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Buhmann, Karin

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Karin Buhmann[1]

Corporate Social Responsibility – what role for law?[2]

Some aspects of law and CSR

Key words: Informal law, human rights obligations, international law, CSR, regulation, non-financial reporting

Abstract
Through a discussion of various contexts of Corporate Social Responsibility (CSR) in which law and legal standards feature, the article questions the conception that CSR is to do "more than the law requires". CSR is discussed with the triple bottom line as a point of departure, focussing on social and environmental dimensions. It is argued that CSR functions as informal law, and that important principles of law function as part of a general set of values that guide much action on CSR. It is argued that aspects of law in the abstract as well as in the statutory sense and as self-regulation influence the substance, implementation and communication of CSR, and that the current normative regime of CSR in terms of demands on multinational corporations may constitute pre-formal law.

Introduction
The aim of this article is to explore the relationship between CSR and law, in order to contribute to an increased understanding of the role that law plays in CSR substance, implementation and communication. Law is understood in the abstract sense as a concept and theory, as well as in terms of statutory and other regulatory elements. No pretence is made to give a thorough analysis of the relationship between law and CSR. The aim is simply to discuss some issues that arise from the way that law and CSR interact, with particular emphasis on norms that appear to function as formal law even though they are not.

The main focus here is on whether CSR functions as informal or reflexive law, and the role that principles of law play in CSR. An outline of these terms is provided in the below section ("Why bother about law and CSR") after an outline of benefits of better understanding the relationship between law and CSR. Focussing on issues introduced in that part of the article, the next part (Norms, law, regulation and CSR action) discusses examples of interaction between law and CSR: First, sources and drivers of CSR, i.e. factors that serve to inform the normative substance of CSR, respectively factors that play a role in motivating actors to act on sources. Next, the role that corporate and societal values play for the normative substance of CSR, and the role of international law in informing the substance and in self-regulation and reporting on CSR. Third, government regulation is discussed, a stick and carrot approach of traditional legislation and encouraging corporate self-regulation, backed by rewards, international law and law-making organisations. This is followed by a discussion of corporate action, focussing on self-regulation of CSR, sometimes in order to limit government regulation, and in many cases based on standards of national or international law, and CSR reporting's reference to national or international law for benchmarking

and indicators. The penultimate part (Summing up: CSR - What forms of law?) sums up on these discussions and prepares for the conclusions on CSR and the role of law made in the final part.

As topics of CSR, the triple bottom line is taken as a point of departure, focussing on People (social) and Planet (environmental) dimensions, in particular human rights, labour rights and environmental protection.

This article does not discuss CSR as corporate law, audit law, or legal regulation of corporate managers' duties and liabilities.

Why bother about law and CSR?

CSR is not just an issue of relevance to corporations and their business stakeholders. CSR is also an issue of potential significance to governments in welfare states and in developing states. Social responsibility of corporations may assist a government in fulfilling welfare state goals of a political character or based in law as obligations. Socially responsible companies may contribute e.g. to the integration of immigrants, education and training, access to health services and to employees' financial conditions after retirement. Where corporations act and fund activities "in place" of the government, government funds may be used for other purposes. Furthermore, corporate action based on social and environmental responsibility may assist governments in addressing social and economic development needs in developing countries, and may contribute to human rights implementation and to fighting corruption. Social responsibility demands in corporations that supply from, or produce in, third world states, may also benefit workers in the latter states. However, labour structures and employee surplus in third world states mean that improvement of conditions for third world workers is, however, a complex process that requires much more than a company making CSR demands on suppliers, to avoid that well-intended actions by political consumers in the North lead to unintended negative results for workers in the South.

Given the potential of CSR to society at large and the role that CSR plays for corporations, it may be useful to understand more about what drives CSR, what constitutes the substance of the concept, and the channels that are relevant to corporations and stakeholders in working with the substance of the concept. **An understanding of the interplay between CSR and law will be of use to corporations and states in handling processes of change encountered by the welfare state, and responsibilities of corporations in a process of globalisation.** Understanding processes leading to the formulation of norms that become part of CSR may also be of use to employees and their organisations, investors and other stakeholders. Such understanding may also assist stakeholders in contributing to the process of formulation through relevant fora and tools and through corporate action,

Although there is not yet one generally accepted definition of CSR, CSR is generally understood to be "doing more than what is required by law",[3] i.e. beyond legal compliance. Given this, we could ask, why discuss law at all in the context of CSR? Does legal science have a role to play in a study of CSR? Apart from the fact that to do more than the law requires, you need to know the law, the answer is partly given by the fact that norms of a legal character are widely used to inform or guide action and reporting within the sphere of CSR: Instruments and standards of international law (especially human rights and labour law) are referred to in reporting systems, some corporations use

international and national law to define CSR efforts, and NGOs monitor human rights or labour rights issues.

According to current international law, international law does not apply to corporations in terms of legal obligations. Notwithstanding this, many corporations and stakeholders on the CSR stage appear to act as if international law (particularly international human rights, labour and environmental law) does apply to corporations in a legally binding way. The past decade has seen several examples of NGOs and media exposing corporations that are suspected or reported of direct or indirect involvement in violations of international human rights or labour rights law or environmental principles. Through their actions, some stakeholder groups in effect hold corporations responsible, even though they do not have a formal legal responsibility. Political consumers may turn away from products produced or marketed by such corporations. Investors, especially certain institutional investors, increasingly CSR screen investments and avoid investment in corporations that may pose such CSR risks. Maybe most important of all, a number of corporations conduct social, environmental or (human) rights impact assessments in or prior to operations in order to avoid risks of acts that may be judged contrary to human rights, labour law or environmental principles, or take steps to improve conditions that may fall within the same issues. In relation to labour rights based on ILO's conventions, it may be argued from a political point of view that employers (and employees) are bound by the conventions, due to the particular tri-partite structure of the ILO that involves not only states but also organisations of employers and of employees in the formulation of conventions. According to theory of law, however, the responsibility for implementation still rests with states, with national implementation according to each state's own modalities, including through collective agreements (Constitution of the ILO art. 19 (5) (d); Nielsen and Rehof 1998: 6, 9-11, 47-48).

Moreover, governments are beginning to introduce legislation that requires companies to report on CSR issues, and the EU Commission has publicised documents encouraging CSR action that takes ILO standards and OECD Guidelines as minimum standards. Most recently, the 60th session of the United Nations Human Rights Commission in Geneva in April 2004 discussed a set of proposed draft norms on the responsibilities of corporations with regard to human rights.

Accordingly, CSR demands arise from a number of actors in society. It is not possible to point squarely to one or a few specific actors that generate CSR norms. The role of the corporate sector in defining the substance of CSR seems to be relatively weak, in the sense that companies seem to be following and acting on external demands rather than setting the agenda.[4] At the same time, some companies undertake voluntary action such as voluntary reporting or adoption of voluntary Codes as a way of influencing or delaying legislation (Adams 2002, Angel and Rock: 2004).

For this purpose, we may ask: What form, or forms, of law is CSR? As indicated, in here, this question will be raised in relation to informal law and reflexive law. The role of principles of law will be addressed an overall level.

Informal law is a set of normative ideas and patterns of behaviour and action that are not based on a sharp distinction between law and morals, or between law and fact. It is not formulated by a central, state or national authority. Its validity does not rely on state sanctions, but on its actual observance that is obtained though means particular to the semi-autonomous area in which it functions. Its sanctions are of a moral or practical character. In some cases, informal law is pre-formal law. This is the case where norms of informal law at a later stage obtain the status of formal law. As pre-formal

law, informal law may be a result of a societal development on a topic that has not yet been the subject of formal regulation.[5]

Neither self-regulation, nor informal norms that are observed as if they were formally legal binding are new phenomena in the corporate sector. Collective agreements are an example of a widely accepted form of self-regulation of corporate action.[6]

Ideas on reflexive law have been developed by Günther Teubner and discussed by several other legal scientists. Briefly, reflexive law does not establish specific rights and duties as law in the Rechtsstaat, nor does it define goals to be realised in a functional understanding of the welfare state. Rather, it emphasises procedures: Appropriate decisions are assumed to be made on the basis of procedures indicating who should take part in making a particular decision, resulting in decisions being presumably made by stakeholders that are directly representative of interest affected by the decision. This is assumed to have as a result that decisions are accepted and abided by, and that they are not perceived by those affected as external intervention. In reflexive law, self-regulation may be combined with due consideration of the interests of the collective. Ideally, decisions are made solely on the basis of arguments and not economic or political power (Dalberg-Larsen 2004, Dalberg-Larsen 1999, Petersen 1991).[7] Teubner (1985 esp. pp. 159-166) has argued that the function of CSR can be to coordinate a corporation with its general environment, and that law can serve to promote internal reflexion processes.

The normative development of CSR may also be approached from the perspective of the role that principles of law play. Principles of law have been discussed by a number of legal scholars. The brief discussion here is based primarily on a new publication by a group of researchers at the Institute of Law at the University of Aarhus, Denmark. Principles of law are defined as a type of legal norms that differ, through their general character, from other norms of a more specific character. They are expressions of basic values in the use of law. Some find a close relationship between principles of law, and ethics and other values, including welfare state values (Dalberg-Larsen and Lemann Kristiansen 2004, Dalberg-Larsen 2004 esp. pp. 34-44 with references). Principles of law may play various roles, such as the basis for assessment of other more specific norms or actions, or as a decisive point of departure for systematisation of law into patterns. For example, the principle of legality may be argued to be a basic principle of law, encompassing a general obligation not just to ban discrimination but also to undertake action to address inequality (Justesen 2004 esp. p 203). Due to the role that human rights play in CSR,[8] it is worth noting also that it may be argued that human rights feature as a common principle of law, and as a principle in many initiatives for development in the third world (Bruun Nielsen 2004).

Norms, law, regulation and CSR action

Sources and drivers

In looking at factors that play a role in the creation of CSR norms and regulation, a distinction can be made between sources and drivers. “Sources” are basically factors that serve to inform the normative substance (like sources of law in a wide understanding, encompassing also ethics, values, voluntary Codes of Conduct, etc.). Drivers are factors that motivate actors to act on sources.[9]

Sources of CSR comprise non-legal (or social) norms as well as legal norms. Non-legal norms that serve as sources of CSR include, for example, ethical norms, corporate values, behavioural norms deriving from consumer groups and other interest groups, and Codes of Conduct that are only guiding and do not create enforceable legal duties or rights.

Legal norms relevant for CSR comprise, for example, international law on human rights, labour and environmental protection; national and sub-national legislation in home or host country (in particular on non-discrimination, security, participation, occupational health and safety, remuneration, working hours, minimum ages, social or environmental impact assessments, environmental protection); legislation on reporting and information of CSR topic; collective agreements; and Codes of Conduct that create enforceable duties or rights, for example between a company and its employees, or between a company and its suppliers.

CSR related actions are often based on a mix of non-legally and legally binding norms. Legal requirements of reporting of non-financial issues are becoming increasingly common in countries in the EU and elsewhere. To some extent this may represent a formalisation of former informal law or pre-formal law, drawing on non-legally binding norms. In other cases, the boundaries tend to blur between norms of a legal character but not directly binding on corporations (for example, international human rights law), and corporate action that draws on such norms (for example social reporting on labour issues, or responding to a possible environmental risk for investment purposes).

Among factors that count as drivers of CSR, i.e. factors that motivate action, are a normative sense of obligation (based on ethics, responsibility towards local society, global sustainability considerations, law that does not have a legally binding effect on the corporation but is taken as guiding, agreements, politics, etc.), economic conditions and market factors, marketing and recruitment considerations, and desire for legitimacy (societal "licence to operate"). The possibility or risk of sanctions (positive (rewards) or negative (punishments, loss of market opportunity or reputation)) and a desire to be among first movers or to set an example are also drivers of CSR. Drivers of CSR seem to form a mix of economic and marketing considerations and considerations related to sociology of law, such as the desire for legitimacy and to avoid negative sanctions by stakeholders. Drivers will often be influenced by the normative "message" of a source of CSR norms. For example, if a corporation is driven to undertake CSR action by a desire for societal legitimacy, the topics selected may be influenced by e.g. corporate values, NGO action or indications by international organisations like the UN.

In practice, drivers tend to blur. For example, being a first mover will often also entail rewards in terms of recognition, thus also touching on market factors and reputation. An example may demonstrate this: At an annual event in Denmark since 1999, "The Network Day", public recognition (a reward in itself) by the Minister of Labour, combined with a formal award and a sculpture, is given to selected companies that have been nominated for their socially responsible action. The event receives national and local TV and written press coverage, has participation from celebrities in the Danish public and private labour sector, and the award is presented by a celebrity.[10]

As we see in the following, non-legally binding norms, legally binding norms and drivers of CSR feature in various degrees the way that CSR and law interact in practice. This relationship between corporate values, other sources of CSR norms, drivers of CSR action, forms of regulation of CSR, and corporate action, indicates that the development of CSR norms is a multi-pronged process in which sources and norms may have reflexive effects on each other, feeding an on-going chain in the formulation and adjustment of what constitutes CSR.

Normative issues

In what ways is CSR related to *development of new norms* based on values?

To many companies, internal values, such as decency in operation, are just as important as, if not more than, external expectations. Values may also be partly based on (maybe not fully recognised) external demands or expectations, creating a chain of sources.

Internal or external values may bounder on considerations born out of greater socio- or geo-political trends or events. For example, backed and encouraged by the Danish Government under the slogan of achieving an inclusive labour market, some Danish companies have undertaken an effort to recruit employees that might otherwise have difficulty in gaining access to the labour market. To some extent backed by financial support, immigrants, refugees and disabled people have found jobs partly taylored to their abilities. To a company, this may be seen as honouring the value of being decent. Adoption of inclusive recruitment as part of values based management has been supported by a public, partly government led discourse on the inclusive labour market (for many practical purposes introduced as the Danish aspect of CSR). Government obtains corporate "assistance" in handling the integration of migrant workers or refugees that are themselves a result of geo-political developments, and who would otherwise be sustained by public funds.

Corporate values may also impinge on a company's decisions in relation to social services that it makes available to its staff, its presence and form of presence in the third world (as a contribution to the socio-economic development of the host country), or decisions on maintaining or cutting links with suppliers that do not themselves live up to the values of the buyer corporation (World Bank 2003).

Demands from stakeholders and society at large that corporations make their values clear and take responsibility for social and environmental development and sustainability locally and globally, force large, medium sized as well as small enterprises to embark on an organisational learning process, and to systematise and institutionalise internal values. Through this process, values may become more important as a source of norms. Internationalisation internally in Europe and in relation to third world countries also force companies to (re-)define, assess and clarify their values and decide to what extent, and how, they are willing to accept social responsibility beyond simple legal compliance. When a company takes on responsibility as if it were legally binding, although a possible legal basis of the responsibility is not directly legally binding on the corporation, the basis of the responsibility may be said to acquire a value based character. Values that thus become norm-setting for corporate choice and action, take on a character of being sources of (informal) law.

CSR relevant values may be influenced by such sources as general societal or political formulation of non-legal norms that are perceived by corporations (and some stakeholders) as norms that should be observed, and international standards or instruments that do not directly bind corporations legally, but provide for norms that investors, consumers and buyers and other stakeholders perceive as binding for the corporation.

International Law plays a considerable role in CSR. As apparent elsewhere in this issue (Rudolfsson Goyer), international human rights law is an important aspect in CSR. Also international labour law and international environmental law and principles play a considerable part for the substance of CSR and for self-regulation and reporting on CSR.

In relation to the topic of this article, the significance of international law is precisely in the fact that it plays such a considerable part for formulations of the substance of CSR, as guidance for CSR self-regulation and for reporting and benchmarking, and for government regulation pertaining to CSR issues. The striking feature is that although CSR is generally understood as being beyond legal compliance, many CSR demands from stakeholders and much corporate CSR action appear to be based exactly on assessments of compliance with international law, especially human rights and labour law. As discussed below, government regulation of CSR (and attempts at such regulation, including through encouragement to voluntary action), especially at supranational and international level, refers heavily to international law.

Developments in external stakeholders' expectations to corporations, and examples of corporate behaviour, indicate that CSR does not only pertain to observance of human rights and labour rights inside the company or in its direct actions, but also to the observance of rights and indirect consequences of corporate action for such rights. Corporations that are present in, or supply from, states with poor rights records have been met with arguments that through their indirect support (financial and moral through presence) to the government, they act in a way that it is not socially responsible.

The draft UN Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Commission of Human Rights 2003) refer extensively to international human rights law. The Norms are the product of a process of about five years of elaboration under the Sub-Commission on the Promotion and Protection of Human Rights, set up under the UN Commission on Human Rights. The Norms assert that states have the primary responsibility to respect, ensure respect for, prevent abuses of, and promote human rights "recognised in international as well as national law" but adds that transnational corporations and other business enterprises within their spheres of activity or influence have the obligation to respect, ensure respect for, prevent abuses of, and promote those same rights.[11]

The Danish CSR communication platform, the CSR Scorecard, bases its questionnaires on nine ILO conventions on core labour rights.[12]

Apart from the examples given in several places above, the importance of international law for CSR is confirmed by the role which international law has been given in reporting and management systems that have been developed in later years and are recommended to or used by CSR conscious companies. The Global Reporting Initiative (GRI),[13] SA8000,[14] and Accountability1000 (AA1000)[15] operate with indicators or standards based on conventions (treaties of international law) and declarations on human rights, labour standards and environmental protection. The fact that general UN Human Rights instruments like the Universal Declaration of Human Rights, the Covenant on Social, Economic and Cultural Rights, the Covenant on Civil and Political Rights, and the Convention on Rights of the Child have been acceded to or ratified by a large number of states serves as an argument of validity across borders to communicate information on value based action in sometimes sensitive topic areas (Goyer in this issue, Thorsen 2003).

Regulation

Government regulation of CSR has a variety of forms and emanates from regulatory bodies at different levels. As a point of departure, government regulation may be formal, binding law, or it may be recommendations that are intended to have a guiding effect but have no legal standing. Public regulation may be issued by bodies at local level (e.g. municipal), regional (sub-state),

national, supra-national based on delegated state government powers (e.g. EU), and international (e.g. at OECD, UN and specialised organisations with regulatory powers, e.g. ILO and UNICEF) that are based on state membership.

One of the difficulties in assessing when a rule issued by a public regulatory body concerns CSR and when it does not, is in simply deciding when government regulation of a CSR topic is or should be characterised as CSR *regulation*. Although generally accepted and also the point of departure for this paper, the understanding of CSR that CSR is to do more than the law requires, may result in some dilemmas and confusion that are probably not intended, nor conducive for wider implementation of CSR. This is the case even if legal requirements for the purpose of this definition are taken narrowly to refer to statutory legal requirements. For example, we may ask whether supra-national or national anti-discrimination legislation or legislation setting a minimum age for employment is regulation of CSR? Or is a topic lifted out of CSR (back into "simple" compliance) when it is, or becomes, regulated by national law? More examples could be stated but are omitted due to space limits.

Already, despite the formal understanding that CSR is action beyond legal requirements, some legislative initiatives are referred to by various actors as CSR legislation.

National legislation on reporting on CSR issues is appearing in various states in the EU and elsewhere. In the two-year period 2001-2002, Belgium, Germany, Great Britain and Sweden passed legislation demanding pension institutions to report or inform on how social, environmental and ethical considerations are taken into account in investment portfolios.[16] Since 1995, certain types of polluting companies have been required by Danish law to keep and publicise environmental accounts ("green accounts", Act on Environmental Protection, § 35a). Belgium, the Netherlands, Norway and Sweden passed legislation in the late 1990s requiring environmental information to be reported in the annual accounts of (certain types of) companies.[17] The Danish Act on Annual Accounts was amended in 2001 to introduce a requirement that certain types of companies report on knowledge resources and the influence of company activities on the external environment, and on measures to prevent, reduce or mitigate environmental damage. This reporting is to be at an overall level and contain only the information necessary to provide a true and fair view of company assets and liabilities, financial situation and annual result, and is therefore not a major step towards CSR reporting requirements. – Outside the EU, Australia has passed legislation on SRI product disclosure obligations for financial planners and investment product providers, and other CSR related issues may be affected through currently on-going processes of reform corporate law reform. In the US, some legislative initiatives that have been passed following later years' corporate governance scandals have also been referred to as legislation on CSR.

While local, regional and national regulation may address itself directly to corporations, supranational legislation may do so (if passed in the form of a regulation according to art. 249(2) EC) but may also (if passed in the form of a directive) address itself to national governments that must ensure implementation in national law. According to classic international law, only states are subjects of international law. States may enter into agreements with each other (treaties). They may agree in treaties to create legislation providing for obligations for corporations inside their national law jurisdiction. When accepting a treaty obligation, states undertake an obligation under international law, towards other states parties to that treaty, to honour the treaty obligation. However, as corporations are not subjects of international law, treaties cannot create obligations for corporations. This classical system is obviously not very well suited for regulating MNCs that work across boundaries.

OECD's Guidelines for Multinational Enterprises are exactly what they say, that is, non-binding guidelines. These recommendations are made by governments and addressed to corporations. Corporate observance of the Guidelines is voluntary and not subject to legal enforcement. In terms of form of regulation, the Guidelines are a sort of public regulation that seeks to encourage corporations to undertake self-regulation.

Without any binding effect for corporations yet, the UN has embarked on a course that may lead towards binding regulation, most likely through national legislation but ultimately possibly through international law with formally legally binding effect for corporations. In the UN Millenium Declaration adopted by the UN General Assembly in 2000, the states members of the UN resolve to "develop strong partnerships with the private sector and with civil society organizations in pursuit of development and poverty eradication." (part III principle 20). Through the Plan of Implementation adopted at the Johannesburg Summit in 2002, governments have committed themselves to enhancing corporate environmental and social responsibility and accountability (para. 13 and para. 17). The draft UN Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights are an example of an initiative that may ultimately, if adopted as a legally binding instrument, impose duties of international law on corporations. If this happens – although at the time of writing there are no clear indications that it will – the result will be a government regulation of a binding character, formulated by states at the international level and addressed to corporations.

Action

In a number of other European countries, including Denmark, the general trend has been until now that corporations have taken on social responsibility on a voluntary basis, i.e. without a legal obligation to do so (see also Hansen 2002, Oxford Research 2002). Often, such *self-regulation* is based on Codes of Conduct prepared by the individual corporation, or in some cases by NGOs or consultancies, in some cases with broader applicability (World Bank 2003).

Voluntariness is what the EU Commission argues in the Commission's 2001 Green Book on CSR (Commission 2001) and the follow-up 2002 Communication (Commission 2002). Even so, the Commission provides quite specific statements to the effect that corporations should demonstrate social responsibility in relation to employees in the EU as well as in relation to the third world, and explicitly encourages companies to take ILO labour standards and OECD's Guidelines for Multinational Enterprises as minimum standards (i.e., a specific reference to international law and standards) (Commission 2002). What will happen if companies in the EU do not act on these clear recommendations, is not stated. The possibility that the Commission may introduce legislative requirements may, however, make corporate action on CSR less than fully voluntary. Moreover, through these recommendations the Commission (thus, the EU) has entered the stage as a stakeholder making demands or at least expectations of corporate action for CSR.

The UN Global Compact[18] that was launched in 2000 is another example of state backed voluntary CSR action. Corporations that participate in the Global Compact commit their support to ten principles on environmental protection, labour rights and human rights. These principles build on declarations and conventions (the Universal Declaration on Human Rights, the Rio Declaration on Environment and Development, ILO's Declaration on fundamental labour rights and principles, and the UN Convention against Corruption) that are instruments of international law. In international law, declarations are not legally binding, but may be seen as morally and politically guiding. When

corporations commit themselves to such declarations, they express a willingness to voluntarily observe and respect non-binding international law.

As UN membership is for states represented by their governments, decisions on UN initiatives are made by states. In agreeing (or not disagreeing) to setting up the Global Compact as a voluntary initiative backed by the Secretary General of the UN, the UN and its members get somewhat around the difficulty posed by the limited possibilities under international law to regulate multinational corporations. At the same time, the Global Compact opens a possibility for corporations to demonstrate social responsibility in accordance with values incorporated in UN international law (such as the values that underpin human rights, specifically with reference to the Universal Declaration of Human Rights that forms a basis for some of the nine principles). Through the Global Compact, the UN and its member states enrol corporations in addressing the immense development needs in, particularly, the third world that may be somewhat alleviated through corporate action to improve social and economic conditions and environmental protection, all under the heading of sustainable development. Moreover, the Global Compact may motivate corporations to abstain from investment, production or other commercial activities in or with states that have poor records in terms of civil and political rights or corrupt regimes. Corruption almost invariably results in human rights violations and, for this reason alone, is a reason why a participant in the Global Compact should avoid activity with corrupt partners.

By sometimes honouring voluntariness with financial rewards, voluntary action is imbued with a certain degree of expectation or a government strategy that companies should regulate themselves within a framework established by politicians and civil servants (also often by indirectly by stakeholder groups). From this perspective, voluntariness becomes somewhat conditioned: The legislative or the executive have indicated the direction that "voluntary" action should take.

Voluntary reporting, although closely related to self-regulation, is discussed below as an aspect of reporting.

Reporting on CSR topics may be voluntary or required by law. As indicated above, legal requirements are emerging for certain types of business enterprises to report on social and environmental responsibility and ethics. Within voluntary reporting, there is considerable variation. More or less specific information in lyrics or numbers is issued under titles as social, environmental, sustainability or yet other names of reports (Pietras-Jensen 2002).

Various tools have been developed to assist in CSR reporting. NGOs (like GRI and Social Accountability International) have been active in this, but initiatives have also been supported by governments. What is interesting in this context is that, as indicated above, some of these refer to international and national law as a point of departure for formulation of indicators and benchmarks.

Voluntariness is observed in non-financial reports that an increasing number of companies produce without a legal obligation to do so. Voluntary reporting becomes an important part of the basis for stakeholder judgments on whether a particular corporation lives up to the ethical standards of each individual stakeholder. A recent study indicates that alternative reports are indeed studied, not just by financial stakeholders but also by consumers (GlobeScan 2004). The report enables stakeholders to sanction the way the corporation acts: If the information provided in the report is judged in accordance with the norms that the particular stakeholder group expects the corporation to follow, the sanction may be positive, such as an improved public perception of the company's reputation, or

increased investment or market share. Negative judgments may lead to negative sanctions, such as loss of image, investment or market share. To the modern corporation, such a loss may matter more than having to pay a fine for a breach of formal law.

In Denmark, voluntary reporting of non-financial issues is used as a communication tool by such Danish based corporations as Novo Nordisk, Novozymes, Danisco, Danfoss and Grundfos, all of which have large parts of their markets outside Denmark. Others keep a lower profile in terms of public communication but use voluntary Codes of Conduct to ensure that corporate stands and politics on CSR are observed internally and with suppliers. Among these are Lego and Abena. Lego has formulated a Code of Conduct for suppliers with regulations concerning child labour, compensation and working hours, discrimination, coercion and harassment, forced and compulsory labour, health and safety, freedom of association, and the environment (Lego Company 2003). Abena makes strict environmental requirements on suppliers and reportedly reacts strongly in case of doubts of whether the requirements are observed.

The use of legal instruments and standards in CSR reporting underscores that such instruments and standards are relevant not just as expressions of general values or principles, but also for the actual implementation of CSR policies and strategies in corporations. Legal instruments and standards are used to define qualitative benchmarks and indicators for action where quantitative goals or assessments are often insufficient. Although CSR is ostensibly to do more than required by law, the unambiguity of legal standards appears to be operational in the process of making plans for implementation or reporting on issues that are not only often more qualitative than quantitative, but also often imbued with political sensitivity.

Summing up: CSR - What forms of law?

From the discussion above, it is clear that law and legal standards in various forms (statutory and other instruments (treaties, recommendations and declarations of international law)) play a considerable role in relation to the substance of CSR, and for implementation and communication of CSR. We have seen that international law and specific standards serve as a source of CSR, and that statutory law also used by governments to demand or encourage corporate actions that relate to CSR, for example through reporting. In an intriguing chain of interrelationships, backed in part by reporting systems like GRI and SA8000 that incorporate legal instruments, law is so much a basis for CSR, that in many actors' understanding, **CSR appears to be to comply with applicable national law and do "something more". This "something more" is often based on non-binding law (e.g. recommendations or declarations of international law) or law that is not binding on the specific corporation. Such non-binding law comes to serve as guidance for the types of action that corporations may undertake as CSR, as a basis for implementation (for example through Codes of Conduct), and as a basis for the information communicated to stakeholders (for example through voluntary reports).** At least, this seems to be the case in areas touching on human rights and labour rights. In environmental protection, the situation appears somewhat less clear cut. This may be due to the limited amount of general international "hard law" (treaty law) on the environment, combined with the fact that national environmental law, at least in Europe, makes such comprehensive demands on corporations that they may not feel inclined to undertake voluntary environmental initiatives.

Granted, precisely because international law does not pertain directly to corporations, corporations can be said to be "doing more" than what is required by law, when they respect and fulfil standards of international (human rights and labour) law on a voluntary basis. Nevertheless, it does not seem

that institutional investors, political consumers or journalists pay much attention to the fact that these standards do not legally bind corporations unless they have been made into nationally binding law by a state with jurisdiction over the corporation.

Probably because international law formally poses obligations on states and not on private legal persons such as corporations, it appears to be generally accepted that where national law is absent or insufficient in comparison with relevant international law, a company that takes on obligations set by international law will be acting "ethically" or "in accordance with CSR", i.e. doing more than required by (applicable, national) law.

In areas touching on human rights and labour rights, international law does not only serve as guidance for companies. It also serves as norms that important stakeholder groups simply hold corporations responsible to, even though there may not be any such formal legal responsibility. Punishments may not be in the form of fines or other sanctions issued by a court of law, but are instead issued by what are effectively "courts" of stakeholders, in the form of decreased market or investment shares, decreased attractiveness with employees or recruits, or negative media reports.

The fact that for many practical purposes, even in the absence of a general understanding of CSR, the concept of CSR seems to be generally understood to cover responsibility for human rights, labour rights and environmental issues, also indicates a very close relationship between CSR and law in terms of the values that underlie, as principles, specific legal standards. With variations across countries, human rights, labour rights and environmental protection are heavily regulated in Western countries, but less so in many developing countries. Nevertheless, many developing countries with inefficient national regulation of human and labour rights have acceded to or ratified relevant treaties of international that provide them with a duty, as states, to ensure that human rights and labour rights are protected and ensured nationally.

The fact that international law is made by states and binding on states only, until the rule becomes binding on private legal subjects (like corporations) according to the relevant state's own system of law, does not seem to lessen the expectations that civil society stakeholders have to corporations' observance of international human rights or labour rights, or to have uniformly strong validity among corporate managers as an argument *against* stakeholders' demands and expectations. This takes us back to CSR as a value based issue, because corporate decisions in this chain of sources and drivers often build on those values that international human rights, labour and environmental law and principles are based on. It also demonstrates that corporations consider and act on the basis of rules that are not legally binding, as if they were. In other words, law that is not formally binding on corporations, has an effect as if it were.

Observations on the sources and drivers of CSR and the way that (especially) international law informs CSR indicate that CSR in many ways fits the definition of informal law as defined above in this article: Corporate action in relation to CSR indicates that CSR is an expression of normative ideas and patterns of behaviour and action. Its value based foundation and numerous references to ethics and moral behaviour indicate that CSR is not based on a sharp distinction between law and morals. Stakeholders' (and some corporations') concern with the actual effects of corporate action, rather than the legal foundation for the effects and for whether the corporation may be held legally responsible, indicate that in CSR there is not a strict distinction between law and fact. Although government regulation of CSR topics is emerging, and although (international) law underpins the topics and actions associated with CSR, CSR as a set of normative ideas is not made by government

authorities. It is made by corporations and stakeholders, although sometimes indirectly. The validity of CSR does not rely on state sanctions – except where a corporation neglects to observe legal requirements in terms of for example reporting – but on awards or punishments meted by stakeholders on the basis of their assessments, or judgments, of the corporation. These sanctions are of practical character, and sometimes also of a moral character (for example when a corporation is condemned publicly by media or NGOs for disregard of the principle of non-discrimination or environmental protection). CSR, in other words, seems to work as informal law. – Depending, *i.a.*, on the future fate of the draft UN Norms on Transnational Enterprises, the role that international law has had for corporate action in the area of CSR over the past decade may also be an example of pre-formal law.

Considered as a possible example of reflexive law, CSR does not, on the basis of the information and assessments in this article, seem to come fully within the definition. The main argument in favour of CSR as reflexive law is that CSR is widely based on self-regulation, and that this self-regulation may be combined with the interest of the collective (sustainable development, observance of human and labour rights and protection of the environment in greater society). However, CSR is strongly imbued with duties (with corporations as the duty holders) and, to a less specific degree, rights (with stakeholders or society at large as beneficiaries). Although stakeholders have an extensive part in deciding and assessing CSR behaviour, CSR does not specify procedures except to the degree that stakeholder participation is considered by various theory and in some social reports to be useful and "good corporate citizenship". There is, however, no definite requirement that stakeholders must be actively involved. However, to follow the argument by Teubner above, law may serve towards promoting corporate processes of reflexion on CSR internally and externally.

In terms of the role that principles of law play for CSR, we have seen that, at least, human rights may be observed in various ways. Whether human rights underpin CSR as a principle of law cannot be fully concluded on the basis of the above. However, it seems that human rights seem to feature as part of a general set of values that guides much action on CSR not just with regard to human rights as such but also with regard to labour standards, and environmental protection (as a prerequisite for the human right of an adequate standard of living). It also seems that human rights feature as an underlying value as well as with respect to specific voluntary initiatives, reporting and government regulation to combat discrimination in the work place and to create an inclusive labour market that contributes to integration of immigrants and others. And human rights, as a principle of law underpinning more specific norms, feature as the basic foundation for international and national specific human rights standards, EU references to ILO core labour standards as a recommended minimum for corporate action in the developing countries, and for law in the making, i.e. the draft UN Norms on Transnational Enterprises.

Concluding remarks: CSR – the role of law

With some exceptions, CSR has mainly been approached from other angles of practice and science than that of law. However, the above examples demonstrate that even though CSR is ostensibly to do more than the law requires, CSR seems to work as informal law and to be based on a set of fundamental principles of law. In several ways, law in the abstract as well as the statutory sense informs the substance of CSR, and implementation and communication of CSR: Principles of law underpin the substance of CSR. So do specific instruments of international and national law, and standards contained therein. By requiring that some types of corporations report on CSR topics, statutory law is used by governments as an instrument to make corporations undertake specific types of action. Through references to international law in recommendations from governments and supra-

national organisations, governments make use of law to encourage corporations to take specific action. When they hold corporations responsible for their (lack of) respect for human rights, labour rights and environmental protection, NGOs, investors, current or prospective employees, consumers and other stakeholders base their assessments on law, including principles of law.

The examples do not stop here, but suffice to demonstrate a close relationship between CSR and law.

Given the relatively brief number of years since CSR began to play the role that it currently does, it is premature to make any specific statements on the normative developments of CSR. Nevertheless, the **normative and regulatory trends in and of CSR seem to indicate a shift in certain normative foundations for corporate action and governance. This shift appears to be characterised by an increased expectation that informal norms are observed by corporations as if they were formally legally binding, with enforcement served not by a state legal enforcement system, but by an informal system of stakeholder sanctions;** and formal government regulation is to some extent being replaced by voluntary corporate self-regulation. Finally, we may be observing steps in a shift in long held notions of the basic foundations of international law according to which the legal subjects of international (human rights, labour and environmental) law are states - but not private legal persons (such as corporations) or natural persons.

With the growth in CSR, value based expectations on the private sector may be reflected in increasing demands or expectations of the public sector to take social responsibility beyond formal legal requirements. A reflective effect between private and public sector CSR action may have effects for the substance of CSR, maybe particularly in local or national contexts, and in the use and forms of government regulation of CSR. Values as a source of CSR may also be reflected from the private to the public sector as the basis of expectations and specific action. As indicated, values already serve as a source for the normative substance of CSR as informal law. In this sense, values as a source of law are becoming an important part of the normative foundations of corporate and stakeholder action.

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[1] Ph.d., M.I.L., cand.jur. et exam.art. Associate Professor, Department of Social Sciences, Roskilde University, Denmark.

[2] The article is a revised and somewhat expanded version of a paper presented at Roskilde University, Denmark, at a conference on Values, Ethics and Social Responsibility, 3-4 December 2003, and published as a working paper (Buhmann 2004).

[3] This definition is the one suggested in the EU Commission's 2001 Green Paper on CSR (Commission 2001) but does not otherwise imply that the author leans on the views of the Commission. Similar understandings of CSR are found with many other actors.

[4] This is supported by interviews undertaken by the author.

[5] The understanding of informal law is based on the definition by Danish Professor of Law Hanne Petersen (Petersen 1991 and Petersen 1996).

[6] Based on research on women-dominated places of work in the Danish public sector, Petersen has demonstrated that informal law plays a considerable role in (certain Danish) places of work (Petersen 1991 and Petersen 1996).

[7] Dalberg-Larsen (1999:326, 327-328) argues that we may observe reflexive law - as a form of regulation governed by an ideal of self-regulation and democracy - in patterns of regulation of

occupational health and safety: Initially in the form of regulation through agreements, moving on to limited formal legal regulation of some issues, and with the establishment of monitoring expert bodies as the next step. In Denmark this was followed by inclusion of workers' and employers' organisations in the regulation process, and the use of occupational safety committees in individual places of work. Dalberg-Larsen also argues that reflexive law may be observed particularly in those areas of law that have encountered problems through traditional welfare state forms of regulation (presumably including implementation of law), specifically citing environmental law and social law as examples.

[8] On human rights and CSR, refer also to the articles by Pia Rudolfson Goyer and Kerstin Sahlin-Andersson in this issue.

[9] See also Sjöström 2004 which does not operate with sources but addresses these as drivers, *in casu* for SRI (Socially Responsible Investment) which is in many ways closely related to CSR.

[10] For example, the 2002 event which coincided with the Danish EU Presidency had senior EU institution participation, and at the 2003 event, the award/sculpture was presented to each winning company by Her Royal Highness Princess Alexandra.
<http://www.copenhagencentre.org/sw2068.asp>

[11] The Norms were discussed at the UN Human Rights Commission in April 2004 where it was decided that they are to be discussed again when the Commission meets in 2005. The Commission decided that in the mean time, the UN High Commissioner for Human Rights is requested to make a report on the scope and legal status of existing initiatives and standards relating to the human rights responsibilities of corporations. The Commission at the same time stated that the draft Norms "as a draft proposal" have no legal standing (Commission on Human Rights 2004, UN Doc. E/CN.4/2004/L.73/Rev.1).

[12] ILO Convention No. 155 (1981) (occupational health and safety), ILO Convention No. 29 (1930) (forced labour), ILO Convention No. 105 (1957) (abolition of forced labour), ILO Convention No. 138 (1973) (minimum age for access to employment), ILO Convention No. 182 (1999) (abolition of worst forms of child labour), ILO Convention No. 100 (1951) (equal pay to men and women), ILO Convention No. 111 (1958) (non-discrimination in employment and occupation), ILO Convention No. 87 (1948) (freedom of association and to organise), ILO Convention No. 98 (1949) (right to organise and to negotiate collectively).

[13] The GRI was originally set up as an NGO initiative but has become closely associated with the UN Global Compact.

[14] A standard and verification system developed by Social Accountability International and based on international core labour standards of the ILO, the Universal Declaration of Human Rights, and the UN Convention on the Rights of the Child. See <www.sa-intl.org>.

[15] See <www.accountability.org>.

[16] With variances between states in reporting and information requirements and in institutions covered.

[17] For a list of CSR relevant legislative initiatives, see CSR Europe, Deloitte and Euronext (2003) p. 10, and Frederiksen *et al.* (2003) p. 37.

[18] See <www.unglobalcompact.org>.

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