.net/our-common-future.pdf>> accessed 12 August 2015.

of life in larger freedom’ and ‘to employ international machinery for the promotion of economic and social advancement of all peoples’<sup>366</sup>.

Despite the good intentions outlined in many international treaties and the flow of foreign aid to developing countries, the issues of development and developing countries is still prominent on the agenda of the UN and most of its institutions. Organisations like the OECD and EITI often direct their objectives principally towards member-state actors. This has started to change with the acknowledgement of the importance of the collaborative role that MNCs can play in the achievement of developmental goals. It is argued that any expectation of business is not misplaced in view of the social objectives of corporations which are in tandem with business objectives. This development can be construed as an attempt to harness corporate ‘power’ without the annihilation of capitalism. Is this a hybrid or meta-regulatory approach? Unfortunately, the impact of corporations receives negative mention when discussions around on sustainable development are held; the complicity of business in corruption, breach of human rights and low economic opportunities are widespread.

### **5.2.1 Corruption**

Jane Valls, has identified some of the challenges facing corporations in Africa to include corruption, lack of institutional capacity, regulatory issues, inactive shareholders, state owned enterprises, board weakness, one-size fits all governance codes, political instability, sustainability.<sup>367</sup> Chayes has correctly identified corruption as a threat to global security.<sup>368</sup>

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<sup>366</sup> Preamble to the Charter of the United Nations and Statute of the International Court of Justice, 1945. Article 61, Chapter IX of the Charter contains provisions for the establishment of the Economic and Social Council with details objectives relating to social and economic development of member states.

<sup>367</sup> Jane Valls, ‘Corporate Governance Will Help Unlock Africa’s Potential’ *Ethical Boardroom* (29 July 2014). <<http://ethicalboardroom.com/global-news/corporate-governance-will-help-unlock-africas-potential/>> accessed 5 July 2016. She is the Chairman of the African Corporate Governance Network (AFCGN) - a not-for-profit organisation.

According to the Corruption Perception Index 2015, of the 167 countries assessed in 2015 most African countries ranked amongst the most corrupt.<sup>369</sup> The calculus-pervaded research of Jing and Graham concluded that “a combination of tough rules, vigilant enforcement, and a rectitudinous leadership” were contributory to reducing corruption in Singapore and Hong Kong in the 1970s and 1980s.<sup>370</sup>

The hacking and eventual publication by the International Consortium of Investigative Journalist revealed details of persons behind several corporations used to avoid detention in arms deals, bribery scandals, money laundering and tax avoidance all through the registration of offshore corporate entities registered for mostly illegal purposes. It is the tax avoidance purposes of these companies, and not their existence that is unconscionable.<sup>371</sup>

The Panama leaks has led to many governments commencing investigations on the ramifications of the leaks. Amidst the confusion, there seems to be public demand that corporations should not be used to reduce tax obligations of wealthy individuals by the introduction of more transparent and bilateral tax and financial services regulation between countries. The guise in which the argument was couched was to prevent easy laundering of funds for terrorist activities around the world. Beyond adherence to the law, therefore, there is a demand that tax avoidance by the rich using offshore corporations should be disallowed. The 2015 Commonwealth Group Meeting on Corruption had in attendance Heads of State of

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<sup>368</sup> See *Thieves of State: Why Corruption Threatens Global Security*, Sarah Chayes, W.W. Norton & Co., 2015

<sup>369</sup> Transparency International *Corruption Perceptions Index 2015*  
<<http://www.transparency.org/cpi2015>> accessed 7 April 2016.

<sup>370</sup> Runtian Jing and John L. Graham, ‘Values Versus Regulations’ (2008) 80 *Journal of Business Ethics* 791, 803.

<sup>371</sup> The ICIJ website contains these documents and have made them available for free downloads <<https://panamapapers.icij.org/>> accessed 3 June 2016. The British Virgin Islands, Guernsey and Canary Islands – all under the control of the U.K government are tax havens also.

the Commonwealth to discuss this issue among other things.<sup>372</sup> The South African Development Community (SADC) has also developed its Protocol against Corruption in combating corruption since 2001.<sup>373</sup> Although the UN, AU and ECOWAS treaties are not in force, the SADC Treaty has been in force for about a decade following the attainment of the required number of ratifications.<sup>374</sup>

The membership of the Organisation for Economic Cooperation and Development (OECD) through its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents 1997<sup>375</sup> and related Guidelines for Multinational Enterprises<sup>376</sup> developed special guidelines for combating corruption by corporations. In Nigeria very little success has been recorded in relation to embezzlement, illicit enrichment by public officers, misappropriation of public funds, bribery or abuse of office leading to financial loss for the state despite the ample opportunities provided by provisions of several laws for criminal prosecution and punishment. Developing countries have all suffered ill reputation as a result of the corruption of public officials. The enactment of legislation giving the host countries of MNCs extraterritorial powers may curb the spread of corruption in the award of contracts in developing countries for the construction of vital infrastructure. The U.S. Alien Tort Act<sup>377</sup> and the U.K. Bribery Act 2010 makes the act of

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<sup>372</sup> The 2015 meeting held in Malta.

<sup>373</sup> The South African Development Community's Protocol against Corruption was adopted by the Heads of State and Government of its members in August 2001. It is noteworthy that this treaty predates both the UN Convention against Corruption (UNCAC) 2003 and AU Convention on Preventing and Combating Corruption 2003.

<sup>374</sup> The SADC anticorruption Protocol came into force on 6 July 2005 after the required nine ratifications by member states was achieved.

<sup>375</sup> The principal document was adopted by the organisation in the Negotiating Conference on 21 November 1997. It came into force on 15 February 1999 and revised in 2007.

<sup>376</sup> These Guidelines were endorsed by the Development Assistance Committee at its High Level Meeting held between 6-7 May 1996.

<sup>377</sup> 28 U.S.C. § 1350

bribing ‘foreign public officials’ by corporations<sup>378</sup> in the U.K. a criminal offence<sup>379</sup> with extraterritorial application.<sup>380</sup>

### ***5.2.2 Poor economic opportunities***

Corporations can behave in such a way as to perpetuate economic inequalities and inhibit opportunities for further growth by not performing their social responsibility activities appropriately. More recently, the heated debate on ‘zero-hour’ contracts in the UK, underscores the polarity in the policy of the two main parties.<sup>381</sup> One of the objectives of business is to create wealth for the society, a contract off employment under a ‘zero-hour’ arrangement has been criticised as not being fair and inhibitive of the employer’s economic security.

The poor opportunities presented in developing countries is often perpetuated by MNCs that offer Foreign Direct Investments (FDIs) in negotiated contracts which are protective of the foreign companies.<sup>382</sup> It is a good thing that ‘pre-establishment commitments and sustainable development-oriented clauses are on the rise’.<sup>383</sup> Additionally, the economic fate of developing countries is influenced by global financial systems and practices. Through the provision of FDIs corporations from foreign countries further influence the economies of

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<sup>378</sup> Section 14 Bribery Act 2010

<sup>379</sup> Section 6 Bribery Act 2010

<sup>380</sup> Section 12 Bribery Act 2010

<sup>381</sup> A ‘zero-hours’ contract is one in which the employer is contracted for no amount of time. The work is at the pleasure of the hirer with no obligation for certainty of the employees requirement. There are cases of exclusivity contracts where a person so contracted cannot take employment with any other contract.

<sup>382</sup> The Royal Dutch Shell Company and other early oil exploration companies in Nigeria negotiated terms protecting their investments by the state. This may have provided a basis for the Nigerian government’s forceful intervention with military troops in the 1995 protests that led to the hanging of Ken Saro-Wiwa.

<sup>383</sup> United Nations Conference on Trade and Development (UNCTAD) *Recent Trends in IIAs and ISDSs* IIA Issue Note No. 1 (February 2015) 1.

<[http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf)> accessed 12 April 2016. IIAs refer to International Investment Agreements and ISDS refers to the Investor–State Dispute Settlement system.

developing countries. There is an inclination for developing countries to honour the historical nexus between them and their colonial masters.<sup>384</sup> Even when the Western powers under the auspices of the IMF and World Bank were negotiating the debt relief of the poorest countries in the world, Simms reported that ‘it appeared to many that the deal was being used to dump a package of widely discredited pro-big business ideas on the countries, with little consideration of whether or not they would work’.<sup>385</sup> This may be changing with the dilution of Western and Eastern influences on developing countries.<sup>386</sup>

Developing countries are susceptible to the reverberation effect of global financial or economic crisis. Global recessions and other economic turmoil invariably halts development efforts of developing countries. The last financial crisis affected developing countries in many ways. In the case of Nigeria, Olu Ajakaiye and ’Tayo Fakiyesi, observed that:

The consequences of the global financial crisis on growth and development in Nigeria are enormous and widespread. The first point of impact is through the drop in the price of oil. This is followed by the fall in the share price of the stock market. The combined effect of these two led to the depreciation of the naira exchange rate. Further worsening the situation is the withdrawal of foreign portfolio investment (hedge funds) from the Nigerian market.<sup>387</sup>

Writing in 2014, Claudio M. Loser noted the effects of the last global financial crisis;

The Great Recession of 2008–2009 and the accompanying standstill of financial markets were a rude awakening. Global wealth declined by the equivalent of 1 year of world GDP, distributed among virtually all regions of

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<sup>384</sup> The main influence is the ‘partition of Africa’ arising from the Berlin Conference 1884 – 1885.

<sup>385</sup> Andrew Simms, *Ecological Debt*, (Pluto Press, 2<sup>nd</sup> ed.) 2009, 8.

<sup>386</sup> By Western influences the capitalist ideology is often accepted and by Eastern influences such as Russian and Chinese influences socialist ideology is spread.

<sup>387</sup> Olu Ajakaiye and ’Tayo Fakiyesi, “Global Financial Crisis Discussion Series - Paper 8: Nigeria” (Overseas Development Institute (ODI) London, 2009)



the world. Commodity prices plummeted, and many of the emerging economies were afraid that they would suffer on a long-term basis. In many regions, including Europe, there has been no full recovery from the crisis even today.<sup>388</sup>

Loser further notes that ‘emerging economies’ growth rates have surpassed advanced economies’ and have contributed to lifting a significant portion of the world’s population out of poverty”<sup>389</sup> The contribution of corporations therefore, needs to be evaluated for continued and increased positive impact on national and global economies.

Foreign companies often get away with abuses they would otherwise be penalised for in their home countries. Fines and reparations are often not enough to compensate local communities of affected persons; the implications go beyond fines and reparations. The damage to the environment may be irreparable with cumulative consequences well beyond this century. Corporations involved in scandals often merge with others, declare insolvency or are acquired by another corporation (as in the case of Union Carbide in India), but the effects of their activities often continue to be felt.<sup>390</sup> Broughton commented that;

India relaxed its controls on foreign investment in order to accede to WTO rules and thereby attract an increasing flow of capital. In the process, a number of environmental regulations are being rolled back as growing foreign investments continue to roll in. The Indian experience is comparable

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<sup>388</sup> Claudio M. Loser, ‘Emerging Market Economies: Out of Favor But Not Out of Steam’ (2014) 6 (2) Global Journal of Emerging Market Economies 97, 100

<sup>389</sup> Claudio M. Loser op cit 98

<sup>390</sup> Edward Broughton, ‘The Bhopal Disaster and its Aftermath: A Review’ (2005) Environmental Health: A Global Access Science Source 1

to that of a number of developing countries that are experiencing the environmental impacts of structural adjustment.<sup>391</sup>

Financial penalties alone often do not and cannot fully indemnify either the human loss, environmental or overall consequences that trail corporate disasters.

### **5.2.3 Human rights and organised CSOs**

There are various forms of human rights of which civil and political rights have been receiving greater attention than social, economic and cultural rights. The protection of social and economic rights have faced challenges in many jurisdictions not the least in developing countries. This is because the fulfilment of these rights are subject largely to the financial ability of each state to fund the enjoyment of these rights. The extent to which these rights are acknowledged and protected often reveals the extent of a country's development.

The work of Ronald Coase<sup>392</sup> *The Problem of Social Cost* is influential in shaping contemporary discussion on the social implications of corporate activities by comparing the costs of production to business and also to society.<sup>393</sup> Coase opined as is now popularly advocated that 'the choice between different social arrangements for the solution of economic problems should be carried out in broader terms than this and that the total effect of these arrangements in all spheres of life should be taken into account'.<sup>394</sup> The idea of curbing corporate excesses must have influenced the Civil Society Organisations (CSOs) of the mid-19<sup>th</sup> century. The rise of civil movements was important in the absence of national and international condemnation of "irresponsible" corporate behaviour. Non-Governmental Organisations (NGOs) and CSOs have wrested the authority to investigate, challenge and

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<sup>391</sup> *ibid* 4.

<sup>392</sup> Ronald Coase won the Nobel Prize in 1991 for his work in Economics.

<sup>393</sup> Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1

<sup>394</sup> *ibid* 43

mete out “justice” to MNCs.<sup>395</sup> In cases where human rights abuses were perpetrated by MNCs in host states, reliance was often placed squarely on NGOs to advocate reform and accountability. There are several areas of social interaction where law has been used to set standards of acceptable behaviour through democratic processes.<sup>396</sup> NGOs have campaigned vigorously internationally and nationally in areas such as agriculture<sup>397</sup>, climate change, the environment<sup>398</sup>, democracy and social justice, disaster management. The burgeoning social media platforms aided by the penetration of IT infrastructure is contributory to the growth of CSOs. This has led to the proliferation of formal and informal publication using social mass media making CSOs impossible to be neglected by states and the international comity of nations.

The challenge is that while corporations can aid social objectives and contribute to the development of developing states, their practices often conflict with environmental and human rights issues. Corporations in applying capital to exploit natural and human resources is the twain issues of environmental sustainability and respect for human rights are firmly engaged and cannot be ignored. Corporate wealth and power have increased over the past century and the wealth of many MNCs outstripping the Gross Domestic Product (GDP) of many developing countries. In developing states devoid of strong political commitment to social justice and equality corporate activity can be seen to be very damaging and ethical consideration may not attract the high priority it deserves. Osuji has identified the requirement of individuals having personal ethics before it can be imbedded in an

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<sup>395</sup> Norbert Horn, ‘International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives’ *American Sociological Review* [1997] 62

<sup>396</sup> See International Law Office for current legislation in environmental, labour and human rights law.

<sup>397</sup> FairTrade and Conflict Diamonds

<sup>398</sup> Green Peace

organisation such as a corporation and the wider society whether nationally or globally.<sup>399</sup> In developing countries where there are poor standards of human rights observance development is slow.

#### **5.2.4 *Weak Political and Judicial Institutions***

Developing countries are also characterised by weak political institutions with asymmetric policy and regulatory information. The traditional economies of most developing countries are mostly dependent on unmechanised agrarian and mining sectors of the economy. The ‘resource curse’ persists despite being a cornucopia of resources.<sup>400</sup>

The advent of market economies was a necessary development concurrent with the establishment of the corporation in the western economies in the 19<sup>th</sup> century. It has been argued that the recent financial crisis eroded social and welfare rights of citizens in many developing countries.<sup>401</sup> The ripple effects across national boundaries necessitated a greater degree of cooperation between states beyond the conventional areas of arms. Thus the influence of global trends on states cannot be overstated: ever increasing rapidity in communication methods have required commensurate high-rate reactions from influenced states to manage the explosion in international trade. National courts are reacting not only to the sensibilities of domestic factors but increasingly adapting, due to globalisation, to

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<sup>399</sup> Onyeka Osuji, ‘Fluidity of Regulation-CSR Nexus: The Multinational Corporate Corruption Example’ (2011) 103 *Journal of Business Ethics* 31, 41.

<sup>400</sup> The ‘resource curse’ refers to the link between political instability and underdevelopment in many developing countries that are resource rich. Venezuela, Nigeria and Angola are prominent among other countries.

<sup>401</sup> Anashri Pillay and Murray Wesson, ‘Recession, Recovery and Service Delivery: Political and Judicial Responses to the Financial and Economic Crisis in South Africa’ in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014). <<http://dx.doi.org/10.1017/CBO9781107337954>> accessed 01 December 2014.

international standards by adopting international jurisprudence and in some cases “inter-judicial” collaboration.<sup>402</sup>

The effects of globalisation should lend CSR to a universal definition, law and subsequently practice, with only some allowance for local adaptations. The social aspirations of consumers and employees seem to be the same. The differences in the developing economies and the developed seems to be in the agitation of the activists from the developed championing change in the developing countries despite that they are the ultimate beneficiaries of profits from the developing countries.

CSR is increasingly being discussed as a topical academic, policy and legal issue in not only business but development and human rights studies, and is increasingly becoming political.<sup>403</sup>

The relevance of the association of CSR and development and human rights studies is more profound in developing countries than the developed ones. Accordingly, this chapter will focus on the peculiar trends in CSR and corporate law in developing countries with emerging economies. The characteristic features of the evolution of CSR in some countries like Brazil, Mauritius, and India, show that globalisation has shaped the practice of CSR in developing countries. The spread of corporations into the now so-called developing countries makes CSR an important phenomenon in the economic and socio-political studies of developing countries. Accordingly, CSR decisions are ultimately political ones which are being made developing economies vis-à-vis their economic ideologies and practices and how do they interact in the society.

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<sup>402</sup> Eyal Benvesti and George W. Downs, ‘National Courts, Domestic Democracy and the evolution of International Law’ [2009] EJIL 59, 61.

<sup>403</sup> David Kinley, Justine Nolan and Natalie Zerial, ‘The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations’ (2007) Faculty of Law, University of Sydney <<http://sydney.edu.au/law/scil/documents/2009/SCILWP8.pdf>> accessed 14 August 2015

Political orientations matter as is demonstrable from the influx of Chinese national and private companies into Africa generally, with the resultant dilution of the prevalent CSR practices with that of the Chinese companies.<sup>404</sup> China's interest in Africa is obvious. Some have contradicted the acceptance of China's investment overtures by citing poor human rights standards and well-documented (and sometimes flagrant) abuse of the personal freedoms of its citizens. It is only in a case where the host countries are firmly pursuing best practice and international standards that their foreign partners can oblige by accepting conditions set in law in the host country even if different from those of the foreign company. In this regard, it is pertinent to note that the discipline of CSR is not precipitating; rather it is still evolving. The practice of MNCs 'outsourcing' production and operating subsidiaries in developing countries with 'cheaper labour' and less stringent corporate responsibility standards but this trend is changing. This trend can be traced to the idea that corporations will reduce cost while seeking to increase profits, and one of the ways in which that has been done by the big multinationals is to produce from less developed markets. With a series of mishaps in countries such as India, Bangladesh, and Sri Lanka, some developing countries have embarked on domestic reform of corporate governance standards to ensure the safety of their citizens and the environment. Nonetheless they are still the preferred destination of large corporations due to their weaker economies and lower cost of labour.

Some common features are identifiable amongst developing countries at the turn of the 21<sup>st</sup> century which may explain the recent international efforts to collaborate and cooperate in their effort aimed at the attainment of improved development in their respective states. Issues

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<sup>404</sup> There is no research study into the CSR practices of Chinese state-owned and private companies in Africa. However, there is unfavourable press and public perception of their corporate activities. See also *Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes: Corporate Complicity & Legal Accountability* (2008) Vol. 1-3 International Commission of Jurists (ICJ), See also Michael Kerr, Richard Janda, and Chip Pitts in Chip Pitts (ed), *Corporate Social Responsibility: A Legal Analysis* (Butterworths/Lexis- Nexis, Canada, 2009).

of sustainable economic growth, improved living standards and improved human capacity indicators are not peculiar to any one state; they all share similar aspirations in this regard.

The development of strong political and judicial structures tends to promote generally the expression and aggregation of social norms. The political climate determines the way in which the economic actors manifest their ideologies. In developing countries, the main influencers of CSR practice corporate managers, the CSOs and the state. The situation of corporate governors at the heart of financial and strategic corporate decision-making subject them to direct criticism or praise for CSR. Their high-visibility while working as the face of their organisations puts them in the path of direct conflict with both the state and civil society. This conspicuousness is easily ascertainable when operational lapses lead to catastrophic events or injury.<sup>405</sup> In developing countries, weak political institutions may lead to a lack of redress of corporate activities and corporate managers often urge liaise with government officials to perpetuate bad corporate practices. Without exception, most emerging economies face an inordinate level of corruption. It is not exclusively blamed on the greed and moral turpitude of citizens of the “host states”. The collusion and connivance of agents of corporations from the “home state” are evident as some cases have shown.<sup>406</sup>

Naturally, those affected by corporate excesses have traditionally opposed oppressive and harmful corporate activity that has a direct effect on their lives. In developing countries,

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<sup>405</sup> In the U.S Congress, the House Committee on Energy and Commerce sat for 10 days’ oversight demanding BP officials to answer questions on the oil spill in 2010. In weaker political environments if this is done at all it may not lead to expeditious action to remedy the situation as the case of Nigeria’s Ogoniland has shown – this took over 30 years. The quantum of damages for direct and indirect impact on the environment and human beings is incalculable. In many cases, those who should benefit are descendants of those injured.

<sup>406</sup> Again, a classic case is the Ken Saro-Wiwa case. Another popular case was the Halliburton scandal reviewed in Barbara Crutchfield George and Kathleen A. Lacey, ‘Investigation of Halliburton Co./ TSKJ’S Nigerian Business Practices: Model for Analysis of the current Anti-Corruption Environment on Foreign Corrupt Practices Act’ (2006) 96 The Journal of Crim. Law and Criminology ‘Investigation of Halliburton Co./ TSKJ’S Nigerian Business Practices: Model for Analysis of the current Anti-Corruption Environment on Foreign Corrupt Practices Act’

especially in communities where exploitation of extractive resources is taking place, informally organised groups have emerged. With the passage of time, they have become more formal and organised in order to muster more clout to challenge – mostly foreign – corporations and with assistance from multilateral agencies, states and sympathetic institutions, civil society organisations have mushroomed in many countries. Not only have their numbers grown worldwide, they have also started command greater influence and importance in regulating business.<sup>407</sup> In the developing states – most of which gained independence in the mid-20<sup>th</sup> century, CSOs have strongly agitated for economic independence also despite the financial support they invariably receive through foreign aid.<sup>408</sup> In 2011, a UK Cabinet Minister raised issues regarding the UK aid budget arguing against a legal commitment by the UK to meet the “United Nations target of 0.7% of national income”<sup>409</sup>. The perceptible policy of the developed countries is to donate aid to developing states while promoting trade with them. Supposedly, developing countries benefit directly from what is seemingly an altruistic gesture through increased trade and indirectly through the propagation of their own ideologies and technologies thereby justifying such expenditure in a way akin to the ‘business case’ of CSR.

States through their respective governments have been very active in demanding and mediating in the clash between corporations and third parties when CSR issues are topical. States often wade in to demand remedial action from corporations as can be seen in the case of the BP oil spill in 2010, and negotiate on behalf of the citizens in disputes,<sup>410</sup> and also legislate when stalemates persist during CSR conflicts. When negotiations and interventions

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<sup>407</sup> Bridget Hunter and Joan O’Mahoney (eds), (2004) ‘*The Role of Civil Society Organisations in Regulating Business*’ ESRC, LSE Discussion Paper No. 26, 3

<sup>408</sup> Strong foreign trade relations exist between the colonial states and the now independent states.

<sup>409</sup> Mark Doyle, ‘Liam Fox row: Where does UK’s aid budget go?’ BBC News, 17 May 2011. <<http://www.bbc.co.uk/news/uk-politics-13430395>> accessed 16 December 2014.

<sup>410</sup> Ogoni, South Africa mining, Rana Plaza etc. are examples where government initiative was crucial in seeking compensation, reparation and other forms of redress for victims.



fail, the final resort is to the courts for judicial intervention.<sup>411</sup> Internationally, states invariably support efforts on imposing social responsibility obligations on big corporations and constitute the necessary parties in international law to effectuate any treaty. So, states astride domestic and foreign jurisdictional obligations.

In developing countries, CSR has meant different things. The fragmented development of the subject – without a clear and authoritative definition – has led to the evolution of many interpretations of what constitutes the CSR of business. Surely, the differences in culture has played a part with differences in economic and political realities of different states determining the focus and depth of CSR practices. Importantly, political theories have influenced the subject. While the Anglo-American model of capitalism has instilled anti-regulation tendencies in their economies, developing countries with less matured economic tend not to deviate completely from cultural impressions.<sup>412</sup>

Since the 1950s when it became fashionable for business to respond to workers' welfare, there has been a resurgent and exponential increase in public discuss and engagement with CSR issues can be trances to the Nike sweat shops scandal of the 1990s.<sup>413</sup> More recently according to Theodore Levitt, corporations have increased interest in social programmes and have given opportunity to states now seeking to regulate business creating an indistinct and confused situation.<sup>414</sup> To be “politically correct” and move with the times, corporations have

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<sup>411</sup> Indonesia's Supreme Court waded in to declare CSR obligations of the state. CSR remains mandatory for firms, court rules 'CSR Remains Mandatory for Firms, Court Rules' *The Jakarta Post* 16 April 2009 <<http://www.thejakartapost.com/news/2009/04/16/csr-remains-mandatory-firms-court-rules.html>> accessed 14 August 2015

<sup>412</sup> The two dominant theories have been the shareholder value and stakeholder theories of corporate law.

<sup>413</sup> Crane and others, *The Oxford Handbook of Corporate Social Responsibility* (OUP, Oxford 2008) 20, where 1950 was used as a benchmark of modern CSR.

<sup>414</sup> Theodore Levitt, 'The Dangers of Social Responsibility' (1958) 36(5) *Harvard Business Review* 41. This position is presumably more true of the mature capitalist economies than the developing states of Africa and Southeast Asia.

increased participation in social programs as they strive to exhibit responsiveness to social issues that are constantly being highlighted in the public domain through social media. Business with its contemporary stance on social issues is taking the position of a ‘development partner’. The contemporary notion that social issues cannot be ignored by business is increasingly becoming a characteristic fixture of modern business. The interdependence of business on a viable society and of society on thriving business is gaining acceptance to the level of truism. The Fairtrade organisation have adopted this ideology by stating that;

FairTrade is about better prices, decent working conditions, local sustainability, and fair terms of trade for farmers and workers in the developing world.

It’s about supporting the development of thriving farming and worker communities that have more control over their futures and protecting the environment in which they live and work.

And it’s your opportunity to connect with the people who grow the produce that we all depend on”.<sup>415</sup>

Porter and Kramer agree that that in modern business, “there is no inherent contradiction between improving competitive context and making a sincere commitment to bettering society”.<sup>416</sup>

As no country can develop in isolation – and the interdependence of states has been reinforced by internationally bonding social agents such as the Internet – developmental

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<sup>415</sup> See the FairTrade website: ‘What FairTrade does’ <<http://www.fairtrade.org.uk/en/what-is-fairtrade/what-fairtrade-does>> accessed 24 May 2016.

<sup>416</sup> M Porter and M Kramer ‘The competitive advantage of corporate Philanthropy’ Harvard Business Review on Corporate Responsibility (2003) 58.

efforts transcend boundaries. It is the aim of every country to develop to its fullest economic, political and cultural capacities. Despite the seeming competition between states to forge alliances that engender their individual aspirations, collaborative and cooperative efforts abound in the quest for individual development. States presumably take up membership of regional and global institutions like EITI, and collaborate with the UN, OECD, etc. partly to entrenchment democratic political processes. Developing countries strive to achieve stable democracies substantial reduction in coups d'état.

Most developed countries are characterised by strong political institutions. Investors therefore often regard 'political risk' when considering investing in developing countries. In developing countries devoid of strong political institutions, regulatory effectiveness is wanting. Regulation in young and fledgling democracies is, therefore, desirable to compensate for the weak social, political, and judicial institutions. Corporations cannot be left to their own regulation as they will self-preserve rather than cater effectively and efficiently to social need due to their inclination to satisfy profit making.<sup>417</sup>

There is relatively corporate power concentrated in MNCs as new mergers and acquisitions continue to grow corporate power in developing countries.<sup>418</sup> The institutional framework and political environment where MNCs operate in developing countries are not the same as in developed countries. It is, however, in the interest of foreign corporations to enhance capacity development in Africa – the greater the number and purchasing power of the society, the greater will be the profits for MNCs.

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<sup>417</sup> The case has been made that corporations have a hierarchy of needs like human being, the first of which is self-preservation and satisfaction. See Nyameh Jerome, 'Application of the Maslow's Hierarchy of Need Theory; Impacts and Implications on Organizational Culture, Human Resource and Employee's Performance' (2013) 2 International Journal of Business and Management Invention 39.

<sup>418</sup> Mergers and acquisitions continue to occur as companies seek more efficient ways of producing goods and services subject to national antitrust laws.

### **5.3 Corporations and Development**

There are definite contributions that corporations can make in the society, especially that of developing nations. Corporations are moving divergently from the endured model of philanthropism to creating longer term impact value especially through human development. As skills and funds are often found in greater abundance in large successful corporations, these factors can be employed to create value for as long as the corporations remain profitable. In turn, corporations are able to draw on the pool of skills and innovations it may have created purposely for its own benefit.

Although CSR practices can be used to achieve immediate and high-profile publicity by corporations, short-term relief should not be prioritised over medium-to-long-term projects such as investing in training of medical personnel for a local community. Photoshoot opportunities should not be abused by corporations in want of reputational credibility at the expense of more lasting developmental opportunities.

Two factors are likely to influence the practice of CSR in developing countries in the next few decades - technological advancement and ethical consumerism – and both are linked. Technological breakthroughs in alternative carbon-free energy sources and energy storage – such as the use of electric cars and solar energy for power generation- will revolutionise the world. The promotion of technological research into these areas has been determined by ethical and socially responsibility-motivated choices mostly. The cyber revolution which has been dubbed the fourth industrial revolution and ethical consumption is being influenced by the stakeholder view of CSR which speaks to the notion of ‘corporate conscience’ and engages suppliers, for example, to be consider ethical consumption patterns which are influencing production worldwide. The influence of FairTrade on workers’ rights in developing countries and the intervention of De Beers in curbing the production of what was

termed ‘conflict diamonds’ are two examples of this. CSR is used as an attempt to solve wider social issues often at a global scale by denouncing unconscionable practices worldwide.

### ***5.3.1 Role of corporations in development***

That government is actively seeking allies in its development strategies and plans is a foregone conclusion of the attitude of states towards achieving general development of their societies. Corporations being an important component of modern society, the government of developing states regard them as indispensable in providing economic growth.

The paradigm of world economic power has changed fundamentally in the 21st century with the emergence of fast-developing economies in Asia, South America and Africa. Although the world’s biggest economies remain predominantly the developed northern hemisphere nations, the rise of developing nations exhibiting distinctive and steady growth potentials is challenging the long-standing notion of “northern hemisphere” dominance of the past centuries.

Known by various acronyms such as the BRICS<sup>419</sup>, MINT<sup>420</sup> and the Next 11<sup>421</sup>, some attention has now been trained on the relevance of the emergence of the prospective new economic powers and what their potential growth means for the world economy. Rooted in the historical economy of the developing countries are well-developed alliances with MNCs of the developed countries. The pattern of collaborations depict a complementary and supplementary role of CSR in developing states.

#### ***Complementary role (qualitative enhancement)***

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<sup>419</sup> The BRICS countries consist of Brazil, Russia, India, China and South Africa. The acronym was first used and coined by Jim O’Neill in Jim O’Neil, ‘Building Better Global BRICs’ (2011) Global Economics Paper 66, Goldman Sachs <http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf>> accessed 14 August 2015.

<sup>420</sup> The MINT countries are Mexico, Indonesia, Nigeria and Turkey

<sup>421</sup> The next eleven countries are Bangladesh, Egypt, Iran, Indonesia, Nigeria, Mexico, Pakistan, the Philippines, South Korea, Turkey and Vietnam.

In some emerging economies, corporations are regarded as major contributors to the developmental efforts of the states.<sup>422</sup> The CSR activities of corporations are complementary to those of the state, in so far as the objective is in consonance with that of the state to provide social welfare. Antonio Vives has argued that CSR is development done by the private sector that is complementary to the efforts of governments and multilateral organisations. He stated that:

‘CSR’, by its very nature, is development done by the private sector, and it perfectly complements the development efforts of governments and multilateral development institutions’.<sup>423</sup>

A fundamental characteristic of developed countries remains their economic strength measured by high Gross Domestic Product (GDP)<sup>424</sup>. Claudio Loser observed:

Historical perspective provides powerful evidence that emerging economies are growing on a positive trajectory. In the last 30 years, we have witnessed a sharp increase in the income of emerging and developing economies and, as a consequence, a rapid increase in the share of these economies in global wealth and GDP.<sup>425</sup>

The voluntary schemes of corporations therefore, are aimed at complementing state programs. However, states as the ‘owners’ of the social welfare programs indicate the areas of cooperation with corporations to achieve its wider objectives such as in urging corporations

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<sup>422</sup> Brazil and Mexico are examples of the social policy framed with corporate participation as a key delivery mechanism.

<sup>423</sup> Antonio Vives, ‘*The Role of Multilateral Development Institutions in Fostering Corporate Social Responsibility*’ (2004) 47(3) Development 45, 46

<sup>424</sup> The GDP is the most commonly used measurement of state wealth. It is an aggregate of the market value of all goods and services produced in a country less the export-import volume usually calculated annually.

<sup>425</sup> Claudio M. Loser, ‘Emerging Market Economies: Out of Favour But Not Out of Steam’ (2014) 6 (2) Global Journal of Emerging Market Economies 97, 97.

to lend oney in a down turn or committing to research in healthcare without mandatory. In India government has been criticised for prescribing taxes through CSR legislation by compelling spending on state-designated programs. This position was taken by Friedman by describing the legislating on CSR as government legislating on corporate expenditure in the name of social responsibility by “in effect imposing taxes, on the one hand, and deciding how the tax proceeds shall be spent, on the other”.<sup>426</sup>

*Supplementary role (quantitative augmentation)*

The involvement of corporations generally can supplement the quantum of state programs in social welfare. States are often not able to meet all desirable social needs of their citizens. Where business adds to the state activity in a social agenda, its role can be said to be supplementary of government responsibilities.<sup>427</sup> The state’s role to provide social welfare and development can be better served when corporations are engaged in a coherent manner. Indeed, it is in the interest of business to engage in any state-sponsored program aided at increasing the capacity fo the citizens to live and work in an environment in which business itself can thrive. In this regard, business itself is a stakeholder in development, although the provision of factors for development itself is firmly under the purview of state responsibility. CSR be used in complementary and supplementary ways, to address environmental and social issues in developing countries.

Climate change is considered one of the world’s urgent prblems. It has been attributed largely to global warming and the effects of carbonisation. The increased production of goods for the world's population places an unsustainable demand on finite global natural resources like fossil fuels. The finiteness of these resources calls for prudence in its management. Simms

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<sup>426</sup> Milton Friedman, ‘The Social Responsibility of Business is to Increase Its Profits’ *New York Times Magazine* (New York 13 September 1970) 32-33, 32

<sup>427</sup> This is the idea of giving foreign aid to developing countries. It is often to supplement donee states’ capacity to meet targets which may be beyond its reach due to insufficiency of state funds.

has argued that using more resources that can be naturally replenished or managed has led to ecological debt. He describes this debt as an ‘ecological debt’.<sup>428</sup>

The traditional concept of CSR and stakeholder engagement promote responsiveness to the needs of those entities that corporations deal with such as employees and suppliers. There are often encounters between corporations meeting the standards of respect for human rights, hence human rights issues are usually associated with big business. Developing or emerging economies are so-called because of certain characterisations or attributes common to them. The UNDP Human Development Report, 2014 ranked Nigeria 152 out of 187, positioning it in the low human development category. In effect, most of its people are of enjoying low levels of security, access to education and economic opportunities. These deficiencies denote social vulnerability on account of the lack of capacity to confront ‘big business’ if their rights are infringed.

### **5.3.2 A new world corporate order?**

There is an urgency due to climate change. This urgency is compelling the serious and earnest action by states. The two world Earth Summits in Rio de Janeiro in 1992 and 2012 highlight the need for all nations of the world to work collaboratively towards curbing the common environmental challenges facing the world.<sup>429</sup> The global effort in this regard is potentially changing the speed, commitment and outcome of the concerted effort at regulating all facets of environmental challenges including regulating corporate behaviour and productions practices worldwide. Though the deep seabed and the moon are the only

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<sup>428</sup> Frank Maes, Wouter Vanhove, Jesse Lambrecht, Erik Paredis and Gert Goeminne, *The Meaning of Ecological Debt* (Academia Press 2009); Andres Simms *Ecological Debt; Global Warming and the Wealth of Nations* (University of Chicago Press 2009)

<sup>429</sup> The Rio de Janeiro Earth Summit as held under the auspices of the United Nations Conference on Environment and Development (UNCED) between from 3 to 14 June 1992 and the 2012 Rio Earth Summit held from 13 to 22 June was organised by the United Nations Conference on sustainable Development.



recognised areas forming the ‘common heritage of mankind’ the global problems associated with climate change is raising issues requiring collective action.<sup>430</sup>

Another emerging significant development is the use of the principle of extraterritoriality to institute cases against corporation in their home states rather than the host state for breach of legal rules under the laws of the home state. In the past decade, case law has started to emerge empowering plaintiffs to bring action against parent companies for actions or omissions of its subsidiaries thereby defeating a possible challenge of the action on the basis of the doctrine of *forum non convenience*<sup>431</sup>. In *Lubbe v. Cape Plc.*<sup>432</sup>, it was argued that a company can be held liable in the U.K for the liabilities of its South African subsidiary. The combined effect of the increasing overreaching by national courts in this manner with the identified international normative approach to environmental issues is likely to lead to a new order or framework for corporations operating internationally.

A well-coordinated national CSR policy and practice can yield several advantages in emerging economies. In South Africa deaths resulting from poor safety of miners has reduced drastically due to government collaboration with industry.<sup>433</sup> environmental sustainability, social inequalities, augment occupational health services, employment and poverty reduction.

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<sup>430</sup> Frank Maes et al. op cit 116.

<sup>431</sup> By this legal principle, a court may decide jurisdiction on a suit where it decide that there is a better forum or court where the case ought to be heard i.e. in a more convenient forum.

<sup>432</sup> *Lubbe v. Cape Plc.*, [2000] UKHL 41. In this case a South African employee brought an action for damages successfully against the U.K. parent company of a subsidiary he worked for.

<sup>433</sup> Kevin Cowley, ‘South Africa’s Mines Deaths Fall to the Lowest in 2015’ *Bloomberg* (28 January 2016) <<http://www.bloomberg.com/news/articles/2016-01-28/south-africa-s-mine-deaths-fall-to-lowest-on-record-in-2015>> accessed 15 April 2016.

In the financial sector, companies are embracing socially responsible lending in recognition of the importance of the impact of unethical lending to the society.<sup>434</sup>

#### **5.4 The experiment of legalise and mandatory CSR; a growing trend?**

The use of legislation as a regulatory tool is a phenomenon that is gaining wide acceptance and application. In 2006, section 172 of the U.K. Companies Act caught the interest of the world. This is because the law provides that directors ‘must act’ to promote the company’s success having regard to long term implication of their decisions on company employs, the community, environment, suppliers and creditors.<sup>435</sup> Some other countries have now followed this trail to legislate on CSR in a trend that challenges long held views about capitalism and the unregulated territory of social responsibility. Indonesia, India and Mauritius are among the countries that have passed legislation in this regard with other countries like Nigeria seeking to follow suit. This seems to be a growing pattern among developing countries mainly.

##### **5.4.1 Indonesia**

On 15 April 2009, the Indonesian Constitutional Court ruled that companies were mandated to act in such a way that stipulated principles akin to CSR guidelines in a mandatory way.

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<sup>434</sup> ‘American Express Global Business Travel Releases First Global Corporate Social Responsibility Report American Express Global Business Travel Releases First Global Corporate Social Responsibility Report’ *Businesswire* (New York, 10 September 2015) <<http://www.businesswire.com/news/home/20150910005899/en/American-Express-Global-Business-Travel-Releases-Global#.VfLZ1BFViko>> accessed 11 September 2015. The report outlines the company’s commitment to responsible, sustainable and ethical processes and practices in five key areas of focus: governance and ethics, employees, customers, community and environment.’

<sup>435</sup> Section 172(1) Companies Act 2006

The Law of the Republic of Indonesia on Investment Law No. 25 of 2007<sup>436</sup>, requires all corporations – domestic and foreign – to implement corporate social responsibility and environmental responsibility.<sup>437</sup> The law requires that all investment be based on the principles of legal certainty, openness, accountability, the equal treatment without discriminating the country of origin, togetherness, impartial efficiency, sustainability, environmental friendly, independency, balance of progress and national economic unity.<sup>438</sup> Corporate objectives was defined and set out in the law as increasing national economic growth, creating job opportunity, improving sustainable economic development, improving competitiveness of national business sphere, increasing the capacity and the capability of national technology, encouraging people economic development, processing economic potential into the real economic strength by using fund coming from both domestic and foreign countries, improving the prosperity of the community.<sup>439</sup>

It is clear upon the application of the ordinary meaning of the words used in this legislation that social responsibility and development influenced it. The implication of this law was to provide investment and corporate accountability as tool for meeting wider social needs. Patricia Waagstein pointed out that the divergent focus of business and society in the new law, when she stated that “While civil society is primarily concerned with the implementation of such a regulation, the business community is more concerned with their impact on

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<sup>436</sup> The new law replaced the Law Number: 1 of 1967 “because they no longer suit the necessity to accelerate the national economic and legal development, especially in investment sector” according to clause (e) of the preamble. Copy of this legislation is obtainable at:

<file:///C:/Users/Cos/Downloads/ASEAN\_Indonesia\_Law%20No25%20of%202007%20on%20Investment.pdf> accessed 23 July 2016.

<sup>437</sup> In an action brought by business and led by the Indonesia Chamber of Commerce challenging this law, the Constitutional court of Indonesia held that the law was in consonance with the peculiar situation in Indonesia where there is weak law enforcement.

<sup>438</sup> Article 3(1) (a) –(j) Law of the Republic of Indonesia on Investment Law No. 25 of 2007

<sup>439</sup> Article 3(2) (a)-(h) Law of the Republic of Indonesia on Investment Law No. 25 of 2007

corporate costs and their comparative advantages”.<sup>440</sup> The Elucidation on the Law of the Republic of Indonesia Number: 25 of 2007 concerning Investment states that;

The rights, obligations, and responsibilities of investors are specially arranged in order to provide legal certainty, to confirm the obligations of investors in applying the principle of good corporate governance, to honour traditional culture of the community, and to implement corporate social responsibility.<sup>441</sup>

The expatiation of the principle of accountability in the legislation was explained thus;

“Accountability principle” shall mean the principle determining that every activity and final result of making investment shall be accountable to the community or the people, as the holder of the highest sovereignty of the country in accordance with the rules of law.<sup>442</sup>

By this law, the benefit of effective CSR policy and law to augment government social and developmental programs is becoming more evident in developing countries. This development marked in part the beginning of the ownership for CSR agenda by states. Zerk has argued that states have the main obligation of regulating CSR due partly to the lack of international law in this regard and also to the fact that control of the management of corporate activity naturally falls obligatorily to them.<sup>443</sup>

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<sup>440</sup> Patricia Waagstein ‘*The Mandatory Corporate Social Responsibility in Indonesia; Problems and implications*’ (2001) 98 *The Journal of Business Ethics* 455 – 466 at 445

<sup>441</sup> Clause 1, Elucidation on the Law of the Republic of Indonesia Number: 25 of 2007 concerning Investment. Copy obtainable at:

<file:///C:/Users/Cos/Downloads/ASEAN\_Indonesia\_Law%20No25%20of%202007%20on%20Investment.pdf> accessed 23 July 2016

<sup>442</sup> *ibid*

<sup>443</sup> Jennifer Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge University Press 2006) See Chapter 7 in particular.

### 5.4.2 *India*

The India – section 135, Companies Act 2013<sup>444</sup> provided that companies with net worth of five hundred crore or more, one thousand crore or more in turnover, or net profit of five crore or more in any financial year is bound by the provisions of section 135 to undertake CSR activities and apply 2% of turnover over a three-year period.<sup>445</sup> The mandating provision of Section 135 generated extensive debate on the likely effects of mandatory expenditure by the companies to be affected by the proposed law and was mostly viewed with scepticism. The law further required that a Corporate Social Responsibility Committee be constituted under the Board consisting of three or more directors, of which one must be an independent director. The concern expressed over the new law was mainly in regard to the mandate CSR provisions as surreptitious introduction of taxes and the lack of a working model and infringement of the human right to pursue legitimate economic activity without unreasonable regulatory hindrance.

In further guidance and explanations published by the Ministry of Corporate Affairs clarified that there are no special tax benefits from undertaking CSR activities under section 135 save where tax relief applies under other legislation.<sup>446</sup> It is not surprising that this law was not received enthusiastically by business. Two interesting provisos apply when complying with the new CSR provisions. The first stipulates that corporations “shall give preference to the local area and areas around it where it operates”, and secondly, that in the case where non-

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<sup>444</sup> This is a comprehensive company law legislation in India replacing the 60-year-old Companies Act 1956.

<sup>445</sup> A crore rupee is equal to ten million rupees or 100 lakhs. A lakh rupee is one hundred thousand rupees. 5 crores = c.744,000USD, 500 crores = c.74,400,000USD and 1000 crores = c.148,800,000USD.

<sup>446</sup> ‘Frequently Asked Questions (FAQs) with regard to Corporate Social Responsibility under section 135 of the Companies Act, 2013’ General Circular 01/2016 – 05/19/2015-CSR, Ministry of Corporate Affairs, Government of India (12 January 2016)

compliance is due to not spending the required amount, the Board shall ‘specify the reasons for not spending the amount’.<sup>447</sup>

Section 135 (5) provides that the Board of every company is required to comply with the new CSR provisions “shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy”.

Public perception of the reporting of CSR in 2015 indicates that the Government of India attaches seriousness to the strict and full reporting under section 135 by the Registrar of Companies. An independent survey indicates substantial compliance by companies with some spending more than the prescribed 2% of their average net profit over three years as stipulated by law.<sup>448</sup>

It has been reported that letters written to over 100 companies by the Registrar of companies requesting fuller explanations to reports submitted in 2014 under section 206(1) to show cause under section 450 of the Companies Act. It will be interesting to see the impact of the newly constituted specialist company law tribunals will deal with cases before it that border on compliance of CSR activities should cases come before it.<sup>449</sup> Section 260(7) and section 450 provides punishment for failure to comply with the provisions and regulations under the Act. However, it is doubtful if prosecutions and fins will be meted out as companies and CSR compliance officers grapple with the relatively new law. No defaults of section 135

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<sup>447</sup> Section 125(5) Companies Act 2013

<sup>448</sup> India’s CSR Reporting Survey 2015 by KPMG India. KPMG is a private global accountancy firm. <<https://www.kpmg.com/IN/en/IssuesAndInsights/ArticlesPublications/Documents/KPMG-CSR-Survey2015.pdf>> accessed 17 May 2016

<sup>449</sup> The National Company Law Tribunal and its appellate arm the National Company Law Appellate Tribunal were set under section 410 of the Companies Act, 2013 and effective from 1 June 2016 under.

provisions were declared in the 1<sup>st</sup> Annual Report on the Working and Administration of the Companies Act 2013.<sup>450</sup>

A new Corporate Social Responsibility Regulations came into force on April 1, 2014, In India, the CSR expenditure is 2% of the pre-tax profits of for-profit corporations calculate as the mean of three years' net profits.<sup>451</sup> CSR expenditure of companies are not exempt from taxation as some other profits are under Section 37 of the Income Tax Act 1961. However, a company may work with third party not-for-profit companies<sup>452</sup> to implement its CSR projects thereby deriving between 50% - 200% tax exemption, depending on the qualifying exercise conducted in compliance with the Companies Act 2013.<sup>453</sup>

The Indian Companies Act, 2013 has been described as inhibiting instead of promoting CSR due to its 'comply or explain' posture. An editorial asserted that the absence of stringent provisions has led companies to hide under the garb of explanation for not meeting CSR norms.<sup>454</sup> Companies to which section 135 applies are required to include in their financial statements 'the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year'.<sup>455</sup> The activities approved for compliance with section 135 requirement of formulating CSR policies must address one or more of the following;

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<sup>450</sup> The report covers the first full year of the Companies Act 2013 and covers 1 April 2014 - 31 March 2015.

<sup>451</sup> This law provides for all companies (domestic and international) with net worth of \$83million or turnover of at least \$160million or annual net profit of \$830,000 to expend 2% pre-tax profits on social welfare programs such as education, poverty reduction etc.

<sup>452</sup> These companies set up under Section 8 of the Companies Act 2013 are generally not-for-profit organisations.

<sup>453</sup> See Section 80G and 35AC of the Income Tax (IT) Act, 1961.

<sup>454</sup> See "The Companies Act, 2013; road to CSR non-compliance. Absence of stringent provisions has led companies to hide under the garb of explanation for not meeting CSR norms. *The Financial Express* 20 May 2016 <<http://www.financialexpress.com/article/fe-columnist/column-the-companies-act-2013-road-to-csr-non-compliance/260467/>> accessed 25 May 2016.

<sup>455</sup> Section 134(3)(o) Companies Act 2013

- (i) eradicating extreme hunger and poverty;
- (ii) promotion of education;
- (iii) promoting gender equality and empowering women;
- (iv) reducing child mortality and improving maternal health;
- (v) combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases;
- (vi) ensuring environmental sustainability;
- (vii) employment enhancing vocational skills;
- (viii) social business projects;

Companies may also meet the requirements of the law by contributing to ‘the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women’.<sup>456</sup> Clause (x) of section 135 is an ombudsman clause admitting ‘such other matters as may be prescribed’.<sup>457</sup> Rule 2(2) of the (Corporate Social Responsibility Policy) Amendment Rules 2016 which came into force on 23 May 2016 amended the principal Rules published in 2014<sup>458</sup>, allows companies to implement CSR activities through limited liability corporations set up for charitable purposes.<sup>459</sup>

The legislation rightly stipulates general principles and fundamental guideline according to the CSR norms and reform the Government of India is seeking to achieve or establish. It

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<sup>456</sup> Clause xi, Schedule VII, Companies Act 2013

<sup>457</sup> Clause x, Schedule VII, Companies Act 2013

<sup>458</sup> The Companies (Corporate Social Responsibility Policy) Rules 2014 came into force on 1 April 2014, setting out rules for the implementation of section 135 Companies Act 2013 provisions on CSR.

<sup>459</sup> Limited liability companies can be set up for charitable purposes under Section 8, Companies Act 2013



retains some discretion for the companies regarding the choice of the projects to fund. This seems to be a deliberation act of deference to the sensitivities of the free market system.

### 5.4.3 *Mauritius*

The research of Renginee Pillay has shown that CSR is widely practiced, and at the same time, being used as a developmental tool in Mauritius.<sup>460</sup> She noted that the early CSR practices was pioneered by subsidiaries of multinationals who were self-regulating.<sup>461</sup> Mauritius also had social problems arising from a popular riot in 1999 and leading to heightened sensitivity of CSR, which state by 2007 sought the cooperation of business to resolve, while seemingly accepting the model of CSR as corporate philanthropism.<sup>462</sup> By 2009 legislation was proposed to require companies spend 2% of their profit on CSR activities approved by the government or remit such funds to the government for the state to determine its disbursement.

The Mauritian legal framework for CSR has been conspicuously reviewed in 2015. The President of Mauritius announced in the 2015 Budget speech the intention to implement ‘a new concept to allow for institutions that are contributing to CSR to take under their wings those unsustainable pockets of poverty’ in the country.<sup>463</sup> The plan to be commenced with ‘meeting with major companies to participate in this national initiative to resolve once for all the problem of poverty’ in identified pockets of high-level poverty.<sup>464</sup> The president further stated;

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<sup>460</sup> Renginee Pillay, *Changing Nature of Corporate Social Responsibility, The: CSR and Development - The Case of Mauritius* (Routledge 2015)

<sup>461</sup> *ibid* 268

<sup>462</sup> *ibid* 270

<sup>463</sup> Paragraph 173 of the 2015 budget speech of the President of Mauritius on 27 January 2015 <<http://mauritiusassembly.govmu.org/English/Documents/Add%20president/govprog2015.pdf>> accessed 15 August 2015.

<sup>464</sup> *ibid* 176

I have given deep thoughts to the matter, and I have decided to review the CSR system in depth. I have come to the conclusion that the preferred alternative is to let companies decide on how best to fulfil their social responsibility and obligation in a most effective manner. Companies, hereon, will be free to allocate the 2 per cent of CSR according to their own set of priorities.<sup>465</sup>

Also, ‘all existing CSR guidelines’ were cancelled but reporting and explaining requirements were retained.<sup>466</sup> The Income Tax Act was amended accordingly to show that; ‘Every company shall in every year set up a CSR Fund equivalent to 2 per cent of its chargeable income of the preceding year to implement a CSR Programme in accordance with its own CSR framework’.<sup>467</sup> A definition of CSR programmes was proffered;

“CSR programme” means a programme having as its objects the alleviation of poverty, the relief of sickness or disability, the advancement of education of vulnerable persons or the promotion of any other public object beneficial to the Mauritian community.<sup>468</sup>

A new provision stipulates that every company ‘shall submit as an annex to its return of income a statement showing the amount of CSR spent and the details of CSR projects implemented by the company during the income year’.<sup>469</sup> The newly published regulations represent reform aimed at the reorientation of companies towards creating shared value, and leaning heavily on the discretionary compliance of companies while stipulating the minimum

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<sup>465</sup> *ibid* 178. This was further legislated via section 24(j) of the Finance (Miscellaneous Provisions) Act 2015 which amended section 50(L)(1) of the Income Tax Act 1995

<sup>466</sup> *ibid* 180

<sup>467</sup> Section 1 Income Tax Act 1995 (as amended)

<sup>468</sup> Section 2 Income Tax Act 1995 (as amended)

<sup>469</sup> Section 4(A) Income Tax Act 1995 (as amended)

expenditure required from them.<sup>470</sup> This legislation deviates from the provisions of section 135 of the Companies Act 2013 of India which predetermined the sectors of the society requiring the fund injection.

## **5.5 CSR and the Development Agenda; Individualism and Neo-liberalism v Collectivism and Social capitalism**

The CSR legislations of Indonesia, Mauritius and India demonstrate the conflict between the need to promote capitalistic economic philosophies epitomised by the concept of individualism and the need to foster collective communal economic aspirations through idealised in notions of collectivism. I reach this conclusion on the basis of the dichotomised aspirations of the society and business on the one hand and the interdependence of business-society relations on the other.

The degree of need in a particular sector of the society may differ from one country to the other but a common denominator can be observed; it all comes down to addressing social need and promoting social and environmental harmony. At the heart of this issue are the investors who want returns on their investment over a long-term, either for their immediate benefit or, for its financial value at any futuristic date of disposal. In short, sustainable existence or development of business is of interest to investors whom some reports show are keen on seeing mandatory CSR reporting for publicly listed companies.<sup>471</sup> The UN Sustainable Stock Exchanges initiative is seeing major Stock Exchanges around the world

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<sup>470</sup> A government run website has been created to publish CSR activities and regulations but has meagre information. See <[www.csr.mu](http://www.csr.mu)> accessed 15 August 2015.

<sup>471</sup> Charlotte Malone, 'Mandatory Corporate Responsibility Reporting Favoured in Poll' *Blue and Green Tomorrow* ([blueandgreentomorrow.com](http://blueandgreentomorrow.com), 12 July 2014) <<http://blueandgreentomorrow.com/2013/11/19/mandatory-corporate-responsibility-reporting-favoured-in-poll/>> accessed 12 July 2014.

embracing its objectives.<sup>472</sup> Jędrzej G Frynas, confirmed that regarding “the relationship between socially responsible behaviour on the part of companies and their financial performance, the majority of them pointing to a positive relationship between the two variables”.<sup>473</sup>

As denoted by Nicholas N. Eberstadt,<sup>474</sup> involvement of businessmen in the affairs of their immediate community is not novel; what he argues changed is the form of business organisation and the contestation of the notion of CSR in contemporary business. Eberstadt notes that the boundaries of business has changed in form over the past centuries from simple forms of social engagement of individual businessmen to complex interactions in the post-industrial era. Eberstadt put it succinctly by stating that;

“Business seldom has enjoyed so much power with so little responsibility. The extent to which responsibility and accountability are accepted by or imposed upon corporate capitalism will be the measure of our adjustment to industrial and post-industrial life”<sup>475</sup>

It is this balance of responsibility with accountability that has defined much of CSR discuss with business insisting that making profits is its main objective which can be realised with less regulation. The issues of social welfare and prosperity capitalist say will come automatically out of free market operations. This argument is not contested in CSR discuss. It is the operational fallouts of corporate transactions that are engaged by CSR. Issues such as

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<sup>472</sup> Nigeria is an assigned partner for the UN Sustainable Stock Exchange (SSE) initiative. The list of partners is published on the official website of the UN SSE

<<http://www.sseinitiative.org/partners/stock-exchanges/>> accessed 08 August 2014.

<sup>473</sup> Jędrzej G Frynas, ‘Corporate Social Responsibility and International Development: Critical Assessment’ (2008) 16(4) Corporate Governance (Blackwell) 274, 278

<sup>474</sup> Nicholas N. Eberstadt, ‘What History Tells us about Corporate Responsibility’ (Autumn 1973) 7 Business and Society Review/Innovation 73

<sup>475</sup> Ibid 79

human rights, the environment and wider social issues require outside intervention for comprehensive assessment and engagement. The two sides of the CSR debate keenly engage socialist and capitalist theorist who in view of the corporate collapses are on different divides of the state-regulation debate. Capitalist advocate the simple and singleness of deregulation and the stakeholder or pluralist view demand inclusive to be included in business considerations.

What role can effective CSR programs play in a developing country? This question is pertinent in view of the objective of states in legislating or seeking legislation of CSR. Utting and Marques have identified the use of CSR as a contemporary social policy, corporate political and developmental tool.<sup>476</sup> A managerial view of CSR may exclude the acknowledgement of stakeholders while others view it as a function of promoting only those social objectives that may bring profits to business. When viewed from outside business the responsibilities what business are being induced to accept, include the solution to practically all social problems like the attainment of the MDGs.

Social policy framers often rely on all financial assets that can be acquired to meet set objectives. Often limited state funds available are insufficient to execute the ambitious proposals announced in budgetary speeches yearly. The task of achieving development in developing countries cannot be undertaken by governments alone meagre incomes relative to social needs is a barrier. This necessitates the 'all hands on deck' approach by governments seeking to accelerate social justice and development. Although government is traditionally tasked with providing social amenities and environmental security, the activities of economic agents interact with both the human and physical environment detrimentally. Laura Alberada et al. maintained that;

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<sup>476</sup> Peter Utting and José Carlos Marques (eds), *Corporate Social Responsibility and Regulatory Governance* (Palgrave Macmillan 2009)

‘In the traditional context, governments had political power and were the only authorities that could legislate. Globalization has changed all this, and now economic relationships go beyond national boundaries and the organizations that operate in civil society.’<sup>477</sup>

There seems to be a perception by the general populace in developing countries, that there is inextricable link between the control of natural resources and social issues like poverty and wealth distribution. Achieving *consensus ad idem*<sup>478</sup> between business and the state is not an easy task. However, it is an essential one; the relationship is more interdependence and reliance than is apparent. Governments these days do not create and run businesses and corporations cannot flout legislation with impunity for long especially where harm can be caused to the general populace. Increasing education of the populace and the vibrancy of social media ensures fast-spreading news of what is both good and bad. While the primary need of corporations is to find the labour and natural materials to produce goods and services to the population, the population provides the manpower and materials both elements that are often protected by the state.

The campaign cannot be for government-led reform only and many CSOs in developing countries follow developments with vigilance and alertness. Importantly, as we have seen that access to information technology and communication aids the quick dissemination of news and rallying without physical boundaries is easily facilitated. Recently, Facebook was accused of unwitting complicity in the murder of Lee Rigby, a British soldier who was murdered by a fundamental religious extremist in London.<sup>479</sup> The family of Rigby denounced

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<sup>477</sup> Laura Albareda et al., ‘The changing roles of government in corporate social responsibility; drivers and responses’ (2008) 17 (4) *Business Ethics: A European Review* 349.

<sup>478</sup> *Consensus as idem* means ‘the meeting of the minds’ or ‘agreement’.

<sup>479</sup> Lee Rigby, a fusilier with the Royal Regiment of Fusiliers, an arm of the British Army was murdered on 22 May 2013 in Woolwich, London by Michael Adebolajo and Michael Adebawale, two

Facebook for not reporting the possible attack. Social commentary on this report suggested that Facebook had a moral responsibility to report the incriminating messages posted by one of the attackers regarding his explicit plan to commit murder.<sup>480</sup> The big technological companies are being coaxed to be actively engaged in CSR activities.

CSR should be transformative in developing countries.<sup>481</sup> Foreign companies are using “soft power” or international diplomacy based on using economic and cultural influences to achieve cooperation in CSR issues. CSR as previously practiced - more or less as strategic corporate philanthropy – which found expression in many gifting and ameliorative activities embarked upon by business as social intervention projects. The assessment of the programmes as to whether they are allied to corporate ends is not easily determinable. With shareholder scrutiny and competitiveness, corporate philanthropy is becoming subjected to greater analysis to ensure relevance and alignment to corporate financial and productivity objectives.

CSR perspectives in emerging economies has largely assimilated the neo-liberal perspective peddled by their major investment and trading partners. With the rise of production and manufacturing by large corporations in China and members of the Association of Southeast Asia Nations (ASEAN), focus was brought to bear on human rights, environmental and other

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Nigerian born British terrorists. See Intelligence and Security Committee of Parliament, *Report on the intelligence relating to the murder of Fusilier Lee Rigby*, (HC 795 published 25 November 2014). This further led to the presentation before Parliament the Anti-terrorism and Security Bill before Parliament on 26 November 2014.

<sup>480</sup> Government departments in charge of intelligence did not escape some criticism. Isabella Sankey, Director of Policy for Liberty, said: "This Report catalogues staggering Security Service failures in dealing with the men responsible for this horrific crime - countless missed surveillance opportunities; delayed investigations, dumping dangerous citizens abroad and ignoring allegations of MI5 mistreatment". See <<https://www.liberty-human-rights.org.uk/news/press-releases/liberty-responds-isc-report-intelligence-relating-murder-lee-rigby>> accessed 29 November 2014.

<sup>481</sup> Renginee Pillay op cit 3, argued that the earlier forms of CSR sought to transform corporations. I argue that the transformation required is the impact that CSR makes in society. It should not be merely ameliorative but should impact society to the extent of being transformative. Otherwise, CSR will not serve more than a rhetorical value in developing countries.

issues. As many of these countries engaged in international trade with developing countries issues have also been raised about their CSR practices.

Frynas has submitted that obtaining competitive advantage, maintaining a stable working environment, managing external perceptions and keeping employees happy are among factors that induced companies in the extractive industry to undertake community-based development projects.<sup>482</sup> In an economy seeking to exploit its agricultural and solid mineral potentials through FDI and by increasing the capacity of local companies to develop alternative sources of foreign exchange earnings, keen competition is predictable in the extractive industry sector of the Nigerian economy in the next few decades. The Nigerian President's 2016 budget speech highlighted the commitment of the government in promoting business in the extractive industry.<sup>483</sup> The time to set out community relations strategies of extractive industry through well-articulated CSR policies and/or legislation perhaps is prior the predictable surge in new entrants into the extractive industry.

The incentivising of business through favourable tax measures for instance, may provide business with the needed impetus to sustain their CSR initiatives. CSR projects that target human capacity building should be encouraged as global economic activity is becoming increasingly knowledge-based. Conversely, governments may 'compensate' business for meeting pre-defined targets measured in terms of social impact.<sup>484</sup> Regarding businesses in the extractive industry, a similar structure may lead to better environmentally sustainable projects for example, if targets are set for recycling materials as part of an overall sourcing strategy for companies that use such materials. A company may therefore increase the usage

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<sup>482</sup> Jędrzej George Frynas, 'The false developmental promise of Corporate Social Responsibility: evidence from multinational oil companies' *International Affairs* 81, 2005, 583

<sup>483</sup> The decline in the price of crude oil globally has necessitated a major shift in focus of the Nigerian economy.

<sup>484</sup> See Dima Jamali and Wilfried R. Vanhonacker, 'A Win-Win Model for Shared-value Corporate Strategic Philanthropy', <http://www.europeanfinancialreview.com> May 2015, 55



of recyclable materials if incentivised by government when social impact targets set for the industry are met.<sup>485</sup> A unique advantage of this scheme is that it reduces the need for enforcement and monitoring. A notable disadvantage is the probable high cost of the incentive required to gain the interest of business that will be sufficient to instigate a self-motivated compliance. Dima Jamali and Wilfried R. Vanhonacker have noted correctly the importance of realising that “the arrival of risk capital in the social sphere is predicated on (a) social programmes becoming more impact-focused, and (b) returns that attract risk-tolerant investors”.<sup>486</sup> Although businesses are foremostly profit-oriented than socially-motivated,<sup>487</sup> the combined effect of enhanced corporate reputation and financial compensation for achieving socially impactful programmes may augur positively.

Major factors influencing the future development of CSR may be attributable to the result of convergence resulting from the international economic cooperation among states. An indication of predictable convergence from the international economic activity of states is demonstrable from the formation of the BRICS Development Bank in 2014 during the BRICS summit in Brazil.<sup>488</sup> The establishment of the ASEAN Economic Community (AEC) in 2003 is another instance of deepening and widening economic and trade relations that point towards greater political cooperation in achieving international economic cohesion. Worthy of observation is the fact that, so as to achieve the commonality of purpose by the states forming these multilateral organisations, the forms of business organisation being adopted is invariably capitalist. It will be therefore inevitable that the issues of corporate governance and responsibility will not recur in these jurisdictions.

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<sup>485</sup> It would be pretentious to discount the issues regarding the acceptability of indices for valuation of social impact and the value to be placed accordingly.

<sup>486</sup> Note above Ibid 56

<sup>487</sup> This statement does not derogate from the fact that socially-motivated investors seem to be increasing.

<sup>488</sup> See <http://thediplomat.com/2014/07/3-reasons-the-brics-new-development-bank-matters/> also for criticisms

The focus on corporate managers to understand, embrace and promote CSR principles has received attention recently at various conferences.<sup>489</sup> It is arguable, that since the turn of this century, business has been responding with seriousness to societal matters which have been designated CSR issues. Businesses who engage positively with the society are thought to be gaining comparative advantage through the pursuit of CSR initiatives. Increasingly, advocates are arguing the financial advantages and a ‘business case’ for CSR. As the number of advocates increase who reinforce improvement and development of CSR and corporate governance, corresponding action has led to CSR being injected into corporate strategy and practices in the boardroom.<sup>490</sup> The challenge facing CSR is its inculcation into corporate governance. However, the success of CSR may depend on reforming corporate governance; arguably, the power to affect social impact lays in the hands of corporate managers who go beyond the conventional objective of profiteering to promote wider social developmental goals. In developing countries, the mixture of free market consideration and need to safeguard domestic concerns has intertwined to develop a unique blend of CSR conceptualisation.

The important and growing subject of “environmentality” is becoming popular. It discusses the intertwined relationship between political and legal control of natural resources exploitation agenda on one hand and human capital development program based on the principle that natural resources are *res communis*. The recently concluded World Climate Summit 2014 was well-attended by states.<sup>491</sup> Since the adoption of the UN Framework on

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<sup>489</sup> See “Asian Forum on Corporate Social Responsibility (AFCSR) Underscores Mindset Change among Businesses to Create Impact on Society” <http://www.marketwatch.com/story/asian-forum-on-corporate-social-responsibility-afcsr-underscores-mindset-change-among-businesses-to-create-impact-on-society-2015-09-09> accessed 11 September 2015.

<sup>490</sup> Jędrzej G Frynas, ‘Corporate Social Responsibility and International Development: Critical Assessment’ (2008) 16(4) Corporate Governance (Blackwell) 274, 279

<sup>491</sup> This summit held in Lima, Peru on 10<sup>th</sup> December 2014. It was the ‘5th edition’ of the World Climate Summit series which began in 1992. Over 700 “high-level participants from both the private

Climate Change (UNFCCC) in the 1992 Rio earth Summit an annual Conference of Parties (COP) has been held to review implementation of the Convention with the Kyoto COP being notable for the adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change in 1998.

The ambit of corporate responsibility has been growing and as the range of corporate-societal engagement widens, the frontiers of responsibilities are enlarged. I argue that what constitutes the responsibility of business and whether once identified it should come within a regulatory purview. Whether the regulation should be by legislation is the crux of the argument that is at the heart of the CSR debate. In developing countries legislation may not be enough to achieve the compliance of business due to lack of enforcement resources but the Indian and Mauritian examples show that legislation need not be draconian.

## **5.6 Summary**

In what is now an important phenomenon in economic and socio-political studies, CSR is being spurred by increasing globalisation with ramifications for the emerging markets and developing countries. The impact of globalisation is being evaluated with a view to suggesting pragmatic approaches to CSR regulation. Several international economic blocs and affiliations exist reflecting shared financial and development statuses. The largest of these in terms of percentage of global wealth, advancement in economy and development are the Group of 7 (G7) consisting of Canada, France, Germany, Italy, Japan, the United

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and public sector” attended it in preparation for Paris 2015. See <<http://www.wclimate.com/world-climate-summit-2014/>> accessed 30 December 2014.

Kingdom and the United States.<sup>492</sup> The wealth of these countries combined constitute the majority of global wealth and are dominating the CSR discuss with developing countries now developing independent approaches using legislation to mandate compliance. It is interesting to note that CSR legislation is aimed primarily at the wealthiest corporations and most MNCs are captured by relevant provisions of the mandating regulations.

Whilst the economic growth is incontestable, some differences can be perceived in their wealth, political stability and mature state governance apparatus; independence of the judiciary, low corruption and high literacy levels or demarcate what some have identified as a North-South divide. The proliferation of mandatory CSR in developing countries as discussed in this chapter has being recognised as a result of corporate stakeholder orientation activities that augured firmer regulatory standards.<sup>493</sup>

The examples of Mauritius, India, Indonesia - and lately the Philippines<sup>494</sup> – seems to be encouraging other countries to legislate on mandating CSR. The case of Nigeria offers an interesting examination as it has particular socio-cultural idiosyncrasies that marks its uniqueness and the need to have a CSR regime that is suited to it. The quest by Nigeria of a CSR legislation is the focus of the next chapter.

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<sup>492</sup> This group was first formed in 1975 and known as the Group of 6 (G6) before Canada joined) and later the Group of 8 (G8). With Russia's exclusion in March 2014 following its annexation of Crimea, there has been a reversion to G7.

<sup>493</sup> Tanusree Jain, Ruth V. Aguilera and Dima Jamali, 'Corporate Stakeholder Orientation in an Emerging Country Context: A Longitudinal Cross Industry Analysis' (2016) *Journal of Business Ethics*

<sup>494</sup> See the Corporate Social Responsibility Act 2011 of the Philippines.  
<<https://www.senate.gov.ph/lisdata/109799357!.pdf>> accessed

## CHAPTER SIX

### CSR in Nigeria; practice and law

#### 6.1 Introduction

This chapter examines the development of CSR in Nigeria. In particular, it identifies the models of CSR practised in Nigeria by MNCs, contextualised by regulatory framework and the existing socio-economic and political environment. Starting with a brief socio-political and economic history of Nigeria, the various influencers of Nigerian CSR law and practice were identified next. Following the celebrated emergence of Brazil, Russia, India, China and South Africa,<sup>495</sup> Nigeria has been ranked among ten other countries called the “Next11” and designated the ‘emerging economy’<sup>496</sup> status by Goldman Sachs in 2008.<sup>497</sup> Nigeria’s economic importance justifies the interest of this research.

An investigation of the extent to which imported practices have influenced present practices is also undertaken in this chapter. In this regard Amaeshi, Amao et al. have queried the originality of the model of CSR practised in Nigeria.<sup>498</sup> With the adoption of various international treaties, Nigeria assumes the responsibility of adopting and implementing the tenets of such instruments domestically. The current regulatory framework is therefore analysed to identify its limitations and prospects, given the several attempts at passing a CSR

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<sup>495</sup> These are also known collectively by the acronym - the BRICS nations.

<sup>496</sup> The term “developing countries” is relative to members of this group from which other nations are termed either “emerging economies” or “developing economies”.

<sup>497</sup> See <<http://www.euromonitor.com/the-next-11-emerging-economies/article>> accessed 18 August 2015.

<sup>498</sup> Kenneth M Amaeshi, Bongo C Adi, Chris Ogbechie and Olufemi Amao ‘Corporate Social Responsibility (CSR) in Nigeria: Western Mimicry or Indigenous Practices.’

legislation in Nigeria. Although the focus of this chapter is Nigeria, comparative analogies are drawn from other developing or emerging economies.

To apply any theories to CSR discourse in Nigeria, an overview of existent legal corporate law framework is necessary. Thus, an enumeration of various legislations that impact upon corporate activity are identified and discussed. The various regulatory authorities and participants shaping CSR discourse in Nigeria are identified, for example, the efforts of CSOs is noted. Also, the contribution of pressure groups to human rights advocacy, and endeavour towards popularising the need for best practices regarding ecological protection and social justice by MNCs is overviewed. Furthermore, a careful interrogation of the other influences and stakeholder interests that contribute to the development of contemporary CSR practices in the extractive industry is evaluated.

The importance of influencing and complimenting developmental efforts of the government is discussed to understand the importance of CSR policy and objectives and its alignment with modern Nigerian corporate objectives. The effect of proposed CSR legislation on business is, therefore, of interest in this research. The judicial proceedings challenging corporate activities in domestic and international courts are examined as are legislations that have extraterritorial effect on corporations.

Given the social dynamics, economic challenges and international influences on the practise of CSR in Nigeria, this chapter examines the existing legal framework and what legally mandating CSR portends for business. It also explores the dynamics of national law, domestic culture, the ever-present international influences and how they interact to determine the interpretation of CSR in Nigeria.

## 6.2 A concise socio-political history of Nigeria

Nigeria in 2013 was the most populated African country and the world's 7<sup>th</sup> most populous nation with its population estimated at 173 million with an annual growth rate of 2.8%.<sup>499</sup> The political, cultural and socio-economic existence of the peoples of the many tribes and peoples of Nigeria were simplistic and agrarian. The pre-colonial dispensation was somewhat opposed diametrically to the European colonialist culture of burgeoning industrialisation. As opposed to individualism and the enjoyment of right to personal property, there was a communal enjoyment of natural endowments which were perceived as divine blessing not to be exploited for the benefit of anyone but the benefit of all collectively.<sup>500</sup> Thus, collectivism was practised as opposed to the pursuit of individualism. Some cultural practices were barbaric and soon outlawed by the colonial masters.<sup>501</sup> The colonial era thus heralded a fundamental change in the social structures of the indigenous population. Politically, the domination of the colonialists and the usurpation of local cultures, and slave trading subdued the indigenous peoples of Nigeria. Under the new dispensation, the new Constitution of the Federal Republic of Nigeria 1960 consisted of the adoption and incorporation of the Statutes of General Application in force in England and Wales in 1990 which was imposed on the new state.

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<sup>499</sup> This is an estimate based on widely quoted UN statistics which is generally accepted. See <<https://data.un.org/CountryProfile.aspx?crName=NIGERIA>> accessed 27 December 2014.

<sup>500</sup> Yuriy Gorodnichenko and Gerard Roland, 'Understanding the Individualism-Collectivism Cleavage and its Effects: Lessons from Cultural Psychology' An undated paper by two economics professors of University of California, available online at: <<http://eml.berkeley.edu/~groland/pubs/IEA%20papervf.pdf>> accessed 16 May 2017.

<sup>501</sup> The killing of twins, discriminatory caste systems and ritual killings that went on are still part of the national social fabric. This may be contrasted with the European Trans-Atlantic slave trade.

Although Nigeria gained independence from Great Britain in 1960, it became a republic in 1963.<sup>502</sup> The country's Northern and Southern Protectorates – as they were known before independence – were amalgamated in 1914 to form the single political entity. The name 'Nigeria' was derived from the longest and most popular landmark in the country – the River Niger – which runs from the northeast to the oil-rich delta regions of the deep southern part of the country. The Constitution of the Federal Republic of Nigeria<sup>503</sup> is the primary source of legislation. As discernible from its name, the country runs a federal system of government with devolved powers to 36 states and a quasi-independent Federal Capital Territory and 774 Local Government authorities.<sup>504</sup>

In the early 1970s, Nigeria began to promote compulsory indigenous participation in business with the enactment of the Nigerian Enterprises Promotion Decree 1972 and the Nigerian Enterprises Promotion Decree 1977 (which are also known as the 'indigenisation Act' of 1972 and 1977 respectively), to imbue foreign corporations with local cultural practices.<sup>505</sup> By these laws, the then military government of Nigeria 'not only attempted to bar whole and partial foreign ownership and activity in certain types of enterprise but also has encouraged foreign and domestic capital partnership where necessary for the long term acquisition of technological and managerial skills'.<sup>506</sup> Most of the subsequent economic legislation also

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<sup>502</sup> Between 1960 and 1963 when Nigeria became a republic, the Privy Council of the House of Lords sitting in London, England was its highest court of appeal.

<sup>503</sup> The current version of the Constitution is the 1999 Constitution which is constantly amended by Acts of Parliament of the federal legislature.

<sup>504</sup> Section 2 and 3 of the Constitution of the Federal Republic of Nigeria 1999. The Federal Capital - Abuja – is administered by an appointed Minister of the Federal Capital Territory who is appointed by the President. Nigeria for policy considerations is divided into 6 geo-political zones; the North-East, North- Central, North-West, South-South, South-East and South-West.

<sup>505</sup> For a full discussion on the impact of the indigenisation policy of Nigeria in the 1970s see Ismaila Mohammed, 'The Nigerian Enterprises Promotion Decrees (1972 and 1977) and Indigenisation in Nigeria' (DPhil thesis, University of Warwick, 1985)

<sup>506</sup> Ibid 333



purport to encourage technological transfer and skill acquisition from local participation in foreign companies' investments and operations.<sup>507</sup>

The Nigerian government has also implemented policy reforms aimed at institutionalising government response in the Niger Delta region which is susceptible to CSR issues by establishing the Ministry of Niger Delta Affairs and the Niger Delta Development Commission (NDDC) in 2000.<sup>508</sup> Some believe it is a redress of the decades of poor development of the communities where oil extraction has caused environmental devastation. Kplovie and Sado have criticised the NDDC for being ineffective and attributed this to 'political appointees running riot with its fund to the detriment of the host communities'.<sup>509</sup> The Ministry of Niger Delta Affairs was formed in 2008 elevating the issue of Niger delta from a departmental-level to a ministerial-level responsibility 'to formulate and coordinate policies for the development and security of the Niger Delta Region'.<sup>510</sup> It is my opinion that the creation of the Ministry is a responsive strategy whereby government meets the social development needs of the people through educational and other programmes to engage the youth of the region in productively rather than destructively. This is supportive of the Ministry's stated functions 'to ensure peace, stability and security with a view to enhancing the economic potentials for the Region'.<sup>511</sup> The Ministry's role in promoting social cohesion is important in securing the source of the majority of Nigeria's government revenue which is

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<sup>507</sup> A government agency - National Office for Technology Acquisition and Promotion (NOTAP) - is dedicated to the task of technology acquisition and transfer in Nigeria. It is an agency under the Federal Ministry of Science and Technology.

<sup>508</sup> The precursors of the Niger Delta Development Commission were the Niger Delta Development Board (NDDB) and the Oil Mineral Producing Areas Development Commission (OMPADEC) established in 1960 and 1992 respectively.

<sup>509</sup> P J Kplovie and A Sado, 'CSR for Conflict Resolution in Niger Delta Oil and Gas Industry' British Journal of Environmental Sciences (2016) Vol 4. No. 5 1 – 53, 11.

<sup>510</sup> An official history of the Ministry of Niger Delta Affairs is available at: <<http://www.nigerdelta.gov.ng/index.php/the-ministry/history-of-mnda>> accessed 8 April 2017

<sup>511</sup> Ibid

often unsecured during militant uprisings, a point well canvassed by Paki and Ebienfa.<sup>512</sup> The local communities in the Niger Delta since resorting to armed agitations which have resulted in military campaigns to neutralise the ‘militants’ and their operations.<sup>513</sup>

In the post-colonial era, the ruling political elite established Nigeria on the footing of a major regional political force. Hence, Nigeria adopted the African Charter on Human and Peoples’ Rights 1981 after ratifying it 1983.<sup>514</sup> It is correct to say that human rights abuses are invariably more during the military regimes which dot Nigeria’s political history. During the regime of General Sani Abacha in 1995, Nigeria was expelled from the Commonwealth of Nations as a direct protest over the hanging of environmental activists notorious for a vociferous demand for remediation of devastations caused by oil exploration companies in Ogoniland.<sup>515</sup>

Politically, Nigeria has been a full member of the major international political organisations like the United Nations (UN) and its financial institutions like the International Monetary Fund (IMF) and the World Bank. Nigeria is currently serving in the Security Council.<sup>516</sup> Nigeria is also a member of the Commonwealth of Nations, the African Union (AU) and the

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<sup>512</sup> Fideliss A E Paki and Mr. Kimiebi Imomotimi Ebienfa, ‘Militant Oil Agitations in Nigeria’s Niger Delta and the Economy’ *International Journal of Humanities and Social Science* (2011) Vol. 1 No. 5.

<sup>513</sup> Oronto Douglas, Ike Okonta and Dimieari Von Kemedi, ‘Oil and Militancy in the Niger Delta: Terrorist threat or another Colombia?’ (2004) Institute of International Studies, University of California, Berkeley, USA Working Paper No. 4, 2

<<http://geog.berkeley.edu/ProjectsResources/ND%20Website/NigerDelta/WP/4-DouglasVonOkonta.pdf>> accessed 16 May 2016.

<sup>514</sup> This charter became part of Nigerian law on the 17th March 1983 by virtue of African Charter on Human and Peoples’ Rights (Application and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990.

<sup>515</sup> This refers to the hanging of the renown environmental activist Ken Saro-Wiwa and eight others in 1995.

<sup>516</sup> Nigeria is serving a fourth stint at the Security Council since its independence and a second time since 2010 under the presidency of Dr Goodluck Ebele Jonathan. The current term expires in 2018.

Economic Community of West African States (ECOWAS). It is also a member of strategic regional and international multilateral organisations such the Organisation of Petroleum Exporting Countries (OPEC) and the Extractive Industry Transparency Initiative (EITI) while maintaining strong affiliations with Organisation for Economic Cooperation and Development (OECD). The efforts at regional integration have been sought at both continental and sub-continental levels through the AU and ECOWAS.

### *Nigeria's corporate history and economic emergence*

The culture and customs of the indigenous Nigerian population is an important influence on what constitutes social responsibility of corporations. Amaeshi et al. have noted that in Nigeria like the rest of the world, the 'meaning and practice of CSR is socio-culturally embedded'.<sup>517</sup> The cultures and customs of Northern Nigeria is predominantly influenced by Islamic religion while Christianity dominates in the Southern part of the country. Despite the differences in culture mostly influenced by religion, the economic activities of most indigeneous Nigerian communities are agrarian. The first large modern corporations were oil exploration and production MNCs which are still relevant in contributing to the production of the major revenue earner for Nigeria – crude oil – since exploration started in 1953 - 1954.<sup>518</sup> The low-level diversification of the Nigerian economy has led to the constinuation of traditional economic activities based on farming. While the oil and gas sector employ less than 2% of the population, agriculture employs about 48% of the population but contributes less to the Gross Domestic Product (GDP).<sup>519</sup>

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<sup>517</sup> Amaeshi K, Bongo Adi, Chris Ogbechie and Olufemi Amao, 'Corporate Social Responsibility (CSR) in Nigeria: Western Mimicry or Indigenous Practices?' (2006) 24 JCC 83, 86.

<sup>518</sup> Alabi O F and Ntukekpo S S, 'Oil Companies and Corporate Social Responsibility in Nigeria: An Empirical Assessment of Chevron's Community Development Projects in the Niger Delta' (2012) 4 British Journal of Arts and Social Sciences 361 - 372, 362

<sup>519</sup> See the United Nations Data <<http://data.un.org/CountryProfile.aspx?crName=Nigeria>> accessed 19 May 2017.

The earliest international trade connection with Nigeria has been recorded to be around 1861. The British traders and explorers “discovered” Nigeria in 1861 influencing administrative and political structures that led to the establishment of the Protectorates. Nigeria’s first constitution was in 1914 followed by several constitutional conferences culminating in the independence constitution of 1960. Nigeria upon independence adopted the entire ‘statutes of general application’ operative in England and Wales as its basic legislation.<sup>520</sup> The most prominent trading company with pre-independence history is the United African Company which still operates as one of the largest conglomerates in Nigeria today.<sup>521</sup> UAC and other companies like it were trading companies majoring in commodities like cocoa and coal but have now diversified into a wide range of economic activities.

The discovery of crude oil in the Niger Delta 1957 marked the emergence of Nigeria as a significant buoyant economy with regard to its revenues. The first decade post-independence became a watershed in the economic history of Nigeria as trading in commodities was replaced by a more lucrative production and trade in global crude oil. As Alley et al. further noted ‘stability and gradual growth of the economy reversed in the era of oil-dominant economy’.<sup>522</sup> The increasing dependence on oil export and the fluctuating fortunes due to price shocks changed the economic and social structure of Nigeria.<sup>523</sup> The proliferation of oil and gas exploration and production in the Niger Delta area heralded the agitation for modern social responsibility. The vociferous campaigns of indigenes of this region is

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<sup>520</sup> Section 45 of the Interpretation Act, Cap.89, Laws of the Federation and Lagos, 1950 provided that the statutes of general application that were in force in England on the 1<sup>st</sup> day of January, 1900 shall be in force in the Federation. This law formed the basic foundation of the subsequent Nigerian constitutions.

<sup>521</sup> UAC was founded in 1879 following the merger of four companies trading up the River Niger: Alexander Miller Brother & Company, Central African Trading Company Limited; West African Company Limited and James Pinnock. A full company history is available online <<http://www.uacnplc.com/history/>> accessed 19 June 2017.

<sup>522</sup> Ibrahim Alley, Asekomeh Ayodele, Mobolaji Hakeem and Yinka A Adeniran, ‘Oil Price Shocks and Nigerian Economic Growth’ (2014) 10 European Scientific Journal 375 – 391, 377.

<sup>523</sup> Ibid

contributory to the significant awareness of the public. The attempts at legislating CSR will, therefore, be reflective of the issues that may impact the major multinational oil corporations that have established Nigeria's economic importance as a major oil producing country.

The influx oil companies began with the granting of sole exploratory licence to Shell BP leading to the discovery of oil in 1956. The dependence on oil exports entrenched the importance of the foreign oil companies which entered into protective trade agreements with Nigeria thereby expanding their foothold and influence on the development of the crucial oil and gas sector in Nigeria. That the preponderance of the large multinational companies set the tone for CSR practices of foreign multinationals is not in doubt.

The issue of corruption which has received international attention and has resulted to enormous wealth 'in the hands of politicians and industry insiders' through malpractices in the oil and gas sector.<sup>524</sup> As at 2000, the estimated oil and gas reserve of Nigeria was 158 TCF, and daily crude oil production stood at 2.2million barrels per day (Bpd) according the state-controlled Nigeria National Petroleum Corporation (NNPC).<sup>525</sup> The processes which are laid down for proper accounting of the production and sales of petroleum products has constantly been criticised for lacking in transparency. A cursory review of the activities of the major corporate activities in Nigeria will reveal breaches of ethical corporate dealings and operations thorough bribery gas flaring, water and land pollution all of which cause constant

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<sup>524</sup> See the report of Transparency International available online at;

<[https://www.transparency.org/topic/detail/oil\\_and\\_gas](https://www.transparency.org/topic/detail/oil_and_gas)> accessed 20 May 2017.

<sup>525</sup> For general information on the history of the Nigerian oil sector see the NNPC website: <<http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/InvestmentPotential.aspx>> accessed 17 August 2015.

friction with host communities.<sup>526</sup> The effect of oil and gas exploitation activities has resulted in the reduction of the quality of life in the affected communities. Although the IOCs and indigenous oil companies are mostly public quoted companies, the regulation of their activities fall within the purview of state agencies with which they have joint venture agreements. The connection between the IOCs and the government of Nigeria may be influencing the manner in which government responds to calls for stricter corporate regulation.

It is important to note also that international and national organisations advocating for CSR have increased in number and influence as IOCs proliferate in Nigeria. These organisations influence CSR policies and practices in Nigeria by aiming to curb corporate unaccountability. For instance, Egbe and Paki observed that the publications of Shell regarding their CSR programmes was ‘constantly contested by NGOs, academics, civil society groups, human rights groups etc.’.<sup>527</sup> The history of CSR in Nigeria will therefore not be complete without the mention of the IOCs, MNCs and those who oppose them.

#### *Criticisms of legislating CSR in Nigeria: surreptitious taxation?*

One the most recurring criticism of legislating CSR in Nigeria is that it is furtive taxation. When in 2011 a Corporate Social Responsibility Bill was proposed, providing for companies to set aside 3.5 per cent of gross profits for CSR activities, it was dubbed a “CSR tax” and firmly rejected by the Lagos Chamber of Commerce and Industry.<sup>528</sup> The criticism and rejection of the Bill was understandable considering that section 2(2) of the Tertiary

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<sup>526</sup> Frynas, Jędrzej George, ‘Corporate Social Responsibility in the Oil and Gas Sector’, (2009) 2(3) *Journal of World Energy Law & Business* 178-195, 192

<sup>527</sup> Olawari D.J. Egbe and Fidelis A E Paki, ‘The Rhetoric of Corporate Social Responsibility (CSR) in the Niger Delta’ *American International Journal of Contemporary Research* (2005) 1(3) 123 – 133, 128

<sup>528</sup> See [http://www.businessrespect.net/page.php?Story\\_ID=2457](http://www.businessrespect.net/page.php?Story_ID=2457) last accessed 18 September 2015

Education Trust Fund Act 2011 provided for registered companies to pay 2 percent of annual profits for educational development.

Also, the lack of transparency in the administration of the state funds and the corrupt enrichment of government officials undermines confidence in the institutions of state and the enjoyment of political, social and economic rights. It leads to society's distrust of state regulation and management of CSR initiatives. Amaeshi et al. observed that Nigeria is characterised by 'corruption, tax evasion, bribery' and weak institutions.<sup>529</sup> With political parties in Nigeria being the most corrupt institutions in the country, the war against corruption is facing intractability.<sup>530</sup> Nigeria in its bid to stem the tide of corruption, however, signed the United Nations Convention Against Corruption (UNCAC) on the 9<sup>th</sup> of December 2003 and ratified it on the 24<sup>th</sup> October 2004. Enforcement of anti-bribery and corruption must be focused on two major industries where corruption is rampant: resource extraction and construction.<sup>531</sup> CSR however, is not a slogan exclusively employed in demanding big business in oil and gas and construction industries to operate responsibly. As an emerging economy, the drive to improve infrastructure and to achieve a better balance of payment position through the promotion of manufacturing and export indicates that corporations will be involved in many unpopular industries such as textiles, chemical production, agro-allied processing, food preservation, ICT, packaging etc. CSR should, therefore, be publicised as being of interest to all companies, whatever their size or industry. This is because big corporations - whether local or multinational – procure production materials and components from smaller local companies. Amaeshi et al. have observed that big corporations 'have an

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<sup>529</sup> Kenneth Amaeshi, Emmanuel Adegbite and Tazeen Rajwani 'Corporate Social Responsibility in Challenging and Non-enabling Institutional Contexts: Do Institutional Voids matter?' *J Bus Ethics* (2016) 135–153, 140

<sup>530</sup> This is the result of a survey reported by Transparency International's in its *Global Corruption Barometer 2013*, 17

<sup>531</sup> Paul Collier, *The Bottom Billion* Oxford University Press (2009) 137

analogous power of the State in their value chain—especially with their direct suppliers’ and may be vicariously responsible for their actions and so can influence them.<sup>532</sup> It is therefore in the interest of a company to acquaint itself with the practices of another with which it deals. Herein lies the rationale of the stakeholder approach to CSR.

In Nigeria, although the Federal Ministry of Trade and Industry is the agency vested with executive powers in matters affecting corporations, trade and foreign investment, it is not vested with jurisdiction over CSR. The NEITI Act regulates the disclosure of mandatory reports in the oil sector, and its parent department is the Federal Ministry of Mines and Steel Development. Despite the lack of institutional capacity and corruption, the criticisms against mandating CSR can be rebutted when the policies proposed are directed towards social development.

### **6.3 Nigeria Corporate Legal framework**

#### *Challenges of CSR in Nigeria*

The CSR legal framework of Nigeria should meet the many domestic social and economic challenges the society faces. The implementation of robust and effective CSR standards over the past decades is urgent given the current international discourse that is causing states to respond to both national and international demands for socially responsible corporations. It is apparent that Nigeria continues to woo foreign investors marketing the country as a favourable trade and investment hub.<sup>533</sup>

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<sup>532</sup> Ameshi et al (n 529) 146

<sup>533</sup> The Nigeria Export Promotion Council and Nigeria Investment Promotion Commission are two agencies of the government saddled with the responsibility of promoting exports of domestic products and attracting foreign investors to the domestic economy. See



The response of international investors into Nigeria is partly dependent on the nature of its regulatory framework though private unlisted companies outside of some regulated services industry is very weak.<sup>534</sup> Accordingly, MSMEs are largely unregulated due to infrastructural deficit. Idemudia has written extensively on the CSR strategies of International Oil Companies (IOCs) in Nigeria and observed that MNCs and public companies in the energy sector are exposed to greater regulation.<sup>535</sup>

All laws flow from the Constitution of the Federal Republic of Nigeria 1999 (as amended) 1999 Constitution) and the legitimacy of all other laws are derived from it. Nigeria has no special legislation on CSR. However, the intendment of certain legislation indicates that the issue of the social responsibility of business is well-covered in various legislations.<sup>536</sup> The ethos of Nigeria's constitution is entrenched as the *Fundamental Principles of State Policy*.<sup>537</sup> Chapter II of the Constitution titled "The Fundamental Principles of State Policy" is interesting given its acknowledgement of social and cultural rights. It has been argued that social, economic and cultural rights are properly so-called "rights to" rather than 'freedoms

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<[http://www.nepc.gov.ng/page\\_corporate\\_overview.html](http://www.nepc.gov.ng/page_corporate_overview.html)> and <<http://www.invest-nigeria.com/>> official websites of the two agencies, respectively.

<sup>534</sup> There are private companies in telecommunications, banking and financial services which are subject to stringent regulations via their professional or industry regulatory regimes.

<sup>535</sup> Uwafiokun Idemudia and Umem Ite "Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives" (2006) 13 Corp Soc Responsib Environ Mgmt 194 at 195; Uwafiokun Idemudia, 'Corporate Partnerships and Community Development in the Nigerian Oil Industry' (United Nations Research Institute for Social Development (UNRISD) Programme Paper, 2007). He identifies several CSR models of IOCs in Nigeria such as "community assistance" and "community development partnerships".

<sup>536</sup> The Tertiary Education Trust Fund Act 2011 and the Nigeria Oil and Gas Development Act 2010 also known as the 'local content Act 2010' are examples of legislation that are forcing CSR practices however, not by using the explicit nomenclature of 'CSR'.

<sup>537</sup> Chapter II of the Constitution of the Federal Republic of Nigeria 1999 (as amended). This provision was introduced by the 1979 Constitution and retained in the current version.

from' certain human rights.<sup>538</sup> On the 1st day of December 2009, the new Fundamental Rights (Enforcement Procedure) Rules came into force to ease access to justice.

It is important to mention that both foreign national laws, international standards, and the Nigerian domestic legislation apply to MNCs. Therefore, two legal influences – internal and external can be identified. The external influences and the implementation of international standards of CSR in Nigeria have been discussed extensively in Chapter 4. In every country where corporations are formed, there is invariably a body of laws governing the formation, constitution and operation of business organisations. In Nigeria, the principal statute is the Companies and Allied Matters Act 1990 (the CAMA). The CAMA makes provision for several kinds of corporations. The business corporations, however, are either private or public companies. The private corporations are sometimes referred to as 'closed' corporations while the publicly subscribed corporations are called 'open' corporations. Big businesses are invariably 'open' corporations allowing subscription from investor owners consisting of several investors as shareholders.

Although the homogeneous characteristics of big corporations are discernible in the corporate law of all market economies where big corporations exist, other forms of business possess all or some of these characteristics in varying degrees of sophistication. Ake surmises that;

If rights are to be meaningful in the context of people struggling to stay afloat under very adverse economic and political conditions, they have to be concrete... in the sense that their practical import is visible and relevant to the condition of

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<sup>538</sup> C. Welch, Jr. 'Human Rights as a problem in contemporary African, in Welch and Meltzer (eds.) *Human Rights and Development in Africa* (Albany: Sunny Press, 1984), P. 24

existence of the people to whom they apply, and most importantly, concrete in the sense that they can be realized by the beneficiary.<sup>539</sup>

Although human rights are universally recognised, in Africa the enjoyment of these rights is relative to the political and economic ability of state to provide access to them<sup>540</sup>.

### *Nigerian Extractive Industry Regulatory Framework*

The proliferation of oil and gas companies since Nigeria's independence in 1960 has resulted in the establishment of some regulatory agencies by the state. The National Environmental Standards and Regulations Enforcement Agency (NESREA) is charged with enforcing the Extended Producer Responsibility (EPR) policy. The agency's objective is to

'have responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology, including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines'.<sup>541</sup>

The National Oil Spills Detection and Response Agency (NOSRDA) is statutorily charged with coordinating and implementing the National Oil Spill Contingency Plan for Nigeria.<sup>542</sup> This agency of government is currently tasked with the implementation of the Nigerian Ogoniland clean-up exercise at the cost of \$1billion. The United Nations Environment

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<sup>539</sup> Claude Ake, quoted in T. A. Aguda, *Human Rights and the Right to Development in Africa* (Lagos: UILA, 1989) P. 26.

<sup>540</sup> A. A. Na'im and F. Deng (Eds), *Human Rights in Africa – Cross Cultural Perspectives* (Washington: The Brooking Institution, 1990)

<sup>541</sup> Section 2 of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007

<sup>542</sup> Section 5 of the National Oil Spills Detection and Response Agency (Establishment) Act 2006

Programme (UNEP) is keenly following the developments in Nigeria.<sup>543</sup> This issue has maintained some form of public attention since it first came to prominence in the early days of oil exploration and culminating in the death by hanging of nine prominent Nigerian activists.<sup>544</sup>

A renewed vigour has been witnessed respecting the clean-up of Ogoni. The lower chamber of the Nigerian parliament passed a motion urging Shell and “other oil exploration companies in the Niger Delta region to urgently carry out a joint environmental pollution audit of their areas of operation and come up with a remediation plan and forward an interim report to the House within thirty (30) days for further legislative action”.<sup>545</sup> It was also resolved that the President of Nigeria was worthy of commendation for acting on the UNEP report and that quarterly monitoring of compliance be undertaken by the Committees on legislative compliance, Environment and Petroleum Resources (Downstream).<sup>546</sup>

Recognising the need to be at least perceived as not only a reporting tool but an action tool, the EITI Global Conference 2016 was tagged ‘Reports to Results’ as more empirical standards are being applied to assessing the value of CSR activities by companies.

#### *Dichotomy of CSR in Nigeria; MNCs and socio-cultural domestic influences*

Amaeshi et. confirmed that in Nigeria “CSR practice as a sociocultural product” that has developed according to deep-rooted traditional practices of the people.<sup>547</sup>

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<sup>543</sup>See <<http://www.unep.org/newscentre/default.aspx?DocumentID=27076&ArticleID=36199>> accessed 14 June 2016

<sup>544</sup> The nine Nigerians hanged are popularly called the “Ogoni Nine” of which the most popular is Ken Saro-Wiwa.

<sup>545</sup> Resolution (ii) (HR26/2015), ‘Urgent Need to Implement the UNEP Report on Ogoni Land – 4 Years After’ Votes and Proceeding of the House of Representatives, 6 August 2015, 94.

<sup>546</sup> *ibid*

<sup>547</sup> Kenneth Amaeshi, Bongo Adi, Chris Ogbechie and Olufemi Amao, ‘Corporate Social Responsibility (CSR) in Nigeria: Western Mimicry or Indigenous Practices?’ (2006) 24 JCC 83, 95.

Amaeshi et al. also posit that;

“For other types of modern firm in Nigeria, such as the multinational corporations and indigenous firms that are modelled on the Western (post-colonial) notion of the firm, their relationship with society is, again, influenced by the process by which the Nigerian economy became integrated into the world economy, as the history of the modern firm in Nigeria reveals. Hence, given the colonial origins of modern Nigeria firms, it is only natural to imagine that the formulation of CSR in theory and practices should retain significant colonial undertones.”<sup>548</sup>

The Tertiary Education Trust Fund Act 2011<sup>549</sup> (popularly called the TETFund Act 2011) provides that companies are chargeable for annual taxes in the sum equivalent to 2% of their annual profit.<sup>550</sup> The taxes collected are to be applied for the “rehabilitation, restoration and consolidation of tertiary education in Nigeria.”<sup>551</sup> This development points to the mandatory implementation of a tax regime for social development purposes.

I submit that the TETFund Act 2011 can be criticised for not consulting with the remitting corporations or giving them the discretion of choosing which projects their taxes will be applied.<sup>552</sup> I submit that this criticism is justified. In the Indian and Mauritius examples, the corporations have not been stripped of participation even though both legislations designate

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<sup>548</sup> Kenneth Amaeshi, Bongo Adi, Chris Ogbechie and Olufemi Amao, ‘Corporate Social Responsibility (CSR) in Nigeria: Western Mimicry or Indigenous Practices?’ (2006) 24 JCC 83, 96.

<sup>549</sup> This legislation repealed the Education Tax Act, 2004 Laws of the Federation of Nigeria Cap. E4. and the Education Trust Fund Act 2003.

<sup>550</sup> Section 1(2) Tertiary Education Trust Fund Act 2011

<sup>551</sup> Section 3(1) Tertiary Education Trust Fund Act 2011

<sup>552</sup> The legislation in Mauritius and India give the companies the options of the organisations they work with in applying the funds. It has been argued that a CSR scheme may lead to tax avoidance; see Fariz Huseynov and Bonnie K Klamm, ‘Tax Avoidance, Tax Management and Corporate Social Responsibility’ (2012) 18 Journal of Corporate Finance 804 – 827

the corporate remittances as “tax”. The criticism of the local content Act of Nigeria may be further justified when the administration of the funds is subject to recurrent public scandals. A CSR legislation will have the input and consideration of business at heart. It will aim at cordial community partnerships, corporate reputational issues or human and infrastructural capital development that in turn ought to benefit business. It will seek to accommodate and not alienate business to achieve compliance.

### ***6.3.1 International Treaties and Judgements of International Courts***

In the international sphere, Nigeria is subject to some important international treaties at the global, regional and sub-regional level that impact its CSR regime. These include a series of global soft law and hard law instruments to which Nigeria is signatory and can be bound by including the International Covenant on Economic, Social and Cultural Rights (ICESCR), several treaties of the African Union (AU)<sup>553</sup> and the regional body the Economic Community of West African States (ECOWAS).

### ***6.3.2 National legislation***

There are several primary and secondary legislations that regulate corporate activities in Nigeria.

#### ***6.3.2.1 Companies and Allied Matters Act 1990 (CAMA)***

Several corporate governance regulations have been made in Nigeria since the regulation of corporate affairs appeared in the Companies Act 1968. The provisions under this legislation were regarded as inadequate and have undergone modifications aimed at improving the corporate governance structure of Nigerian corporations. The Companies and Allied Matters

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<sup>553</sup> An example is the African Union Convention on Preventing and Compating Corruption (AUCC) and Preventing a detailed discussion of which was done by Akeem Olajide Bello, ‘United Nations and African Union Conventions on Corruption and Anti-corruption Legislations in Nigeria: A Comparative Analysis’ (2014) 22 African Journal of International and Comparative Law 308-333

Act 1990<sup>554</sup> (CAMA) expanded on the provisions found in its 1968 predecessor by including extended duties to cover directors' accountability and shareholder rights. Some specialist professional bodies have also issued Codes for their members.

The Corporate Affairs Commission recently published guidelines to clarify the capability of not-for-profit organisations<sup>555</sup> to take up shares in private for-profit corporations. This clarification became necessary due to previously held position of the Commission. The new position is in congruence with Sections 596 and 603 of CAMA and does not affect the position of these organisations to apply all incomes to charitable purposes and the promotion of trust objective.

#### *6.3.2.2 Nigeria Extractive Industry Transparency Initiative Act 2007*

The extractive industry deserves a special remark due to the importance of this sector to the Nigerian economy. The fact that Nigeria's Gross Domestic Product (GDP) is principally based on the production and export of crude oil accounts for the interest in the CSR programs of companies involved in this industry. It is not inconceivable that the CSR practices of companies involved in the petroleum industry have determined the business considerations, ideology or jurisprudential persuasions that inform reform and legislation.

Nigeria in the past has not lacked adequate regulation on environmental and labour issues. With the adoption of many international standard instruments many of the laws have been upgraded. The Nigerian Extractive Industry Transparency Initiative Act 2007 (NEITI Act) is one of the legislations influenced by Nigeria's membership of the Extractive Industry

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<sup>554</sup> This piece of legislation was enacted a Decree under a military government but was adopted by the parliament and thus renamed an 'Act' upon the resumption of democratic governance. Following the consolidation of federal laws in Nigeria it is now known as Companies and Allied Matters Act 1990 Laws of the Federation of Nigeria Chapter C21 2004.

<sup>555</sup> Not-for-profit and incorporated trustee are registerable under Part C of the Companies and Allied Matters Act 1990.

Transparency Initiative (EITI) framework in 2003. Implementation began in the following year that led to the enactment of the Nigeria Extractive Industry Transparency Initiative Act 2007. Nigeria was the first of the 46 member nations to enact a specific law to implement the objectives of the organisation. One of the reasons for the adoption of EITI principles was to curb corruption in the oil sector of the economy and to cascade such principles to other extractive industries. The NEITI Act was passed into law to meet the full compliance criteria of the global Extractive Industries Transparent Initiatives (EITI), an international organisation based in Norway. However, a recent publication by EITI contends that Nigeria is owed several unremitted huge sums amounting to over \$7billion by foreign oil companies operating in Nigeria since 2005.<sup>556</sup> Criticisms of the law have been mainly based around the lack of political will to ensure full compliance with the law.<sup>557</sup> Okeke and Aniche has opined that the reason the enforcement of the NEITI Act 2007 provisions is not effective is due to the conflict of interest of the Nigerian government and the unchecked corrupt practises associated with the industry in Nigeria.<sup>558</sup> It is unclear if a reported attempt at introducing an automated electronic disclosure system to reduce incidences of fraud was implemented.<sup>559</sup> The NEITI Act can be considered as one way of regulating corporate adherence to CSR issues such as transparent publication of reports and accounts through legislation. The only shortcoming in this instance is its limitation to the extractive industry. The yearly reports produced under NEITI Act 2007 provisions have revealed that the powers to prosecute

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<sup>556</sup> Andres Krakenes, 'Nigeria EITI report shows \$billions owed to government' <<https://eiti.org/news/nigeria-eiti-report-shows-us-billions-owed-to-government>> accessed 18 August 2017.

<sup>557</sup> See for a general discussion on the effectiveness of NEITI Act enforcement in NNigeria Okeke V O S and Aniche ET, 'A Critique of the Enforcement of Nigeria Extractive Industries Transparency Initiative (Neiti) Act 2007 in Nigerian Oil and Gas Sector' 1 British Journal of Arts and Social Sciences (2013) Vol. 1, 98 – 108.

<sup>558</sup> Ibid, 107

<sup>559</sup> Onnwuka Nzechi, '*FG Insists on Electronic Payment System*' 9 December 2009 <<http://www.legaloil.com/NewsItem.asp?DocumentIDX=1260394879&Category=news>> accessed 19 July 2017.



corporations that do not comply with provisions of the law by giving false information etc. punishable with fines or imprisoned has not been used despite reports of noncompliance.<sup>560</sup>

### *6.3.2.3 Financial Reporting Council of Nigeria Act 2011*

The Nigerian Financial Reporting Council Act 2011 (FRCN Act 2011), was designed for the “developing and publishing accounting and financial reporting standards to be observed in the preparation of financial statement of public entities in Nigeria”.<sup>561</sup> The FRCN Act 2011 further established the Financial Reporting Council of Nigeria (the Council).<sup>562</sup> The objects of the Council include, but is not limited to protecting “investors and other stakeholders interest”,<sup>563</sup> to “ensure good corporate governance practices in the public and private sectors of the Nigerian economy”.<sup>564</sup> It also includes to “ensure accuracy and reliability of financial reports and corporate disclosures, pursuant to the various laws and regulations currently in existences”<sup>565</sup>. The Council is also mandated to “harmonize activities of relevant professional and regulatory bodies as relating to Corporate Governance and Financial Reporting”<sup>566</sup>.

The Council exercises influence across all industries in the economy and regulates the “accounting and financial reporting standards to be observed in the preparation of financial statements in the private sector and small and medium scale enterprises”.<sup>567</sup> This

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<sup>560</sup> Section 16, Nigeria extractive Industry Transparency Initiative Act 2007. It should be noted that no case of prosecution has been recorded for any default of the relevant laws despite reports of discrepancies in records obtainable in the oil sector.

<sup>561</sup> See the Explanatory Memorandum to the FRCN Act 2011. The Act came into force on 3<sup>rd</sup> June 2011.

<sup>562</sup> Section 1(1) FRCN Act 2011

<sup>563</sup> Section 11(a) FRCN Act 2011

<sup>564</sup> Section 11(c) FRCN Act 2011

<sup>565</sup> Section 11(d) FRCN Act 2011

<sup>566</sup> Section 11(e) FRCN Act 2011

<sup>567</sup> Section 24(a) FRCN Act 2011

development is interesting as the impact of this legislation is not exclusive to business organisations whether small or large. Interestingly, the promotion of ‘public interest ... in the preparation of financial statements of public interest entities’ is in the purview of the agency,<sup>568</sup> while the corporate governance objectives include to ‘encourage sound systems of internal control to safeguard stakeholders’ investment and assets of public interest entities’.<sup>569</sup> A comprehensive public engagement on corporate governance issues and consultations with national and international organisations is also envisaged by this law.<sup>570</sup>

The Corporate Governance Codes of public companies stipulate reporting requirements on issues such as environmental and social responsibility policies and practices. Listed companies are also required to submit at least annually sustainability reports. This has brought a sharp focus on the activities of public listed companies. The regulatory framework of public companies is also under the strict supervision of the Securities and Exchange Commission (SEC).<sup>571</sup> SEC makes secondary legislation on corporate governance rules to which public companies must adhere.<sup>572</sup>

#### *6.3.2.4 Nigerian Oil and Gas Industry Content Development Act 2010*

With the coming into force of the Nigerian Oil and Gas Industry Content Development Act 2010, new responsibilities was placed on IOCs to ensure the inclusion of “local content” in their project plans with minimum content requirements that have been approved for each

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<sup>568</sup> Section 24(f) FRCN Act 2011

<sup>569</sup> Section 49(f) FRCN 2011. Presumably, an effective implementation of this function can lead to the reduction of public financing or ‘bail out’ of failing corporations, especially banks.

<sup>570</sup> Section 51 FRCN 2011

<sup>571</sup> This body is established under section 1 of the Investments and Securities Act 2007

<sup>572</sup> The current provisions are contained in the Securities and Exchange Commission Rules and regulations 2013

project during bids.<sup>573</sup> This Act has far-reaching implications for the oil and gas sector because section 1 states that it ‘shall apply to all matters pertaining to Nigerian content in respect of all operations or transactions carried out in or connected with the Nigerian oil and gas industry’. The inclusion of a requirement to submit an annual Employment and Training Plan showing ‘anticipated skill shortages in the Nigerian labour force’ is an attempt to influence the developmental goals of the Nigerian government through this scheme.<sup>574</sup> Is this surreptitious mandation of CSR principles on corporations in Nigeria? I hold the view that it is.

#### **6.4 CSR Policy and Practice**

There is no articulated national policy on CSR in Nigeria. This is despite the inclination of government to publicly support agitation of strident pressure groups that constantly advocate for corporate tolerance of social needs. However, indications of government policy direction can be gathered from several sources. The legislature seems to be influencing government on this issue also. For example, an official publication of the Department of Research and Statistics of the National Assembly<sup>575</sup> has published an article supporting legislating CSR in its quarterly publication called ‘*Issues in National Policy*’.<sup>576</sup> Although the publication is not reflective of the opinions of its contributors, the fact that the publication is meant to “assist legislators in their Law Making” by “undertaking research into topical issues affecting the

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<sup>573</sup> See section 7 and 11 of the Nigerian Oil and Gas Industry Development Act 2010 respectively

<sup>574</sup> Section 29(a)(ii) Nigerian Oil and Gas Industry Development Act 2010

<sup>575</sup> *Issues in National Policy*, Vol. 1 (2015) is a publication of the Department of Research and Statistics an official organ of the federal legislature of Nigeria - the National Assembly.

<sup>576</sup> See U. M. Mari, ‘*Corporate Social Responsibility (CSR): Why legislation and Regulation*’ *Issues in National Policy* Vol. 1 (2015), 53 – 65.

nation or other issues required for legislative purposes” is suggestive of its purpose – to guide and influence legislators in policy matters.<sup>577</sup>

CSR policy gives guidance on “who does what?” and “why it should be done that way”. The power that corporations can wield are often enormous.<sup>578</sup> If CSR is left to the altruism of firms, there will be randomness in its implementation. Again, those who implement CSR projects may have self-serving motives. The intervention of government in CSR by legislating it would, therefore, aim at creating the sense of “doing of the right thing for the right reason”. This is to say that the “hand of government” and not the “invisible hand” nor the “hand of management” will suffice to balance the consideration of both business and society.<sup>579</sup>

It is therefore argued that state agencies can impact CSR practice through responsive public procurement policies. This is because of the significant value of the purchase of recurrent items in the annual budget of developing countries. However, the Public Procurement Act 2007 which sets out the terms of all Federal Government procurement processes does not mention anything concerning the compulsory procurement from domestic companies.<sup>580</sup> It is posited that developing countries can influence CSR practice in both a positive and substantial way, by enacting mandatory provisions and rules that compel corporate activities in ways that promote social justice and national development.

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<sup>577</sup> *Id* per S. A. Maikasuwa in the ‘Preface’, Issues in National Policy Vol. 1 (2015) iv. Maikasuwa is the Clerk to the National Assembly of Nigeria.

<sup>578</sup> Shell was accused of using the government of Nigeria against Nigerians during a military standoff with protesters in the Niger-Delta. This remains one of the criticisms of deploying military assets in the Niger-Delta against indigenous populations. It is notable that kidnappings and other nefarious activities have been credited to youth in the Niger-Delta, also.

<sup>579</sup> Kathryn M Bartol and David Clarke Martin, *Management* (McGraw-Hill 1994) Series in Management identified the “invisible hand”, “hand of government” and the “hand of management” as major influences of CSR.

<sup>580</sup> See section 4, Public Procurement Act 2007 for the objectives of the Bureau of Public Procurement established under section 3 of the Act.

The International Oil Companies (IOCs) present a special case because of their prominence in Nigeria. The state-owned corporations like the NNPC and quasi-independent organisations like the Nigerian Stock Exchange (NSE) can lead the way. Interestingly, the NSE was voted best CSR corporation in 2015.<sup>581</sup>

The government's policies and action about corporate governance and social responsibility issues reveal their CSR strategy. The policy of government may be explained, for instance, through the shift in position by the Corporate Affairs Commission (CAC) following the relaxation of the restriction on not-for-profit companies and incorporated trusts from investing in for-profit private and public companies announced in 2015. The CAC has been encouraging corporations to embrace best practice in corporate governance by instituting the CAC Annual Corporate Citizens Award.<sup>582</sup>

#### *International Courts and their effectiveness in corporate liability cases*

Consequent to the execution of some civil rights activists famously known as “the Ogoni Nine” by the Nigerian government in 1995, the plight of the people of the Niger-Delta region of Nigeria has gained much notoriety. The activists sought to highlight internationally, the impact of illicit corporate activity in the Southern part of Nigeria which led to gross environmental degradation amongst other devastations and economic losses for the local communities. In 2003 and 2012 respectively, the African Commission in *Social and*

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<sup>581</sup> Cynthia Okoroafor, ‘Despite Recent Setbacks in Nigeria’s Stock Exchange, NSE Receives Award’ *Ventures* (28 September 2015) <<http://venturesafrica.com/despite-recent-setbacks-in-nigerias-stock-exchange-market-nse-receives-award/>> accessed 3 February 2016

<sup>582</sup> The annual award is to companies in any sector of the economy. The award criteria include assessment of ‘environmental performance’, ‘corporate social responsibility’, and ‘management of stakeholder relation’. See; < <http://new.cac.gov.ng/home/cac-annual-corporate-citizens-award/>> accessed 30 June 2016.

*Economic Rights Action Centre (SERAC) and Another v Nigeria*<sup>583</sup> and the ECOWAS Community Court of Justice in *Social and Economic Rights Advocacy Project (SERAP) v Federal Republic of Nigeria and the Attorney-General of Nigeria*<sup>584</sup> - in suits brought by non-governmental organisation (NGOs) - made what was then regarded as landmark decisions in respect of actions brought on behalf of the Niger Delta indigenes.

Given the recent announcement that Royal Dutch Shell has agreed on a compensation of \$84million to selected affected individuals and for community remediation projects in the Niger Delta.<sup>585</sup> Following these developments, this paper argues that the combined impetus to be derived from these cases and others that may follow, with trending international law jurisprudence being discussed to make business more responsive to environmental and social issues will impact not only the decisions of corporations but of governments also in seeking regulatory regimes that will meet the standard of effectiveness in its duty to protect the environment and uphold human rights.

*The case of SERAP v Federal Republic of Nigeria and another*<sup>586</sup>

The SERAP case is interesting because the plaintiffs, Socio-Economic Rights and Accountability Project (SERAP) is a non-governmental organisation that brought an action on behalf of the indigenes of the Niger Delta pursuant to Article 10 of the Supplementary Protocol A/SP.1/01/05. SERAP by this case took the question of the justiciability of

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<sup>583</sup> Communication 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*. The decision is reproduced in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60

<sup>584</sup> See *SERAP v Federal Republic of Nigeria and another* ECOWAS Court of Justice General List No. ECW/CCJ/APP/08/09 [2012] JUDGMENT N° ECW/CCJ/JUD/18/12

<sup>585</sup> See 'Shell agrees \$84m deal over Niger Delta oil spill' BBC 5 January 2015 <<http://www.bbc.co.uk/news/world-30699787>> accessed 17 August 2017.

<sup>586</sup> See (n584)

collective human rights abuses in the Niger-Delta from conjecture to realisation. Before this case, no legal challenge had invoked the obligations of the state of Nigeria in an international court.

The allegation against the Federal Republic of Nigeria and the Attorney-General of Nigeria who remained of nine originally named Defendants<sup>587</sup> were, according to clause 4 of the Judgement of the Court, alleged violations of “the rights to health, adequate standard of living and rights to economic and social development of the people of Niger Delta and the failure of the Defendants to enforce laws and regulations to protect the environment and prevent pollution”<sup>588</sup>. Although the Plaintiff pleaded many Articles of the Charter, the Court was selective in its judgement and reasoned that Article 24 was representative of the rights the plaintiffs sought protection for.

The Court considered preliminarily, procedural matters and subsequently, the weightier substantive issues. The court determined that:

“32. Indeed there are situations in which the enjoyment of the economic, social and cultural rights depends on the availability of State resources. In those situations, it is legitimate to raise the issue of enforceability of the concerned right. But there are others in which the only obligation required from the State to satisfy such rights is the exercise of its authority to enforce the law that

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<sup>587</sup> The original suit named the state-run Nigerian national oil company and six other major multinational oil corporations i.e. Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria Limited, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil. The absolution of these corporations raises the question of the rationale for the exclusion of corporate citizens from the jurisdiction of regional and international courts when they are to some extent at least capable of suing and being sued in national jurisdictions.

<sup>588</sup> See *SERAP v Federal Republic of Nigeria and another* Judgement Number ECW/CCJ/JUD/18/12. [4]

recognises such rights and prevent powerful entities from precluding the most vulnerable from enjoying the right granted to them.

33. In the instant case, what is in dispute is not a failure of the Defendants to allocate resources to improve the quality of life of the people of Niger Delta, but rather a failure to use the State authority, in compliance with international obligations, to prevent the oil extraction industry from doing harm to the environment, livelihood and quality of life to the people of that region”.<sup>589</sup>

The decision of this Court raised two important points;

- (i) An international obligation of member states can be justiciable despite the national laws of member states saying the contrary.<sup>590</sup>
- (ii) Despite the adoption of a “specific instrument” by ECOWAS member states of human rights, the court is obliged to apply the rules based on the states’ avowed allegiance to these rights even if declared in secondary treaties.<sup>591</sup>

The ECOWAS Court made it plain that it recognised obligations arising from international treaties. This jurisprudence of the court is expected to influence the treatment of non-explicit provisions of ‘imported’ treaties by giving them appropriate interpretation consistent with the jurisprudence of national court. Understandably, references to the IESCR and UN conventions was rife in the judgement. The consideration of inexplicit provisions and the apparent endorsement and legitimisation of IESCR was couched in superior and superlative terms. The Court having considered the jurisdictional issues then turned to the task of rationalising its cogitations in its judgement.

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<sup>589</sup> *ibid* [32]

<sup>590</sup> *ibid* [34]

<sup>591</sup> *ibid* [29] and [36]



The court applied international law treaties as overarching legislation in this case. The court's apportionment of culpability was unambiguous. It also identified the injured and applied the principle of *ubi jus ibi remedium*. In paragraphs 71 and 72, the court articulated the argument against foreign companies operating in Nigeria whose actions harm the local economy and stated that 'it is incumbent upon the Federal Republic of Nigeria to prevent or tackle the situation by holding accountable those who caused the situation and to ensure that adequate reparation is provided for the victims'.<sup>592</sup> It is interesting to note that the arguments canvassed by SERAP are akin to the principles enunciated in the Ruggie Principles to protect the citizens from third party infringement or blockade of opportunity to earn a living thereby ensuring the enjoyment of other rights such as health and other cultural rights.

An effective justice system should provide for easy access, expeditious delivery of justice and reduced financial requirement. Since it is the rights of the less powerful members of a society that may be less able to access the justice system, it is important that their access to justice is unhindered. In the matter of the protection from infringement of social, economic and cultural rights amongst other human rights, the case of Nigeria deserves special mention.

The rule upon which litigants in human rights cases will rely provides for the expeditious hearing of human rights infringement cases.<sup>593</sup> This exemplifies the regard that the law places on the infringement of personal liberties and fundamental freedoms. The spirit and intendment of the law are often not in accord with the practices adopted by judicial officers. In a rare example of expeditious dispatch of cases, Rhodes-Vivour J. heard and determined *Ron Obey v West African Examination Council* within 21 days.<sup>594</sup>

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<sup>592</sup> *SERAP v Federal Republic of Nigeria and another* Judgement Number ECW/CCJ/JUD/18/12. [97]

<sup>593</sup> See for example Order IV Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules 2009

<sup>594</sup> *Ron Obey v West African Examination Council* [2000] 2 WRN 130; 2 NPILR 106.

The Constitution of Nigeria 1999 provided for the mandatory ‘duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or Judicial Powers, to conform to, observe and apply the provisions of this chapter of this Constitution’.<sup>595</sup> It also provides, however, that ‘any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in chapter II of this constitution’ is not justiciable.<sup>596</sup> Interestingly, it provides for the protection of ‘any person who alleges that any of the Fundamental Rights provided in the Constitution or African Charter on Human and Peoples’ right (Ratification and Enforcement) Act’ may bring an action to remedy such infringement.<sup>597</sup>

The bane of the protective legislations in Nigeria has been effective judiciary and unfettered access to justice through lack of funds to enable an equal playing field. An alert, vibrant and apt judiciary is required to interpret and make pronouncements of legal positions, rights, duties and obligations to secure the respect and trust reposed in it. It is only when judicious judicial pronouncements are made that enforcement can be sought by parties that are favoured. In this regard, the judiciary is looked up to as the last ‘bus-stop’ for all disputes involving or against the state

Even when a judgement is favourable, its enforcement may raise another layer of challenge, hence settlement of disputes using alternative resolution methods such as mediation is less cumbersome and more readily available to injured parties of less means. The ineffectiveness

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<sup>595</sup> Section 13 Constitution of the Federal Republic of Nigeria 1999

<sup>596</sup> Section 6(6)(c) Constitution of the Federal Republic of Nigeria 1999

<sup>597</sup> Order II Rule I Fundamental Rights (Enforcement Procedure) Rules 2009

of the forms of redress for corporate abuses exposes the need for legislative provisions regarding the protection of social, economic and cultural rights in the face of corporate abuse.

Some special legislations are in force for the extractive industry in Nigeria, including:

- (i) Petroleum (Drilling and Production) Regulations 1969
- (ii) Federal Environmental Protection Act 1988
- (iii) Impact Assessment Act 1992
- (iv) Oil and Gas Pipeline Regulations 1995
- (v) Environmental Standards and Regulation Enforcement Agency (Establishment) Act 2006
- (vi) The Environmental Guidelines and Standards for the Petroleum Industry 2002
- (vii) National Oil Spill Detection and Response Agency (Establishment) Act 2006
- (viii) Harmful Waste Special Criminal Provision Act 1990

“Thus, the duty assigned by Article 24 to each State Party to the Charter is both an obligation of attitude and an obligation of result”<sup>598</sup> and “[t]he environment is essential to every human being. The quality of human life depends on the quality of the environment”<sup>599</sup>. In Clause 105 the Court opined that legislation without “additional and concrete measures” may still fall short of compliance with international obligations in the matter of environmental protection. The court identified the problem of Nigeria as the “lack of enforcement of the legislation and regulation in force, by the Regulatory Authorities of the Federal Republic of Nigeria in charge of supervision of the oil industry”<sup>600</sup>.

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<sup>598</sup> *SERAP v Attorney General of Nigeria* Judgement Number ECW/CCJ/JUD/18/12. [100]

<sup>599</sup> *Ibid* [100]

<sup>600</sup> *Ibid* [108]

*Laws are not enough.*

I posit that although laws are a necessary starting point for redressing the appalling standards of environmental degradation caused by companies in the extractive industry. To put this point in perspective is to consider what would be the likely scenario if laws did not exist at all.

In *SERAP v Attorney General of Nigeria*, the ECOWAS Court of Justice rejected the argument of the Nigerian government that corporations can manage any resultant issues affecting the environment with the affected peoples when it stated that “a vital resource of such importance to all mankind, such as the environment, cannot be left to the mere discretion of oil companies and possible agreements on compensation they may establish with the people affected by the devastating effects of this polluting industry”<sup>601</sup>

In deciding the case against Nigeria, the Court ordered the defendant to do the following:

- (i) take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta;
- (ii) take all measures that are necessary to prevent the occurrence of damage to the environment; and
- (iii) take all measures to hold the perpetrators of the environmental damage accountable.

I suggest that the decision made in the ECOWAS Court of Justice of incorporating the various international statutes that affect Member States’ adoption of the regional African Charter on Human and peoples’ Right 1981 which came into force 21 October 1986.

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<sup>601</sup> Ibid at [109]

It can be deduced from the decision of the Court that perhaps an attempt at establishing a CSR principle on the basis that a symbiotic relationship exists between the state, corporations and the local community in which oil exploitation companies operate. This decision may be the proverbial ‘one little step’ for CSR that may lead to a ‘giant leap’ in the further development of international law jurisprudence on this subject. In a region plagued by widespread corruption and political interference in judicial proceedings, it can be hardly considered an exaggeration to label this judgement as ‘ground-breaking’ for lacking precedent. Darbney Marshall has remarked on the readiness of judges to declare new frontiers in jurisprudence. He said ‘once admit a principle into jurisprudence, and lawyers and judges fearlessly follow it to its logical conclusions, however inconvenient or absurd they may prove to be. This is strikingly illustrated in the history of the judge-declared portion of the law’.<sup>602</sup> CSR in emerging economies may be one area in which judicial activism may be required. However, lack of adequate formal knowledge and information on the subject may prove debilitating in view of the fact that CSR is not taught or expounded in the tertiary academic institutions in Nigeria. The quality of benchers may thus reflect the quality of the educational system from which they are bred.

#### *6.4.1 The drivers of CSR in Nigeria; CSOs, the state and business*

The drivers of CSR law and practice in Nigeria can be broadly categorised as the state, business and the civil society organisations (CSOs)<sup>603</sup>. These are the main promoters and factors of corporate accountability in Nigeria.

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<sup>602</sup> See T. Darbney Marshall, ‘What Law Is’ (1893) 27 American Law Review 540, 540. This is a rather generalised and optimistic view that judges are creative in developing jurisprudential thought in developing economies.

<sup>603</sup> In the context of this paper this group includes the not-for-profit organisations and non-governmental organisations (NGOs).

The New Nigeria Foundation, a high-profile CSO established with the support of the United Nations Foundation (UNF) and United Nations Development Programme (UNDP) organised a CSR retreat in 2008 to develop assessment tools “patterned on the draft ISO 26000”.<sup>604</sup> It is unknown if this effort was sustained as there is no available public record on its furtherance of their CSR project. However, the influence of similar organisations pre-dates the notorious case of Ken Saro-Wiwa and eight others that were hanged by the Nigerian Government in 1995<sup>605</sup> – a case which caused an international furore and diplomatic spat which led to Nigeria’s expulsion from the Commonwealth of Nations. Darbney Marshall’s has remarked in the readiness of judges to declare new frontiers in jurisprudence. He said ‘once admit a principle into jurisprudence, and lawyers and judges fearlessly follow it to its logical conclusions, however inconvenient or absurd they may prove to be. This is strikingly illustrated in the history of the judge-declared portion of the law’.<sup>606</sup> CSR in emerging economies may be one area in which judicial activism may be required. However, lack of adequate formal knowledge and information on the subject may prove debilitating in view of the fact that CSR is not taught or expounded in the tertiary academic institutions in Nigeria. The quality of benchers may thus reflect the quality of the educational system from which they are bred.

The point of note is that the advocates were organised as not-for-profit organisation in demanding social responsibility of IOCs in the Niger Delta. The CSOs create interest in environmental, human rights and other activities of the oil corporations. The increasing involving of CSOs has marked a turning point for CSR in Nigeria’s extractive

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<sup>604</sup> See the New Nigeria Foundation website: <<http://www.nnfng.org/news/16-csr-retreat>> accessed 11 July 2016

<sup>605</sup> See Greenpeace website <<http://archive.greenpeace.org/comms/ken/murder.html>> accessed 18 August 2011.

<sup>606</sup> See T. Darbney Marshall, ‘What Law Is’ (1893) 27 American Law Review 540, 540. Although this is a generalised and optimistic view that judges are creative in developing jurisprudential thought in developing economies, it is not an unreasonable assumption in my view.

industry in particular and generally. The amnesty granted erstwhile ‘militants’ in the Niger Delta by Nigerian government can be directly or indirectly linked to the agitation for socially responsible conduct by the multinationals who operate in this region.<sup>607</sup>

The other drivers of CSR are the state, through their procurement policies and legislation. As discussed elsewhere in this paper, the society influence CSR through boycotts and other activities that force changes in government or corporate policy.

#### *6.4.2. Challenges of CSR in Nigeria*

At the levels of policy, practice and law, CSR has not received adequate attention. As already noted there is no coherent government policy on CSR in Nigeria; its practice is also not coordinated with weak institutional interventions by standardisation organisations and no underpinning legislation.

With reference to the role of the judiciary in interpreting state policies and institutional structures based in law, it is critical that they are independent to serving the democratic process. In Nigeria, accessing the judicial system should not be the preserve of the well-to-do and when accessed the independence of the courts needs to guarantee fair hearing and unfettered delivery of justice. Judicial processes are notoriously slow in Nigeria. Therefore, the recent computerisation of judicial administration has been hailed as capable of speeding the processes of case administration.<sup>608</sup> Judicial reform will be particularly important in the backdrop of the proliferation of non-judicial but vociferous pressure groups demanding accountability beyond national courts as in the case of SERAP.

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<sup>607</sup> Dele Olowu, ‘From defiance to engagement; An evaluation of Shell’s approach to conflict resolution in the Niger Delta’ 16 December 2010 <An evaluation of Shell’s approach to conflict resolution in the Niger Delta> accessed 17 July 2017.

<sup>608</sup> For benefits of technological administration of court processes see James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard ZorzaHarvard, ‘Using Technology to Enhance Access to Justice’ (2012) 26 Harvard Journal of Law & Technology 24.

The failure of passage of CSR legislature exposes lack of political will in making legislative provisions for CSR in Nigeria. The effort first major effort aimed at introducing legal mandation of CSR via the Corporate Social Responsibility bills in 2008 and 2012 failed.<sup>609</sup> Another attempt via the Corporate Social Responsibility (Special Provision, etc.) Bill, 2015 was read the first time on 8 December 2015.<sup>610</sup> It was read for the second time on 15 December 2015 and referred to the House of Representative Committees on Commerce and Justice for further legislative input.<sup>611</sup> These previous Bills reached the committee stage on each occasion but did not complete the cycle of legislative processes required for passage into law. The challenge here is the inability of lawmakers to propose a Bill capable of general acceptance.

The passage of the Petroleum Industry Bill 2010<sup>612</sup> has met a lot of bottlenecks also, indicating the nature of legislative reform concerning corporate activity in the oil and gas sector Nigeria. According to UN Environment website, Ogoniland should be a protected natural habitat.<sup>613</sup> To achieve legislation of CSR in Nigeria will, therefore, require fundamental reforms. The Petroleum Industry Bill 2010 gained notoriety in Nigeria and among prospective foreign investors in the oil and gas industry since it was first proposed in 2007. The importance of the Bill is in its reform of transparency issues, constitution of a new legal framework with the creation of new enforcement agencies. Some controversies followed the presentation of the Petroleum Industry Bill for the first time in 2012. The Bill in

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<sup>609</sup> The Bill sponsored by Uche Chukwumerije, a senator is titled “An Act for the establishment of a Corporate Social Responsibility Commission” and presented in 2008. The Commission is supposed to be the body charged with the administration of the regulatory provisions of the Act.

<sup>610</sup> Votes and Proceedings of the House of Representatives, of 8 December 2015, 660.

<sup>611</sup> Votes and Proceedings of the House of Representatives, 15 December 2015, 717.

<sup>612</sup> The Petroleum Industry Bill 2010

<sup>613</sup> The UN Environment claims that the area comprising Ogoniland is the third largest ecosystem in the world.

<<http://www.unep.org/disastersandconflicts/disastersandconflicts/where-we-work/nigeria/what-we-do/about-ogoniland>> accessed 6 August 2017



its original form has been amended severally but maintains some key features. In its present form, it was presented as the Petroleum Industry Bill 2015.

#### **6.4.3 Domestic corporations, SMEs and the practice of CSR**

For the Small and Medium-sized Enterprises (SMEs) and companies, there is no coherent CSR policy. So, currently, there is no coordinated policy regarding the challenge which theorists, empirical researchers and corporate executives in developing countries face is the development and translation of an autochthonous CSR conceptual construct into practice.<sup>614</sup> Government and organisations touting the adoption of standards and codes should not encourage standards which are a mere mimicry of western models.<sup>615</sup> The purpose of standard organisations, especially those of international repute and influence, should be to support programs for economic growth and sustainable development of adopting states.

Small companies are not regulated in the same way bigger corporations are. In 2003, the Bankers' Committee's Subcommittee on Corporate Governance issued the Code of Corporate Governance for Banks and Other Financial Institutions in Nigeria to its member banks. The Securities and Exchange Commission (SEC) issued its first Code of Corporate Governance for Public Companies 2003 shortly afterwards. In 2011, the Financial Reporting Council of Nigeria was set up by law<sup>616</sup> to "protect investors and other stakeholders' interest"<sup>617</sup> and

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<sup>614</sup> See for a discussion on the search for new identities resulting from the formation of new states in Asia and Africa: Clifford Geertz (ed), 'The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States' in *Old Societies and New States: The Quest for Modernity in Asia and Africa* (University of Chicago 1963)

<sup>615</sup> Kenneth Amaeshi, Bongo Adi, Chris Ogbechie and Olufemi Amao, 'Corporate Social Responsibility (CSR) in Nigeria: western mimicry or indigenous practices?'

<sup>616</sup> Financial Reporting Council of Nigeria Act 2011

<sup>617</sup> Section 11(a)

“ensure accuracy and reliability of financial reports and corporate disclosures, pursuant to various laws and regulations currently in existence”.<sup>618</sup>

The SEC published its amended Code of Corporate Governance for Public Companies in 2011 which in its entirety is expected to “ensure the highest standards of transparency, accountability and good corporate governance, without unduly inhibiting enterprise and innovation”.<sup>619</sup> The applicability of the code covers all public companies including those seeking to raise funds and whether listed or not.<sup>620</sup> Put together, these laws were aimed at establishing a culture of good corporate governance in Nigeria.

In carrying out their functions, companies are enjoined by virtue of the provisions of Part D to contemplate the interests of other stakeholders other than shareholders in furthering their objectives. According to Rule 37, stakeholders “include directors, employees, creditors, customers, depositors, distributors, regulatory authorities and the host communities”. Rule 28.3 requires the annual reporting on “nature and extent of its social, ethical, safety, health and environmental policies and practices” – all issues central to corporate social responsibility.

In pursuit of furthering the objective of better corporate governance several amendments were made in 2014, to the Code of Corporate Governance for Public Companies 2003. The new Rules mandated compliance with the provisions of the Code and imposed financial and non-financial sanctions for non-compliance. The new Rule 1.3(a) provides that;

The Code is expected to facilitate sound corporate practices and behaviour. It should be seen as a dynamic document defining minimum standards of

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<sup>618</sup> Section 11(d)

<sup>619</sup> Introduction to the Code of Corporate Governance for Public Companies 2003(as amended).

<sup>620</sup> See Part A, Rule 1.1(a)(b) and (c)

corporate governance expected particularly of public companies with listed securities.

The amendments also cover compliance with the provisions of the Code which “shall be mandatory”<sup>621</sup>. Non-compliance to the new rules will attract financial and non-financial penalties attached.<sup>622</sup>

The preceding review of the efforts at infusing good corporate governance and responsibility standards in Nigeria reveals the presence of fundamental laws. However, these laws are lacking in enforceability, capacity of institutional mechanisms and slow reform opportunities being taken to improve on them.

## **6.5 Recent developments and prospects**

Recent developments on CSR in Nigeria has both historical and contemporary significance. The well-defined ideological positions in CSR no doubt have been shaped by the dichotomy of corporate law theories, shareholder primacy and stakeholder theory. In Nigeria, it would seem that CSR has been influenced by the early foreign companies and multinational companies (MNC) that dominated the petroleum industry.<sup>623</sup> However, recent developments in global warming and the domestic political climate in Nigeria has created opportunities for advancing CSR discourse.

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<sup>621</sup> Rule 1.3(g) of the Standing Orders of the House of Representatives of Nigeria 2015.

<sup>622</sup> The penalty for violating the Rules is “N500,000 at the first instance and a further sum of N5,000 for every day the violation persists and any other sanction as the Commission may deem fit in the circumstance”

<sup>623</sup> Manby, B., *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York: Human Rights Watch, 1999).

(i) *Global Climate Change Conference*

In most jurisdictions in the developing world, even where there are little resources for enforcement, legislative influence in environmental, climate change impact reduction and consumer protection are easily observable.<sup>624</sup> A Bill for an Act to Provide for Corporate Manslaughter to make Corporate Organisations Criminally Responsible for the death of Employees arising from its Acts or Omissions; and for Other Related Matters (HB. 273) was considered on 4 May 2016 and passed into law subject to Presidential assent on 7 June 2016.<sup>625</sup>

For the first time, the legislature has a standing Committee on Climate Change.<sup>626</sup> The ambits of CSR have been the subject of interesting debates among its exponents. The more established areas of engagement have been human rights, stakeholder issues, corporate ethics and other areas of economic, social and cultural rights.

(ii) *The beginning of Ogoniland clean up*

A comprehensive chronicle of the travails of the people of Ogoniland has been analysed by May Ifeoma Nwoye.<sup>627</sup> SERAP after winning the case against the Federal Government has been urging the implementation of the judgement of the ECOWAS Court of Justice. SERAP claimed that successive Nigerian governments have lacked the will to hold to the

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<sup>624</sup> In Nigeria for instance, the federal legislature – The National Assembly – is actively considering the passing of ‘A Bill for an Act to regulate the Disposal by Industries or Companies; Prohibit Environmental Pollution, prescribe Penalties against Offenders; and for Other Matters Related Thereto’ HB. 346. This Bill passed second reading on 8 March 2016; this is the stage of final consideration before passage into law. If passed, the legislation will expand the issues over which companies will be required to take into account in the course of production.

<sup>625</sup> Votes and Proceeding of the House of Representatives No. 102, 7 June 2016, 1906

<sup>626</sup> The Committee on Climate Change inaugurated in the 8<sup>th</sup> Assembly (2015 – 2019) is the first of such committees to have special mandate on climate change matters in Nigeria. There is no government department charged with this responsibility although the Federal Ministry of environment has overall responsibility for climate issues.

<sup>627</sup> May Ifeoma Nwoye, *Oil Cemetery* (Strategic Publishing and Books, 2013)

International Oil Companies (OICs) concerned to account and the court accepted this argument.<sup>628</sup>

(iii) *Emergence of radical militant groups*

The emergence of a new militant group in the Niger Delta region of Nigeria called the Niger Delta Avengers has led to serious economic and security challenge for the country. The Niger Delta Avengers have claimed responsibility for the degrading of many production facilities in the region that led to a drastic reduction in the production capacity of Nigerian oil firms.<sup>629</sup>

(iv) *Increased regulatory effectiveness – the case of MTN Nigeria Limited*

Recent events seem to strengthen the case for greater regulation of big corporations in Nigeria. The meteoric rise of the telecommunication sector in Nigeria to assume the position of the highest contributor to the country's GDP is ironic.<sup>630</sup> This is because the telecommunications sector has not escaped public scrutiny due to the high visibility and impact of its operations.

Furthermore, the services they provide may be correctly viewed as the most important factor in the dissemination of CSR news. The unabated rise in the number of “active lines” and expansion of data availability in Nigeria is significant when considering the prospect of CSR in Nigeria. As the availability of telecommunication services spreads to all parts of the country, public engagement, virtual assembly and organised real-time protests are made easier. Expectedly, CSR topics have not escaped the interest of the public as blogs continue

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<sup>628</sup> [97] *SERAP v Federal Republic of Nigeria and another* Judgement Number ECW/CCJ/JUD/18/12.

<sup>629</sup> Nigeria's production fell from an average of 2.2million barrels per day (bpd) in 2014 to 1.3million bpd in the first quarter of 2016.

<sup>630</sup> This position was declared following the rebasing of the Nigerian economy in 2013. Following the rebasing of the economy and the addition of the popular film industry (Nollywood), Nigeria took its place as the largest African economy.

to proliferate articulating to the global audience local issues.<sup>631</sup> The voice of dissent is more easily heard and through social media can be heard more loudly and continuously reverberated until notice is taken by appropriate authorities.

The seeming indiscriminate location of masts in all the cities of Nigeria, publication of huge profits by telecoms operators<sup>632</sup> and less-than-perfect services is constantly under attack in the social media and elsewhere. This and other issues cause constant public irritation and has led to calls for telecoms companies to be fined. The Nigeria Communications Commission fined MTN Nigeria Limited (MTN) the sum of \$5.2billion for flouting regulations relating to the registration of subscribers.<sup>633</sup> Although there are allegations surrounding this fine as being tainted by political interests the culpability of MTN has not been contested. It regarded the indictment of the company for allowing the use of unregistered mobile phone telephone sims in Nigeria which the government alleged fell into the hands of the Boko Haram terrorist group. Indeed, MTN seems to have conceded wrongdoing. This case suggests that it is not fantastic to think of corporations being held criminally liable for sponsoring terrorism, genocide or other crimes against humanity in the near future.

(v) *New political responsiveness*

Under the leadership of Muhammadu Buhari<sup>634</sup> – who is largely regarded globally as an incorrupt leader - there seems to be a new public anti-corruption persecution which may be responsible for a renewed societal intolerance towards corporate indiscipline. The apparent

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<sup>631</sup> One of the most popular blogs dwelling on CSR issues is *Nigeria CSR Reports* <<http://nigeriacsrreports.blogspot.co.uk/>> accessed 16 January 2016.

<sup>632</sup> MTN Nigeria Ltd famously declared world record profits in its first few years of operation in Nigeria and has maintained

<sup>633</sup> The Nigerian Communications Commission (NCC) is the watchdog of the telecommunications industry.

<sup>634</sup> President Muhammadu Buhari was elected on the platform of a “change agenda” which included the routing of corruption from public service. He was sworn in on 29 May 2015 as the 7<sup>th</sup> (4<sup>th</sup> by election) Head of State.

public mood towards corruption aversion may not be unrelated to the unprecedented spate of investigations and trials of former government officials including those placed at the highest level of executive authority. The EFCC has recorded an unprecedented 125 convictions within the first year of Muhammadu Buhari's tenure.<sup>635</sup> The Buhari administration can take credit for the MTN fines, the clean-up of Ogoni and the good press in the international community accorded Nigeria on account of its leadership. If CSR is not internationally regulated, it may be that large corporations will seek out countries where they can operate with minimal regulation as was the initial interest in their operating in Asian countries and which led to foremost internationally acclaimed CSR issues.

It is evident that the practice of CSR is embedded in businesses of all sizes in Nigeria, with the large corporations being most scrutinised by the public. However, vox populi has always leaned towards greater regulation which now seems to be imminent. In the next chapter, the prospects of legal regulation of CSR is evaluated.

The enactment of Nigeria Freedom of Information Act 2011 (FOI Act) should aid the assessment of companies regarding their responsiveness to social issues. This is because the FOI Act establishes 'the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described'.<sup>636</sup> There are indications that this law has led to a revival of CSOs. There is also a need for a Whistle Blowing Act in Nigeria akin to what is obtainable in Ghana for complementary purposes.

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<sup>635</sup> A full list of 2016 convictions are available online from EFCC website. <<https://efccnigeria.org/efcc/images/RECORD%20OF%20CONVICTION%202016%20Complete.pdf>> accessed 14 July 2017.

<sup>636</sup> Section 1(1) Freedom of Information Act 2011

## 6.6 Summary

There is a mixture of CSR as envisaged by western corporations and organisations considered standard bearers. This explains the influence of Western models of CSR in Nigeria. However, peculiar national circumstances have hampered necessary reform aimed at making CSR practice more readily adaptable to the requirement of meeting developmental needs of an emerging economy like Nigeria. I posit that the current myriad of international codes, continental, regional and national laws in existence does not negate the introduction of CSR legislation in Nigeria and should be seen to be complementary to any home-grown efforts at internalising CSR practises.

The international codes and legislations have impacted corporate managers in the big multinationals by creating a culture of effective reporting of relevant issues, having ensured good practice in dealing with not only shareholders but stakeholders also while pursuing the legitimate end of making profits. Whether expressly or by implication, it seems corporate managers are entrusted with the obligation to pursue ethical practices in the course of doing business in Nigeria.

I also argued that the combined effect of the long history and accountability structure in place as a result of current laws will not be at variance with a proposal to legislate CSR in Nigeria. CSR legislation can serve to strengthen rules and legislation on Corporate Governance and effective practices and to report on social initiatives of the big corporations. A CSR Bill affords a unique opportunity to craft a legislation that shall reflect the socio-cultural and economic needs of Nigeria.

With the Nigeria Oil and Gas Development Act 2010 (popularly referred to as the ‘Local Content Act’), Environmental Impact Assessment Law, NEITI Act etc., there seems to be some legislation capable of extracting the required conformity of corporations towards achieving sustainable development goals. What perhaps is lacking is the coordination of the



various government agencies established by the instrumentality of legislation to bring the necessary focus and cordination to the issues of CSR. Competetion rather than cooperation is seldom observed in the operations of Nigeian government departments.

It must be stated that if there are no laws on a subject in a democracy, the judiciary cannot be expected to make them up. Where there are laws then, the courts are rightly seen as the bastion of the common man; where redress can be obtained against infringement of rights by adjudication of facts by a 'blind' and impartial arbiter of the legal rules as stipulated in the extant laws of the state. Legislating on CSR can be indicative of the 'direction' government is facing when collaborative developmental programs are to be fashioned.

## CHAPTER SEVEN

### Legally Mandating CSR in Nigeria; challenges and prospects

#### 7.1 Introduction

From the previous chapter, it is evident that models of CSR being practised in Nigeria is influenced by several factors including corporate standards of international organisations and national socio-political circumstances. It can also be concluded that Nigeria has been keen to legislate on CSR in the past decade in order to define the law and practice.<sup>637</sup> This development is attributable in part to the resilience of CSOs that have advocated for a more robust CSR framework for IOCs in the oil and gas sector over the last few decades. Additionally, some sensational national and international developments such as the Shell oil spill off the Mexican coasts and the historic developments in the Nigeria Delta, recently culminating in the UNEP report has given new impetus to the CSR debate. The Ogoniland cleanup has commenced under the new government headed by Muhammadu Buhari.

In the legal sphere also, some national and international court judgements with repercussions capable of impacting the development of CSR in Nigeria are notable. Despite what can be deemed apparent gains for CSR in Nigeria, there remains some challenges to legislating CSR. This chapter focuses, therefore, on these challenges and the prospects of the Corporate Social Responsibility Bill 2015 (CSR Bill 2015) currently passing through legislative processes to becoming law. This chapter discusses what may be considered with the passage of the CSR Bill 2015 as a welcome development for Nigeria.

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<sup>637</sup> The Nigerian Extractive Industry Transparency Initiative Act 2007 became law on 28 May 2007, the Financial Reporting Council of Nigeria Act 2011 became law on 3 June 2011 repealing the Nigerian Accounting Standards Board Act 2003 which was much restricted in scope regarding reporting requirements of public companies.

## 7.2 CSR and Nigeria's development agenda

Considering the history of corporations and the practice of CSR in Nigeria, the proper management of CSR programs has been criticised as the bane of development in the Niger Delta. To a lesser extent this criticism is valid for the rest of the country where non-oil businesses operate. The ostensible impunity with which IOCs operate in the Niger Delta has contributed to the agitation for legislation to institutionalise CSR practices in Nigeria. This task is not devoid of inherent challenges including lack of research, human capital issues and unstructured business-society interfacing strategies. The importance of CSR to a developing country is important because CSR policies engender developmental goals.<sup>638</sup>

### 7.2.1 *Socio-cultural issues of Nigeria's development*

Businesses often talk of an 'enabling environment'. This environment must be in the context of a society and its norms. Research has shown that CSR is influenced by the socio-cultural norms of Nigeria.<sup>639</sup> Recognising the peculiar socio-economic and corporate history of Nigeria informs the notion of 'an enabling environment' in China, Germany or the US will differ according to the context of the socio-cultural norms. One of the most iconic characteristics of Nigeria is the pervasiveness of corruption and tribalism.<sup>640</sup> The Federal Character Commission established under the Constitution to ensure adherence to the 'federal

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<sup>638</sup> For a discussion on CSR and its developmental impact in the Niger Delta see: Oko Ndu and B.A. Agbonifoh 'Corporate Social Responsibility in Nigeria: A Study of the Petroleum Industry and the Niger Delta Area' *International Review of Social Sciences and Humanities* (2014) Vol. 6, No. 2, 214-238, 234.

<sup>639</sup> For a discussion on Nigeria's peculiar CSR environment against the backdrop of Western influence see Amaeshi K, Bongo Adi, Chris Ogbechie and Olufemi Amao, 'Corporate Social Responsibility (CSR) in Nigeria: Western Mimicry or Indigenous Practices?' (2006) 24 JCC 83.

<sup>640</sup> Section 14 (3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) recognises the diversity of Nigerian tribes and provides for fair representation of indigenes from the major tribes. Nigeria consists of over 250 ethnic tribes and languages. Often, there are allegations that political office holders favour tribesmen in all manner of government discretionary appointments.

character' of Nigeria recognises this issue.<sup>641</sup> Jing and Graham have argued that the various tribal affiliations exhibited by public official tends to promote corruption in Nigeria.<sup>642</sup> An effective CSR policy or law should impact society positively. Nigeria being a country of many languages and entrenched tribal sentiments, CSR can be a tool for business to build partnerships with the local communities in which they operate.<sup>643</sup> Diverse cultures, ecological and social needs can be addressed through a CSR program that recognises the particular needs of host communities. CSR programs can support CSOs in campaigns /can help solve many social problems in healthcare, SME-small business sustainability, solar energy, education, scientific research etc.

The direct application of funds to community projects will create a further bond between business and such communities. This is recommended in developing countries where national priorities may divert taxes away from social projects in particular communities that produce high revenue for the country. In Nigeria, the Niger-Delta people have consistently argued that they should be given more proceeds of the crude oil with which they are naturally endowed. This apparently influenced the Federal Allocation and Derivation Policy of Nigeria.<sup>644</sup> Nonetheless, Omotosho captured the public perception accurately when he observed that 'the federal government controls a disproportionate amount of resources to the detriment of the sub-federal governments'.<sup>645</sup> The oil producing areas continue to agitate that the development profile of their communities is vastly different from that of the federal government territory and its areas of influence.

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<sup>641</sup> Section 153(1)(c) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

<sup>642</sup> Runtian Jing and John L. Graham op cit have concluded that regarding societies with various tribal affiliations, the more homogenous a society is the less the propensity for nepotism.

<sup>643</sup> This is one of the stated objectives of the Philippines Corporate Social Responsibility Act 2011.

<sup>644</sup> Femi Omotosho, 'Nigerian Fiscal Federalism and Revenue Allocation Formula for Sustainable Development in Niger delta' (2010) 5 The Social Sciences 246

<sup>645</sup> ibid 249

There is no CSR Social Impact Index data for Nigeria. Frynas has observed that “SPDC built three town halls in one Niger Delta community as three community chiefs wanted to benefit personally from contracts for their construction”.<sup>646</sup>

This would be useful in the measurement of the effectiveness of CSR projects in deprived communities. It will be further useful in having a coordinated approach to mapping and recording CSR projects to assess the impact on host communities. The increasing urbanisation of many towns (now cities) in Nigeria calls for a moderation through planning and effective policies. CSR by the government will dictate the situation of industrial areas outside of populations, rigorous administration of pollution management policies. In all steps taken by corporation or government, inputs from CSO organisations should be sought with wide consultations undertaken.

### ***7.2.2 The economy, developmental imperatives and strategies***

The Nigerian economy is the largest in Africa with communication, oil and gas, power, the financial sector, oil and gas as the main contributors to the GDP. With the tracing of the economic crisis to the failure of corporate governors to apply adequate ethical considerations to their operations, the big corporations in Nigeria cannot escape scrutiny.

Clearly, it is important to consider the impact of legislating CSR in Nigeria to the economy. This is a consideration for not only business but government and society. Business measure the effectiveness or acceptability of legislation by allusion to the impact on the “enabling environment” desired for the conduct of business. On the other hand, government perceives the propriety of its legislation by the willingness with which there are compliance and social conformity with extant policies and laws. A bad law often leads to various methods of

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<sup>646</sup> Jędrzej George Frynas, ‘The false developmental promise of Corporate Social Responsibility: evidence from multinational oil companies’ *International Affairs* 81, 2005, 585. SPDC is the acronym for Shell Producing and Development Company.

condemnation by those it affects. The public in their assessment will gauge the value of such laws to achieving what is generally perceived as fair and equitable in the context of the society in which the laws apply and the environment in which it is meant to apply. The value of public opinion to both business and government is of great importance. In view of these assumptions, CSR should be tailored to have transformative effect on the lives of the citizens. Policies in this regard should be of long-term impact and should not be easily subject to change. Businesses that contribute to society through CSR activities can be granted tax exemptions commensurate to the value of their contributions. In this way, corporations will be made to enjoy tax rebates and exemptions rather than tax payments.

### ***Developmental imperatives (SDGs) and strategies***

Following from the lack of research and information on business-society relations, no nationwide business-society strategy which incorporates the developmental imperatives or aspirations can be identified. Although CSR is being embraced by most organisations in Nigeria, it remains largely uncoordinated and inconsistent. The application of extant laws such as the Tertiary Education Trust Fund Act 2011 which stipulates the monthly tax of 10% of corporate profit may inhibit business from accepting further taxation. Corporations will benefit from engaging in developmental initiatives with stakeholders who provide value-chain benefits to them. Food processing companies in the agricultural sector can extend their CSR projects to farmers and intermediate processors. Other important sectors of the Nigerian economy that may benefit from this approach are the financial, mining and telecommunication industry. The educational sector can benefit from stakeholder development initiatives from corporations in every sector of the economy; CSR can be very effective in sustaining teaching, learning and research in Nigerian schools at all levels and types – primary, secondary, tertiary and where formal or informal, vocational or professional. Although some exist, there seems to be very little examples to point at when considering

educational CSR projects in Nigeria. The various specialist corporations can fund the development of all levels of skills required in their industry by partnering institutions delivering courses in their areas of interest. Funds for CSR can be used to promote innovation and research partnerships in the areas of interest of the funding corporation.

It is not surprising that discussions on CSR elicits underlying questions about Nigeria's development. The reason is not farfetched; there is an inextricable link between the wealth of the country and the role of the IOCs that exploit the country's vast crude oil reserves. Accordingly, CSR is linked with social justice and developmental expectations of the people, and the government being the legitimate authority to maintain the development agenda should not lag behind in articulating its business-society position.

Government commitment to the implementation of strategies aimed at the attainment of the Sustainable Development Goals (SDGs) should be made public and constantly reinforced.<sup>647</sup>

### ***7.2.3 Political stability and development***

The economic policies and laws of countries are invariably a reflection of their political persuasions. Although it is accepted that there are myriad of permutations and cross-pollination of political ideologies at play at various times in the history of a country, albeit extant laws reflect certain political leaning of those at the helm of political power.

The recent leak of company registration and activity information tagged the "Panama Papers" has led to mixed reactions in jurisdictions around the world.<sup>648</sup> The historic practice by wealthy individuals who use shell using companies for tax avoidance by corporate registering entities in "tax havens" to store funds offshore has been exposed by the Panama leaks.

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<sup>647</sup> Nigeria has adopted a slogan for its SDG Programme 'leave no one behind' and has an informative website about its implementation at [www.sdgs.gov.ng](http://www.sdgs.gov.ng).

<sup>648</sup> The "Panama Papers" refers to the 2.6TB of information released by the International Consortium of Investigative Journalists on 9 May 2016 <<https://panamapapers.icij.org/>> accessed 16 June 2016.

### **7.3 The failed attempts at legislating CSR**

There have been two failed attempts at legislating CSR at the Federal level in Nigeria with the proposal of the Corporate Social Responsibility Bill 2008 (CSR BILL 2008) and the Corporate Social Responsibility Bill 2012 (CSR Bill 2012). The Corporate Social Responsibility Bill 2015 is the third attempt at legislating CSR in Nigeria. These failures highlight the challenge of navigating the legislative process to make laws which can be considered controversial.

#### ***7.3.1 Corporate Social Responsibility Bill 2008***

The consideration of the CSR Bill 2008 raises issues that call to question an investigation into the purport of the intended law. The CSR Bill was introduced in 2008 and passed the second reading in Parliament raising some questions in its trail on how corporations can contribute to developmental efforts of government before it was aborted.<sup>649</sup> Okoye maintains that the challenge of legislating CSR is real ‘where governments acknowledge this shared role and begin to regulate for corporations to contribute mandatorily to development funds’.<sup>650</sup> Okoye further noted that the challenge can be resolved if ‘governance is re-interpreted to involve states forging closer partnerships with non-state actors and providing a role for them in the development agenda’.<sup>651</sup>

The failure of the CSR Bill 2008 can be attributed in part to the lack government backing for the Bill. Mordi et al. argue that government’s insensitivity ‘encourages the passive attitude of

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<sup>649</sup> In the application of law in society, it is presumed that there is a purpose or objective to be achieved by law. Legislation is not the end but a means to an end, for example, of achieving cooperative developmental strategy with business to meet specific social needs.

<sup>650</sup> Adaeze Okoye, ‘Exploring the Relationship between Corporate Social Responsibility, Law and Development in an African Context’, (2012) 54 (5) International Journal of Law and Management 364, 365.

<sup>651</sup> Ibid 368.



the corporate organizations towards their corporate social responsibility to the people'.<sup>652</sup> This Bill proposed several punishments for noncompliance and was rejected by some CSOs as 'coercive and punitive'.<sup>653</sup> The rejection of the CSR Bill 2008 was further on the ground that the 3.5% taxes it sought to impose was roundly condemned by business as unreasonable in the face of poor infrastructural amenities and the increase in transactions costs it will impose on business.<sup>654</sup> It may be said of the CSR Bill 2008 that it was doomed to failure before it was debated.

### **7.3.2 Corporate Social Responsibility Bill 2012**

The fate of the CSR Bill 2012 followed that of its predecessor to failure. It was introduced by Senator Uche Chukwumerije, a veteran labour activist, employee rights and human rights campaigner.

The proposal of a CSR Bill is totally in consonance with Nigeria grund norm which guarantees internationally accepted human rights of its citizens. The Constitution provides for the Fundamental Objectives and Directive Principles of State Policy which reconfirms that "the State social order is founded on ideals of Freedom, Equality and Justice"<sup>655</sup>. It further states in section 17(2) that in furtherance of the social order mentions in 17(1);

(a) every citizen shall have equality of rights, obligations and opportunities before the law;

(b) the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced;

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<sup>652</sup> Chima Mordi, Iroye Samuel Opeyemi, Mordi Tonbara and Stella Ojo, 'Corporate Social Responsibility and the Legal Regulation in Nigeria' (2012) LXIV (1) Economic Insights – Trends and Challenges 1, 6.

<sup>653</sup> L Raimi, I A Adeleke, A Aljadani, and A O Fadipe, (2014) 2 (2) Net Journal of Business Management 18, 22.

<sup>654</sup> *ibid*

<sup>655</sup> Section 17(1) of the Constitution of the Federal Republic of Nigeria.

(c) governmental actions shall be humane;

(d) exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented.

*Fundamental Objectives and Directive Principles of State Policy*

By the provision of section 4(1) of the Nigerian Constitution, ‘legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation’<sup>656</sup>.

Section 4(2) states that:

The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.

Item 60 (a) of the Second Schedule of the Constitution states the federal legislative powers can be exercised for:

The establishment and regulation of authorities for the Federation or any part thereof:

(a) To promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution.

It is arguable that when the exercise federal legislative power is considered with item 60(a) of the Exclusive legislative list Second Schedule<sup>657</sup>, that Constitution has imposed a

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<sup>656</sup> Section 4(1), The Constitution of the Federal Republic of Nigeria 1999 (as amended).

<sup>657</sup> The Part I of the Second Schedule of the Constitution of the Federal Republic of Nigeria contains the ‘Exclusive legislative List’. Part II contains the ‘Concurrent Legislative List’. CSR is arguably in the ‘Concurrent List’ and states can also make law by virtue of the in exclusivity of legislative power in this regard to the federal government.

responsibility on the federal lawmakers to make laws which are in the public interest and in accordance with the ‘Fundamental Objectives and Directive Principles of State Policy’. This argument has not been touted by advocates seeking the legislating of CSR in Nigeria, although - I suggest - it is highly persuasive. This is pertinent because the oath of allegiance of all elected officers of state – whether legislative or executive - include the promise “to preserve the Fundamental Objectives and Directive Principles of State Policy contained in the Constitution of the Federal Republic of Nigeria”.<sup>658</sup>

The provisions of the Constitution further mandate the federal legislature to monitor the ownership of business enterprises and report to the president on the same. Section 16 (3) reads:

A body shall be set up by an Act of the National Assembly which shall have power;

(a) to review, from time to time, the ownership and control of business enterprises operating in Nigeria and make recommendations to the President on same; and

(b) to administer any law for the regulation of the ownership and control of such enterprises.

This obligation may have been overlooked as no agency or department of government seems to have taken up this responsibility.

An equally important development is the proliferation of CSOs and local partners of international organisations. Advocacy groups have played an important role in checkmating

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<sup>658</sup> The President, Vice President, Governors, Deputy Governors, Senators and Representatives in both federal and state governments and parliaments take identical oaths of allegiance contained in the Seventh Schedule to the Constitution of the Federal Republic of Nigeria.

the rampant abuse of corporate power in Nigeria. The return of Nigeria to democratic rule has opened the floodgates of rights and development advocacy groups that have become rampant in Nigeria. The new era of democratic governance has heralded the emergence of vociferous champions of issues relating to climate change, development, social justice, health and safety amongst other issues. I argued that the ‘fundamental objectives’ stated in the Constitution are not at variance with CSR goals but promote it. CSR will benefit the society at large. This is the argument of this research in view of the developmental goals and objectives of developing countries.

### ***7.3.3 Corporate Social Responsibility Bill 2015***

Notwithstanding the failure of the earlier CSR Bills in 2008 and 2012, a further attempt was launched with the introduction of the Corporate social responsibility Bill 2015. The reasons for the failure of the passage of the previous CSR Bills are found partly in their provisions. The present CSR Bill 2015 seems to be gaining traction having been referred to the Committee on Interior and justice for further legislative input.<sup>659</sup> The need for legal reform is often the product of changing culture, social or economic circumstance of a state and the need to reform legislation to ensure its relevance and effectiveness in the present and foreseeable future.

The representation of a CSR bill signifies the importance and currency of the subject in contemporary corporate law both national and internationally. It is also argued that the attempted recourse to a CSR Bill exposes the inadequacy of other legislations on human rights, employment and environmental issues to address the broader social issues being tackled under the discipline of CSR.

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<sup>659</sup> It is common knowledge that when Bills are referred to the specialised Committees having passed the first and second readings they are likely to pass in the absence of legal contradictions. However, at this stage Bills are subject to pressure from lobbyists and passage cannot be taken for granted.

The failure of the 2015 Bill may be attributable to the fact that it was lacking in research-based premises. I contend that the precursor to the making of good and acceptable laws is an understanding of the socio-economic and politico-legal environment in which the proposed laws will operate. If a law does not reflect the community in which it is meant to be observed, it may face rejection and become useless. As at 2015, no identifiable CSR research document is obtainable from any governmental organisation. Of the meagre research papers available on CSR in Nigeria, most have been written by academics and a negligible amount by state agencies and organised business forums. Most are qualitative studies with limited empirical quantitative content. This development should not be discountenanced because it is from a thorough discussion on the theories and conceptions of CSR that more quantitative research can be undertaken. Sector-by-sector research is also needed to gain the benefit of a holistic understanding of the extent of the practice of CSR in Nigeria. Some research has been done on CSR in the banking sector<sup>660</sup>, oil and gas<sup>661</sup>, cement industry<sup>662</sup>, community development<sup>663</sup>, and small and medium-scale private businesses<sup>664</sup>. As CSOs and private practitioners delve into the subject, government should be conducting or commissioning credible research upon which policies can be made. The lack of this may have contributed to the lack of traction by previous proposals at legislating CSR in Nigeria.

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<sup>660</sup> Joseph K. Achua, 'Corporate Social Responsibility in Nigerian Banking System', (2008) 3 (1) *Society and Business Review* 57. Achua called for external regulation in addition to the self-regulation in the Nigerian banking sector.

<sup>661</sup> C. Ukeje, 'Changing the Paradigm of Pacification: Oil and Militarization in Niger Delta's Region' in C. Obi and S. A. Rustad (eds), *Oil and Insurgency in the Niger Delta, Managing the Complex Politics of Petro-Violence* (1st, Zed Books Ltd., Uppsala, Sweden 2011) 94.

<sup>662</sup> Adeolu O. Adewuyi and Afolabi E. Olowookere, 'CSR and Sustainable Community Development in Nigeria: WAPCO, a case from the Cement Industry', (2010) 6 (4) *Social Responsibility Journal* 522

<sup>663</sup> Adeolu O. Adewuyi and Afolabi E. Olowookere (2010) *op cit*.

<sup>664</sup> Eme Joel Efiang, Obal U. E. Usang, Inyang O. Inyang & Charles Efiang, 'Corporate Social Responsibility in Small and Medium Scale Enterprises in Nigeria: An Example from the Hotel Industry' (2013) 8 (14) *International Journal of Business and Management* 119. This study focused on privately run hotels.

### *Human rights and CSR*

Although a lot has been written on the human rights issues in Nigeria generally and those relating to corporations in particular, what is lacking here is the firmness of state agencies in either implementing extant laws or giving effect to court decisions. Historically, the case of the Ogoni Nine is unforgettable for its place in the history of the unrest in the Niger Delta region. CSOs and private individuals must be able to freely assemble and disseminate grievances when corporations are concerned. The Consumer Protection Council (CPC), Corporate Affairs Commission (CAC), The Niger Delta Development Commission (NDDC) other relevant agencies need to establish monitoring and evaluation processes in order to capture information on corporate practices in the region in particular and all over Nigeria.

Where infringements have occurred private litigations should be possible and not a hindrance as it is currently. There is a wide chasm of financial and political clout between a private litigant and the corporations that discourages protestors. This has led to some lethargy on the part of potential litigants. Instead of litigating, aggrieved persons find expression through public demonstrations instead of filing lawsuits. Of course, mass rallies are often dispersed by state security agents and so are less effective. Legal aid and public interest should, when weighed together, provide adequate incentive to pursue claims in the public interest where corporate malfeasance has been identified.

#### **7.4 The prospects of mandatory legislation of CSR**

The successful enforcement and implementation of existing rules, codes and legislation such as the Nigeria Extractive Industry Transparency Initiative Act 2007 (NEITI Act) can promote the passing of a CSR legislation. This is because of the knock-on effect and fundamental acceptance and understanding that such laws can create. The NEITI Act was derived from Nigeria's subscription to the voluntary global organisation Extractive Industry Transparency

Initiative (EITI) which has been endorsed by the UN.<sup>665</sup> The focus of NEITI as published has been on what the oil companies operating in Nigeria owe the country out of their joint enterprise. However, little attention is paid to the more serious issue of the internal administration of the wealth is accounted for. The loot of the former head of state Abacha which was put at several billions of dollars allegedly were syphoned from proceeds and accruals from this one entity. The mandatory requirement of publishing payments to government by oil companies and the actual receipts by the government as provided by the NEITI Act should contribute to a more credible audit of Nigeria's oil revenue if implemented.

I suggest that the penal provisions Penal provisions of the NEITI Act and other such regulatory regimes of the environment or employee rights alone are insufficient to stem the tide of corporate social impunity in Nigeria. The passing of a Whistleblowing Bill will complement the effectiveness of the existing laws against corruption. In 2008, the Whistle Blower Protection Bill<sup>666</sup> was not passed into law. It has been reintroduced recently as the Whistle Blower Protection Bill 2015 but has not been passed into law but has been adopted as policy by government. This is notwithstanding the protection offered in Freedom of Information (FOI) cases by section 27(2) (b) of the Freedom of Information Act 2011 that protects “any public officer who discloses to any person any information which he reasonably believes to show – (a) a violation of any law, rule or regulation; (b) mismanagement, gross waste of funds, fraud, and abuse of authority; or (c) a substantial and specific danger to public health or safety, notwithstanding that such information was disclosed pursuant to the provisions of this Act.”<sup>667</sup> Similarly, Nigeria is obligated to “protect informants and

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<sup>665</sup> UN General assembly adopted unanimous a resolution supporting EITI in September 2008.

<sup>666666</sup> The Whistle Blower Protection Bill 2008 (SB.233) Senate, National Assembly, Nigeria. <<http://nass.gov.ng/document/download/904>accessed> 14 July 2015

<sup>667</sup> Section 27(2) (b) of the Freedom of Information Act 2011, Laws of the Federation of Nigeria.

witnesses in corruption and related offences, including protection of their identities” as a signatory to the African corruption Convention.<sup>668</sup> In Nigeria, consideration should be given to the procurement processes. A whistleblowing law if introduced will provide protection for those who risk recrimination for divulging any unwholesome practices of their employers. The procurement process of an economy in which a large proportion of budgetary allocation is spent on recurrent expenditure should not be lightly disregarded.

#### ***7.4.1 How should the law be framed? (enactment)***

The recurrence of Bills in the Nigerian parliament suggests that the mandating of CSR is a matter of when and not if. It is importance to look at the existing framework to examine the likely outlook for the Nigerian economy upon the introduction of legislation for CSR.

Some factors that will affect global markets and by extension CSR policy-making in the future have been predicted. According to Euromonitor International:

Despite the uncertainties facing the global economy, certain trends are inevitable. The world will become smaller, more aged, more city-focused, more cautious and more polarised between the rich and poor. The climate will change, food prices will rise, and economic power will shift from West to East.<sup>669</sup>

In their report, the following trends were identified as being vital factors in the future growth of consumer markets: the emerging middle class in developing markets, global climate

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<sup>668</sup> Article 5, Paragraph 4 of the African Union Convention on Preventing and Combating Corruption.

<sup>669</sup> Euromonitor International a private market research company based in London which in 2005 predicted some global trends which they considered to be “inevitable” in the “next five years”.



change and a more connected world.<sup>670</sup> Therefore, any proposed CSR reform should not create limitations on the right of expression so as not to hinder innovation and entrepreneurship.<sup>671</sup>

### *Appropriate legislation*

Any CSR legislation must take into account the socio-cultural, economic and political environment by recognising that the suitability of any legislation is determined in the context of jurisdiction in which it will apply. For example, an effective CSR model for Nigeria should not dissuade foreign corporations from continued investment due to Nigeria's continued need to attract FDI. It should be sensitive also, to the need to promote the transfer of technological skills from foreign corporations to the indigenous labour force.<sup>672</sup> In order to build local capacity, improving the education and investment in science and innovation should also receive due consideration. In view of all the above, a CSR law will need to achieve a balance between the social needs of Nigeria and the interest of big foreign companies in particular. A hybrid CSR meta-regulatory approach may be better suited to the needs of Nigeria. The proposal of a hybrid (or meta-regulatory CSR model) is based on balancing the main objective of corporations generally with the wider issues of the inclusiveness of stakeholders, and environmental sustainability. The purpose is to examine the existing regulatory climate to achieve prudential regulation.

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<sup>670</sup> These trends may still be relevant for the foreseeable future and in any event over the next further five years. See <<http://blog.euromonitor.com/2012/11/10-global-macro-trends-for-the-next-five-years.html#sthash.c.O8HvTC.pduf>> accessed 14 July 2016

<sup>671</sup> There is a compelling case for harmonisation of business's social responsibility programs with government's development or social welfare program. Porter and Kramer<sup>671</sup> want businesses to create value from the interconnecting activity between its objectives and social welfare objectives. Tobacco and arms dealing companies may not be able to have a 'shared value' with society. This is because wars and ill health are anathemas to social welfare. Indeed, it would seem that business can only thrive in a society where there is stability, development and fair and wide distribution of wealth. Conversely, the government will thrive (and it must be emphasised) in a free market economy where business is enabled by government and not 'stifled' by legislative intrusions into corporate dynamics.

<sup>672</sup> The Nigeria Oil and Gas Industry Development Act 2010.

### *The benefit of legal precedent*

The concept of legal precedent provides in law a certain ‘assurance’ and ‘predictability’ in legal proceedings. Nigeria can draw from comparative research on the Indian and Mauritian models to generate an autochthonous framework. The decisions of courts must be incorporated in its provisions to ensure that the new law is not contradictory to existing binding judgements.

#### **7.4.2 What of enforcement mechanisms?**

The requirement of wide consultation is necessary to ensure obtaining credible facts and premise for any proposed CSR legislation. The inclusion of the responsibility of publication of reporting standards issued by the Financial Reporting Council of Nigeria is a welcome development.<sup>673</sup> Although it will provide public access information about corporations, it will not provide information about the difficulties and challenges corporations face in the course of compliance.

Most observers of corporations have adjudged their attitudes to be nonchalant and at best inconsistent. Corporations must be induced by the corporate sanction to dialogue actively with their communities and produce relevant reports evidencing the same. The era of producing sound bites on websites as evidence of complying with social responsibility should be over. This will ensure that corporate reports are relevant and relatable to their communities.

Corporate leaders must be engaged actively to ensure they are abreast with and consciously applying the principles of CSR.

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<sup>673</sup> See Section 24(a) Financial Reporting Council of Nigeria Act 2011

### *Standardisation of corporate responsibility*

Where ‘responsibilities’ have been identified, it is beneficial to ‘concretise’ them through legislation in order to ensure greater regulatory efficiency. It is suggested that the ‘comply or explain’ mechanisms of most international organisations and the adopted self-regulatory stance of corporations have yielded only limited benefits to society.

Standards should not only be prescribed for acceptable corporate behaviour but also of remedies in the case of instances where the law is breached. Where remedies are stipulated in law, the society can develop legitimate expectations of remedial action in relation to any infringements by corporations. Through legislation, high regulatory standards can be achieved. Periodic reports on CSR compliance by corporations can also be published which will detail the degree to which a company meets stipulated standards. The use of CSR Impact Assessment Reports and the like can be made public documents for the use of interested investors and researchers.

To ensure proper standardisation of CSR, the regulatory agencies tasked with compliance monitoring should be properly funded. For example, foreign investment into Nigeria is not screened to ensure that corporate social performance requirements are considered and socially responsible means are deployed in the implementation of corporate plans.<sup>674</sup> Also, any ratings and indexes compiling compliance in Nigeria should be reflective of the local circumstances in order to gain credibility for relevance.

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<sup>674</sup> In Angola, the Bases for Private Investment Law 2003 require foreign investors to obtain government approvals especially where oil concessions are required. Investors in diamond and oil sectors are required to provide social infrastructure for the local communities in which they operate.

### *Adaptability*

One of the issues of CSR is the adaptability of standards across different types of corporations. Different industries face different issues. The modus operandi of corporations differs in context. Some are primary consumers of raw materials such as in extractive industries and others are primary users of labour as in agricultural produce firms, whilst others are engaged in a chain of value-added operations in more than one country such as in the clothes making industry. CSR needs may differ from community to community; where one may be heavily involved with environmental issues, the other may be more involved in labour or health. CSR standards must, therefore, be adaptable to each company's needs. The making of legislation to address the general CSR issues leaves in the hands of corporations the ability to develop compliant systems through internally designed models. Visser and Kymal have suggested the need to analyse and map the needs of a particular company so as to produce a company-specific and objective-oriented CSR model.<sup>675</sup> This approach can also be extrapolated to states seeking to legislate CSR.

### **7.4.3 Assessment - evaluation and reform**

#### *Assessment and evaluation*

In regulating CSR, adequate assessment criteria relevant should be identified. There is no assessment organisation with comprehensive industry by industry criteria. The use of rating organisations has not been widely adopted in Nigeria. There is limited recognition and application of popular standards such as FairTrade and no local alternatives have been formulated. Until standards are formulated for the local corporations there will be limited acceptance and application of some international standards.

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<sup>675</sup> See Wayne Visser and Chad Kymal, 'Creating Integrated Value: Beyond CSR and CSV to CIV' (2014) Available at <<https://ssrn.com/abstract=2522987>> accessed 22 July 2017.

## *Research*

There is little visibility of – if at all there exists – products of research into CSR. This may be because the subject is more firmly rooted as part of business management than corporate law studies. It is, however, vital that MNCs and large companies invest in research to identify their stakeholders. Research in this area will help corporations understand their environment and how to engage with them. The assessment of corporate reputation, branding and product acceptability will be inconclusive without considering the impact of public perception and its impact on products and services of corporation. There is evidence that public perception of a corporation's social value affects consumer choice.

Research projects should not be centred only on understanding the corporate objectives and social responsiveness of corporations only. Conversely, corporations should not be fixated on promoting only research and development activities that guarantee financial returns. Although investment in future products is essential for the growth of companies in a competitive environment, investing in social projects such as in green economy cannot be ignored. Indeed, corporations that invest in researching ecological preservation and realising competitive product lines may achieve a desirable balance between long term profiteering and socially responsible strategy.

GlaxoSmithKline - one of the world's largest pharmaceutical companies – announced recently relaxation of its intellectual property rights to benefit about 85 developing countries most of which are in Africa, as part of its CSR.<sup>676</sup> The announcement relates to the

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<sup>676</sup> This issue came up for discussion at the 3<sup>rd</sup> India Africa Forum Summit that held in New Delhi between 26 – 29 October 2015. See M K Venu, 'India Must Resist US Pressure on Generic Drugs, African Leaders to tell Modi' *The Wire*, (26 October 2015). <<http://thewire.in/2015/10/26/india-must-resist-us-pressure-on-generic-drugs-african-leaders-to-tell-modi-14015/>> last accessed 6 March 2016. See also Julia Kowelle, 'GlaxoSmithKline to Lower Drug Prices in Poorer Countries' *The Guardian* (31 March 2016)

production of generic antiretroviral drugs for the treatment of HIV/AIDS treatment in poorer countries.<sup>677</sup>

Contemporary research therefore should concentrate on environmental issues which seem to be receiving increasing attention since the turn of the century. It may be that very little areas in which corporate responsibility will not be left unlegislated but the environment from which all economic activities flow should be considered fundamental to CSR. As a developing country Nigeria's CSR policies and prospective legislation should also ensure adequate research in understanding the modern MNC and technological innovations. Concerning research of CSR in Nigeria, the work of the National Office for Technology Acquisition and Promotion (NOTAP) Act 1994 and National Board for Technology Incubation (NBTI) can be crucial to successful proposal of CSR legislation.

What is predictable for the foreseeable future is the continued proliferation of big business and globalisation. With this, a formidable challenge to regulation should be expected with an expansion in the influence of capitalism. The force of the argument against legislating on, or regulating CSR by a third-party entity, can only be diluted when a case is made in the interest of business. On this footing, the thesis of this study is that legislation (with special interest in Nigeria) in itself does not automatically lead to inhibition for business. It can be advantageous for business. The laws must not be complex but simple and codified in a single statute for ease of reference and legislative elegance. The legal framework must embrace already acceptable standards against forced labour, economic and cultural rights etc.

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<<https://www.theguardian.com/business/2016/mar/31/glaxosmithkline-to-lower-drug-prices-to-help-poorer-countries>> accessed 14 July 2016.

<sup>677</sup> HIV is the acronym for Human Immunodeficiency Virus which attacks the body's immune system. Untreated HIV leads to Acquired Immune Deficiency Syndrome (AIDS) in the final stages and may lead to other health complications.

In view of corporate law history and corporate objectives being pursued through CSR programmes, prospects and opportunities exist for mandating CSR in developing countries such as Nigeria. The evaluation of the socio-legal framework of the practice of CSR in Nigeria dictates that certain measures will be required for the optimal efficacy of any proposed legislation in regard of mandating CSR.

#### *A hybrid solution?*

As a developing country, there are peculiar socio-political and economic realities to be considered when answering the question of the benefits of legislating CSR in Nigeria. Notwithstanding the clear criticisms of legislating CSR mainly the potential to ward off prospective foreign investors and inhibiting, it is argued that the benefits outweigh any perceived disadvantages.

In the case of foreign investors, it will be inconceivable that such investors are not subject to public scrutiny of their actions and activities in their home states. Although they may not be statutorily regulated by legislation, corporations are often more responsive to public scrutiny in the modern world than to the often bureaucratic and slow winding regulatory machinery of developing states.

Graeme Auld et al., have analysed CSR in terms of a “win-win” and win-lose” strategy which they explained; ‘In win-win situations, solutions are available internally, where improvements in practices are also profitable. In win-lose cases, however, immediately available internal solutions are unprofitable or otherwise harmful to the firm’s survival or success in the marketplace’.<sup>678</sup>

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<sup>678</sup> Graeme Auld, Steven Bernstein, and Benjamin Cashore, ‘The New Corporate Social Responsibility’ (2008) 33 Annu. Rev. Environ. Resour. 413, 415.

It is evident that achieving a win-win situation in developing countries will be desirable and should be actively pursued; in a scenario where companies do not envisage any benefit for their businesses, compliance with any strategy of regulatory mechanism will be low.

*Probability of the Emergence of international corporate law*

The seeming recent convergence of jurisprudence and legislation on CSR coupled with the intendment of the various ‘codes’, ‘principles’ and ‘guidelines’ of multilateral organisations is suggestive of a global convergence towards a more concrete social responsibility regulatory regime for MNCs. The general application of corporate criminal liability and criminal sanctions for corporate crimes is indicative of the wide acceptance of corporate liability in criminal law. Corruption is a worldwide phenomenon but is particularly rampant in Nigeria. Corruption includes the giving and taking of bribes by corporate managers and their agents who pursue their business interests. Therefore, the criminalisation of “grease money” and other forms of undue gratification to public sector workers in the course of doing business should be pursued. An effective way of combating corruption is the reform of legal stipulations regarding preventative, investigative and prosecutorial aspects of criminal law. Criminal law should complement any other legislation seeking to achieve the conduct of business in an ethical manner.

Nigeria is a signatory and ratifying member of the United Nations Convention against Corruption.<sup>679</sup> On the continental level, the Assembly of the African Union adopted the Convention on Preventing and Combating Corruption in 2003.<sup>680</sup> It is interesting that the AU

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<sup>679</sup> The Convention was adopted by the UN General Assembly on 31 October 2003. However, Nigeria signed it on 9 December 2003 and ratified it on 24 October 2004.

<sup>680</sup> This Convention was adopted on 11 July 2003 and so predates the UN Convention against Corruption by a few months. It came into force on 5 August 2006 having been ratified by the required number of states (15). As at 2013 34 states of the 54 member states of AU had ratified the treaty.



Convention makes reference to the respect of the African Charter on Human and Peoples' Rights 1981 as one of its principles.<sup>681</sup>

There are many provisions in Nigerian law prohibiting corrupt practices which does not exclude corporate managers. Sections 8 – 10 of the Independent Corrupt Practices and Other Related Offences Commission Act 2000<sup>682</sup> (ICPC Act) prohibit bribery by public officers in all possible ramifications. Despite the stipulation that bribery can occur in the public sector and private sector, no prosecution of private sector bribery has been recorded in Nigeria.<sup>683</sup> Notwithstanding the collection of international treaties aimed at cooperation amongst states in fighting corruption, very little successes have been recorded in developing states.<sup>684</sup> In South America, the Guatemalan President was ousted and charged after he was stripped of immunity by the state parliament. However, in Nigeria, reporting provisions in laws such as the NEITI Act may be yielding results exemplified by the recent announcement that Nigerian National Petroleum Corporation (NNPC) declared for the first time in 15 years.<sup>685</sup> Transparency International has stated that “the larger the oil sector relative to a country’s economy, the greater the potential for political corruption”.<sup>686</sup>

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<sup>681</sup> Article 3, African Union Convention on Preventing and Combating Corruption 2003

<sup>682</sup> This Act came into force on 13 June 2000 upon receiving presidential assent. Although this law is primarily applicable to public officers its section 17 does not seem to discriminate on applicability to corporate managers or corporations.

<sup>683</sup> UNCAC Executive Summary on Nigeria published 11 June 2014 and obtainable online: <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1403916e.pdf> last accessed 8 September 2015.

<sup>684</sup> See

<sup>685</sup> Ejiofor Alike et al., ‘For the First Time in 15 years, NNPC reports monthly profit of N274m’ *This Day* (Lagos, 8 July 2016) <<http://www.thisdaylive.com/index.php/2016/07/08/for-first-time-in-15-years-nnpc-reports-monthly-profit-of-n274m/>> accessed 13 July 2016. N274 million is about USD1 million.

<sup>686</sup> Transparency International’s Global Corruption Report, 2004. Transparency International was initiated by the UK Government after its unveiling in Johannesburg, South Africa in 2002 by British Prime Minister Tony Blair at the World Summit on Sustainable Development.

Regrettably most prosecutions have been lacking credibility and subject to the criticism of being politically motivated.<sup>687</sup> Critics argue that prosecution of a few, when most former and incumbent public office holders should probably be investigated, leads the public to dismiss efforts in this regard as lacking credibility. They argue that executive discretion in prosecutions make the process subject to abuse. In the case of money laundering brought by the British Government against Diepreye Solomon Peter Alamiyeseigha, this led to prosecution but a grant of pardon by Nigeria's President Ebele Jonathan on 12 March 2013.

In developed countries, strong commercial competition strong legal institutions, and more enlightened public force corporations to take notice and be responsive to social issues. As these elements grow in Nigeria, corporations may become more accountable. However, in view of the present state of lack of competitiveness, under-performing legal institutions and mainly unenlightened public, the law and an effective regulatory framework remains the basic recourse.

#### *Lex ferenda of CSR in Nigeria*

The consideration of the existing legal framework has revealed the aspects of legislation that ought to be explored when contemplating the making of legislation on CSR.

- (i) a resort to the use of legislation in a less frontal way by taking cue from the Section 172 of the UK Companies Act 2006 – The idea here is that the legislation does not need to be called a 'Corporate Social Responsibility' legislation.

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<sup>687</sup> See report on Nigeria titled 'Corruption on Trial? The Record of Nigeria's Economic and Financial Crimes Commission' (2011) Human Rights Watch 47 available online < <https://www.hrw.org/sites/default/files/reports/nigeria0811WebPostR.pdf>> accessed 22 July 2017.

- (ii) also, a complementary legislation can also be adopted: The passing into law of the Nigeria Financial Reporting Act<sup>688</sup> and the likely passage of the Petroleum Industry Bill portends a future for mandatory CSR.

The examples of Philippines, India and Mauritius suggest a “creep” towards legislation of CSR by more developing countries. This gives each country the opportunity to domesticate international standards. In the case of Nigeria, it can achieve many social, economic and political benefits. Advantages will also be gained in ecological conservation and human capacity building.

It is evident from the array of legislations enacted by the Nigerian government that socially responsible corporate behaviour is intended by them. The issue is, however, the “teeth” of legislation and effective management and enforcement of regulatory provisions. Corporate activity cannot be exercised *in vacuo* the socio-cultural realities of a community. Corporations should see CSR legislation as an opportunity rather than a threat to doing business. In Nigeria where there is a strong socio-cultural allegiance, a corporation that adopts the tenets of “communal living” and the provision of social services for the host community will reap the benefits of a protective and welcoming society.

The making of laws mandating CSR in some countries has in the case of India, the Philippines and Nigeria is probably the result of serious domestic situations regarding environmental degradation and human rights abuse. In these countries, where soft law previously existed (and still do exist in the form of international standards), hard law has taken its place; countries with ineffective implementation of extant laws should expect greater pressure for the further regulatory action. In the case of Indonesia, judicial pronouncement was required to interpret ambiguous regulatory provisions.

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<sup>688</sup> The case of IBTC and the Reporting Council of Nigeria reinforces safeguards for investors and responds to the wide social interest issue of enforcing good banking practices.

This research suggests that lack of adequate regulatory authorities such as should be conferred by legislation is to blame for the current situation, rather than non-performance of existing regulatory authorities. It is also suggested that in legislating on CSR in Nigeria, the consideration of the economic, social and political impact of any regulatory regime is imperative. It is important for the government to formulate or adopt a policy stance with a clear strategic objective. A policy position is important as state organs will be directly involved in the articulation, implementation, monitoring and evaluation of its execution.

Corporate sustainability can be enhanced by the positive endorsement of a socially responsible corporation and its products. A socially responsible company can, therefore, earn competitive advantage due to its practices and build a positive reputation for its products.

One thing is certain in the study of CSR; the fast moving and changing shape discourse in the subject often takes. Countries considering the role of the state in this discourse must contend with and consider the need to propose sustainable ideas and solutions. Not to do this may mean that events will relegate such proposals to obscurity and irrelevance in the near future. To this end, some prediction is inevitable of the social, political and technological advancements being achieved globally.

## **7.5 Looking beyond 2015 – what lies ahead?**

The notoriety of the devastation caused in Ogoniland by Shell and its partners have in no small measure led to the public apathy towards IOCs in Nigeria and IOCs will remain relevant in CSR discourse.

The self-regulatory programmes that multinational companies have used in Nigeria have not fully assuaged the desire of the public to see greater accountability of big corporations

especially those in the oil and gas sector. It is a matter of discomfiture for every Nigeria government since independence that gas flaring and spillages continue to devastate the poor rural areas in which big oil and gas MNCs operate.

Therefore, the influences to regulate more stringently on CSR will persist well into the present century. International legislation and standards will apparently continue to impact national policies towards mandatory CSR models. Substantial corporate failures may instigate legislating CSR more quickly than anticipated. For instance, large-scale industrial hazards and corporate indiscretion have sometimes led to the enactment of laws. The EU in responded to the industrial accident in Seveso, Italy by enacting the EU Seveso Directive (82/501/EC)<sup>689</sup> aimed at creating a Europe-wide policy to prevent further large-scale industrial mishaps that can potentially harm humans and the environment.

The generous subscription of states to Sustainable Development Goals, it can be argued, is indicative of the policy leanings of the subscribing governments. This is because, in achieving the various stated goals set out, changes may need to be made in procurement choices thereby influencing decisions regarding corporate sustainability. For instance, the Italian Chamber of Deputies in 2015 passed a comprehensive legislation aimed at giving policy direction in areas such as environmental liability, green public procurement and sustainable mobility. New rules were also made affecting recycling, waste reduction and green public procurement with companies adopting green standards and sustainable practises enjoying competitive advantage. Furthermore, the investment of €35 million by government in green mobility will further impact corporate decisions for companies in affected industries.

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<sup>689</sup> This law was replaced in 1996 by EU Seveso II Directive (96/82/EC) and 2012 with EU Seveso III Directive (2012/18/EC) which gave citizens the right to access information regarding this legislation.

The United Nations Framework Convention on Climate Change<sup>690</sup> The global climate change issue is increasing in profile. The Climate Change Conference in Paris 2015 attracted the highest level of governmental participation.<sup>691</sup> The urgency attached to the attainment of a decarbonised global environment was reinforced at the Conference in Abu Dhabi, United Arab Emirates (UAE) 2014 and has led many to believe that the world has awoken to its responsibilities and buried the myths which sought to obscure the scientific assertions that human activities impact climatic changes universally. The outcome of these conferences has conspired to bring new urgency and focus to bear on global environmental issues.

Interestingly, the sharp and sustained fall in the global price of crude oil has not resulted in reduced production in the product. There has been no significant increase in the global consumption of renewable energy to warrant a significant change in the global demand for fossil fuel. The prognostication of alternative sources of energy is debateable and defies accurate conjecture.<sup>692</sup> The significance of this is that production in the oil and gas sector continues to impact communities in the same way as before but with the dwindling resources of affected companies may have retrogressive impact on the funding and implementation of CSR projects.

## **7.6 Summary**

In summary, the prospects of legislating CSR in Nigeria has been set by the extant law. In one sense, there is no need to replicate the provisions of the various laws that impact

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<sup>690</sup> The United Nations Framework Convention on Climate Change came into force on 21 March 1994.

<sup>691</sup> The theme of the 2015 UN Summit on Climate Change was aimed at reducing global carbon production to less than 2%.

<sup>692</sup> While the funding of governments around the world may be encouraging, the commercialisation of new energy innovations may be far from being achieved. The US Government is funding research in new energy sources.

corporations in extracting socially responsible commitment from them. The venture of the failed attempts at legislating CSR may have failed for lack of concision in its formulation, but has probably failed more for being superfluous. In the next chapter, the considerations for drafting a viable CSR legislation in view of Nigeria's circumstances will be considered.

In the next chapter, an overview of this thesis will be conducted with a view to making recommendations and contributions of this work to the theory of CSR and its practise in Nigeria. The next chapter will conclude with identifying the prospects of prospects of introducing a CSR legislation subject to the removal of institutional and political challenges.

## **CHAPTER EIGHT**

### **Summation and Recommendations**

#### **8.1. Summation of thesis**

This research observes that corporate social responsibility has evolved with speed but without a determined destination since the 1950s. It is also clear that the subject is concretising into a widely referenced subject in social, economic and political studies, moving towards a global convergence of the stakeholder theoretical view of corporate law. The increasing spate of the enactment of hard law is shaping corporate behaviour in a way unprecedented due to a more vocal and interested public.

It is also determinable from the historical development of CSR that developing countries are employing CSR as a developmental tool. In some jurisdictions like India, Nigeria, Mauritius and Indonesia, CSR has become mandatory through democratically political processes making it a strong feature of the extant regulations of business. All this is to recognise the changing objectives of companies; no longer is the shareholder value maintained absolutely in the interest of company owners and promoters, it is now admitting of wider interests in environmental, social and governance matters. Unfortunately, the lack of research and data from the monitoring and evaluation of the immature laws from India and Mauritius where the mandatory CSR is still in its experimental stages reduces the exactness of any predictions for the future of CSR – for example, a resurgence of capitalism to boost global economy may derail the future trajectory of CSR all over the world, though this is unlikely due to the firm entrenchment of capitalism. An important note is the need to develop home-grown CSR regulatory measures and making the range of structural or institutional reforms required to align corporate activity to the developmental needs of society. As for the prospects of CSR in



international law, the poor prospect of the possibility of the development of an ‘international corporate law’ regime is a debilitating factor despite the production of some regulatory instruments by some regional, continental and global international political institutions.

In the final analysis, this research reveals that CSR can be used in a supplementary and complementary way to support state developmental initiatives, - and critically – that it can be mandated in a well-crafted legislative instrument. The prospects of the viability of legally mandating CSR in Nigeria is at best assessed as ‘cautiously optimistic’ in view of the peculiarities of the country. Some recommendations have been proffered recognising the importance of aversion to international regulatory developments. Nigeria’s economic situation in international commerce does not allow for neglecting any relevant international occurrence that may affect its ability to maintain a balanced approach to its policy on CSR.

Considering both domestic and international influences on CSR development in Nigeria, and the opportunities and threats that legislating CSR may proffer, some recommendations are inescapable.

## **8.2 Recommendations: International Law**

Based on the findings in this research, some recommendations can be submitted for consideration.

### **8.2.1 Insurance**

A study by Dylan Minor and John Morgan has shown that corporations can exploit CSR as insurance against reputational damage.<sup>693</sup> This study confirms the value of CSR beyond the

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<sup>693</sup> Dylan Minor and John Morgan, ‘CSR as Reputation Insurance: Primum Non Nocere’ (2011) 53 (3) California Management Review 40.

short-term and in times of reputational crisis. It is highly recommended that corporations consider CSR as a strategic investment for this reason alone.

### ***8.2.2 Amendment of Corporate Governance Codes etc.***

As has been discussed, corporate governance codes that do not have the force of law may not be as effective as those with sanctionable provisions. In international law, soft law instruments are used most frequently to engage business and draw attention to what ought to be standard practice but the various attempts have not been very successful. It is pertinent to ensure that future codes do not only exhort corporate managers and company promoters but also ensure they comply with definitive rules of social responsibility with sanctions attached.<sup>694</sup> The application of ‘apply or explain’ procedure instead of ‘comply or explain’ leave no room for exception. This is recommended for any new standards, codes, guidelines or principles of CSR aimed at ensuring the adoption of social responsibility by corporations.

Additionally, CSR codes should ensure that corporations use “certified” professionalism. With standardisation of concepts and the development of a more structured subject, obtaining certification in CSR by “professionals” is becoming the norm.<sup>695</sup> The development of CSR requires the full involvement of professionals at all levels and the shunning of “amateurism”. This is easier said than done without an internationally recognised professional body. Compulsory training of corporate managers in corporate ethics and social responsibility is desirable.<sup>696</sup> This training will be aimed at imbuing those that are responsible for making

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<sup>694</sup> No particular sanctions have been suggested here. In the case of Nigeria, low financial penalties for MNCs will hardly be deterrent or sufficient punishment for breach of corporate governance codes.

<sup>695</sup> Some of the prominent certifying organisations are The CSR Training Institute, International Standards Organisation, and CSR International.

<sup>696</sup> Entrants into many fields of endeavour are expected to undertake some formal training but this is not so for new entrepreneurs. New company promoters are not required to undertake any training themselves but made to rely on other professionals like lawyers and accountants. However, the company shareholders and directors are ultimately responsible for the success or failure of their

corporate decisions with a ‘conscience’ attuned to their social obligations beyond the keeping of law and making profits.

### **8.2.3 *International Non-Governmental Organisations***

The major participants in the quest for the good practice of CSR in the international arena can be grouped into two; the non-governmental international organisations and the international states-subscribing institutions such as the UN and OECD. The direction of each group though forging towards convergence will take different routes due to their peculiar spheres of influence and ‘comparative advantage’.<sup>697</sup>

The production of ratings and country reports exposing the degree of compliance by corporations with industry codes is not novel. This scheme has been developed for CSR practices of large corporations that display endorsements and achievements of standards by rating organisations.<sup>698</sup> However, by applying more stringent membership criteria, organisations like EITI can influence corporations by leveraging on their already found fame and acceptance.

### **8.2.4 *International State Institutions***

There is a consensus emerging globally that the notion of corporate responsibility and sustainability must go beyond mere corporate rhetoric.<sup>699</sup> Corporate behaviour must be seen to be held to effective regulatory standards. At the level of multilateral and international

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businesses. Undertaking short formal deontological training which stresses the social implications of corporate existence is what is advocated here.

<sup>697</sup> While CSOs can influence corporations using social pressure, states can pressure corporations from a different angle using powers to control institutions like the Stock Exchange and other fiscal instruments of the central bank. Quantitative easing has often been used for social ends by central banks who encourage banks to lend in times of recession by manipulating the banks’ reserve levels.

<sup>698</sup> See Steven Scalet and Thomas F. Kelly, ‘CSR Rating Agencies: What is Their Global Impact?’ (2010) 94 (1) *Journal of Business Ethics* 69.

<sup>699</sup> The notion is echoed in most international events such as conferences on global decarbonisation, environmental sustainability and climate change etc.

regional organisations, greater interest in CSR issues should be demonstrated. The decision of the West African Court of Justice in *SERAP v Federal Republic of Nigeria*<sup>700</sup> should embolden the regional organisation to look further into CSR guidelines for setting regional standards of corporate practices.<sup>701</sup> Indeed, the criminalisation of health and safety failures through corporate criminal liability legislation should be considered in international law due to the rapid mobility of corporations and their transnational operative nature.

Collective action is encouraged on corporate behaviour that can have cross-border effect. In Ghana, the so-called “Monsanto law” which will give the large corporations power over seed distribution is cited in reference.<sup>702</sup> Although this is a chiefly a matter for Ghana, the probable implications should educe the interest of the regional body. States are increasingly facing challenging issues collectively. With developmental challenges in education, food security, social inequality and poverty, collective action in pursuing cross-border CSR practice and regulatory framework may prove to be advantageous.

### **8.3 Recommendations: Nigerian Law**

The historic failure of CSR programmes has been highlighted as the leading cause of unrest especially in Southern Nigeria. To resolve the long-standing social development issues, corporations, CSOs and the government must find credible ways of impacting social development. The Federal Government of Nigeria is apparently toeing the path of mandating

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<sup>700</sup> *SERAP v Federal Republic of Nigeria and Ors.*, ECW/CCJ/APP/08/09 (JUDGMENT N° ECW/CCJ/JUD/18/12) delivered 14 December 2012.

<sup>701</sup> It is disturbing that there is no single regional CSR-specific instrument obtainable in the African continent which is comparable to the EU Council Directive 2014/95/EU of 15 November 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups OJ L330 or the UN Guiding Principles on Business and Human Rights 2011.

<sup>702</sup> Monsanto Company is a publicly traded American agricultural biotechnological company established in 1901 and credited with developing genetically engineered (GE) seeds.

CSR by legislation as has already been introduced in one of the states.<sup>703</sup> The relevance of developing Nigeria-centric CSR regulation cannot be neglected. The evolving diversification of the economy into other sectors of the extractive industry such as mining of solid minerals calls for a comprehensive and cohesive strategy to maximise favourable outcomes for business-society relations.

However, it is pertinent to note that, the prevailing socioeconomic and political environment in Nigeria cannot guarantee a positive outcome of legally mandating CSR. In order to maximise the benefits of CSR and gain developmental milestones, some reforms need to be implemented to create the ‘enabling environment’ for CSR practices.

### ***8.3.1 Need for institutional reform***

The institutions of state such as the Ministries of Industry, Trade and Investment charged with the oversight of the business environment lack extensive corporate data and well-funded research departments. Disappointingly, there is no publicly available policy, report or position statement regarding CSR on the official website of the ministry.<sup>704</sup> Other important departments that should have interest in CSR such as the Consumer Protection Council and the Financial Reporting Council do not have any publicly available document setting out policy on CSR. The low level of government interest in producing indigenous research in this area - as demonstrated by the meagre information on their most widely and easily assessed information portal - is highly regrettable.<sup>705</sup>

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<sup>703</sup> Corporate Social Responsibility Domestication Law 2015 of Cross River State of Nigeria.

<sup>704</sup> See: Federal Ministry of Industry, Trade and Investment website; <<http://www.fmiti.gov.ng/>> accessed 30 June 2016. It is also noteworthy that the government did not introduce any of the Corporate Social Responsibility Bills between 2008 and 2015. They were all private member Bills.

<sup>705</sup> A recent reports credits one of the largest technological companies as predicting a record number of Nigerians to be internet-connected by 2020: See; **Ozioma Ubabukoh**, ‘Nigeria’s Internet traffic’ll grow six-fold by 2020 — Cisco’ *The Punch* (25 July 2016)

### **8.3.2 *Need for Public Consultations***

It is further recommended that wide public consultations are held with open invitations to all stakeholders to contribute to the reform and formulation process. A balance of competing interests where identified is important for the wide acceptance of legislation and reform. The participation of business and CSOs will ensure transparent accounting of divergent views and ideologies. The initiative of the ThistlePraxis Consulting<sup>706</sup> a private company which hosts the African RoundTable and Conference on Corporate Social Responsibility (AR-CSR™) should be emulated.

### **8.3.3 *Company Law and Corporate Governance Reforms***

There are indications that the business community is embracing the stakeholder model of CSR for some reasons; as a corporate reputation enhancement strategy, comparative advantage and regulatory compliance. The prevailing paradigms of global codes have ensured deep-rooted allegiance to the status quo and thus perpetuates the notion of philanthropism which is wearing but gradually.<sup>707</sup> Corporate law and governance reform may demand resilient political will to accomplish but reform and vibrancy is required.

As Nicholas Eberstadt put it;

Were corporate leaders to review the past, they would see that today's corporate responsibility movement is neither the preaching of self-appointed saviours nor the plotting of economic nihilists; it is a historical swing to recreate the social contract of power with responsibility, and as

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<sup>706</sup> See ThistlePraxis Consulting Limited website: <<http://www.thistlepraxisconsulting.com/>> accessed 30 June 2016.

<sup>707</sup> Kishan Khoday, Vanessa Lamb, Tyler McCreary, Karin Mickelson, Usha Natarajan and Ileana Porras, 'Locating Nature: Making and Unmaking International Law: Introduction' [2014] *Leiden Journal of International Law* 27.

such may well become the most important and welcomed reform of our time.<sup>708</sup>

Considering, that the socio-cultural disposition of Nigerian indigenous businesses takes on social responsibility obligations as a matter of course, I concur with this statement and urge the appropriate reorientation of business and corporate law reform accordingly.

#### ***8.3.4 Need for Legislative Reform***

The British Company Law Reform that ushered in the introduction of section 172 of the UK Companies Act 2006 is an example of a non-confrontational introduction of CSR by legislation. The wording of it does not suggest that it is to be applied by compulsion or dismissed as irrelevant by company directors. The CAMA should be amended to reflect a clear commitment to the future of business-society relations by making provision for CSR. The rebranding of capitalism with such terms as ‘sustainable capitalism’, and ‘social capitalism’, future corporate law legislation will likely continue to introduce social responsibility for business in the fashion seen in Indonesia and India. I argue that it is the need to preserve the capitalist economic system as the preferred means of organising the factors of production that dictates the reform agenda in favour of CSR legislation. In view of domestic and international occurrences, states – especially those of developing countries – can dictate the role of legislation in delineating the responsibilities of corporations in order to achieve set social objectives. Furthermore, it is the responsibility of individual states to determine and pursue the realisation of social welfare in the public interest, in this regard CSR can be augmentative.

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<sup>708</sup> Nicholas Eberstadt, ‘What History tells us about Corporate Social Responsibilities’ (1973) 7 Business and Society Review 76, 77.

#### 8.4 Recommendations and Suggestions for Future Research

Research on CSR regulation in Nigeria has been mainly concentrated on the oil and gas industry and the banking industry. It is further concentrated on large corporations without the impact of smaller companies being measured. An economy-wide approach is required in the form of multi-stakeholder cooperation to define CSR and sector-by-sector practices. Geoffrey Lantos has suggested that in marketing transactions, “others who share collective responsibility include competitors, who can blow the whistle on others in their industry who they think are being socially irresponsible”.<sup>709</sup> In Nigeria, it is suggested that the task of holding corporations to account should not be left to government regulatory agencies or CSOs only. Multi-stakeholder cooperation should be the foundation of any national CSR policies. This is because the effect on stakeholder groups such as credit providers, employees, customers, local communities, suppliers and interest groups can be more effective when all sectors participate actively. Klaus Schwab<sup>710</sup> observed that the world is “witnessing profound shifts across all industries marked by the emergence of new business models, the disruption of incumbents and the reshaping of production, consumption, transportation and delivery systems”.<sup>711</sup> The vigilance of all citizens is therefore imperative. Klaus also noted the positive prospects of the fourth industrial revolution when he noted that the “new ways of using technology to change behaviour and our systems of production and consumption also offer the potential for supporting the regeneration and preservation of natural environments, rather

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<sup>709</sup> Geoffrey P. Lantos, ‘The Boundaries of Strategic Social Corporate Responsibility’ (2001) 18(7) *Journal of Consumer Marketing* 595,622.

<sup>710</sup> Professor Klaus Schwab is the Founder and Executive Chairman of the World Economic Forum which is attended by most world leaders in summits held in all regions of the world to discuss emergent economic challenges and solutions to them.

<sup>711</sup> Klaus Schwab, *The Fourth Industrial Revolution* (World Economic Forum 2016) 1.



than creating hidden costs of externalities”.<sup>712</sup> Corporations themselves should therefore see the cost benefit opportunities provided by imbibing strategic engagement of society.

Nigeria presents a unique and interesting research case study: this is because its political structure has undergone dramatic changes. In the economy, a similarly dramatic history is evident from its changing fortunes and emphasis from commodities export to crude oil. Therefore, empirical research into practices of small and medium-sized businesses and developing an indigenous CSR model as now being experimented in India will be highly expository. Importantly, future research into corporate law should be engaged at a multi-disciplinary level. The subject of CSR engages amongst other disciplines issues in sociology, ecology, economics, management, and of course, international law. In future, this work can form the foundations for a collaborative research in view of the overlapping subjects relating to the social responsibility of business; business management, financial accounting and social policy are interjection points for consideration.

Furthermore, concerning Nigeria in particular, the combined effect of the transcendence of illiteracy, poverty, impunity by corporations aided by state agents with the non-justiciability of the Fundamental Objective and Directive Principles of State Policy<sup>713</sup>, makes the ‘principles’ a fanciful provision to aggrandise the democratic ethos of the country since it is perhaps illusory or elusive and at best merely aspirational. Future research can explore in greater detail the value of this provision to the making of laws that promote social and developmental objectives.

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<sup>712</sup> *ibid* 2.

<sup>713</sup> This is contained in Chapter II of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

## 8.5 Contribution to knowledge:

This work has enriched understanding of CSR theoretically by formulating a new definition which deliberately recognises the impact of climate change on CDR discourse. The subject of CSR necessarily should encompass all social issues both national and global in the context of a particular community, state or the wider world.

It has been noted by many that there is a dearth of research into CSR in developing countries and studies specialising in the development of the practice and law of CSR in Nigeria is not an exception.<sup>714</sup> The result of analysing the policy and legislation in Nigeria should contribute to the available body of knowledge on contemporary CSR practices in Nigeria. Any recommendations will assist companies conform and adapt to changing stakeholder issues and interfacing civil society aspirations. This work therefore, contributes to the law literature on the subject of CSR in Nigeria and by implication the wider group of developing markets.

This research will be useful to regulators and policy makers who are contemplating legislating CSR after the India and Mauritius models.<sup>715</sup> This work should provide a guide to policy makers and regulation framers by identifying underlying principles and assumptions from which to build suitable CSR models. The importance of locating theoretical justification is in gaining persuasiveness of critics of CSR and aligning them towards the acceptance of regulation of CSR through legal mandation as a research-informed view.

It is hoped that this thesis will provide a rationale for corporations not to embrace CSR *faute de mieux*, but in acceptance of the benefits of infusing sustainable production practices and the use of alternative energy sources as part of contributing

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<sup>714</sup> As far as published books are concerned one of the few major works is Amao Olufemi, *Corporate Social Responsibility, Human Rights and the Law Multinational Corporations in Developing Countries* (Routledge 2011)

<sup>715</sup> This research will, of course, be useful to those interested in Nigeria also.

meaningfully to the sustainability of not only their business and immediate community but for the larger global society to which they belong.

David Kershaw noted, and I concur that;

More contemporary ideas of how to get the market to self-regulate focus less on enabling market actors to create and enforce rules applicable to all market actors, and more on facilitating pro-regulation norm formation within the players themselves: within the cultures of the firms and within the heads and identities of their managers and employees. If successful, this is true self-regulation in the literal meaning of the term and external rules, whether state- or market-controlled, become far less important as internal firm norms ensure targeted behaviours.<sup>716</sup>

The objective of legislating CSR should therefore emphasise the thematic application of society and environment considerations when making business decisions. CSR practitioners will therefore benefit from the conclusions of this work in the determination of strategies to complement developmental state programmes.

## **8.6 Final remarks**

Archie B. Carroll predicts, and I agree, that:

More than likely, we will see new realms in which to think about businesses responsibilities to our stakeholder society, particularly at the global level, and in new and emerging technologies, fields, and commercial applications. In this context, it appears that the CSR

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<sup>716</sup> David Kershaw, 'Corporate Law and Self-Regulation' (2015) LSE, Law, Society and Economy Working Papers 5/2015, 39. Available at: <[https://www.lse.ac.uk/collections/law/wps/WPS2015-05\\_Kershaw.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2015-05_Kershaw.pdf)> accessed 20 October 2015.

concept has a bright future because at its core, it addresses and captures the most important concerns of the public regarding business and society relationships.<sup>717</sup>

In the case of developing countries - Nigeria in particular – this statement cannot be truer. The pressing issues of climate change, high population growth, technological advancement, increasing literacy level of the population, possible steady economic growth and political stability will likely conspire to instigate fundamental reform which will impel corporations to take CSR even more seriously.

I therefore can predict with a degree of optimism that as verifiable evidence of the benefits of mandating CSR in India, Mauritius and other countries emerge, it will suggest a strong indication to other countries to take the path of legislating CSR.

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<sup>717</sup> Archie B. Carroll, 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) *Business and Society* 268, 292.

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