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THE CHANGING SCOPE OF CORPORATE SOCIAL RESPONSIBILITY: PARADYMS OF IMMORAL CAPITALISM ON THE ENVIRONMENT

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ABSTRACT

Industrial and digital revolutions have transformed economies and created vast wealth for the world economy with the result that most of the companies involved in the globalised heritage have become politically powerful. However, pollution, labour challenges, exploitation of natural resources, environmental degradation, serious climate change issues, displaced communities, abuse of human rights have characterised capitalistic endeavours. This paper shows a general consensus that the ends and means of development must involve all stakeholders in shaping their respective destinies as to strengthen and safeguard society particularly the environment. Consequently, the paradigm is no longer about companies integrating social responsibility precepts and better environmental practices in their business models on a voluntary basis but that of mandatory minimum legal obligations of companies towards society, the environment and other stakeholders. So many questions arise: Are states complying with the norms and laws. Do the systems processes provide for remedies? What level of corporate profit is required to ensure long-term business success? Can a company optimise profits, for shareholders so atomistically and immorally as to decrease its capability to influence and manage other stakeholders? Can companies improve their performance economically and financially by undertaking their core business in a manner that conforms with impact on the broader society. In short, is there morality in naked capitalism?

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INTRODUCTION

Colonialism partly grew out of the need of Western European capitalists to find markets for rising industrial products as well as raw materials to feed the industries. The system adversely effected both the agricultural and industrial sectors of the affected economies. Lord Lugard constantly highlighted the purpose of the British economic pursuit in his public presentations: (1893:381-382) as follows:

It is in order to foster the growth of the trade of this country (i.e. Britain) and to find outlets for our manufacturers and our

energy, that our far-seeking statesmen and commercial men advocate colonial expansion.... If our advent in Africa introduces civilization, peace and good government, abolishes the slave trade, and affects other advantages for Africa, it must not be therefore supposed that this was our sole and only aim in going there. However greatly such objects may weigh with a large and powerful section of the nation, I do not believe that in these days our national policy is based on motives of philanthropy only.

Lord Lugard's pronouncements were directed at those sections of the British tax-payers who thought that British colonial ambition was too expensive. The colonial presence led to the appearance on the Nigerian scene of an increasing number of expatriates in banking, shipping and trading companies.

¹Friedman Milton "Capitalism and Freedom, University of Chicago Press, 1962. Friedman proclaimed that a corporation is a morally natural legal construct with maximizing for shareholders as its single purpose. Directors and executives were employed to achieve this.

Since the trading companies controlled the export as well as the import trade and fixed the prices not only on imported commodities but also on the exports produced by the Africans the huge profits that accrued from these activities went mainly to the companies and their shareholders and not for any stakeholder activities.² Furthermore, corporate expansion and profitability resulted in contamination of aquatic and non-aquatic ecosystems by deleterious toxicants like untreated waste from textile companies, breweries, refineries, pharmaceutical companies and construction projects which also dislocated whole communities, caused dreadful diseases.

Globally, there have been regional and approaches to the environmental problems created by corporate expansions. The European Commission generally approached CSR of companies as the responsibility of enterprises for their impacts on society, with the aims of:³

- Maximizing the creation of shared values for their owners or shareholders and for their other stakeholders and society at large⁴.
- Identifying, preventing and mitigating their possible adverse impacts⁵.

The UN Sub-Commission on Human Rights concluded a treaty-like document called Norm on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights⁶. Essentially, the norms impose on companies, directly under international law, essentially the same range of human rights duties that States have accepted for themselves under Treaties already ratified. The framework rests on three pillars:

- The state duty to protect against rights abuses by third parties, including business, through appropriate policies, regulations, and adjudication.
- An independent corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved;⁷
- Greater access by victims to effective remedies, judicial and non-judicial.
- Many international declarations and instruments on the environment have been affirming the rights of communities and individuals to clean and healthy environment⁸. The salient principles and covenants can be summarised:

- Utilization of the environment must conform with sustainable development i.e. the development needs of the present generation must align with future interests. Consequently, environmental degradation of any form cannot be allowed as part of a natural consequence of economic and industrial development.
- All stakeholders in the society i.e. government, non-governmental organisations, universities, businesses and private persons must collaborate and synergize towards uniform goals of environmental sustenance.
- Precautions must be taken against any possible harmful environmental consequence of socio-economic or military activities. Such precautions include Environmental Impact Assessment (EIA), Environmental Risk Assessment (ERA), Environmental Audit and Environmental Monitoring.
- Countries should ensure that their nationally determined contributions are clear implementable and enforced.
- Polluters must remediate including paying adequate compensation for pollution.
- Government and non-government institutions are to form Global partnerships to conserve, protect and restore the health and integrity of the earth's ecosystem.
- Countries need to enact their respective frameworks for environmental laws⁹.

Global Judicial Approaches on the Protection of the Environment

Globally, the courts have displayed ingenuity and astuteness in applying the necessary rules of interpretation (Mischief and Golden rules) in order to advance the right to a clean and healthy environment as a necessary corollary of the right to life enforceable under national constitutions.

- **Industrial Pollution:** In the Nigerian case of *J. A. Adediran and Anor v. Interland Transport Ltd*¹⁰ the Supreme Court held that a plaintiff has a right of action in nuisance. The communities and individuals of on Estate in Lagos Nigeria petitioned against noise, blocking of access roads, and unsafe environment for children.
- **Blocking public streams by construction of dams:** In *Amos v. Shell DC Nig. Ltd*¹¹, the action of the defendants in building a dam to facilitate their operations had blocked the stream resulting in flooding of the upstream and drying the downstream of the creek. This had disrupted commercial agricultural and economic activities within the area. The defendants were held liable for public nuisance.
- **Cement production and damages to crops, streams, buildings:** In *Jimoh Lawani v. West African Portland Cement Co.*¹² the Court admitted that the plaintiff's action was rightly brought for damages to crops, streams and buildings by cement production which was public nuisance. However, a technical point of classification of the action prevented redress.

² The Presidency, Sixth Report on Privatization & Commercialization of Enterprises in Nigeria (1976).

³ The Nature & Scope of Corporate Social Responsibility: Responsible Business Conduct. Thomas H. Davenport & Julia Kerby (HBR), June, 2015.

⁴ Legesse, Asmarom, "Towards a theory of Human Rights (1980) 124

⁵ Penna and Campbell "Human Rights & Culture, 3rd World Quarterly (1998) vol. 19, No. 1, pp. 7 – 27.

⁶ John Gerrard Ruggie & Tamaryn Nelson: Human Rights and the OECD Guidelines for multinational Enterprises. Normative Innovations and Implementation Challenges, May 2015 CRI Working Paper No. 66.

⁷ Barnett, Michael L. (2007). Stakeholder influence capacity and the variability of financial returns to corporate social responsibility, University of South Florida, (2007). Vol. 32, No. 3, 794 - 816

⁸ The Stockholm Declaration; The World Charter for Nature; The Rio Declaration on Environment, The Draft International Covenant on Environment and Development. 1992, UN Framework Convention on climate change, 188 governments have submitted in DC Kyoto Protocol, Paris Agreement 2015

⁹ The USA, China, Algeria (1983), Nigeria (1988), Guinea (1987), Burkina Faso (1994), Cape Verde (1993), Egypt (1994), Gambia (1994), Ghana (1994), Malawi (1996), have enacted such laws.

¹⁰ (1991) 9NWLR 155

¹¹ (1977) 6 SC (pt 109) 114

¹² (1986) LR 3HL 300

- **Gas flaring:** In the case of *Mr Jonah Gbenre v. Shell Petroleum Development Company Ltd*¹³ *inter alia*, the Federal High Court, (Benin Division) condemned the action of Shell and NNPC in continuing to flare gas in the course of their oil exploration and production activities in the applicants community. The court affirmed the activities as a violation of fundamental rights to life (including healthy environment) and dignity of human persons¹⁴.
- **Disposal of copper waste into beaches and destruction of marine life:** In the case of *Pedro Flores Y Otros v. Corporacion del cobre*¹⁵, (CODELCO), the Supreme Court of Chile applied Articles 19 (Right to Live in Unpolluted Environment) and 20 (legal action to enforce Art, 19) of the Constitution to restrain a mining company from further deposition of copper wastes into Chilean beaches, thereby destroying all traces of marine life in the area.
- Also, in *Fundacion Fauna Marina v. Ministerio de la production de la Proncia de la Bueno Aires*¹⁶ a Federal Argentinian judge invoked constitutional rights to a clean environment.
- **Hewing of timber:** In *Juan Antonio Oposa v. The Honorable Fulgencio S. Factorum*¹⁷, the Supreme Court of the Phillipines gave full effect to Article 16, Art 11, 1987 of their constitution providing for a right to a healthy and balanced ecology in accordance with the rhythm and harmony of nature. Licence for timber was reviewed and withdrawn in the overriding public interest.
- **Manufacturing:** In Uganda, the High Court in the case of *Greenwatch v. Attorney General and Anor*¹⁸ granted leave to an NGO registered and incorporated in Uganda to institute an action on behalf of citizens whose rights to a clean and healthy environment were being violated by the manufacture, distribution, sale and disposal of plastic bags, containers and food wrappers.
- **Dumping of Toxic waste:** In the case of *Indian Council for Environment-(legal Action) v. Union of India*¹⁹, the Supreme court of India held that the dumping of toxic and dangerous substances was a threat to the right to life. The Courts specifically acclaimed its power to protect the constitutionally guaranteed right to life by ordering the closure of the plants and directing the government to determine and recover the cost of remedial measures from the owners of the plant.
- **Vehicle emission of hazardous smoke:** In the case of *Foroogue v. Government of Bangladesh*²⁰, the Supreme Court of Bangladesh confirmed the right to life to include the right to enjoy life. The case concerned pollution by vehicles emission of hazardous smoke and emission of toxic air of Dhakar city.
- **Disposal of Toxic waste:** In *GaniFawehinmi v. SaniAbacha*²¹, the Supreme Court of Nigeria affirmed the rights of Ogoni people to environmental integrity. The

court specifically observed that Nigeria had domesticated *The African Charter on Human and Peoples' Rights* (Ratification and Enforcement) Act. Article 24, thereof, provides that: "All peoples shall have the right to a general satisfactory environment favourable to their development"

In this last case, two non-governmental organizations (NGOs) instituted an action against the government of Nigeria for violating the rights of Ogoni people at the African Commission. The NGOs alleged that owing to the oil exploration activities of the Shell Petroleum Development Company and Nigerian National Petroleum Corporation, the health and environment of the surrounding communities had been put in serious jeopardy as they disposed of toxic wastes into the local waterway contrary to applicable international environmental standards. The Supreme Court decided that, as a result of being ratified, the African Charter now forms part of Nigerian law thereby taking precedence over municipal laws, of Nigeria, even though it is not above the Nigerian Constitution.

The Court further held that Article 24 of the African Charter imposes an obligation on a government to take reasonable care and other measures to prevent pollution and ecological damage as well as promote conservation and ensure ecologically sustainable development and use of natural resources. It is noteworthy that Article 24 of the Charter is in consonance with section 20 of the 1999 of the Nigerian Constitution which requires the state to protect and improve the environment and safe guard the water, air and land, forest and wild life of Nigeria. Where the state fails to do so, individuals and NGOs can seek redress for violation of environmental statutes.

Municipal and Common Law Principles

In the USA, some states such as Florida, Michigan, Illinois, New York, provide for a right to a healthy environment in amendments to their Constitutions. This implies that the right to a healthy environment has been guaranteed by the Constitution of the State and an individual can move against a person or governmental agency to assert such a right. Also, the principle of strict liability applies for negligence based on causation and proximity²². Similarly, the United States legislation on oil pollution and compensation and the Indian Supreme Court rely on "absolute liability concept" to compel the polluters to pay for their actions. In *Uganda v Netherlands case*, it was held that the Dutch government had breached its duty of care to its citizens for failing to adopt more stringent greenhouse gas reduction targets.

Predatory Exploitation of Natural Resources

Interest in natural resources has sustained armed conflict through companies who evade prosecution by the International Criminal Court or other war crime tribunal. For example, over 125 companies are alleged to have contributed directly or indirectly to the conflict in the Democratic Republic of Congo DRC in which about five million people were killed. Most of the companies involved were multinational enterprises operating within the OECD.

²²Rylands v Fletcher 1868 – UKHL. In that case, Fletcher employed independent contractors, build a reservoir. He played no active role but the contractor was negligent in not sealing disused mines. He was strictly liable for environmental breach.

¹³Suit No. FHC/B/CS/53/05

¹⁴ These rights are guaranteed by sections 44(1) and 34(1) of the 1999 Constitution of the Federal Republic of Nigeria, and reinforced by Arts. 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement Act, Cap A9, Vol. 1, Laws of the Federation of Nigeria, 2004

¹⁵81, (1988) 12. 753. FS 641 (Chile)

¹⁶No 11 March, 2006 Commercial Court No. 11

¹⁷G.R No. 101083, Supreme Court Phil. July 10, 1993

¹⁸(2003) EALR IEA 83 (CAK)

¹⁹(1996) AIR 1446

²⁰(1997) 50 DLR (HCD) (1998) 84

²¹2001 51 WRN 29 S Ct. June 2015

Predatory exploitation of natural resources carried out directly by insurgents amount to theft and stealing under domestic law, as relevant municipal laws continue to apply. Criminal proceedings may be instituted under municipal courts against insurgents and corporations involved in stealing natural resources²³. In the *I.G Farben Trial – The United States of America v. Carl Kraush²⁴ & 22 Orsi.e Nuremberg trial*, the tribunal found the defendants/accused persons liable for spoilation and plunder in occupied territories based on the inviolability of property rights both public and private during military occupancy; Farben and others used its technical knowledge and resources to plunder and exploit the chemical industry, used poison gas in extermination of concentration camps inmates and provision of toxic chemicals.

Also, on the issue of exploiting natural resources, the case of Charles Taylor succinctly demonstrates the criminal aspect of the breach of international humanitarian law. The trial highlighted the manner in which insurgents worked with immoral capitalists, to pillage natural resources. One of the main targets of the RUF²⁵ was the diamonds deposited in Sierra Leone. The Revolutionary United Front of Sierra Leone (RUF) received annual revenues of millions of dollars from the mining of diamonds. During the proceedings, Naomi Campbell testified to receiving a few “dirty pebbles” the night after a dinner party with Charles Taylor but said she did not know the source of the gift. In 2001, in an effort to halt the smuggling, the U.N imposed sanctions upon the export of diamonds from Liberia.

The Role of minority Shareholders, other Creditors and project financiers

Consequently, on environmental breaches, there is convergence between public policy, law and morality. Legally, the veil of incorporation will be lifted for application of the UN guidelines to subsidiaries, creditors and project financiers for injunction and other remedies. These principles applied to POSCO’s case, where a coalition of NGOs from South Korea, the Netherlands and Norway (Lok Shakti Abhiyan, South Korean Trans National Corporations Watch, Fair Green and Global Alliance, and the Forum for Environmental Development) filed complaints with their respective National Contact Points (NCPs) regarding POSCO’s proposed iron mine, steel plant and related infrastructure such as a port and roads in Odisha, India²⁶. The complaint was filed against POSCO and its joint venture POSCO India Private Limited. The coalition of NGOs maintained that POSCO did not conduct human rights and environmental due diligence, including adequately consulting with communities about actual and potential impacts. Accordingly, POSCO could not be in a position to “seek to prevent and mitigate human rights abuses directly linked to their operations and exercise their leverage to protect human rights” – including the 20,000 people expected to be economically and physically displaced. Furthermore, the NGOs sought to hold responsible several project investors. The Dutch Pension Fund (ABP) and its pension funds asset manager, All Pension Group (APG) who were project financiers. Other respondents were the Norwegian

Government Pension Fund Global (GPF), the world’s largest sovereign wealth fund, and its operational fund manager, Norges Bank [Norway’s Central Bank] Investment Management (NBIM) – which were signatories to a 2011 investor statement supporting the adoption of the United Nations Guiding Principles on Business and Human Rights. The complainants specifically averred that as investors the fund managers should seek to prevent or mitigate adverse impacts directly linked to their operations through their financial relationships with POSCO. ABP reportedly had shares in POSCO worth approximately €17 million, and as of December 2012 NBIM’s holdings in POSCO amounted to 1,420 million NOK, representing a 0.9% of ownership share²⁷. Norges Bank (Norway’s Central Bank) Investment Management (NBIM) asserted that the OECD Guidelines did not apply to minority shareholders who did not control companies and essentially ignored the complaint. In May 2013 the Norwegian NCP issued a final statement drawing on the OECD Guidelines as well as the UN Guiding Principles as a source document. Also, a letter written by the NCP requesting guidance from the UN Office of the High Commissioner for Human Rights on the applicability of the GPS to minority shareholders, was referred to. After extensive consideration, the Norwegian NCP concluded that the Guidelines apply to all types of business relationship. Particularly, the Guidelines’ Commentary defines business relationship to include “relationships with business partners, entities in the supply chain and any other non-State or State entity directly linked to its business operations, products or services. The NCP added that “the Guidelines do not make any exception for minority shareholders. Furthermore, the NCP stated that the size or percentage of the shareholding is not a determining factor in the attribution of responsibility, and that “although the [Norwegian Government Pension] Fund’s equity investment in any single enterprise is on average one per cent and does not often exceed five per cent, this can nonetheless be a significantly large investment in monetary terms”.

Norwegian Finance Ministry has sought a clarification from the OECD Working Party on Responsible Business Conduct, a subsidiary body of the Investment Committee composed of representatives of all countries adhering to the Guidelines, regarding the applicability of the Guidelines to financial institutions and to minority shareholders.

Some major complaints on Environmental breaches in the world

- Housing and health abuses relating to the 2010 earthquake in New Zealand by construction and insurance companies.²⁸

²⁷ POSCO’s project would add 12m tonnes of steel annually but with negative impact on the environment. Complaints of non-implementation of Forest Rights Act, resulted in the National Green Tribunal suspending the licence in 2013. In 2014, Canada announced a CSR new strategy, “Doing Business the Canadian Way: A Strategy to Advance Corporate Social responsibility in Canada’s Extractive Sector Abroad.” The strategy references both the Guidelines and the UN Guiding principles, and affirms that non-cooperation by any company with NCP or any negative funding of a company will attract penal consequences by government.

One of the penalties for CSR defaulters is the withdrawal of the support of Canadian governments in foreign markets will be withdrawn.

²⁸ WeCAN vs. Vero Insurance NZ Ltd, IAG NZ Ltd, Tower Insurance, Fletcher Construction Company Ltd, 11th Nov. 2013; WeCAN vs. Southern Response & Earthquake Commission (EQC) CA 520/2013; Arrow International

²³ Some International Humanitarian Laws prohibit pillage

²⁴ US Military Trial (1947)

²⁵ RUF was a rebel army that fought a failed 10 years’ war in Sierra Leone starting in 1991.

²⁶ POSCO India Private Ltd is an Indian subsidiary of the Korean conglomerate POSCO.

- Dutch bank financing palm oil development without conducting adequate due diligence.
- Lack of due diligence and mitigation of impact related to the Formula One Grand Prix in Bahrain against UK companies.
- Alleged environmental and human rights impact in Laos, Thailand, Cambodia, and Vietnam²⁹ by an Austrian engineering firm.³⁰
- Lack of due diligence, inadequate consultation with communities, and informing the public of environmental, health and safety risks; evading new laws and regulations by Oil exploration in Virunga National PARK (DRC).³¹
- Inadequate stakeholder engagement with indigenous communities, environmental risks, poor working conditions, forced displacement and involvement in state repression of protests in Ecuador against three German multinationals.
- B.T company's involvement in providing infrastructure related to the use of drones in Yemen³².

Conclusions

- Although, different civilizations or societies have different conceptions and attitudes to social responsibilities, there seems to be a universal consensus embedded in international conventions, national constitutions, municipal laws, case law, and declarations by NGOs and other private institutions that there must be urgent global collaboration on enforcement to protect the environment.
- The law imposes certain obligations on directors of companies to manage in the interest of stakeholders which include shareholders both present and future. A larger body of rules imposed by morality, good reason and public policies are crucial to the survival of the corporation.
- Current developmental needs and aspirations must not jeopardize those of future generations.
- Good corporate governance contributes to corporation's competitiveness. In fact, the overall success of a corporation may only be attained if corporate governance embraces a wider range of themes which include:
- Financial viability of the company and economic prosperity;

- Internal and external constituencies;
- Environmental concerns and ethical issues.
- Corporations usually depend on shareholders equity and debt financing with the responsibility of managing the funds lying in the hands of the directors and other corporate managers. However, due to CSR issues, many investors face the risk of the returns on their investment not materializing.
- There is need to develop diverse regulatory and monitoring institutions to incorporate CSR in the various aspects of business endeavours e.g. technology, emerging markets, education, health, labour, telecommunication, manufacturing initiatives.
- Legislation on environmental protection should become rule-oriented i.e. proactive. Rule oriented laws place emphasis on prohibition, administrative or judicial remedies through assessment, planning and coordination. Result-oriented laws are more concerned with civil and criminal penalties and compensation payment. This could be useful because of their deterrent effect on future conduct but rule-oriented laws are recommended because they are geared towards initial compliance with rules regulating the use of the environment with the aim of preserving damage in the first place.
- Implementation of environmental laws should be done with increased public awareness and participation as well as political will³³. The Ministries of Environment, the Federal Environmental Protection Agency, the State Environmental Agencies and the Local Council Authorities, Non-Government Organisations, Communities, and all other stakeholders, should ensure enforcement of Multilateral Agreements, legislations, the constitution and other instruments.
- There should be synergy of case law legislations and legal principles in jurisdictions. Judges should be dynamic and creative in interpreting laws, adopting a mischief approach rather than a legalistic approach. Particularly, efforts should be stepped up to bridge the capacity gap of quantity and quality of training and retraining judges, lawyers and other stakeholders on environmental law.
- The environment of the entire world is endangered which calls for concerted efforts to save it from further degradation. Serious steps should be taken to restore or rehabilitate the environment where harm has already been done. Governments must be involved at international, regional and national levels.
- Higher awareness and interest are required by the financial sector from investment planning up to insurance options and other aspects of business development.
- Cyclically, this approach can result in shareholders reaping large profits, consumers enjoying cheaper products and workers get better packages.

Friends of the Earth vs. Rabobank.

²⁹Americans For Democracy and Human Rights in Bahrain vs. Formula One Management Ltd, April 2015 (mediation case).

³⁰Center for Social Research and Development et al vs. Andritz AG, The role of Andritz AG in Laos, Vietnam dam, April 2014.

³¹Canada Tibet Committee vs. China Gold Int. Resources where 83 miners were buried, January 2014

International Union of Food, Agriculture, Hotel, Restaurant, Catering, Tobacco & Allied Workers' Association (IUF) vs. Mondelez Int'l; WWF vs. SOCO dated 7/10/2013, complained about UK SOCO's oil exploration activities which disregarded legal commitments to preserve Virunga as a World Heritage Site.

Alleged violation of employee rights in Bangladesh; FIDH et al vs. Corriente Resources Inc.

³²Privacy International vs. Vodafone Cable, Interroute, Level 3, BT, Verison Enterprise, Viatel (2014). Case Nos IPT/14/85/CH& IPT/120 – 126/CH.

³³Privacy International vs. Vodafone Cable, Interroute, Level 3, BT, Verison Enterprise, Viatel (2014). Case Nos IPT/14/85/CH& IPT/120 – 126/CH.

Reprieve vs. BT – Reprieve alleged BT contributed to gross Human Rights abuses by providing key communication infrastructure from US military base to Djibouti.

³³Gibson J. E and Haktar, F. (1994): "Strengthening the Environmental Law in Developing Countries" p. 3.