

The Social Function of International Law in the Context of Corporate Social Responsibility

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Abstract

Law is the presence of the social past, the organising of the social present and the conditioning of the social future. The paper analyses this three-fold social function played by international law in the context of Corporate Social Responsibility (hereafter 'CSR').

It studies the social past by looking at how international organisations functioned as law making bodies after the advent of globalisation in the early nineties. It then examines the social present by looking at the concept of 'Responsible Business Conduct' and the response of international organisations to the Covid-19 pandemic. To predict the social future, the paper will attempt to determine the possibilities of achieving 'peace through commerce' and 'peace through CSR activities'. It also discusses in brief the CSR initiative under 'Operation Sadbhavana' that was used to counter terrorism through employment of the Kashmiri youth.

Keywords: Social function; Globalisation; International organisations; Responsible business conduct; counter terrorism

Introduction

In 2001, The European Commission Green Paper on Corporate Social Responsibility defined CSR as “the concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.” Ten years later, the European Commission broadened the definition to mean “the responsibility of the enterprises for their impacts on the society [1].” Today, the scope of CSR is much wider owing to the increasingly globalised nature of business and the expanding social function played by international law [2,3].

According to Professor Philip Allott, the social function of international law is three-fold:

- i. 'It carries the structures and systems of society through time.
- ii. It inserts the common interest of society into the behaviour of society-members.
- iii. It establishes possible futures for society in accordance with society's theories, values and purposes [4].

In other words, law, including international law, is the presence of the social past, the organising of the social present and the conditioning of the social future. As far as corporations are concerned, this social function of international law is best illustrated in the context of Corporate Social Responsibility.

The Social Past- Globalisation, International Organisations & CSR

After the decolonisation of the various nation states and the increasing recognition of state sovereignty, the United Nations General Assembly (hereafter 'UNGA') began to emerge as an important medium of law making, to promote the social and economic development of the newly sovereign states. UNCITRAL was established in 1966 as a subsidiary of the UNGA in order to facilitate international trade and investment. As international trade and investment flourished, several Transnational Corporations (hereafter 'TNC') began to be set up across countries.

By the 1970s, there was a proposal for a 'New International Economic Order' of which the 'Draft Code of Conduct for Transnational

Corporations' was a major aspect. The Draft Code marks the inception of CSR into international law [5].

Impact of globalisation on CSR

In the 1990s, with the wave of globalisation, the operations of the TNCs and MNCs increased multi-fold following the integration of markets. Globalisation advocated trade and investment liberalisation, privatisation, and deregulation. The world saw an increase in the power of MNCs and a decrease in the power of nation states [6]. Simultaneously, debates began to emerge regarding the negative effects of the phenomenon such as the marginalisation of the poor people, lack of concern for labour laws and damage to the environment [7]. It was felt that public actors such as the governments and political powers were not concerned with human rights and safeguarding the environment, as long as the market conditions were conducive to Foreign Direct Investment.

Hence, the 'strategy adopted was to get businesses to act independently to ensure that globalisation is supportive of social and economic progress, without the assistance of public actors'. Emergence of international corporate social responsibility can thus be seen as a response to the fear regarding the lack of corporate accountability following the advent of globalisation [8].

The link between globalisation and CSR is best explained by the United Nations Global Compact [9]. It was initiated by the then United Nations Secretary General, Mr. Kofi Annan wherein he emphasised on the 'sharing of values and principles between the United Nations and the business community'. The UNGC contains ten principles on human rights, labour standards, environmental protection and fighting corruption [10].

There was also a lot of emphasis on sustainable development in the 1990s as evident from the establishment of the European Environment

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Agency, the UN summit on Environment and Development held in Rio de Janeiro, United Nations Framework Convention on Climate Change (UNFCCC) and the adoption of the Kyoto Protocol.

‘The creation of these international bodies and the adoption of international agreements represented international efforts for setting higher standards with regards to climate-related issues and indirectly to corporate behaviour.’ In other words, these TNCs and MNCs were forced to adopt socially responsible practices so as to adhere to the international standards of ethical conduct [11].

Role of international organisations

Over the years, the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organisation (ILO) have developed codes of conduct for the TNCs to follow. Namely, the UN Guiding Principles, the OECD Guidelines, and the ILO Tripartite Declaration are the important instruments of CSR under International Law [12-14].

The UN Global Compact paved the way for the UN Guiding Principles on Business and Human Rights (the UN Guiding Principles) which were unanimously endorsed by the UN Human Rights Council in 2011. It contains 31 principles implementing the United Nations “Protect, Respect and Remedy” framework in the context of human rights and business enterprises.

Thesecondcodeofconductisthe OECDGuidelinesfor Multinational Enterprises (the OECD Guidelines). It makes recommendations on key areas such as human rights, employment, industrial relations, the environment, and bribery and consumer interests. Unlike other ‘soft law’ that is addressed by particular bodies of international organizations to their member States, the OECD Guidelines are recommendations addressed by governments to MNEs [15].

The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the ILO Tripartite Declaration) contains fundamental principles on employment, training, working conditions and industrial relations. It also makes a reference to the Declaration on Fundamental Principles and Rights at Work [16]. ‘The ILO Tripartite Declaration is intended to be non-binding and lacks a formal enforcement mechanism for its provisions’. Thus, globalisation acted as a catalyst for international organisations to lay down soft laws governing CSR practices of TNCs and MNEs, as the world transitioned to a more integrated society [17].

The Social Present-Responsible Business Conduct & Covid-19

Responsible Business Conduct is a concept in international law that is prominent today as a result of the OECD Guidelines for Multinational Enterprises. Similarly, one cannot talk of the present without referring to the Covid-19 pandemic which has completely changed the way businesses operate. It is thus imperative to discuss how CSR practices in India have been affected by the Covid-19 pandemic and how international organisations have responded to the chaos, which is the social present.

Responsible business conduct

Responsible Business Conduct (hereafter ‘RBC’) is not limited to the traditional understanding of CSR, but extends to compliance of all laws dealing with issues such as human rights violations, environmental protection, labour relations and financial accountability, even where these are poorly enforced. It also emphasises on meeting the expectations of other channels other than law, such as inter-governmental organisations, trade unions and even the press. It is largely

provided for under the OECD Guidelines for Multinational Enterprises. ‘The governments that adhere to the Guidelines aim to encourage the positive contributions MNEs can make to sustainable development and minimise the difficulties to which their various operations may give rise’. ‘The Guidelines are the only existing multilaterally agreed corporate responsibility instrument that adhering governments have committed to promoting in a global context [18, 19].

RCB therefore is not limited to mere compliance with the law. The Business Leaders’ Initiative on Human Rights defines three levels of company behaviour [20]:

- i. Essential actions refer to minimum business standards defined by national and international law.
- ii. Expected actions go beyond what is legally required to meet the additional expectations of key stakeholders such as investors, employees, customers, and suppliers as well as NGOs and the wider community. As standards improve, some of today’s expectations could become tomorrow’s essential requirements.
- iii. Desirable actions are often company-specific and may include pioneering philanthropic or community-based initiatives.

As far as India is concerned, the Ministry of Corporate Affairs has issued the ‘National Guidelines on Responsible Business Conduct, 2018 (hereafter ‘NGRBC’) [21]. The NGRBC is an improvement over the existing National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business, 2011 and are a means of nudging businesses to contribute towards wider development goals while seeking to maximize their profits [22]. The NGRBC has been drafted in accordance with the UN Guiding Principles and aims at not just making the companies more responsible and accountable but also at creating a whole ecosystem to ‘Protect’, ‘Respect’ & ‘Remedy’ as envisaged in the Principles.

Covid-19 and CSR

In 2013, India became the first country in the world to mandate CSR. After the WHO declared Covid-19 as a pandemic, the Indian government announced that spending of CSR funds for Covid-19 would be eligible CSR activity [23]. Several companies such as Infosys Foundation, ITC Ltd, Hindustan Unilever Ltd and TCS have contributed large sums of money towards Covid-19 related relief work. Although CSR was very much a part of the Indian corporate governance framework even prior to Covid-19, the crisis appears to have incited a more conscious approach towards CSR spending and the pursuit of Sustainable Development Goals [24-26].

At a global level, according to a latest report by the OECD centre for Responsible Business Conduct, it is advisable for companies to take proactive steps to address the risks related to the COVID-19 crisis in a way that mitigates adverse impacts on workers and supply chains [27]. ‘This is likely to build more long-term value and resilience, improving their viability in the short term and their prospects for recovery in the long term’ [28].

The pandemic has also brought to the attention of the United Nations the various inequalities and failures prevalent in the society. The UN now proposes to address them in the 2030 Agenda for Sustainable Development and the Paris Agreement on climate change. These includes topics such as good health and well-being, access to clean water and sanitation, sustainable cities and decent work and economic growth, to name a few.

Covid-19 has perhaps triggered one of the largest economic crisis

to have affected the world since the Great Depression of the 1930s. If history has taught us anything, it is that a crisis more often than not leads to change and improvement in existing international law. For instance, the financial crisis of 2008 was attributed to poor corporate governance practices, the aftermath of which saw the IMF emerge as a pioneer in global economic governance. In response to the crisis, the IMF reformed its governance structure and even changed its long standing views on certain economic policies. It will be interesting to see what CSR related guidelines will be issued by these international organisations to tackle the after-effects of Covid-19 on employees, environment and the society in general[29].

The Social Future- Peace Through Commerce & CSR

The goal of all law is to foster peace and harmony among nations and communities. 'Peace through commerce is a body of literature based on a diverse foundation with roots in law, business ethics, economics, political science, sociology, and anthropology'. 'It is based on the idea that through ethical business practices, businesses can create conditions needed for peace and also reduce violence around the world'[30]. By taking into consideration the interests of all stakeholders such as customers, shareholders, employees, the community and the environment and by abiding by the law, these corporations can help in promoting peace [31].

Peace through commerce

Authors Timothy L. Fort and Cindy Schipani have identified three ways in which businesses can promote peace within societies [32].

- i. By promoting economic development
- ii. By use of track two diplomacy
- iii. By utilizing and redesigning corporate governance structures modelled on peaceful societies.

Historically, most conflicts and violence have been a result of the fight over scarce resources. MNCs by setting up business in underdeveloped countries often directly and indirectly help in the economic and social development of these countries by creating jobs, attracting foreign direct investment, etc.

Corporations can also play an informal diplomatic function in fostering peace. 'They have the capacity to cross social and political boundaries and play the role of ambassadors for their countries'. They facilitate conversation between various countries through unofficial channels and in this process defuse some of the tension between these countries and help build friendly relations [33].

Finally, corporations by incorporating the characteristics of peaceful societies in their corporate governance practices and by modelling their governance systems around peaceful societies can achieve both economic progress and social harmony [34].

Peace through CSR

CSR standards are important tools in fostering sustainable peace through commerce. This is possible in two ways:

- i. CSR standards that address issues of violence and conflict.
- ii. CSR standards that encourage companies to engage in behavior that promotes peace [35].

The first set of CSR standards govern the obligation of companies to not engage in any activity that fuels or funds violence or conflict in any manner. For instance the Voluntary Principles on Security and

Human Rights, 2000 was created by the United States and United Kingdom along with international human rights organisations such as Amnesty International and Human Rights Watch for the purpose of governing the conduct of companies in the extraction business [36]. The principles require companies to hire and work with private security forces in conflict zones.

An example closer to home would be the illegal mining of mica in Jharkhand that often creates conflict between the local contractors, NGOs and the government. Mica is a popular ingredient in most cosmetic products and is mined by child labourers in remote parts of Jharkhand under the careful watch of these contractors [37]. After the issue of child labour received much publicity owing to the operations of certain NGOs, several international cosmetic companies strengthened their CSR policies on child labour and also included new standards to ensure that all of their raw material is ethically sourced.

The second set of CSR standards followed by companies promote peace by adhering to the rule of law and adopting external evaluation principles in the countries in which they operate. The Global Reporting Initiative for instance is an international independent standards organisation that encourages transparency in corporate governance practices, which in turn leads to conflict prevention, reduction of poverty and development of economies [38].

Additionally, CSR practices help deepen stakeholder relationships and expand the type of stakeholders who are interested in the business of these companies. NGOs for example might focus on activities on corporations in conflict zones. CSR practices also encourage organizational learning. Companies are able to learn from the activities of their contemporaries in the same industry, both in terms of accepted practices and unaccepted practices, thus benefitting from this collective knowledge [39].

In order to ensure sustained peace, it is necessary that there is a consolidation of the CSR practices along with the introduction of specialised and industry specific standards of CSR. International law will play a key role in this process, and in doing so carry out its function of conditioning the social future.

Operation sadbhavana and CSR in kashmir valley

The Kashmir Valley has been fighting insurgencies since 1948. As part of 'Operation Sadbhavana', the Indian Army, along with NGOs, set-up the CHINAR 9 Jawan Club in the Kashmir Valley and roped in several public sector companies, including ONGC and Genpact, to help provide training in tailoring and fashion designing to the youth as part of their CSR initiative [40]. The initiative employed the WIFM ('what's In It for me') Approach to encourage even organisations like ASSOCHAM and NSDC to contribute to the training and employment of over 700 young persons in a span of one year. The objective was to counter terrorism with employment of the youth of the valley and in the process, promote peace and hope [42].

Conclusion

Under the current legal framework, TNCs and MNCs are subject to only 'guidelines' or 'soft laws' that are non-binding international law standards as discussed above [43]. While some scholars deny the existence of soft law, others consider it a new source of international law.

Of all functions played by international law, the social function is perhaps the most important in terms of ushering in a peaceful society [44]. International law no doubt caters to commerce, but it

also emphasizes on CSR practices and RBC by corporations. This will in turn pave the way for international peace. However, as stated by legal scholar John Anthony Carty the society is constantly evolving and an international law that is complete in itself is not good law [45]. As standards improve, some of today's expectations could become tomorrow's essential requirements. International law must therefore adapt and grow as the society evolves, laying down specialized CSR standards and codes of conduct for corporations along the way.

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