Article

The limits to self-regulation and voluntarism: from corporate social responsibility to corporate accountability

by Renginee G Pillay

Ideas about the social responsibilities of corporations are far from new and can be traced back at least as far as the 1920s and 30s. There is a tendency, however, to treat ideas about CSR as monolithic and essentially unchanging. In fact, the contemporary idea of CSR is much more conservative than the older ideas of CSR which prevailed in the decades after World War II. The latter centred on the idea of the "socially responsible corporation" and entailed a fundamental challenge to the principle of shareholder primacy and a radical re-conceptualisation of the corporation as a social or *public* institution whose directors should owe duties to employees, consumers, creditors and society as a whole, as well as to shareholders (Dodd, 1932).

By contrast, contemporary ideas of CSR tend to be firmly premised on a shareholder-oriented model of the corporation as a *private* enterprise whose directors owe enforceable duties only to shareholders. While the earlier idea of the socially responsible corporation had a genuinely transformative edge, therefore, contemporary CSR is essentially ameliorative, seeking to temper without unsettling or displacing the idea of the corporation as a private, exclusively shareholder- and profit-oriented enterprise (Pillay, 2006; Ireland and Pillay, 2010).

The core features of contemporary CSR are its focus and reliance on corporate self-regulation, voluntarism and partnership. It emphasises voluntary, bottom-up, self-regulation by private actors; one of its mechanisms of choice being corporate codes of conduct. As such, it de-emphasises mandatory, top-down, coercive regulation by the state. The techniques associated with contemporary CSR thus seem implicitly to endorse the neoliberal claim that the state should play but a limited role in economic affairs. It should also be noted that the case for CSR made by its proponents is usually a "business case": CSR, it is argued, is good for shareholders in the long-term (hence the idea of "enlightened shareholder value" as enacted by section 172(1) UK Companies Act 2006). The long-term benefit of shareholders is treated as more or less synonymous with the long-term benefit of society as a whole.

In this respect, contemporary CSR operates very much within the prevailing neoliberal consensus: it does not fundamentally challenge the notion that economic growth and development are best achieved through free markets, free trade, and the free movement of capital; and through the deregulation of labour markets, privatization and the minimization of state interventions in economic affairs. The argument is that the state should desist from making unnecessary interventions which might distort the efficiency-enhancing and wealth-maximising rationality of "the market" which operates for the benefit of us all. Thus, contemporary ideas about CSR do not only leave unchallenged the principle of shareholder primacy and the idea that corporations should focus on maximising "shareholder value", they also, through their emphasis on corporate self-regulation, confirm the neoliberal claim that states have a limited role to play in these matters.

As such, it is, perhaps, not surprising that CSR has been embraced by NGOs and corporations alike. For NGOs, contemporary CSR is a "politically" palatable strategy in that it does not challenge prevailing neoliberal orthodoxies about corporations and the role of the state. Moreover, unlike the earlier version of the CSR in the form of the "socially responsible corporation", which not only openly recognised that conflicts of interest between corporate shareholders and other groups were not always reconcilable but argued that they should not always be resolved in favour of the former, contemporary CSR downplays the irreconcilability of these interests, emphasising the scope for "partnership". Thus, NGOs have been proponents of the idea that contemporary CSR is based upon notions of cooperation and collaboration, working on the premise that more can be achieved through compromise and inclusion than through confrontation. They

too, therefore, have come to place less emphasis on external coercive regulation by the state, and have embraced the notion that CSR is good for the corporate "bottom line": doing well by doing good.

As for corporations, many of them have concluded that for reasons of social and political legitimacy – as well as brand image – that they need to be seen as "socially responsible". The warm corporate embrace of CSR has thus arguably been made possible precisely by the fact that contemporary ideas of CSR are so unthreatening – leaving unchallenged the shareholder-oriented model of the corporation as a *private* enterprise and the neoliberal antipathy towards mandatory state regulation in the area of corporate law.

In the last few years, however, contemporary ideas about CSR, and in particular their reliance on voluntarism and self-regulation, have been subjected to growing criticism. This is reflected in the emergence of the so-called "corporate accountability" (CA) movement. This movement views the emphasis placed by contemporary CSR on voluntary self-regulation as opposed to direct state regulation as fundamentally flawed. Thus, for Newell, "the term [corporate accountability] implies both a measure of answerability (providing an account for actions undertaken) and enforceability (punishment or sanctions for poor performance or illegal conduct)" (Newell 2002). Interestingly, the emphasis here is not only on law and public policy but also on different regulatory approaches and institutions (McBarnet, Voiculescu and Campbell, 2007; Utting and Clapp, 2008).

In this context, the CA movement has embraced a wide selection of mechanisms for holding corporations to account as an alternative to simply urging them voluntarily to improve standards or report. Two "post-voluntarist" strategies can be readily identified: the first involves ways in which "private" legal and extra-legal mechanisms can be used to harden voluntary CSR initiatives; the second challenges the neoliberal consensus by calling for a return to direct state mandatory regulation.

In the first category, there have been attempts by advocates of CSR to give indirect force of law to corporate self-regulatory codes. In the well-known case of *Kasky v Nike* (27 Cal. 4th 939 (2002), *cert granted*, 123 S. Ct. 817, and *cert dismissed*, 123 S. Ct. 2254 (2003)), for example, an activist on environmental issues and labour rights brought a legal case against Nike on the basis that the company had made false statements in its CSR reports. In response to criticisms about sweatshops, Nike stated that its suppliers adhered to its code of conduct which did not permit sweated labour. This, Kasky argued, was not only untrue but in violation of California's legislation on unfair competition and false advertising. The case ended with an out-of-court settlement, and Nike ended up paying $1.5 million to the NGO the Fair Labor Association.

Moreover, there has been the emergence of ethical shareholder activism. Some NGOs, for example, are making use of company law to gain status and voice within companies through share ownership, exercising their rights to bring resolutions to annual general meetings (AGMs). Hence, ShareAction, a UK NGO, which monitors and engages with the investment industry, orchestrated a successful campaign whereby a number of questions relating to Shell's activities in Nigeria and the Arctic (amongst others) were asked by shareholder activists at the company's 2014 AGM in The Hague.

Other attempts in the first category have included the organisation of public campaigns and lobby for legal and policy reforms by bodies like the UK Corporate Responsibility Coalition (CORE) and the Tax Justice Network; the use of "public interest litigation" in India (Utting, 2008: 968) and of the United States Alien Tort Claims Act (the latter, somewhat diluted by the recent case of *Kiobel v Royal Dutch Petroleum Co* 133 S.Ct. 1659 (2013)); and the development of the *UN Guiding Principles for Business and Human Rights*, which has in turn led to the 2011 review of the OECD *Guidelines for Multinational Enterprises* as well as the Performance Standards of the World Bank's International Finance Corporation (Morgera 2012).

In the second category and, arguably, more radically, elements within the CA movement are calling for a restructuring and rethinking of the relationship between business and the state; for more mandatory *legal* regulation of corporations by the state and other agencies; for a return to "hard" (or, at least, "harder") law. Thus, Joel Bakan, author of *The Corporation* (2004), argues that CSR in its contemporary, voluntarist, self-regulatory form is potentially dangerous, enabling companies to appear to be addressing their social and environmental "externalities" and reducing the pressure for proper state-based and backed regulation. Although, he argues, robust nongovernmental institutions and community activism can make important contributions, they can never be a substitute for government regulation. In similar vein, Thomas McInerney of the International Development Law Organization has argued that "[s]tates occupy a privileged position in connection with regulatory activities" as only they "can undertake the necessary work to ensure that international norms to which they have bound themselves in international fora are respected in their territories." In comparison to voluntary CSR measures, "which at best offer spotty coverage of firms and industries", he adds that "states regulate comprehensively" (McInerney 2005: 28-31).

The call for regulation appears to have been heard by the governments of developing countries. In 2007, Indonesia became the first jurisdiction in the world to mandate CSR with the enactment of the Indonesian Limited Liability Corporation Law No 40 and the Indonesian Investment Law No 25.

Mauritius and India also enacted CSR legislations in 2009 and 2014 respectively. However, to date, no implementation mechanism has been put in place for the Indonesian legislation (Waagstein 2011) unlike for the Mauritian and the Indian ones (the latter only since April 2014). Both the latter legislations compel resident companies to set aside a percentage of their profits for CSR programmes, as approved by the respective governments: the Mauritian legislation is the Mauritius Finance (Miscellaneous Provisions) Act 2009 - Act No. 14 of 2009, which amended the Income Tax Act 1995 by inserting Sub-Part AD – Corporate Social Responsibility whilst the Indian one is found under section 135 Companies Act 2013.

Although undoubtedly, these corporate accountability mechanisms – in both categories – are steps in the right direction in attempting to make corporations more accountable, however the CA movement itself actually fails to take into account the vital corporate governance dimension of the strategies being put forward. In other words, the CA movement does not adequately clarify the crucial question as to whom or what corporations should be accountable. From an Anglo-American corporate governance perspective, the board of directors (acting on behalf of a corporation) should be accountable to shareholders (and this is also the corporate governance model being promoted in the developing world via the OECD *Principles of Corporate Governance*, see Soederberg, 2004). Shareholder primacy is thus seen as being the norm. As such, stakeholder interests and/or CSR issues do not have priority in terms of managerial decision-making; section 172(1) CA 2006, for instance, only asks managers to "have regard to" non-stakeholder matters.

For the CA movement to effect meaningful changes, and to actually compel corporations to not simply pay lip-service to their social responsibility, it is crucial that it starts to engage with the corporate governance dimension such as the very nature of the corporation: is it a private enterprise – a legal "fiction" serving to facilitate private contracting (see Easterbrook and Fischel, 1991, amongst others) – or is it a public or quasi-public institution with broad social responsibilities towards employees, customers and society in general (Dodd, 1932; Kay and Silberston, 1995)?

To illustrate this point, one only has to examine/consider the new CSR legislations in Mauritius and India: these can be qualified as amounting to "legislating corporate philanthropy" (Pillay, 2012); in other words, the legislations in question do not really contribute much to making corporations more accountable in terms of the way that they do business as they simply endorse the view that "the business of business is business" in terms of profit-maximising, only coming into effect *ex-post*. Hence, it is arguable that under the legislation, the corporation can very easily not be paying a living wage to their employees (or, in fact, even lay off those employees in the name of shareholder returns) but as long as they make a profit and give a percentage away to those CSR programmes, they would be seen as being socially responsible.

Engaging with corporate governance structures would mean confronting the status quo in terms of the current (ruthless) shareholder value imperative framework. It would entail a much needed dialogue between corporate lawyers and scholars and business and development scholars as well as activists in the corporate accountability movement, who all seem to be talking past each other at the moment. More importantly, it would necessitate a radical corporate governance reform agenda to socialise corporations (Ireland, 2009): in terms of shareholder rights, by diminishing or eliminating their control rights; in terms of the composition of boards, by including representatives of employees, consumers and other groups on them; and in terms of directors, by reshaping their duties in their entirety and by instilling deep cultural change, for instance. Systemic reform is thus needed if the proponents of the corporate accountability movement want to see any meaningful changes in corporate behaviour. Therein lies the challenge.

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