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978-0-521-86818-1 - The New Corporate Accountability: Corporate Social Responsibility and the Law

Edited by Doreen McBarnet, Aurora Voiculescu and Tom Campbell

Excerpt

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Introduction

DOREEN MCBARNET

This book is about the relationship between corporate social responsibility (CSR) and the law, and it is a book addressed to the many people in business, non-governmental organisations (NGOs), governments, academe and society more generally who are currently concerned with what corporate social responsibility involves and with its potential impact on both business and society. The objective is to inform and to stimulate the growing debate both on corporate social responsibility itself and on its potential role in the area of business regulation, law and ethics.

At first sight, the pairing of CSR and the law might seem a contradiction in terms. The adoption by companies of CSR policies is, after all, routinely characterised as voluntary – a matter of business going the extra mile beyond what the law requires. Describing CSR as voluntary is however a little misleading. The adoption of CSR policies by business has taken place in a very specific context. If CSR is self-governance by business, it is nonetheless self-governance that has received a very firm push from external social and market forces. From the start, ‘voluntary’ CSR has been socially and economically driven. What is more, the reality – as this book demonstrates at length – is that law is playing a much more significant role than the image of voluntary or NGO and market-driven CSR suggests, a role that could increase still further.

This book explores how this is happening and how it could develop in the future. It also demonstrates the operation, in the arena of CSR, of a complex interaction between government, business and civil society, private law, state regulation and self-regulation, at national and international levels, with social, legal, ethical and market pressures all being brought to bear in ways that cut across traditional pigeonholes, and interrelate with and foster each other. Indeed, as Chapter 1 argues, the multiple sources and interweaving forms of corporate governance – legal and extra-legal – coalescing under the banner of CSR might be seen as a new, multi-faceted corporate accountability.

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[More information](#)

Analysing CSR and the law takes us into a broad spectrum of areas of law and policy, and of business and social practice. The contributions to this book are multidisciplinary and interdisciplinary – drawing on law, sociology, political science, economics, business management, accounting and philosophy. They are international and multinational, in terms of the contributors themselves, the issues addressed and the jurisdictions covered, often comparatively. The areas of law and legal process covered are wide-ranging. Company law, securities, tort, contract, criminal, international, human rights, trade law, tax, accounting and environment law all come under discussion, though that discussion is consciously written not for lawyers or business executives alone but to interest and inform the layman. Different perspectives and methods are brought to bear. Some chapters analyse law and policy, some look at the politics behind legal developments, some at the social and economic forces at work. Several chapters are based on empirical research, while others speculate on future developments or take a moral or normative perspective, considering not what is but what should be and why. Some contributors are critical, others hopeful of CSR, some neutral observers, others advocates. Despite the range of disciplines, areas and perspectives covered, however, there is a single, clear focus throughout on exploring the relationship between CSR and the law.

The book is presented in five parts. Part One, on *Corporate Social Responsibility and the Law*, comprises a single long chapter by McBarnet setting out the development, context and critique of CSR, as background for the rest of the book, and exploring the interface between CSR and the law, which is analysed as CSR *beyond* law, *through* law and *for* law. CSR *beyond* law addresses the familiar concept of CSR as an extra-legal movement, CSR *through* law demonstrates the increasing intervention of law in what can really no longer be seen as ‘voluntary’ CSR. CSR *for* law reminds us that law itself has its limits and argues that CSR has a role to play in complementing law, by providing wider ethical standards and forces of social accountability, and by not only making demands on business beyond those of formal law, but making formal law itself more effective. The chapter also conceptualises the developing interaction between voluntary, or market-driven, CSR and the law, as a new corporate accountability.

This new corporate accountability is addressed in a range of ways in the chapters that follow. With the more familiar territory of CSR *beyond* the law set out in Part One, Parts Two to Four of the book focus in particular and in depth on the new corporate accountability as demonstrated by

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[More information](#)

INTRODUCTION

3

CSR *through* law, while the wider ethical issues also raised in Part One are returned to in greater depth in Part Five.

Part Two, *Bringing Law into Corporate Social Responsibility*, looks in detail at some of the innovative legal mechanisms being used to make inroads on 'voluntary' CSR, exploring the often subtle and indirect ways in which law is being used to enforce voluntary CSR standards and to legally back social accountability. This also demonstrates how private law is increasingly being used to regulate business, often by private organisations such as NGOs.

Chapter 2, by McBarnet and Kurkchiyan, explores the operation of 'contractual control', showing how business is increasingly being 'regulated' by business through private contractual arrangements – for example in the CSR standards required in supply contracts – and assesses the impact and potential of the practice. In Chapter 3 McCrudden shows how governments, as purchasers of goods and services, can also exercise such control through their procurement policies, focusing particularly on the European Union. Chapter 4, by Glinski, reassesses the legal status of voluntary codes of conduct adopted by businesses, asking: are they really voluntary? It shows how law is being used, and could be used more extensively, to hold corporations legally accountable to their own voluntary corporate codes.

Chapter 5, by McBarnet and Schmidt, analyses the creative use of the all but moribund US Alien Tort Claims Act, originally enacted in the eighteenth century to deal with piracy, but used in the late twentieth and early twenty-first centuries to hold multinational corporations liable for human rights abuses overseas. This analysis demonstrates, specifically, the creative use of domestic private law, by private organisations, to enforce rights established in public international law. More generally, it demonstrates the dynamic potential of law and the fact that corporate practices can prove in practice to be less immune from legal sanction than is often assumed. Jägers, in Chapter 6, examines the emergent development of the status of NGOs, within the particularly testing context of the World Trade Organisation, from social catalyst to a legally recognised role. Chapter 7, by Parker, straddles the themes of Parts Two and Three, demonstrating the interlinking of state regulation and voluntary action. It looks at government control through 'meta-regulation', showing the less direct legal tools governments can bring into play both to foster CSR policies and to facilitate private enforcement.

Parts Three and Four, *Expanding Legal Accountabilities*, review a range of areas of law, showing how the accountability of corporations in

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Excerpt

[More information](#)

substantive law is being stretched through new legislation or challenged through new interpretation – or suggesting how it should be. Governments are also shown to be using new approaches to legal regulation.

Part Three focuses particularly on company law. Chapter 8, by Campbell and Vick, analyses the expansion of CSR accountability fostered by the United Kingdom's new legal disclosure strategy which is based on a three-way interplay of law, voluntary CSR and the financial market. It reviews developments in the law, analyses the politics and economic models behind them, and assesses the practical impact of socially responsible investment. In Chapter 9, Mitchell looks from current law and practice to potential routes to enhanced corporate responsibility through the role of the Board. Chapter 10, by Bottomley and Forsyth, reviews recent developments in corporate law, drawing particularly on experience in Australia, and focusing on its impact on the interests of employees. In Chapter 11, Amann, Caby, Jaussaud and Piñero analyse policy and practice in the United States, Japan, France and Spain on the exercise of shareholder rights for CSR goals. Chapter 12, by Voiculescu, examines law and policy in the European Union in relation to CSR, showing how CSR goals are being approached not only through the overt routes set out in the Green Paper, but through subtler methods such as the use of legal instruments established in relation to human rights. This chapter leads us through company law to human rights, and so to Part Four.

Part Four analyses some of the expanding legal accountabilities confronting business in the context of human rights and the environment, as well as examining the way law is widening its approach to the basic concept of holding a company, as opposed to an individual, responsible at all. In Chapter 13, Voiculescu considers the concept of corporate legal responsibility in the CSR context, drawing lessons from recent developments in a range of jurisdictions in the specific and testing arena of corporate criminal responsibility. Chapter 14, by Muchlinski, traces developments in international law, showing how the traditional idea that international law, in a context such as human rights, applies to states rather than corporations has been eroded, and the practical issues arising. Chapter 15, by Kinley, Nolan and Zerial, takes this further, analysing the politics behind the controversial UN Human Rights Norms for Corporations.

Chapter 16 takes us to the issue of CSR and the law in the context of the environment, with Gunningham examining the role of the licence to operate, in a range of senses, as a mechanism of corporate control. Sinden, in Chapter 17, approaches environmental and human rights issues from a more normative perspective, arguing that the power wielded by

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Excerpt

[More information](#)

INTRODUCTION

5

multinational corporations justifies the imposition of an obligation of responsibility.

Part V concludes the book with Campbell's analysis, in Chapter 18, of the concept of CSR and of its moral foundations, drawing on a number of themes raised throughout the book, and asking particularly whether human rights can provide a moral grounding for CSR, and for the social, political and legal forces sustaining the new corporate accountability.

Thanks are due to all those who have contributed chapters to this book, to Tom Campbell and Aurora Voiculescu for contributing both chapters and editorial support, and to Ewen Miller for his hard work copy-editing. Thanks are also due to the Economic and Social Research Council,¹ whose award of a professorial fellowship to Doreen McBarnet contributed significantly by funding both the specific empirical research and analysis behind Chapters 1, 2 and 5, and the more general research project on 'Regulation, responsibility and the rule of law', which inspired exploration of the new corporate accountability.

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¹ ESRC Professorial Fellowship RES-051-0031.

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[More information](#)

PART ONE

Corporate Social Responsibility and the Law

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[More information](#)

1

Corporate social responsibility beyond law, through law, for law: the new corporate accountability

DOREEN MCBARNET

It is difficult to open a newspaper these days without coming across some reference to corporate social responsibility (CSR). As the ready resort to acronym suggests, it is a term that has entered into routine usage in debates both about business and within business. Post-Enron, and in a world in which the role of business in human rights and the environment is a matter of standard debate, the social and ethical responsibilities of business have become key issues, and CSR has become a much talked about element in corporate governance.

CSR essentially involves a shift in the focus of corporate responsibility from profit maximisation for shareholders within the obligations of law¹ to responsibility to a broader range of *stakeholders*, including communal concerns such as protection of the environment, and accountability on ethical as well as legal obligations. It is a shift from 'bottom line' to 'triple bottom line';² as it is sometimes put, from 'profits' to 'people, planet and profits', or indeed to 'profits and principles', to cite Shell International's social reports. These broader concerns are not necessarily seen as in conflict with shareholder interests but as protecting them long term. CSR is not philanthropy, contributing gifts from profits, but involves the exercise of social responsibility in how profits are made.

I would like to thank the Economic and Social Research Council (ESRC) which is funding this research through its Professorial Fellowship Scheme (RES-051-27-0031). The work on CSR is part of a larger programme of research on 'Regulation, responsibility and the rule of law'. This chapter draws on a number of working papers including 'New sources of leverage in the regulation of global business: harnessing CSR', plenary lecture at the first Regnet conference, Canberra, December 2003.

¹ M. Friedman, 'The Social Responsibility of Business is to Increase its Profits', *New York Times Magazine*, 13 September 1970.

² J. Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (Oxford: Capstone, 1997).

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[More information](#)

Typically, CSR policies involve a commitment by corporations, usually expressed in their statements of business principles or corporate-specific codes of conduct, to enhanced concern for the environment, human rights, fairness to suppliers and customers, and opposition to bribery and corruption. The range of issues involved is constantly expanding, with matters such as the promotion of 'diversity' in the workforce, ethical policies on the supply chain, responsible marketing, especially with regard to marketing to children, and even demand for a responsible approach in the food business in relation to obesity, recently added to the agenda. After Enron, CSR is also regarded as not only involving social and environmental issues but as going to the heart of core business operations such as accounting and even tax policies, and has become an issue for corporate governance in the narrower sense of the term. The language of business ethics is also frequently brought into play, with environmental and social impact seen as part of a new business ethics. The trend to a shift of language in business from CSR to simply CR, corporate responsibility, reflects this. CSR has indeed become something of a portmanteau concept which incorporates a broad sweep of ethical concerns from saving the planet to demanding honesty and fairness in business dealings.

The institutionalisation of CSR as a business issue has been demonstrated by the increasingly routine adoption of CSR policies in major companies. In 2001, 73 per cent of the United Kingdom's FTSE 100 companies had codes of conduct or statements of business principles. By 2004, this was up to 91 per cent.³ In the United States, all of the Fortune 500 companies have introduced codes of conduct. The publication of CSR reports has increased with eighty-three of the FTSE 100 companies reporting in 2005,⁴ ninety of the top hundred European companies and fifty-nine of the US top hundred producing CSR reports for 2005–06.⁵

The range of sectors adopting CSR policies has widened. The financial sector, which a decade before felt far from the frontline of social and environmental issues faced by the likes of oil and clothing companies, has acknowledged it too is affected by CSR just as much as its clients, and reporting there doubled in 2004–05. By 2005, even tobacco companies and arms manufacturers, sectors beyond the pale for many CSR advocates, were producing CSR reports. The number of 'ethics officers' in US corporations has been on the rise,⁶ and company structures have increasingly

³ UK Institute of Business ethics survey, 2005.

⁴ Context, *Directions: Trends in CSR Reporting 2003–04* (2005).

⁵ Context, *Reporting in Context* (2006). ⁶ *Ethical Corporation*, 26 July 2005.

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Excerpt

[More information](#)

included dedicated CSR managers and directors expressly responsible for CSR. Indeed, making CSR a matter for board-level responsibility has become established practice among leading companies.

Companies are recruiting the services of CSR consultancies to produce CSR codes, write or verify CSR reports, train staff in CSR and market their CSR credentials. They are signing up to CSR initiatives and putting themselves up for CSR awards. In a survey in December 2005 by management consultants McKinsey, only 6 per cent of the 4,238 executives surveyed worldwide agreed with the Milton Friedman line that the sole purpose of business was to produce high returns for shareholders; 84 per cent thought high returns had to be balanced with contributions to the broader public good.⁷

This chapter examines the interface between CSR and the law. At first sight that may seem a contradiction in terms. The adoption of CSR policies is, after all, routinely characterised as voluntary – a matter of business going the extra mile beyond what the law requires. As Chris Tuppen, social and environmental programmes manager at British Telecom (BT), put it in the company's first social report: 'The key issue is really what companies are going to do beyond mere compliance with the law.'⁸ Ricoh, the digital office equipment company, markets itself under the headline 'Ricoh goes beyond compliance; we're going beyond the legal framework.'⁹

The UK government's major review of company law, reporting in 2001,¹⁰ underlined this approach by opting to retain CSR as a voluntary matter rather than making it a direct legal obligation, and the theme has been reiterated since, with Stephen Timms, Energy and Corporate Responsibility Minister, describing CSR as 'going beyond legal requirements'.¹¹ The Department of Trade and Industry's line is to 'see CSR as the voluntary actions that business can take, over and above compliance with legal requirements'.¹² The European Commission took the same approach in its Green Paper on CSR, defining CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary

⁷ McKinsey, 'Global Survey of Business Executives: Business and Society', *McKinsey Quarterly* 2 (2006), 33–9.

⁸ BT Social Report (1999); and see S. Perrin, 'Show how much you care', *Accountancy* September (1999), 44–5.

⁹ See, for example, *Financial Times* special report on corporate governance, 15 December 2004.

¹⁰ Department of Trade and Industry, *Company Law Review Report* 2001.

¹¹ *Ethical Corporation*, September 2004, p. 13.

¹² www.csr.gov.uk/whatiscsr.shtml

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Excerpt

[More information](#)

basis'.¹³ The subsequent 'Communication on CSR' reported that business respondents to the Green Paper 'stressed the voluntary nature of CSR', with the Commission noting 'large consensus' that CSR is 'behaviour by businesses over and above legal requirements, voluntarily adopted'.¹⁴ Indeed, it made 'recognition of the voluntary nature of CSR' the first principle of its framework for action.¹⁵ The United Nations' Global Compact for business is signed up to on a voluntary basis.

The voluntary adoption of CSR by multinational corporations might seem rather paradoxical in a context where multinationals have been seen for some time as in many ways stronger than nation states, with consequent implications for the feasibility of effective governmental control over their practices. Why would business voluntarily commit itself to standards beyond the requirements of law? The reality is that describing CSR as voluntary is a little misleading. The adoption of CSR policies by business has taken place in a very specific context. If CSR is self-governance by business, it is nonetheless self-governance that has received a very firm push from external social and market forces. From the start, 'voluntary' CSR has been socially and economically driven.

Section I of this chapter sets out some familiar themes in the CSR debate, reviewing the social and market pressures that lie behind businesses' 'voluntary' adoption of CSR policies – the 'drivers' so often referred to in discussions of CSR in a business context – though it introduces some new perspectives too. It looks, in short, at the conventional concept of CSR as *beyond* the law, in the dual sense both of involving goals beyond the requirements of law, and of being driven by extra-legal forces – extra-legal forces that we might see as constituting a new corporate *social* accountability. It also examines the argument that CSR is *against* the law, contravening the legal duty of managers to owners, along with a range of wider criticisms of 'voluntary' CSR and, indeed, of social accountability.

Section II, however, moves the discussion on from the conventional understanding of CSR, by questioning just how voluntary CSR really is, or can remain, not only in social and economic terms but in legal terms. It analyses the many ways in which law is in fact being used to make business adoption of CSR policies much more of a legal obligation than the discourse of voluntarism – and indeed the current demands from many non-governmental organisations (NGOs) to supercede voluntarism with regulation – would suggest. It explores the interface between CSR and the law by analysing the growing phenomenon of CSR being brought about

¹³ COM (2001) 366.¹⁴ COM (2002) 347.¹⁵ COM (2002) 347, p. 8.