February 12, 2013

CSR AND LAW AS ALTERNATIVE REGULATORY SYSTEMS

Benedict Sheehy, RMIT University
CSR AND LAW AS ALTERNATIVE REGULATORY SYSTEMS

By Dr Benedict Sheehy
## TABLE OF CONTENTS

1. Introduction: Understanding The Problem ................................................................. 3  
   a. Social Costs: Labour and Environment ............................................................... 6  
   b. Concentrations of wealth and power ................................................................ 8  
   c. Role of the Corporation and Law ..................................................................... 9  

3. Systems: Social, Political, Legal and Economic ....................................................... 10  

4. A Systems Understanding of the Problem of Social Costs, Concentrations and Law .... 12  

5. Analysis of System Encroachments, Contamination and System Failures .............. 17  
   a. Analysis of Economic Subsystem Failure and Effects ......................................... 17  
   b. Analysis of Legal Subsystem ........................................................................... 18  
   c. Analysis of Corporate Law and Law Reform ..................................................... 19  


7. CSR as Private Law in Systems Perspective ............................................................... 23  
   a. Public Law as Regulation ................................................................................. 24  
   b. Public Law and Corporations .......................................................................... 25  
   c. CSR as regulation ........................................................................................... 26  
   d. CSR regulating LIO.......................................................................................... 28  

8. Public and Private Law ............................................................................................ 23  

9. Regulating LIO, Regulation the Corporation ............................................................. 31  
   a. Social costs ...................................................................................................... 32  
   b. Concentration of decision making and LIO as Political Actor ......................... 32  
   c. Construal of Industrial Organisation: Corporate Models ............................... 35  

10. Systems Regulatory Solution .................................................................................. 36  

11. Conclusion ............................................................................................................. 41  

Abstract: CSR (Corporate Social Responsibility) is an increasingly important area of corporate and legal concern. In addition to problems defining the meaning of the term and understanding the implications for, there is a lack of understanding how it can, does and should interact with law. This paper answers this gap using a method used in the sociology of law, systems theory. The paper argues that CSR can be understood as a response to social costs and law's apparent failure to curb those costs. It focuses the examination on social costs generated by large industrial organisations and how they are regulated by public and private regulatory systems. It concludes with an innovative suggestion integrating ideas from ecological economic systems with both new and traditional regulatory solutions.
1. Introduction: Understanding The Problem

Corporate Social Responsibility, “CSR”, is an interesting and important phenomenon from a variety of perspectives. Its history, development, debates and undulating presence as a soft law or institutional guide for corporate conduct, all merit consideration. This paper scrutinises the phenomenon of CSR in the latter role, guiding corporate conduct, and how that role interacts with the role of public law. It does so using a systems perspective to investigate, illuminate and explain both the phenomenon and its interaction.

Control of the corporation has long been contested, but particularly so since its use by large industrial organisations. While the history of corporate law can be read in many ways, one reading of it is as a history of the contest between a wealthy minority seeking to maintain power and privilege, and a majority seeking to spread more widely the benefits and constrain the negative externalities of industrial activity. In this telling, the majorities have relied on their political power to force change, while the powerful minority have relied on political connections combined with promises of good behaviour and well-publicised philanthropy to resist the constraints and re-distributions sought by the majorities. From a political perspective the concentrations of wealth and power associated with the corporation have been viewed as anti-democratic in nature and the subject of scholarly investigation and debate for more than three quarters of a century. In such analyses, corporations have been a focal point of the contest.

Such broad brush strokes, of course, fail to take account of the subtleties and shifts in historic-socio-political discourse, changes in the environment, both natural and social at a global level, and the impact of these shifts and changes on corporate practices, corporate control and industrial activity. The point of the discussion, however, is that regulatory efforts aimed at the corporation and its control—i.e. the common concern to constrain corporate harms (i.e. social costs) and distribute more widely corporate benefits on some basis other than pre-existing wealth on the one hand, and the opposing efforts of the elite seeking to resist those claims and to continue externalising costs and concentrating the benefits utilising the corporation on the other—has a long and chequered history.

It is critical to note at the outset, though, that the issue is not necessarily as framed—an issue of the corporation per se. Indeed, industrial activity was usually

---

1 One may consider the early twentieth century’s concerns with corporate power as a starting point if one chooses to ignore medieval contests between ecclesiastical and secular authorities.


3 ADOLF A. BERLE & GARDINER C. MEANS, The Modern Corporation and Private Property (Harcourt, Brace & World, 1968); E. MERRICK DODD, For Whom are Corporate Managers Trustees?, 45 Harvard Law Review (1932); and of course, before then by Thorstein Veblen THORSTEIN VEBLEN, The Higher Learning in America: A Memorandum on the Conduct of Universities by Businessmen (Hill and Wang, 1957); and THORSTEIN (NEW YORK VEBLEN, MENTOR, P. 182., The Theory of Business Enterprise (1958 [1904]), among others.

4 S SOULE, Contention and Corporate Social Responsibility (Cambridge University Press. 2009).


organised by way of trusts than corporations in some countries. Rather the issues to a large degree are those surrounding large industrial organisations.

The colloquial conflation of large industrial organisations and the legal corporation confuses the analysis. In this regard, it is common to hear reference to “corporate social responsibility”, “corporate excess” and “corporate irresponsibility.” This conflation, however, not only fails to add clarity, it obscures the real issues. Accordingly, instead of pursuing a misguided focus on the corporation-cum-industrial organisation, this paper distinguishes carefully between the two. When large industrial organisations are the focus, the acronym “LIO” will be used. When the legal body of the corporation is intended, the term “legal corporation” is used with the adjective “legal” to emphasise the usage. While it is understood that most LIO’s are organised as legal corporations, or indeed collectives of corporations, to conflate the two undermines the strength of the analysis. The separate issue arising from the LIO’s use of legal corporation is that the corporation not only forms the foundation for most LIO’s and provides an organisational framework, but it increases exponentially the potential benefit as well as the negative costs of the LIO. Accordingly, the separate analysis of the legal corporation will be necessary. Before that can happen, however, a clearer understanding of the contest is necessary.

The issues under contest are three-fold. They can be characterised normatively as: what should the purpose of LIO be? Second, in terms of distributions: who should get what benefits and who should bear what costs? And third who should have the right to make these purposive and distributive decisions? Essentially, the questions are about how to characterise the LIO and where to draw its boundaries—i.e. to decide who are insiders and have their values implemented and who will be external to the LIO and can be ignored. These are evidently political issues and political agendas have regulatory programs.

One major set of private regulatory initiatives is aimed at industrial organisations. This set includes various industry focused private regulatory initiatives such as the chemical industry’s Responsible Care program, the forest industry’s

---

7 For example, the USA’s anti-trust and combines movement, led by US Supreme Court Justice Brandeis, was focused on breaking up the trusts which were harming the US society and economy. PHILIP CULLIS, The Limits of Progressivism: Louis Brandeis, Democracy and the Corporation, 30 Journal of American Studies (1996), D LITOWITZ, Are Corporations Evil?, 58 U. Miami L. Rev (2004).


13 SHEEHY, Conflicts between CSR, Corporate Law and the Problems of Social Costs.


Forestry Stewardship Council and the jewellery industry’s Kimberley Process, as well the broader industry wide ISO 2600, and even the publicly sponsored private regulatory initiative, the UN sponsored GRI. This group of private regulatory programs can be grouped together under the umbrella term, CSR. The regulatory space around industrial organisations, however, is already dense with public law. This observation of CSR as private regulation and public law as co-existing regulatory systems, both attempting to regulate LIO, is a phenomenon under theorised and unexplained in the literature. As noted, therefore, this paper explores and seeks to explain this phenomenon using systems theory.

Traditionally public governments have been the sole source of regulation in the social system.16 This tradition, however, has been in decline over the recent decades for a variety of reasons.17 After the collapse of Keynesian economics in the 1970’s, governments were increasingly subject of business criticism generated by normative neo-classical economists, and as governments shifted toward neo-liberalism, they became increasingly reluctant to constrain business.18 This has led to the decline of the welfare state and rise of the regulatory state, and an increase in what political scientists refer to as “private politics”.19 Finally, changes in thinking about the nature and possibilities of regulation20 have led to the development of new forms of regulation including among others private self-regulation.21 This change in regulatory studies and practices amounts to what can be described as a revolution in regulation. In sum, at a basic level, these changes represent fundamental changes in society’s institutions and hence, the social system.

Turning the attention to systems, a feature of all systems is that they rely on some form of regulation in order to operate.22 From a systems perspective, which shall be discussed in greater detail below, a regulatory subsystem23 is necessary to control activity within a system to prevent its explosion or implosion. The regulatory subsystems control inputs, throughputs and outputs and further, they control the border between a system and its environment ensuring adequate transfers for sustaining the system, while preventing it from being overrun. That is, regulatory subsystems and their mechanisms and processes have both internally and externally focused activities and dimensions.24

Bringing together these three issues and ideas—the control of LIO, new regulatory approaches, and systems thinking—permits new thinking about and

16 SOULE., 31-35
18 DAVID HARVEY, A Brief History of Neoliberalism (Oxford University Press. 2005).
19 SOULE., 30
evaluation of the public and private regulatory systems for the LIO. This shift of the discussion about the control of the LIO from the contest of the political sphere to the regulatory sphere leads to a re-framing of the basic issue. Whereas in the political sphere, the question is a power contest, from a regulatory perspective, the question is: how best to control the power generated and concentrated by the LIO and the LIO’s use of the legal corporation without destroying its benefits?

There are two main approaches contending for regulatory control of the LIO and collaterally, the legal corporation. These are: a public law solution which works through a combination of the laws of corporations, contract, tort, environment and labour, and a private law solution in the form of CSR. The efforts of these two regulatory initiatives do not coalesce. Different points of reference, different objectives and different methods bring them into conflict. One way to think about the issues is as CSR and law as competing or alternatively, as symbiotic regulatory systems.

This article explores these two approaches—public and private law—by examining the nature, strengths, weaknesses and limitations of the two regulatory systems, and the conflicts between them. It analyses this regulatory contest using systems theories. Systems theory, applied by Luhmann to social systems, provides a way of understanding the structures and processes in society and as such, a way to examine and analyse the dynamic interaction between actors and subsystems within society. Applying Luhmann’s theory to the problem at hand provides new insight, first into the nature of the problem and second, into how the private regulatory system of CSR might interact and contend with the public legal subsystem to regulate industry. Before turning to this examination and analysis, however, a better understanding of the problem being addressed by both public and private regulatory systems is necessary.

2. Framing the Problem

The three normative questions raised about LIO do not arise in a socio-historical vacuum. Rather, they reflect a set of broader concerns or problems. Although there is a lack of consensus on the nature of the problems, there is discussion about three interrelated phenomena and their related issues. These are: the social and environmental consequences of industrialisation, the political and economic consequences of LIO in which power is concentrated in the hands of a few, and the role of the law and its legal person, the corporation. The paper turns next to address each in turn.

a. Social Costs: Labour and Environment

The first issue, discussed in economic terms as negative externalities, or social costs, refers to the harmful aspects of industrial production and particularly,

25 Soule., 31-35
26 Sheehy, Conflicts between CSR, Corporate Law and the Problems of Social Costs.
27 See for example, the discussion in Gar Alperovitz, America Beyond Capitalism: Reclaiming Our Wealth, Our Liberty, and Our Democracy (John Wiley & Sons. 2005).
28 Soule.
those of the LIO. This facet of the debate, as noted above, can be conceived of politically as about who should bear what costs of industrial activity, with the parties being private corporate interests on the one side, and the general public on the other. These issues have been identified in the discussion of private politics as matters of LIO policy, products and negligence. These political questions first became an issue in the late 18th century with Speenhamland, as the expansion of the economy led to merchants investing in fixed plant and led in the 19th century to a broader social reform movement associated with the 7th Earl of Shaftesbury and the effort to reform working conditions for the working class generally including their work in factories, mines, and chimneys, and continued intermittently throughout the 20th century with the Depression. More recently, large scale changes in work as a result of de-industrialisation in developed countries, consumer injuries and mass pollution, enlivening concern about new types of social costs again in the early 21st century which reflect, among other things, an extension of concerns about the consequences of globalisation stemming from the technological innovations and changes and their impacts on the natural and social environment of the last part of the 20th century.

Social costs as Kapp defines them are:
“all direct and indirect losses sustained by third persons or the general public as a result of unrestrained economic activities. These social losses may take the form of damages to human health; they may find their expression in the destruction or deterioration of property values and the premature depletion of natural wealth; they may also be evidenced in an impairment of less tangible values.”

The nature and extent of externalities increased exponentially in this period with innovations of such things as factory ships which drain the fish stocks of the oceans much more efficiently; the business take over of the natural environment through such things as the manipulation and patenting of genes, its increased control over public dialogue through such things as concentration of ownership of mass media and telecommunications, and control over democratic governments providing policy to government through business lobbying, think-tanks resulting various pro-business legislation in the national sphere and in international trade regulations.

The issues of industrial activity have spread to all parts of the globe in terms of social and political activity, and in ultimate terms challenging the ecological and political foundations of human life on the planet.

30 Id. at.
31 SOULE. 54-64.
32 KARL POLANYI, The Great Transformation (Beacon Press. 1944, 2001). p. 78
33 Id. at. 171-184
34 Factory Act 1833 (3 & 4 Will. IV) c103
35 Mines and Collieries Act 1842 (c. 99)
36 Chimney Sweepers and Chimneys Regulation Act 1840
37 There is a vast literature on these subjects of globalisation and its effects. See for example, JURGEN OSTERHAMMEL & NIELS P. PETERSSON, Globalization: A Short History (Princeton University Press. 2005), JOSEPH E. STIGLITZ, Globalization and its discontents ( W. W. Norton. 2002), SASKIA SASSEN, A Sociology of Globalization (W.W. Norton. 2007), etc and the often over-looked issue that this is not the first globalisation. AG HOPKINS, Globalisation In World History (Random House 2002).
This first set of problems, as noted, has been recognised for centuries and had different regulatory solutions proposed with varying degrees of success. Regulatory solutions have been focused on the mitigation of the degradation of the natural environment and the social consequences of the commodification of labour— including the above noted efforts to limit exposure to harmful work environments and practices, and improve working conditions generally. They are essentially calls for changes in the organisation of work and a simultaneous reduction of the impacts of industrial production on the natural environment.

b. Concentrations of wealth and power

The second issue is more contentious. Whether one thinks the concentration of wealth and power is problematic depends on basic political philosophies as much as it does on one’s position relative to that concentration—or at least one’s view of such. Unsurprisingly, those at the heart of the concentration, and those aspiring to or hopeful of achieving those positions, are unlikely to see it as problematic. Further, those of a conservative mindset or libertarian political philosophy are less likely to oppose the concentrations believing in the virtue of the status quo or in the case of libertarians, the virtue of the processes that led to the status quo. However, parties committed to democratic political philosophies, those who believe a society, and particularly a democratic one, functions better when inequality is not dramatic, and those committed to egalitarian principles are less likely to see these concentrations as unproblematic and more likely to see them as problems (or even social costs) to be addressed. As Justice Louis Brandeis, put it “We may have democracy in this country, or we may have wealth concentrated in the hands of a few, but we cannot have both.”

This problem has two aspects. First, as noted by Brandeis, it harms democratic societies which are based on limited power inequalities. Second, there is a concern about power concentrations as represented by LIO’s which control vast swathes of the planet, economies larger than the GDP’s of many countries, and are outside of democratic control. LIO’s in such positions not only manifest the control of geography, ecology and economic systems, but they also dominate the social sphere. They unilaterally control of people’s activities through structured work,

---

40 Polanyi’s false commodities of labour, land and money. POLANYI.
41 Reseisarch demonstrates that lower classes support tax cuts for the top 1% of the wealthy on the hope that they too will one day be part of the 1%.
42 R. NOZICK, Anarchy, State, and Utopia (Basic Books. 1974). R.
45 I AYRES & A EDLIN, Don’t Tax the Rich. Tax Inequality Itself, New York Times 18 December 2011.. I have looked for the quotation but the closest I have found is from Brandeis testimony before Congress in which he stated: “the proposition that mere bigness can not be an offense against society is false because ... our society, which rests upon democracy, can not endure under such conditions. Quoted in CULLIS. p 394
46 SEWARD.
population movements by shifting locales of work, \(^{48}\) and through their domination of culture, \(^{49}\) people’s personal and collective preferences and aspirations. \(^{50}\) For example, one important aspect of the marked shift in the political environment toward the right was in part in a response to business’ recognition of the importance of control of mass media for the shaping of public dialogue, beliefs and government policy. \(^{51}\)

c. Role of the Corporation and Law

The third issue, also contentious, concerns the role of law generally and the corporation specifically. One group sees the first two problems, those of externalities and concentrations, in terms of failure of public law. \(^{52}\) That is, they believe that law has failed to live up to expectations: \(^{53}\) it has failed in its mandate to protect society and the environment from the negative consequences of industrialisation and LIO’s in particular. The other group, which opposes public control of matters currently in the private sphere, seeks to avoid this eventuality of public political determination to redistribute costs and benefits of industrialisation by extending the scope of LIO’s responsibility, \(^{54}\) to be co-extensive and co-terminal with the impacts of its activity. \(^{55}\)

In sum, at a more fundamental level, these problems can be characterised as problems which have arisen as a consequence of developments within the social system (i.e. the activities of society not concerned with production and distribution on profit bases), namely the freeing of the economic subsystem from the rest. This issue has been discussed in the political economy literature by Polanyi as a transformation in society, \(^{56}\) and as an issue of the disembedded economy in the sociology of economics literature. \(^{57}\) The social and economic system issues may be viewed and addressed in the first instance through systems theory.

Systems theory is outside the expertise of most law scholars and accordingly a brief introduction is presented next to assist the reader. After that brief introduction, the approach is applied to the problems just discussed.

---

\(^{48}\) Polanyi.

\(^{49}\) Consider for example, Disney, 20\(^{th}\) Century Fox, Sony and other major Hollywood studios, and recording companies which dominate music such that it is difficult for artists playing music of local significance to survive. See discussion in D Conversi, The limits of cultural globalisation?, 1 Journal of Critical Globalisation Studies (2010).

\(^{50}\) Sharon Beder, Global Spin: The Corporate Assault on Environmentalism (Green Books. 1997). in RICHARD STARKEY & RICHARD WELFORD, The Earthscan Reader In Business And Sustainable Development (Earthscan Publications 2000). Social and cultural domination by LIO’s are exemplified by companies such as News Ltd, Disney Studios with its ubiquitous Mickey Mouse, MGM, Pixar Studios animations.

\(^{51}\) Beder, in Starkey & Welford.

\(^{52}\) Greenfield.

\(^{53}\) Luhmann’s idea of law as an expectation, and law reform as being a response to excessive failure to live up to expectations, NIKLAS LUHMANN, Law as a social system (Fatima Kastner, et al. eds. Klaus A. Ziegert trans., Oxford University Press. 2004). 142ff.

\(^{54}\) This group, usually business advocates, hold a benign view of industrial activity and concentrations. The positions are well represented by Noam Chomsky’s concern with LIO’s impact on democracy NOAM CHOMSKY, Profit over People: Neoliberalism and Global Order (Seven Stories Press. 1999). on the one hand and Jerol Manheim’s attack on “anti-corporate” activists on the other J MANHEIM, Biz-War and the Out-of-Power Elite: The Progressive Left Attack on the Corporation (Lawrence Erlbaum Associates. 2004).

\(^{55}\) Polanyi.

\(^{56}\) MARK GRANOVETTER, Economic Embeddedness, in Contemporary Sociological Theory (C. Calhoun, et al. eds., 2007 [1985]).
3. Systems: Social, Political, Legal and Economic

Systems theory in broadest terms posits systems as a set of interacting, interdependent components. As a non-reductionist approach to complex problems, systems theory provides an approach to dynamic and complex phenomenon, including social systems. Nikolas Luhmann, who first applied systems theory—a theory developed in natural sciences—to social phenomenon, took his analysis further and applied it to law, examining law's characteristics as a subsystem of the larger social system. Systems, according to Luhmann, have three features: they must be able to understand their own function in relation to the whole; they must be able to observe other systems and so be able to gauge their performance; and hence, they must be able to observe themselves. These features he termed function, performance and self-reflexivity. Luhmann believed systems could be self-generating and would naturally tend to be self-regulating on the basis of these three features as systems are always embedded in environments.

Applying Luhmann's three features to the social system generally, it is argued that the function of the social system is to sustain human life on the planet. This norm underpins his first feature—system “function.” Everything, including subsystems such as the legal and economic subsystems must be understood and analysed in relation to its function in supporting the achievement of the objective of the larger function of the social system—“ensuring the satisfaction of future social needs.” In such an analysis, it is clear that the function of each subsystem subsumes a particular set of norms—from biological sustenance in the case of the ecology, to social order in terms of law, to production and distribution on the basis of profit as norms of a capitalist economic subsystem.

The feature of system analysis examines each subsystem in relation to other subsystems, the feature Luhmann refers to as “performance.” How a subsystem performs depends on how it interacts with adjacent subsystems. It may encroach upon, retreat from, interact symbiotically, or it may act parasitically or become prey. Society functions with a higher degree of stability to the extent that the subsystems are in stable, symbiotic relationships. Changes and upheaval in society can be explained as or by reference to subsystem performance, described more recently by systems thinkers as “crisis.” The final feature for analysis is each subsystem’s “self-reflective” activity. This activity occurs as a subsystem evaluates its activity and restrains itself to avoid undermining the differentiated, neighbouring specialised subsystems on which it, they and the overall system rely.

---

61 N. LUHMAN, Funktion der Religion (Suhrkamp. 1977.), cited in G TEUBNER, Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility, in Corporate Governance and Directors' Liabilities: Legal, Economic and Sociological Analysis on Corporate Social Responsibility (K. Hopl & G Teubner eds., 1984)., p. 162
62 LUHMAN., cited in TEUBNER, Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility., p. 162
64 LUHMANN, Law as a Social System., p. 180-81
The self-reflective activity is the regulatory function within a system. Luhmann understood this issue as problematic in relation to the legal subsystem. He wrote “To clarify at the outset that the relationship of this [legal] system with the all-embracing social system is ambivalent. On the one hand society is the environment for its legal subsystem; on the other hand, all operations of the legal subsystem are always also operations in society, that is, operations of the society. The legal subsystem performs in society by differentiating itself within the society. In other words, the legal subsystem creates its own territory by its own operations... Only when doing so does it develop a social environment of law within society.”

In other words, as legal language spreads law through a society, so too economic language, and in particular, its use in law, spreads economic norms through the legal subsystem.

At this point, I wish to depart from Luhmann’s view of the legal subsystem and social theory in two important ways. First, Luhmann views subsystem as having distinctive internal logics which organise their own concerns internally and exclude other subsystems’ logics and complexities, which subsystems are not visible to that particular system and simply form part of the environment. The thinking in this paper sees the subsystems as having boundaries that are not apolitical and autopoetic subject to hard operative closure, but as cognitive, contested and encroachable, particularly where language is shared. That is, I see systems as being susceptible to invasion, co-option, subversion and collapse where they share particular phenomenon and descriptors of such. It is not that Luhmann does not see this possibility—he does—however, Luhmann describes it in as an evolutionary or adaptational matter of one subsystem adopting norms of another subsystem rather than the result of political contest.

Teubner has addressed the issue of subsystems overreaching and harming neighbouring subsystems, which with respect to the legal subsystem he describes as creating a “regulatory trilemma.” The trilemma is that law may be irrelevant to the neighbouring systems, may damage neighbouring subsystems by overlegalising them, or be oversocialised itself, so destroying its self-reproductive ability. In

---

65 Id. at., 73
66 Luhmann sees subsystems as developing operative closure through reducing complexity internally through organising phenomena while excluding other complex phenomena not susceptible to its own classifications. LUHMANN, Law as a social system. p. 475
67 For example, in discussion systems self-reproduction, Luhmann observes that it does not always go well. These reproductions he describes as “deviant self-reproductions”.N LUHMANN, Social Systems (J Berdnarz & D Baecker trans., Stanford University Press. 1996). p 457. The method of encroachment can be explained in Luhmann’s system this way.
68 LUHMANN, Law as a social system. Chapter 3. Explained in a succinct, if summary form, in Introduction, Richard Nobles and David Schiff, id. at. p. 10-11. I am not arguing that Luhmann is wrong in his argument. Indeed, the analysis which follows supports this view. For example, law has adopted economic language particularly in corporate law in the Australian CLERP discussed below, or the adoption of contract language favoured by economics for the corporation, while manifestly inadequate, as demonstrated by Hayden in the High Court, and failing to distinguish between economists’ use of the term and legal uses. THOMAS W. JOO, Contract, Property, and the Role of Metaphor in Corporations Law 35 U.C. Davis L. Rev (2002). And in that same instance, the economists use of the language of “contract” but meaning something other than a legally enforceable agreement and “firm” not meaning a partnership all have reshaped law’s understanding and use of the terms. The use of terms like “citizen”, “consumer” likewise have been used to create confusion.
Teubner’s terms, the latter leads to a “juridification of the social spheres.” While Teubner’s concern has been how the legal subsystem interacts with neighbouring subsystems, Luhmann’s vision of the legal subsystem as autopoietic, making its blind determinations of what falls within and what is excluded ignores the political determination and regulation of the boundaries of the subsystems and leaves a marked gap in his analysis. And this gap is the second differentiation of this work from Luhmann—i.e. that Luhmann does not see an overall regulatory system at work mediating between subsystems or policing borders. As just noted, Teubner sees this potential problem. Again, it is not that Luhmann does not see the function of the legal system as regulatory. He does, and sees it in this regard as “a regulatory mechanism, serving the adaptation of society to its environment.” However, in his view of law so functioning, Luhmann does not see it as regulating other subsystems. Rather, it forms part of the environment of other subsystems influencing them, but no more.

The paper next turns to bring a systems approach to bear on the problems identified—social costs, concentrations of power and wealth, and the role of law.

4. A Systems Understanding of the Problem of Social Costs, Concentrations and Law

In terms of the problem at hand—i.e. regulation of LIO—the issue can be characterised as the meeting of three subsystems, namely, economic, law and politics—all housed in the social system which in turn finds its context in the ecology. (See Figure 1 below) The problems of the intersections of these three systems—i.e. the performance and function aspects—have been exacerbated first by the legal

70 Id. at.
71 See in LUHMANN, Law as a social system. Chapter 2
73 This view is not problematic in Luhmann’s theory which takes biology as its starting point and rejects (with good reason) the hierarchical model of government drawn from Europe’s history. LUHMANN, Law as a social system.. There is an irony that while economists interested in ecological systems call for a regulatory authority to control of human exploitation of ecological systems, ELINOR OSTROM, Governing the Commons: The Evolution of Institutions for Collective Action (Cambridge University Press. 1990)., Luhmann who bases his theory of human society on ecology does not.
75 LUHMANN, Law as a social system., 465
76 In this article, I use the term “economic subsystem” to continue with the conventions of systems discussion. However, this understanding of the economic subsystem is quite distinct from the understanding of the economic subsystem as the interaction of rational actors seeking to maximise utility at the margins, as per neo-classicists. E. ROY WEINTRAUB, Neoclassical Economics, Library of Economics and Liberty [online]) (David R. Henderson ed., Warner Books 1993). This latter view of the economic subsystem denies or ignores the critical role of social institutions—such things as law and its equitable principles, and ethics. This institutional support is more readily captured by the term “business system” which of course includes economic norms and concerns such as production, resource allocation on rational grounds of utility and efficiency, and it also takes account of social norms and institutions including politics and other types of human behaviour which are inadequately treated in orthodox neo-classical economic analysis. From a functional perspective, business is a system within contemporary society which produces and distributes goods and services. It does so via markets organised on profit norms. The business system then bridges the broader social norms and the economic subsystem.
corporation, and second, in the current era of globalisation, by new developments in their interaction, new problems and a re-defining of boundaries. Not only are the boundaries of the subsystems re-drawn, as is evident from neoliberalism’s changed conceptions of public and private, where the market has become the metaphor for all things private and the government re-defined as the regulatory state, but the overall system function has been re-cast. The core of the problem is twofold. First, the economic subsystem has been re-cast as the whole of the social system, its norms as superior, and all other subsystems as subordinate to it. In a theoretical analysis of the conflict between legal subsystem and the economic subsystem, this re-positioning of the economic has been described as follows: “[economics] not only seeks to reduce all legal decisions to calculations of utility, but also assumes that all of the activity surrounding law is economic in nature.” Second, economics’ normative project and resulting crowning of wealth as the ultimate value has reshaped society to devalue all else in relation to it. As a result, economic pursuit of wealth has become a significant normative driver of human behaviour in society.

An example of the economic subsystem’s invasion of neighbouring subsystems is the shift of the overall function of the social system from saving and preserving for the next generation, as suggested by Luhmann, to economic growth based on consumption driven by the current generation. It may be argued that the roles of the subsystems are undergoing dramatic reform as a result of the dynamics introduced by an unregulated and disembedded economic subsystem. Obviously, the unregulated economic subsystem acts without regard for the ecology. Polanyi puts it sharply as: “from the denudation of forests, from erosions to dust bowls, all of which, ultimately, depend upon the [economic] factor land, yet none of which respond to the supply-and-demand mechanism of the market” – albeit in a different argument. In other words, the ecology does not respond to economic supply and demand functions found in markets. Rather, the ecology operates on its own bio-geo-climatic systems. Clearly, a better framework for discussing such issues is a Social-Economic subsystems (SES) framework, discussed below.

The economic subsystem’s encroachment upon the legal subsystem can be seen in the implementation of economic language in law--i.e. communication. In the academy, the Law and Economics movement has taken up not only the method, but also the ideology of economics and its core value of efficiency. It attempts to shift

---

77 AMSTUTZ, Eroding Boundaries: On Financial Crisis and an Evolutionary Concept of Regulatory Reform, (7)
79 HARVEY.
80 Introduction, Richard Nobles and David Schiff, in LUHMANN, Law as a social system. P. 4
82 DAVID C. KORTEN, When Corporations Rule the World (Kumarian Press. 1995).
83 GRANOVETTER, ( and POLANYI.
84 POLANYI. 193
85 OSTROM.
86 The response that economics is science and not properly called ideology ignores the facts of both science and economics. See DANIEL HAUSMANN, The Inexact and Separate Science of Economics (Cambridge University Press. 1992).
the goals and methods of law from equity and doctrine to efficiency, and makes and effort to make economic principles the main path of law.\textsuperscript{87} The economic subsystem, has also colonised the political system,\textsuperscript{88} or perhaps more accurately, developed using in its symbiotic relationship based on shared liberal political philosophy and neoclassical economic theory.\textsuperscript{89} Both systems when based upon liberalism view the unit of analysis as rational, independent, self-made individuals without society or community. As a result, investment in society or communal living is attacked whereas the commoditisation and privatisation of those commodities are seen as inherently desirable, manifestations of individual’s meritorious decisions. This reciprocal cycling of ideas has led to the encroachment and domination of the political by the economic subsystem.\textsuperscript{90}

The criticisms of government, even by businessmen favouring CSR is instructive. Hawkins, for example, writes: “In many cases governments fail to negotiate conclusions to disputes based on ideology whereas in business there is generally a compromise and deal to be made.”\textsuperscript{91} This criticism is misdirected because government and business have different goals—one is to make a profit, the other is to govern a society for its collective well-being. This prioritisation of economic norms is precisely the issue behind the failure of Habermas’ discursive democracy. Essentially, Habermas saw democracy developing out of a dialogue, informed by participants views being shared, refined, restated and ultimately adopted. If Habermas’ ideal fails to materialise, what’s left is likely to be something closer to the lowest common denominator—i.e. the economic.\textsuperscript{92}

One example of the encroachment by the economic on the political can be seen in the institutionalisation and dominance of cost-benefit analysis in policy. Whereas at first, such analysis was but one of a variety of measures, which itself is an implicit acknowledgement that benefits tend to be more widely distributed and hence more difficult to measure while costs are clear, quantifiable immediately, cost-benefit analysis has now become determinative of whether or not measures will be taken. In Australia, a federal government department, the Department of Finance and Deregulation, is dedicated to this task and so cast, favours the economic subsystem’s goals over other important social projects. In the same country a decade series of corporate law reform, known as the Corporate Law Economic Reform Program, was driven on the basis of economic norms. An example of the same phenomena in operation in the political sphere, where the political subsystem is seen as subordinated to and little more than essentially an underpinning of the economy is evident in some of Bill Clinton’s communications. His explanation to a journalist of his campaign was: “it’s the jobs, stupid” and at another point in more colourful

\textsuperscript{87} See, for example, \textsc{Richard Posner}, The Economics of Justice (Harvard University Press. 1983) and Melamad’s work.
\textsuperscript{88} JONES.
\textsuperscript{89} For discussion of the problem from an economic viewpoint see ROBERT ASHFORD, Milton Friedman’s Capitalism and Freedom: A Binary Economic Critique, 44 Journal of Economic Issues (2010)., in political terms see \textsc{Harvey}.
\textsuperscript{90} FERRARO, et al.
\textsuperscript{91} D HAWKINS, Corporate social responsibility: balancing tomorrow’s sustainability and today’s profitability (Palgrave 2006). p 64
\textsuperscript{92} AMSTUTZ, The Double Movement in Global Law: The Case of European Corporate Social Responsibility, ( 380

327520-text.native.1360729898.doc 14
"You mean to tell me that ... my re-election hinges on the Federal Reserve and a bunch of fucking bond traders?"³⁹³

It is not that economic analysis is blind to the issue. Indeed, it is well known to economists, referred to in economic language as externalities or "social costs"³⁹⁴ and is the subject of a large body of literature. Ultimately, the concerns about social costs are dealt with by others, parties external to the transaction through extending property rights,³⁹⁵ or in law and economics views of the corporation, extending contracting,³⁹⁶ or taxation³⁹⁷—again assuming negotiations concerning tax too are conducted between equals seeking to address public social costs as opposed to maximising private wealth.

This broad set of problems can be illustrated graphically in the following diagram, Figure 1.

---

Lang: en

**Figure 1: Systems in contest**

---

³⁹⁷ Chen & Hanson.
Figure 1 illustrates the systems under consideration. The whole of social activity, the social system, exists within the ecosphere. Accordingly, the ecological system functions in accord with laws of biology and is the ultimate system which surrounds all others and in which all others exist and upon which all others rely. The social system, represented by a dash-dot line rests within the ecological system and it contains all other subsystems. Its function of facilitating the survival of human society is coincident with its norm of social existence which also operates as a *grund norm* for all other systems. The interaction and interfacing of the other subsystems is somewhat more complex. The political system with its norm, power, operates within the social system—and it functions as the creator and distributor governance power among the population. It is socially embedded and is to some degree regulated by the legal subsystem—the rule of law ideal.

The legal subsystem, represented by a dotted line, itself functions as a normative regulator of power, i.e. the political, by prohibiting the ruling of a society on the basis of violent power, and instead inserts other values, be they political ideologies, religion or values such as equity. It extends beyond both business and politics into larger society, and even possibly into the ecosphere where one wishes to attribute rights to forms of life other than humans. Lastly, the economic subsystem, which is not contained by the legal subsystem or the political, but extends beyond both, is represented as encroaching on neighbouring systems. Where these subsystems overtake subsystems one had a situation leading to crisis.

Indeed, it has been argued that the financial collapse and ensuing crisis of 2008 is the consequence of this encroachment.

The discussion of the diagram thus far leads to a consideration of the economic subsystem’s prime actors, the LIO’s, as represented by the boxes. The LIO’s occupying legal corporations—i.e. the intersection of economic and legal subsystems—are connected to the legal subsystem by way of arrows which indicate that connection, and as part of the economic subsystem extend their reach through the rest of society’s systems and the ecology. The diagram illustrates how the economic subsystem encroaches on other neighbouring subsystems. While in Luhmann’s view, the legal system has a significant temporal dimension, an “immunisation” of society against undesirable futures, against anticipated possible crises.

---

98 Kelsen’s idea of the normative foundation of a legal subsystem, is the pre-legal grund norm. By using it in this context, I am arguing that the grund norm of the legal subsystem must be that which permits and sustains social existence. H. Kelsen, General Theory of Law and State (A Wedberg trans., Russell & Russell. 1961).

99 Luhmann comments on the difficulties associated with differentiating the political and legal subsystems. He writes that they are distinct in that while the political systems wields power, the legal subsystem wields norms and creates expectations. Luhmann, Law as a social system. 162-65.


100 Amstutz, Eroding Boundaries: On Financial Crisis and an Evolutionary Concept of Regulatory Reform, (Kjaer, et al. and in particular, Kjaer’s Introduction.  Luhmann’s curious use of language here makes sense where one thinks, as Luhmann does, about the legal subsystem’s function as “not to eliminate misconceptions about what is rights because in that

---
conflicts, a different orientation sees the function of the public legal subsystem as enacting, maintaining and adjudicating the political determination of the limitations or boundaries or powers of the differentiated subsystem within a society. In this sense, it is possible to talk about subsystems encroachments or over-powering neighbouring subsystems, and to speak of subsystem failures, as political acts and with their systemic consequences. Further, it allows such changes to be discussed as not simply as disembodied re-opening of subsystems which have achieved operative closure but equally, and perhaps more enlighteningly be described as a political movement seeking to shift costs and benefits, re-embedding industrial production into human society. CSR in this regard may be defined as a social effort to re-open the law’s closed operative system, not just cognitively, but also politically in terms of norms.

5. Analysis of System Encroachments, Contamination and System Failures

Applying the foregoing systems analysis to the three issues identified—labour and environment; concentrations of wealth and power; and the role of the corporation and law in society—leads to particular theorising. First, it leads to consideration of the impact of the economic subsystem with respect to social costs. To state the obvious, it is evident that priorities within society's normative ordering or value preferences have been shifted. This shifting has impacted society, the ecology and political systems. Second, it leads to an analysis of law, which has been involved in facilitating and inhibiting various developments of and in response to those changed priorities.

a. Analysis of Economic Subsystem Failure and Effects

First, as to the issue of LIO’s social costs or encroachment, the economic subsystem has expanded and encroached on the other subsystems in a manner coincident with its own economic norms. The economic subsystem’s encroachment on or failure to remain within its functional domain with respect to the overall social system—as can be seen in the rising inequality in society, which in case any problems would be easily loved... The immune systems enables society to cope with the structural risk of the continuous production of conflicts.” Luhmann, Law as a social system. 477.

Referred to by anthropologists as a second institutionalisation of institutionalised values—see discussion in Paul Bohannan, The Differing Realms of the Law, 67 American Anthropologist (1965).

And see the critique of Luhmann and discussion of judges activity in Saltman. pp 140-152.

Luhmann does not see it as encroachment. Rather, each system, as a self-referential, differentiated system, the logic of which comes from within its self-reproductive and reflective powers, interacts with its environment, and maintains only its own boundaries set to exclude and protect itself as a differentiated subsystem from the whole and adjacent subsystems. Luhmann, Law as a Social System.

And Luhmann would argue, expansionist tendencies of all systems.

turn has resulted in society’s inability to balance economic and ecological considerations with the consequent harm to the ecological system. The benefits are not shared equally and the costs visited disproportionately on those with less.

In terms of the impact on the value structures within the social system, the economic subsystem’s encroachment has shifted preferences which can be readily illustrated with four examples: 1) favouring the present over the future contrary to the grund norm of securing future life, 2) evaluating social status on the basis of wealth and consumption rather than relationships or accomplishments of other sorts, 3) preferring work as opposed to leisure, and 4) fostering social disintegration by commoditising services previously produced on the basis of kinship and community.

As to the second area of contest, the concentrations of wealth and power, they are the political consequences of economic power. They are the result of political decisions. As the political subsystem legislated and so institutionalised the grant of rights to owners of assets, it systemically dis-embedded economic production. This dis-embedding allowed a normative re-arrangement which prioritises the increase of capital over both production and distribution of goods and services and devalued the equitable distribution of those goods and services. Further, it allowed concentration of production and wealth generated. From a systems perspective, this dis-embedding facilitates the encroachment by the economic subsystem on the political and destabilises the social system. This disturbance is exemplified in the business pressure on government to dismantle the welfare state, which while good for human functioning by prioritising human development, was bad for business in that it limited opportunity to expand markets and profit making opportunities into areas deemed public strengthened labour’s hand.

b. Analysis of Legal Subsystem

These encroachments, undertaken by the economic subsystem’s main actor LIO, have been facilitated by the regulatory subsystem—in this case the public legal subsystem—in various ways. It has been facilitated doctrinally by its treatment of the corporation as if it were a human person within the legal system. The courts have stated that the corporation is a person, but rejected any argument that the legal person is different from the human person, a person in the liberal philosophical tradition understood to be an autonomous, rational individual—who it must be remembered, inexplicably follows social mores.

It has further facilitated these encroachments by adopting a procedure which does not monitor LIO, but, as is more appropriate between liberal philosophy’s human persons, is driven instead by complaints, and as a result catching only random violations in which harmed parties have the knowledge, power and resources to litigate. In those instances where LIO is monitored, it has been prosecuted only where public regulators have been able to catch and been adequately resourced to prosecute violators.

110 Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394 (1886); Salomon v. A. Salomon & Co. Ltd. (1897) AC 22
112 See discussion in JAMES MACEY, Corporate governance: promises kept, promises broken (Princeton University Press. 2008). 105-117
These two systemic failures, social and economic, are exacerbated by particular developments in corporate law. Particular features of the corporation encourage imposition of social costs. Further, the corporation acts a vehicle for the concentration of wealth and power. Essentially it allows concentrated privatisation the wealth and the externalisation of social costs. Where the corporation is used by LIO it facilitates encroaching by the following doctrines: the doctrine of limited liability, the independent identity of the corporation and the invention of the legal and social role of corporate director. In particular, the political decision to create the role of company director along the lines of the law of agency rather than acting in a personal capacity, reduced the role of social inhibitions which otherwise may have placed some constraints on economic prioritising in directors’ decision-making in instances where it is clearly contrary to social and ecological public interests.

c. Analysis of Corporate Law and Law Reform

The third area of contest, legal control and regulation of the LIO, internally through corporate law and its reform, and externally through the coordination of tort, contract and property law, has been driven to the fore by the political decisions which allowed encroaching social costs to escalate in terms of both ecological harms and social inequality. Over the century and a half since the corporate law institutionalised both limited liability and company directors as impersonal agents, it has continued to facilitate the decisions of controllers of legal corporations to prioritise wealth generation and concentration—a matter begun with the invention of capitalism and as noted with the enclosure acts of the 17th century. This latter act, the doctrines of property, contract and tort, and the legislation in these areas where touching upon the LIO’s, largely favoured the wealthy who were seeking to increase control of resources and power. This class favouritism, not only facilitated the development and expansion of the economic subsystem but set the path for its encroachment on other subsystems. The groups benefiting from the encroachment for the most part did little to change the law.

Efforts to reform law in these areas has been slow and met with only limited success. The legal subsystem has only reluctantly and slowly adapted to the social changes resulting from the developments in the economic subsystem but did so on its function norm of equity, as illustrated by the amelioration of such laws as the Master and Servant Act 1823 which initially made a servant’s disobedience a criminal offence, the slow and protracted road to landmark cases in worker injury, worker unions and product liability and eventually legislation. Even today, in less

113 SHEEHY, Corporations And Social Costs: The Wal-Mart Case Study.
114 Well explained in SOULE. 10 and 17.
117 See for example, the The Enclosure Act 1773 (13 Geo.3 c.81) followed by several more and see discussion in J.L. HAMMOND & BARBARA HAMMOND, The Rise of Modern Industry (Harcourt, Brace and Co. 1926).
120 CHRISTOPHER FRANK, Master and servant law: Chartists, trade unions, radical lawyers and the magistracy in England, 1840-1865 (Ashgate Publishing. 2010). 235-46
developed countries, the difficulty in getting LIO’s to collaborate with governments to address the same basic issues is problematic.\textsuperscript{122}

While at times landmark decisions by the courts have intervened to overturn these decisions of political economy, discussed in the legal literature optimistically as the “evolution of law” the courts for the most part have not been a progressive force.\textsuperscript{123} Hutchinson observes that these landmark cases achieve their status because, among other things, they are decided against the legal trend. The normal course, Hutchinson writes is “giving priority to institutional stability [i.e. the status quo] over individualised justice or wholesale reform.”\textsuperscript{124} Hutchinson makes clear just how this normal or preferred approach amounts to exercise of fundamentally political power and he points out that a legal subsystem focused on the integration of the economic subsystem with the social system would not have held such cases to be remarkable or landmark, and indeed would simply have gone in that direction as a matter of pursuing the course of justice—i.e. a broad approach to social fairness.

It is uncontroversial to observe that the public legal subsystem, as the institutionalisation of political decisions, is the product of the political subsystem. As demonstrated, the political subsystem has been encroached upon by the economic subsystem as governments have given way to business.\textsuperscript{125} Thus in sum, from a systems perspective, it is clear that law has followed private interests of those seeking to privatise benefits while externalising social costs. It has done so through evolving corporate law doctrines.

What is evident from this discussion is that the legal subsystem failed to uphold public expectations, failed to regulate effectively, and in doing so has failed to mitigate the social and environmental impacts of changes to business practices on a society dependent upon the ecological system. Instead, it has acted as an expression of the interests of the elite. To some extent, therefore, the problem of the regulation of the LIO is correctly characterised as a failure of the public legal subsystem to operate as the regulator of the overall social system.

That is, rather than acting as the social system’s self-reflective dimension, which it may have if looked at from a Luhmann’s perspective, constraining the various subsystems to ensure the social system’s overall performance is maintained by maintaining the balance of subsystems, the legal subsystem acted to help free the economic subsystem. It did so both by its innovations in corporate law, and by normative and risk shifting in contract, property and tort law so as to preference those with power and financial wealth (as opposed to social or other types of wealth), and increasingly, allowing financial wealth to be the measure of all things.

If one is to consider a regulatory subsystem as distinct from Luhmann’s autopoetic legal system, a different approach needs to be taken. That approach is turned to next. The section which follows examines regulatory systems as systems within their own right which exert energy and force within a system, and where consciously designed as such in social systems, having specific identifiable features.


\textsuperscript{121} \textsc{Allan C. Hutchinson}, Evolution and the common law (Cambridge University Press, , 2005).
\textsuperscript{122} ., see Section 3, Ch9.
\textsuperscript{123} \textsc{Gerald N. Rosenberg}, The Hollow Hope: Can Courts Bring About Social Change? (University of Chicago Press. 1991). Within the law, the evolutionary theory has been critically reviewed by Hutchinson \textsc{Hutchinson}.
\textsuperscript{124} \textsc{Hutchinson}., 157.
\textsuperscript{125} . especially Chapter 2, and see also \textsc{Harvey}., 64-86.
Regulation is a control activity focused on human behaviour housed in a system. In simplest terms, regulatory systems have three elements—a tripartite construction. These are: a series of processes, infrastructure and motivating energy discussed next. First, the system requires the following processes: norm generation, a consensus on objectives and then a decision about techniques. Finally, some type of evaluation process will be built in so that those generating the norms can inquire whether the techniques have been successful in achieving the objectives. Second, regulatory systems also require some components, usually some type of organised management of the processes just identified. Normally, the tasks will include rule making, execution and adjudication. This institutional infrastructure in terms of public regulation may include anything from Congress or Parliaments, to agencies, to a law reform process. Finally, regulatory systems need to be energised to motivate the desired behaviour. It motivates the regulatory system by use public resources such as threats of punishment or incentives such as tax breaks to cause people to behave in the desired ways. In terms of private regulation, although the processes and structure of regulatory systems remains the same, the infrastructure must be privately provided. Accordingly, it may be comprised of an organisation, such as a non-profit organisation, or a non-partisan think tank, or an industry association, usually a set of codified rules, and some type of feedback mechanism, whether through conferences, meetings or some other form of feed back which feeds into a consensus generation on whether objectives have been achieved with consequences with respect to system maintenance or reform. Finally, private regulatory systems need to be motivated. They can be motivated by use of private resources from prizes, to acknowledgement, economic incentives.

Conflicting regulatory systems exist. Regulatory systems, as noted, evaluate and restrain, control inputs, throughputs and outputs, prevent systems from explosion, implosion and control the border between a system and its environment ensuring adequate transfers for sustaining the system, while preventing it from being overrun. Where regulatory systems overlap they may be in a symbiotic relationship, or in conflict. Where and to the extent that they are in conflict, the conflicts will generate a form of social friction which will appear intractable particularly as the functions, and hence, the normative foundations of the systems, are incommensurate. Such conflicts may be within a public system, as found in agencies with conflicting mandates such as between agencies tasked with regulating environmental protection and agencies regulating promoting economic development, between public authorities as between national and subnational bodies, or between nation states in the international arena. However, conflicts may also occur between

---

126 Feaver & Sheehy. Sheehy & Feaver, A Normative Theory of Coherent Regulation.
127 Feaver & Sheehy. Sheehy & Feaver, A Normative Theory of Coherent Regulation.
128 Feaver & Sheehy. Sheehy & Feaver, A Normative Theory of Coherent Regulation.
130 Sheehy, Regulation by Markets and the Bradley Review of Australian Higher Education. In the policy context, this is referred to as “whole of government” policy initiatives.
131 These systems, says Luhmann, are “auto-poetic” or self-creating, closed systems that interact with their environment, which includes other systems. Each system’s rationality or logic is self-generated, self-referential not derived from its connection to other natural or social phenomena or environment. In one reading of Luhmann’s systems analysis, there is no politics, no overarching regulatory body, simply blind, impersonal systems which both self-create and self-regulate. But in this reading, Luhmann’s model is reductionist and naïve. Luhmann, Law as a Social System. 182-3
private and public regulators. While some of these conflicts have been addressed through traditional areas of law such as conflict of laws, a newer approach which acknowledges and allows simultaneous, conflicting claims to juridical sovereignty exists. This approach, called legal pluralism, accepts the simultaneous existence of different and indeed divergent regulatory authorities, jurisdictions and issues. In the current context, this approach does not place CSR and public law onto a collision course—although some argue that CSR may be viewed as an effort to displace the state. Rather, it allows both the public subsystem and the private subsystem of CSR to co-exist, cooperate and compete.

Frictions and conflicts may frustrate the regulatory efforts as energy is diverted from regulatory objectives to maintaining the regulatory systems’ space rather than using such energy to achieve regulatory objectives which fall by the wayside. Such frictions and conflicts are more readily apparent at the macro level. For example, one may consider conflicts between political regulatory systems such as the monarchical or dictatorial versus democratic, or in religion as between competing monotheisms, and competing economic subsystems as between pure capitalism and pure communism. These subsystem conflicts illustrate the diversion of resources away from regulatory objective of political power, one particular religion or wealth creation to subsystem space maintenance. Yet at a subsystem level, the frictions and conflicts while not as obvious can pose equally apparently intractable problems. So, at the interface of largely private economic and public legal subsystems, the competition to regulate the corporation and the LIO it houses, provides for frictions as well as symbiosis.

As Teubner observes, subsystems such as law may damage neighbouring subsystems by overlegalising them. We may extrapolate from this observation to describe the economic as “over-economising” its neighbours, and in this context of increasingly independent economic subsystems Teubner describes “the task of juridification … to bring the rationality of other social subsystems into play against the economy.”

How then is one to accomplish this task of pushing back on the economic subsystem? How do we control LIO and its harms? One must resort to private regulation through social activism or CSR. In this regard, Teubner observed “CSR represents a contradiction between guiding principles of the political subsystem and the economic subsystem” and amounts to a “politicization of the economy” –

---

133 The modern work which initially shaped the area is STORY, Commentaries on the conflict of laws, foreign and domestic: in regard to contracts, rights and remedies (Hilliard, Gray and Co 2nd 1841 ed. 1834). For a contemporary review, see PAUL S. BERMAN, Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era (bepress Legal Series 2005).
135 Noted in CROUCH... ( 41
137 LÜHMANN, Law as a Social System., p. 181
139 Id. at., p. 32
140 SOULE.
141 See, for example, id. at., but see also, ROSENBERG.
142 TEUBNER, Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility, (, p. 160
perhaps more accurately a second politicisation. Taking this view of CSR, the analysis may be construed as a contest and a collaboration between private economic and public legal subsystems operating as regulatory systems seeking to control LIO pursuing different but related norms.

The next section, therefore, examines CSR as a form of regulation, private regulation, aimed at regulating LIO.

7. CSR as Private Law in Systems Perspective

Changes in subsystems and their boundaries have reshaped the state and created a space which has permitted private regulatory regimes to increase in scope of activity, jurisdiction, and in sophistication, while simultaneously shifting, displacing and at times undermining the position of the state as the exclusive centre of authoritative regulation. One explanation of these changes, including the displacement of government from its role as the sole authoritative source of regulation, from a systems perspective, is that the newer private system and transformed regulatory state result from the increasing specialisation, differentiation and disintegration of increasingly complex social systems. Teubner suggests that this fragmentation of systems gives rise to CSR in the first instance. Teubner wrote: “CSR can be understood only in terms of differentiation and integration of society.” That is as noted the increased specialisation and shift of the economic subsystem from provisioning the current generation and saving for the future to wealth creation has both required and served to disconnect the economic subsystem from the broader social system. This logic led Teubner to a critical insight, namely, “CSR serves as one among several integrative devices in society which is characterised by extreme functional differentiation... [answering] The most conspicuous trait of the process of differentiation... the high degree of autonomy attained by the economic subsystem.”

Teubner’s analysis, however, does not go far enough. It explains neither how it does so, nor the process by which it occurs—something this paper argues occurs by way of regulation. Nevertheless, what Teubner’s analysis does accomplish is that it allows us to explain the economic subsystem’s social costs in a systems framework as no more than a contamination or encroachment by the economic subsystem on neighbouring subsystems and further, it allows CSR to be viewed as the economic subsystem’s self-reflective or regulatory dimension attempting to constrain the economic subsystem itself. Before exploring this insight further, we turn to examine greater detail both public law and private as regulatory systems.

8. Public and Private Law

As noted, although Luhmann does not see law as a regulatory system, this paper takes the opposite view. It sees law as functioning as a significant regulator in
the social system. Further, law here is seen not as unitary, but as plural in terms of sources, objectives, and resources. In this section, the tripartite framework for regulation outlined above is used.

a. Public Law as Regulation

Applying the tripartite framework for regulation, we note first the discrete processes of norm generation, development of consensus on objectives and decisions about techniques in public law. Public law’s norms are drawn from the political sphere. Politics, as noted, is not distant from law and nor is it distant from power—economic or otherwise. It has conflicting norms of ensuring economic provisioning of the population, on the one hand in a capitalist economy by way of consistent economic growth, and on the other preserving the natural environment. Further, the public politicians face the conflict of being tasked with developing policies that will maintain social stability while ensuring sufficient popularity to be re-elected. Law’s own norms are inconsistent. There is a group of norms about the common weal which to a considerable degree are inconsistent with norms around private rights. This is a problem of normative ordering.149

As to the process of developing objectives, the public legal system has a wide range of objectives that extend well beyond the sole focus of LIO. From a systems perspective, the public legal subsystem in a social system provides stable expectations. In a democratic society, it is expected to reflect the interests of the majority—i.e. majority power. It does so through a combination of laws such as public laws of environmental protection, administrative law and constitutional law, and private laws such as contract, tort and property. The law so allows people to function in a way that provides a relatively predictable social existence or stable expectations150 based on knowledge of who is in control, what controls they may have, what the limits of that control are—i.e. accountability, and how to protect themselves. It also allows people to arrange their affairs in ways that suit them and provides security too in that regard. Finally, in a rule of law state, it limits government action against citizens. In these ways law is designed to provide a significant benefit to society.

Given this broad task and wide range of objectives, it is unsurprising that with respect to matters concerning LIO, the law has dealt with them as discrete phenomena. Externalities have been assigned to distinct areas of law, namely tort, contract, environment, labour and employment law. The law has not focused on the actor involved or particular systems as a whole. Rather, each of these areas of law deals with the specific issues and externalities starting from different principles utilising different doctrines. Why is this the case? There is a prima facie case for this organisation of law in that torts, contracts etc not being limited in focus to the corporation or LIO. Torts, breaches of contracts, and destruction of the natural environment are regularly committed by ordinary human persons. There is no need to make these issue peculiarly corporate law issues. The regulatory techniques law uses is primarily damages, and in limited cases, injunctions and restitution. These techniques are embedded in substantive and procedural law.

The second part of the tripartite regulatory framework considers components that make up the institutional infrastructure. The well known institutions of the three

149 Feaver & Sheehy.
150 This view of law providing stability is consistent with Luhmann’s idea that the function of law is to maintain expectations despite disappointments. Luhmann, Law as a social system., Chapter 3
branches of government, the relevant agencies and the civil service need no further mention other than the function just noted. Issues of efficacy and coherence are unrelated to the analysis of their role in a regulatory system.\textsuperscript{151}

As to the third part, energising the regulatory system through appropriate \textbf{motivation}, the public law has the widest array of potential methods. These range from the execution of public legal authority, to public economic resources to any type of license, fine, grant imaginable. Most public regulatory systems rely on combinations of these methods, including the much discussed “new methods” of regulation.\textsuperscript{152}

\subsection*{b. Public Law and Corporations}

In terms of the substantive law of corporations, law has done four things. It has created the entity. It has organised the corporation internally. It has determined the corporation’s relationship with outside parties. Finally, it has established both the procedure and substance for clash between the corporation and other members of society—they are dealt with through the legal system as are conflicts between any other persons.

In terms of its creation, however, the corporation has a unique status in the legal subsystem.\textsuperscript{153} It is law’s unique child—it is law’s person. This peculiar status gives it full participatory rights in the legal subsystem, and of particular import for this paper, the economic rights of holding property\textsuperscript{154} and entering into contracts.\textsuperscript{155} Thus, it is simultaneously a legal person and a unique economic actor. All other actors in both the legal subsystem and the economic subsystem are human, and so subject to human social inhibitions and constraints. By way of contrast, the legal corporation is wholly disembedded.\textsuperscript{156} As such, it is the truly atomised individual of neoclassical economics—advancing primarily economic interest.\textsuperscript{157}

As this lego-economic actor is not subject to social inhibitions, indeed it has been described as “psychopathic”\textsuperscript{158} it pursues the powerful new norm of wealth accumulation, particularly as taken up by the powerful elite leaders following their own elite consensus on norms and values.\textsuperscript{159} Further, this lego-economic actor’s internal workings are not subject to democratic control. People whose lives it controls, i.e. its workers, and peoples lives it effects, i.e. the community, have no rights in its internal governance. Rather, those rights are distributed to directors and officers on the basis of private politics among incorporators. It is established and organised on the basis of private economic interests and so is not accountable to the public. Indeed, it has been argued that the corporation is unique among legal concepts and doctrines in that it is the only aspect of the legal subsystem not set up

---

\textsuperscript{151} \textsc{Feaver} \& \textsc{Sheehy}; \textsc{Sheehy} \& \textsc{Feaver}, \textit{A Normative Theory of Coherent Regulation.}

\textsuperscript{152} \textsc{Feaver} \& \textsc{Sheehy}; \textsc{Sheehy} \& \textsc{Feaver}, \textit{A Normative Theory of Coherent Regulation.} and the standard texts, \textsc{Robert Baldwin} \& \textsc{Martin Cave}, \textit{Understanding Regulation: Theory, Strategy, and Practice} (Oxford University Press. 1999). \textsc{Anthony Ogus}, \textit{Regulation: Legal Form and Economic Theory} (Clarendon Press. 1994).

\textsuperscript{153} \textit{Salomon v. A. Salomon & Co. Ltd.} (1897) AC 22

\textsuperscript{154} \textit{Bowman v Secular Society Ltd} [1917] AC 406 at 440-1

\textsuperscript{155} \textit{Defell v White} (1866) LR 2 CP 144

\textsuperscript{156} \textsc{Sheehy}, \textit{Corporations and Lateral Obligations of the Social Contract.}, the matter of embeddedness

\textsuperscript{157} \textsc{Granovetter}, (C. \textsc{Wright Mills}, \textit{The Power Elite} (Oxford University Press. 1956).
in principle to benefit society.\textsuperscript{160} Thus, although the right to incorporate is a publicly granted right, the corporation itself is considered a private matter. As a private matter, it is not subject to the public scrutiny and accountability as it would be if it were public, and no account, hence is required, regardless of the quantity of power or resources under its control.

The relations it has with either insiders or outsiders is thus not a function which is dependent upon its power. Rather, as determined by law, these are all private matters settled as between the incorporators as they choose to distribute rights and duties among themselves. The issue of relations with outsiders requires further consideration, however, in thinking about the topic of this paper, namely, social costs.

Finally, in terms of procedure, law has set the corporation’s activities as to be controlled as any other human persons. It is to be left alone, prosecuted after the fact on an ad hoc basis for breaches of the social norms. Of course, this greatly reduces the number and types of actions which will be brought, particularly in the case of LIO. Only those with the time, money and inclination to challenge a LIO will put themselves into such situations. LIO’s are well known to abuse the legal subsystem through SLAPP suits\textsuperscript{161} using their disproportionate resources to silence those who would challenge their operations.\textsuperscript{162} In addition, there are administrative agencies which can bring actions against members of the public for breach of state laws such as environmental harms. The efficacy of such agencies, however, is questionable as they are often not only chronically underfunded,\textsuperscript{163} but subject to political whim\textsuperscript{164} and may suffer such poor regulatory coherence as to result in regulatory failure.\textsuperscript{165} Given this complaint driven approach and the potential economic benefits of ignoring both law social inhibition, it is hardly surprising that there would be a considerable gap between public expectations of law’s ability to reign in the corporate economic actor, and its actual ability to do so.

c. CSR as regulation

Applying the tripartite framework of regulatory systems to CSR, first, it can be noted that CSR involves the three normal regulatory processes of norm generation, consensus on objectives and a decision about techniques. First, in terms of norms, it presents somewhat of an unresolved conflict: as noted, Teubner observed that “CSR represents a contradiction between guiding principles of the political subsystem and the economic subsystem” and amounts to a “politicization of the economy.”\textsuperscript{166} The norms, however, are not so much in conflict—all parties agree that the ecology is important and that a sustainable economy where “economy” means providing for

\textsuperscript{160} \textsc{Greenfield}.


\textsuperscript{162} There are many other means by which LIO’s abuse the legal process.

\textsuperscript{163} Chemical Regulation: Options for Enhancing the Effectiveness of the Toxic Substances Control Act. (2009).


\textsuperscript{165} \textsc{Feaver & Sheehy;Sheehy & Feaver}, \textit{A Normative Theory of Coherent Regulation}.

\textsuperscript{166} \textsc{Teubner}, \textit{Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility}, (, p. 160
human sustenance is necessary. The disagreement is more about the prioritisation of the norms—a political matter.\(^{167}\) CSR, with its roots in private economics and private rights, prioritises by default, such rights. Where the focus is on public rights or the public commons, it struggles at its core. Yet, this conflict or disagreement is not the only disagreement.

CSR norms are set by private interests. The lack of public input provides a basis for the concerns about private regulation’s democratic deficit in which public norms are displaced and so failing to reflect democratic public interest.\(^ {168}\) Where CSR is to reach a larger group, some avenue for public input will be necessary.

Second, as regulation CSR needs a consensus of objectives.\(^ {169}\) In this area, CSR is particularly divided. The positions range from improved marketing of the LIO, known as “greenwashing”,\(^ {170}\) to moderating social costs by focusing on particular LIO policies or products,\(^ {171}\) to wholesale industry changes,\(^ {172}\) to radical change to economic systems.\(^ {173}\) As to the third process, namely, selection of techniques, a whole range is available. First one may consider public law—i.e. government initiated. Second one may think of private initiatives such as ISO 26000, SA8000. A third set of techniques are classified by Soule them as insider tactics and outsider tactics. In terms of insider tactics she identifies shareholder activism through use of shareholder resolutions, socially responsible investment and its related community investing and micro-lending tactics, and ethical screening—negatively for objectionable or positively for desirable—LIOs.\(^ {174}\) As to outsider techniques, she identifies boycotts, corporate campaigns of various types, advocacy science, tempered activism, collective legal manoeuvres, and protest demonstrations.\(^ {175}\) While arguably, not all of these activities fit comfortably under the rubric of CSR,\(^ {176}\) they do represent private efforts at regulating LIO behaviour. The decision to sustain, terminate or modify regulatory efforts is dependent upon the objective,\(^ {177}\) so which an established objective one cannot identify any particular feedback system.

---


\(^ {168}\) See CROUCH, \(^ {17}\) KERNAGHAN WEBB & A. MORRISON, The Law and Voluntary Codes: Examining the “Tangled Web”, in Voluntary Codes: Private Governance, the Public Interest and Innovation (Kernaghan Webb ed. 2004); KERNAGHAN WEBB, Voluntary Codes: Private Governance, the Public Interest and Innovation. (Carleton Research Unit for Innovation, Science and Environment, Carleton University 2004); A SOBCZAK, CSR: A New Form of Social Regulation for Labour Relations within Transnational Companies, in The Responsible Corporation in a Global Economy (Colin Crouch & Camilla Maclean eds., 2011).

\(^ {169}\) On these issues see SHEEHY, Defining CSR: Problems and Solutions.


\(^ {173}\) SOULE.

\(^ {174}\) Id. at.

\(^ {175}\) See discussion in JONATHON PORRITT, Capitalism: As if the World Matters. (Earthscan. 2005).

\(^ {176}\) SOULE., 10-12

\(^ {177}\) Id. at., 12-18

\(^ {178}\) SHEEHY, Defining CSR: Problems and Solutions.
Second, as to the **components** of the institutional infrastructure, again, there is no single approach among CSR participants.\(^{178}\) While a debate exists among political science scholars about the desirability and efficacy of organisation,\(^{179}\) from a regulatory perspective, there is clear infrastructure both established which can be drawn upon, and developing which can address the issues. As examples, one may consider the private industry initiatives such as forestry industry’s Forest Stewardship Council,\(^{180}\) consumer driven Fair Trade movement,\(^{181}\) the jewellery industry’s Kimberley Process,\(^{182}\) the chemical industry’s Responsible Care program,\(^{183}\) and on the public side the UN’s GRI,\(^{184}\) all of which function as and provide regulatory infrastructure to contribute to the regulation a large number of LIO’s.

Third as to **motivation** energising the regulatory system, one can see from the above list a variety of incentives and potential punishments.\(^{185}\) The incentives include certification which adds value (both social and economic), social acceptance or license, and the punishment would include disclosure of unacceptable practices, exclusion from groups revocation of certification and various insider and outsider tactics. Where CSR lacks critical framework, problems emerge which are inimical and ultimately fatal to the project.\(^{186}\) Accordingly, CSR can be understood and analysed in terms of regulatory systems. The next section then examines how CSR approaches its regulatory task.

d. CSR regulating LIO

Contrasting CSR to public law clarifies how CSR is a markedly different approach toward regulating LIO. There are three significant distinctions. In the first instance, CSR has a different starting point. This regulatory effort starts with a focus on the social and physical phenomena of social costs, on concentrations of power and on environmental degradation, whereas public law’s focus is on legal phenomena—namely, rights and duties. Secondly, CSR focuses on a specific actor,

\(^{178}\) SHEEHY, Defining CSR: Problems and Solutions.

\(^{179}\) SOULE., 32-33


\(^{185}\) SHEEHY, Understanding CSR: an empirical study of private self-regulation.

LIO and the corporation—as noted not distinguished in the literature. Public law focuses on rights and duties in tort, contract etc. Thirdly, in contrast to public law, which is a state based authoritative body of law, CSR is a private regulatory initiative which garners its regulatory power from non-public resources such as consumer demands, institutional pressures and the like, all of which seek to regulate LIO’s behaviour with respect to certain aspects of industrial production, including practices and some incidents of corporate law. Of course, a major issue is understanding CSR, a separate matter.

While business interests may define CSR as “businesses’ commitment to contribute to sustainable economic development, working with employees, their families, the local community, and society at large to improve their quality of life,” a broader definition by scholars is that CSR is best conceived of as a field of inquiry. The position taken in this article, derived from the scholarly inquiry (and coincidently coalescing with Luhman’s idea of the legal subsystem as a communication system), is that at a theoretical level CSR is an examination of and effort to regulate the externalities, inequalities and concentrations that result from LIO and a space for political debate about regulating LIO—i.e. control of LIO. By this definition, CSR is a form of private politics. As social phenomenon, CSR is a type of private self-regulation. This understanding may be expanded further by identifying CSR as a form of regulation emanating from the economic subsystem. What makes CSR interesting from a regulatory perspective is that it can be understood as regulation generated by the economic subsystem, but with norms that run contrary to market norms—at least to some extent. What it seeks to do is include public non-economic concerns within the economic subsystem which subsystem is based on prioritising private economic norms.

CSR’s focus on the particular actor, the LIO, has caused CSR to be described as “new corporate law” by some scholars. These scholars explain their use of the term because as they see it: “[CSR is] a system of corporate regulation that depends as much on (if not more on) non-statutory mechanisms and methods, which in many

\[187\] SHEEHY, Conflicts between CSR, Corporate Law and the Problems of Social Costs. but see SOULE. who notes that sometimes activists target industries.

\[188\] SHEEHY, Understanding CSR: an empirical study of private self-regulation.

\[189\] SHEEHY, Defining CSR: Problems and Solutions. In this context, LIO’s strategic use of CSR is highly problematic. It is used as a shield and a sword to coopt the adjacent subsystems to avoid the fundamental issues of reducing consumption and allowing democracy to be dominated by public pursuit of human interest instead of subordinating it to the private pursuit of economic interest. As such, criticisms of CSR as no more than greenwash are well merited. SHAMIR, World Business Council for Sustainable Development (WBCSD) quoted in R DE CAMINO, Forest management and development, (Dietrich Burger, et al. eds., 2005).


\[191\] SOULE., See also SHEEHY, Defining CSR: Problems and Solutions. SHEEHY, Understanding CSR: an empirical study of private self-regulation.


cases can have a more immediate impact on corporate operations.” This position is a significant position because the corporation which houses the LIO is a creature of the nation state, and subject to the local laws. It is at this national level that corporate law operates and the specifics of corporate regulation are worked out. Accordingly, it is at the level of the nation state that CSR may be seen as a competing or complementary regulatory regime.

CSR also functions as a form of regulation in the international sphere. Sahlin-Andersson’s institutional analysis provides a useful insight. Essentially, she argues that CSR functions as a members’ club in which prestige serves to keep up membership but with little more required and for the most part, little more given—although some argue that as private politics it has considerable effect. CSR as a soft norm may be more important in the international reach of MNC’s.

CSR as regulation is more than the institutional pressures of club membership. It is clear from an examination of the legal regulatory literature that CSR is a form of regulation using two well recognised techniques: regulation by information and regulation by incentives. Regulation by information is well known in the corporate world by certifications and from the disclosure requirements placed on companies listed on public stock exchanges. Certifications are public representations of achievement, usually conferred or verified by third parties. The mandatory disclosure regimes force corporations to disclose their financial positions and to report them in a certain, certified format. By doing so, these certification and disclosure regulatory regime places corporations that do not comply, or that fail to achieve adequate returns at risk of a change of management or takeover.

The disclosure regime therefore causes LIO corporations to conduct their affairs in certain preordained ways. Public, independently verified information that is complied and presented in a way that makes it possible to compare competitors enhances the regulatory potential of the information. In this context, certification becomes increasingly important.

In the context of CSR, disclosure can occur voluntarily or involuntarily. Where NGO’s disclose LIO’ environmental impacts or political activities—an involuntary disclosure—the revelation of the information operates in much the same way as voluntary regulation by information. LIO’s voluntary engagement in activities such as Triple Bottom Line reporting and the GRI is CSR regulation by information.

CSR also regulates using another well known technique of incentives, a form of regulation by market. Where a LIO is failing to act in ways deemed appropriate by communities, those communities may organise economic penalties such as boycotts. Again, management response to or anticipation of such economic threats

---

196 Id. at.
198 SOULE.
200 See for example, BALDWIN & CAVE., p. 41 and 49.
201 The value in CSR certification as a market signalling technique is an emerging area of research: see Hungarian work.
203 See discussion in NIKOLAeva & BICHO.
204 OGIS.
maybe considered either internal or external, but in either case, are a form of regulation by CSR. These two regulatory techniques, however, demonstrate that the normative ordering of private regulation prioritises economic profit seeking norms above all others and so constrains the regulatory systems ability to constrain the economic subsystem and LIO.

CSR seeks to regulate in two other important dimensions. First, at the local level, business needs a social license to carry on its productive, profit-generating activities. These activities require acceptance by the local community in order to avoid civil unrest or direct action against the business organisation via attacks on its property or employees. This dimension is addressed through adequate wages, acceptable environmental and social impacts as measured at the local level by local standards and may include philanthropy. This aspect of regulation is the LIO’s outwardly directed regulation—regulating the community response of the community in which it operates. This regulatory effort is increasingly important in a globalised world as the community increasingly includes consumers in other countries as Nike, Apple and other companies have discovered.

The second dimension of CSR as regulation is markedly as subtle as it is important. If it is recalled that CSR is mostly a matter of concern about regulating LIO’s, including MNC’s that have the resources of many smaller countries and produce negative externalities of global proportions, it is evident that LIO’s seek to regulate potential organised opposition. This regulation requires a strategic response to potential trouble for LIO’s profit making abilities and may lead to greenwash or genuine and truly transformative CSR.

LIO, although purporting to serve the public, does not allow the public into its decision making, access to its information about its impacts, nor to consult the public on its policies. Rather, it sets its priorities and develops its policies which policies coincide with its private economic norms, and the personal political norms and priorities of the elites in control. This lack of democratic input keeps the main two issues from the policy discussion: the reduction of material consumption to allow humans to live within the ecological boundaries of the planet, and leaving democracy to the voters.

With this review of the two regulatory systems, public law and private CSR, the discussion now turns to review how the two regulatory systems approach the three externalities.

9. Regulating LIO, Regulation the Corporation

LIO and its three externalities—social costs, concentrations of wealth and power, and corporate law—are addressed at least nominally, through a contest over the corporation. The contest between public law and private CSR occurs at three critical points: 1) distributions benefits and costs (and in particular social costs), 2)
the right to make purposive and distributive decisions and 3) the proper construal of
the industrial organisation itself. Each of these contests are essentially about how to
characterise the LIO and where to draw its boundaries—i.e. to decide who are
insiders and have their values implemented and who will be external to the LIO and
can be ignored.

a. Social costs

Social costs are the main concern addressed by CSR regulation. As has been
argued, these costs may be understood systemically as resulting from the economic
subsystem’s encroachment on neighbouring subsystems. It fails to act self-
reflectivity so that it may evaluative of its performance and restrain its activity to avoid
undermining the differentiated, neighbouring specialised subsystems.

CSR views externalities as issues belonging to LIO and which ought to be the
subject of internal corporate regulation only. Rather than looking to public regulatory
responses, CSR advocates suggest that these are best addressed via insiders
making “better” decisions. Of course, “better” decisions are a normative category,
subject to political settlement as well ethical argument. And this leads back to the
fundamental questions: who is to benefit from the LIO? Who is to bear its costs? And
how and on what basis are these decisions to be made? Yet, as has been noted,
corporate law has already set its limits and focus. And further, public law has
determined that these costs will be addressed on an ad-hoc, post facto basis.

Yet some CSR advocates suggest that these externalities should be
internalised by LIO and some reform is called for to ensure they become essential
aspects of corporate law. These advocates see a solution in expanding the law of
corporations to encompass all the productive activities (as opposed to merely the
internal legal arrangements) and by so expanding, catching and internalising the
external consequences of LIO’s productive activities and not merely those expressed
in terms of corporate rights and duties. In this vision, corporate law will regulate the
rights and duties of employees, restrict the nature and type of industrial activities
carried on by the corporation, including potentially industrial processes, so as to limit
environmental consequences, and take account of other unspecified community
concerns. The pressure to internalise social costs is applied, as noted, by a
combination of insider and outsider tactics.

Traditional corporate law scholars and generally, those favouring the status
quo oppose any such re-arranging, refocusing or inclusion in corporate law. Social
costs are trivialised, excluded from the analysis and relegated to other areas of law
which wealth generation-as opposed to efficient production and distribution—remains
paramount. The extent to which LIO is expected to deal with social costs in this latter
paradigm is essential a type of cost-benefit-analysis , another form of the efficient
breach.

b. Concentration of decision making and LIO as Political
Actor

The area of corporate decision making is hotly contested as it is obvious that
whoever participates in decision making has power to regulate the corporation, and
hence LIO along his/her own normative lines toward his/her preferred ends.
Whereas corporate law had clearly established decision making structures and
processes, at least since the early 20th century, CSR views it as wide open. As such CSR is an area of interest for scholars involved in the corporate governance debate. The “who” and “for what ends” debates about corporate activity are resurrected the political discussion.

The basic argument is that a LIO with a social footprint equal to that of governments of many nation-states should have its decision-making processes open to equal scrutiny if not input. In other words, the expanded role, rights and benefits granted to LIO exploiting the corporate form in an industrial society normatively should carry an equally expanded duty with respect to the protection and maintenance of that society. A corollary of this proposition is that those regulating the LIO, the corporate controllers, the directors and officers will not only have greater responsibilities but will also need expanded discretions to address these responsibilities, a matter which leads to consideration of the debate which has run at least since Berle and Dodd in the 1920’s.

Both were concerned about the LIO’s corporation in the America of their day. They noted the great power and wealth amassed by these corporations. They also noted the great impacts of corporate activity on society. Finally, they worried about the power of directors who controlled the corporations. Berle focused more narrowly on the power of directors and managers in the exercise of their discretion over the vast assets of the corporate empires, and the potential use those powers to divert corporate power and assets to serve their own personal ends. Berle expressed it as a concern that the parties whose money these managers were dealing with had little control over those managers—an issue he identified along with Gardiner Means as the separation of ownership and control.

Dodd focused on the broader issue of political power of large corporate empires referred to here as LIO’s. He argued that corporate law should “protect the nation from corporations” –i.e. protect society from LIO’s social footprint or regulation of society by LIO, as did robber baron industrialists of the early industrial revolution.

Dodd, like Berle, focused on directors’ duties; however, his view was that shareholders were not uniquely vulnerable to corporate exploitation. He suggested that the directors of corporations take account of social needs, and according to Amstutz notes that this issue lies behind the EU’s decision to exclude non-industrialists from its CSR dialogue. The Double Movement in Global Law: The Case of European Corporate Social Responsibility.

This proposition seems to cause consternation for some scholars who appear to be market fundamentalists, to use Stiglitz’s term, or who have misunderstood Hume’s attack on St Anselm’s ontological argument. http://www.theconglomerate.org/2006/12/walmarts_irresp.html#comments

Berle & Means., see discussions in Wells. and Chen & Hanson.

Wells., p. 6.

Wells., p. 80.

Dodd.

Wells., p. 87 discussing Dodd

The concern about LIO exerting regulatory authority on society and other actors is part of the issue with their efforts to regulate supply chains. See, for example, Anne Tallontire, CSR and Regulation: Towards a Framework for Understanding Private Standards Initiatives in the Agri-Food Chain, 28 Third World Quarterly (2007). Michael P. Vandenberg, The New Wal-Mart Effect: The Role Of Private Contracting In Global Governance, 54 UCLA Law Review (2007).
Chen and Hanson, saw the separation of ownership and control as an opportunity to exploit corporate wealth for the betterment of society.\textsuperscript{218}

These views have been advanced over the intervening decades by a variety of actors, and most recently been advanced by progressive thinkers. For the most part, progressive thinkers have not sought to destroy the corporate form, have they sought to eject shareholders from the corporation; rather, their objective has been to add to shareholders other parties whose rights and interests are affected by LIO. Further, it is important to note that progressive corporate law scholarship focus has been on the large corporate enterprise.\textsuperscript{219}

In essence, the contest could be a considered as a contest about corporate models answering the questions: What is the corporation? What are its purposes? Whose concerns should be included? And, how should those persons be taken into account? In other words, the issue becomes one of the politics of corporate law, and in particular, the public-ness of LIO’s and hence, the corporations that house them. It asks: how public are powers and functions being exercised by management? What are appropriate corresponding public accountabilities? And what is the better way to determine this corporation’s role in society.

Thus In terms of CSR the insider-outsider distinction is considered though stakeholder theory and concerns about political representation.\textsuperscript{220} Stakeholder theory posits representation in corporate decision making on a number of different grounds.\textsuperscript{221} These include the inclusion of those effected by the decision, and those with investments of various types e.g. labour, finance and community in the corporation and grants power to influence decisions.\textsuperscript{222}

Unlike like corporate law, however, CSR offers no decision-making structures or processes.\textsuperscript{223} Rather, it offers an area of contest between corporate advocates and others who have a broader conception of the role business in society. To this latter group, access to decision making via a reform of structures and processes, is viewed as a highly desirable solution, to the problems of LIO and forcing it to control its externalities. Stakeholder theory allows a normative re-ordering which would not necessarily preference economic gains above all others. Of course, LIO’s have no interest in allowing access to decision making processes where there is any threat to the normative economic agenda except where these is a direct threat to its economic agenda.\textsuperscript{224}

Where there is political agreement that the sole or overriding purpose of LIO is wealth maximisation and not the efficient production of necessary goods, the regulatory decision making processes and structures will do little more than allow input as to the best means to achieve that end. Where there is contest about the norms to be taken into account, the politics of regulation then consideration of such

\begin{itemize}
\item \textsuperscript{218} CHEN & HANSON., p. 36
\item \textsuperscript{219} WELLS., pp. 78-80
\item \textsuperscript{221} R. EDWARD FREEMAN, Strategic Management: A stakeholder approach (Pitman, 1984).
\item \textsuperscript{222} SHEEHY, Scrooge – The Reluctant Stakeholder: Theoretical Problems in The Shareholder-Stakeholder Debate.
\item \textsuperscript{223} Teubner suggested a way of moving beyond the CSR stalemate about organisational construction or arrangements and the object or focus of directors duties by shifting the discussion laterally. He suggested that duties be changed substantively to process model.\textsuperscript{224} TEUBNER, Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility, (2005).
\item \textsuperscript{224} SOULE.
\end{itemize}
things as environment, labour interests can and will be of significance. With no clear conception of the entity to be regulated and no agreement on either decision makers or the normative basis for their decision making authority, it is unsurprising that CSR has less to offer substantively in terms of the main issue, externalities. These issues sit at the foundation of the political criticisms of private regulation. Who is to determine what externalities will be dealt with, by whom and at what price? As one scholar put it, "CSR we contend encompasses contradictory moments with tendencies toward greater democratic accountability as well as toward privatized unaccountable power." How then are we to move forward?

Characterising this issue from a regulatory perspective, it is clear that there is no normative policy consensus. As such, it is impossible for CSR scholars to articulate a unified position on regulation of LIO via internal decision making. A public alternative has not yet been developed: CSR has no central authority or coordinating body. Efforts such as the UN’s Global Compact on the public side, or ISO 26000 on the private side, lack power and legitimacy to re-organise internal decision making processes. Further, a cornerstone of much thinking has been that CSR must be "voluntary" with a range of explanations and justifications given. In that diverse context, CSR is best described as a poly-centric, loose networked regulatory initiative. CSR’s difficulty in dealing with these issues are serious weaknesses not only in its regulatory power but also in its theory.

c. Construal of Industrial Organisation: Corporate Models

As noted, law and CSR have markedly different conceptions of the problem. While law does not see a problem with the actor, but instead sees problems distributed throughout society, CSR focuses on the actor—the large industrial organisation, LIO. Law, as noted, views the corporation as a legal individual like any other legal individual subject to no specific discriminatory constraints nor receiving any undue privileges. The corporation is long ago settled and decided. Unlike law, CSR does not have clear sense of either the LIO or the corporation. CSR prefers to discuss the corporation as somehow equated with the LIO. To understand this conception, it is helpful to turn to Windsor who identifies political, ethical and economic models of the corporation. These models are far from a congruent set and do not match the corporation of corporate law. We discuss each in turn.

The political model is a LIO using a corporation which is so organised as to include all members of society affected by that industry’s activity. Given the ubiquity of the corporate form, its outputs, and effects in all things from policy to income distribution, this model has justification. Taking this view potentially shifts the whole of corporate production and distribution from the private sector back into the public sector—a model rejected in capitalist economic subsystems although not by democratic theory. While in fact democracy is probably better served by making

---

226 A problem noted by Prakash Sethi, among others.
227 SHEEHY, Defining CSR: Problems and Solutions.
229 This model can be loosely equated with the stakeholder model. See SHEEHY, Scrooge – The Reluctant Stakeholder: Theoretical Problems in The Shareholder-Stakeholder Debate.
230 PHILLIPS;GERSTLE & FRASER.
those decisions explicitly political and deciding as a polity on that basis,\(^{231}\) such an outcome is most unlikely to eventuate.\(^{232}\)

The ethical model adopts a human or ecological model of LIO and its membership. All parties human or ecologies impacted by the organisations’ ecological footprint need to be taken into consideration in decision making. This model forms a foundation for discussion of sustainability; however, it serves no better than the previous model as identifying the object of regulatory attention. It provides no boundaries and leaves the regulator responsible for the “regulation of everything.”

The economic model of the firm, which economists purport to be the equivalent of the legal corporation,\(^{233}\) also has a different view of the corporation and LIO. Rather than a specific organisation within a market economy, the economic view is that the firm is nothing more than a nexus of contracts.\(^{234}\) That is, in the economic space, it is a rather densely contracted space, but just the same, nothing more than individuals contracting together. From this perspective, law’s “insider-outsider” distinction, makes little sense. Either one has contracted for benefits and liabilities or one has not. The corporation is only contracts and its regulation is simply a matter of making, performing and where necessary enforcing those contracts. In this model, failure to enter contracts for a clean environment or safe working conditions are failures to create, distribute and provide contracting mechanisms for the buying and selling of property and \textit{in personam} rights. So, in contrast to corporate law which creates a separate legal entity and marks its boundaries, CSR offers a trilogy of competing models of industrial organisations.

This lack of conceptual clarity concerning the focus of CSR organisational concern undermines its ability to exert regulatory power. Should it focus on directors, the legal person, an association of such persons, i.e. LIO, products, policies, industry or some other actor?\(^{235}\) Further, the issue of boundaries is an important one about insiders or outsiders. The concern about insider and outsider is a concern about power in decision making and in particular, norms of the decision makers which underlie decisions. The regulatory issues of who, what and on what basis are to be included in decision making is normative and cannot be settled on terms internal to the debate. It is purely political and as such only susceptible to that type of resolution. This point leads to the discussion of decision making.

10. Systems Regulatory Solution

The paper thus far has discussed the nature and structure of society’s systems, and the role of LIO as the economic subsystem’s primary actor. The issue has been characterised as the economic subsystem encroaching upon the political, social, legal and ecological systems and in doing so encroaching on the neighbouring political subsystem forcing the retreat of the state, undermining the social system. It subverts a society’s culture to achieve business ends of mass culture,\(^{236}\)

\(^{231}\) David Schweickart, After Capitalism (Rowman and Littlefield. 2002).
\(^{232}\) At least at first Gerstle & Fraser.
\(^{233}\) Joo.
\(^{235}\) Soule.
\(^{236}\) As argued in the informative text on PR Stuart Ewen, PR! A Social History of Spin (Basic Books. 1996). Taking control of culture makes it easier to manipulate consumer tastes. The argument has also been made in the legal context, see for example, G Teubner, Global law without a state (Dartmouth Publishing Group 1997).
conceptualises humans as consumers rather than political, biological and social beings, and coopts the legal subsystem by introducing efficiency as the fundamental norm.\footnote{237} It is clear that systems—from ecological\footnote{236} to economic\footnote{239}, to political—cannot sustain themselves in the current configuration, and require something more. That something more, contrary to Luhmann’s idea of self-regulating systems, is some type of consciously designed regulatory solution.\footnote{240}

This regulatory role is something Polanyi saw as critical to protecting society from an overreaching market economy. He explained the relationship between land, society and market as follows:

“what we call land is an element of nature inextricably interwoven with man’s institutions. To isolate it and form a market for it was perhaps the weirdest of all … undertakings… life and nature form an articulate whole. Land is thus tied up with the organizations of kinship, neighbourhood, craft, creed—with tribe and temple, village, guild, and church. One Big Market… is an arrangement of .. factors [which] happen to be indistinguishable from the elements of human institutions, … and nature.”\footnote{241}

He continues: “the economic function is but one of many vital functions of land. It [land] invests man’s life with stability; it is the site of his habitations; it is a condition of his physical safety; it is the landscape and the seasons.” Polanyi described society’s “double movement” where law, among other institutions, was capable of performing both protective as well as exploitative functions.\footnote{242} As he saw it : “the purpose of the intervention was to rehabilitate the lives of men and their environment, to give them some security…[and] introducing public control of national resources”.\footnote{243} While referring specifically to inter-war Germany, this function of regulation, he argues, is consistent.

Thus, what is lacking is a systems approach to the solution. A systems framework, applicable to Social-Economic subsystems (SES) has been developed by Elinor Ostrom. For such systems, she has identified eight “design principles”.\footnote{244}

These are:

1. Clearly defined boundaries (effective exclusion of external un-entitled parties);
2. Rules regarding the appropriation and provision of common resources that are adapted to local conditions;
3. Collective-choice arrangements that allow most resource appropriators to participate in the decision-making process;
4. Effective monitoring by monitors who are part of or accountable to the appropriators;
5. A scale of graduated sanctions for resource appropriators who violate community rules;
6. Mechanisms of conflict resolution that are cheap and of easy access;
7. Self-determination of the community recognized by higher-level authorities;

\footnote{237} As is the foundation of the Law and Economics movement. See for example, Posner.
\footnote{236} Ostrom.
\footnote{239} See discussion in Granovetter, (\footnote{240} For a contrary view, see Newell.}
\footnote{241} Polanyi. 187
\footnote{242} Id. at. 223
\footnote{243} Id. at. 225
\footnote{244} These were designed to solve for problems in the limited context of common pool resource management.
8. In the case of larger common-pool resources, organization in the form of multiple layers of nested enterprises, with small local CPRs at the base level.\(^{245}\)

While Ostrom’s framework is designed for specific common pool resources, it may also be broadly applied to the ecology as a whole. The foregoing analysis is not to jettison Luhmann’s work. Indeed, a solution can be achieved by bringing Luhmann and Ostrom together, to identify the problem clearly. It may be characterised using Luhmann as a problem resulting from the failure of the economic subsystem’s self-regulation and an excessive disappointment of expectations in law. Drawing from Ostrom’s perspective, it is a failure to adequately protect the common resource of the ecology from exploitation for purposes of economic profits, described in economic terms as a collective action problem—a systems integration problem. Polanyi contributes to this discussion by providing the historical political background—he explains how the economic subsystem came to be disembedded from the social and natural environments. The issues so framed, can be addressed by an institutional view of regulation. What Ostrom’s institutional efforts\(^{246}\) focus on is precisely what Teubner saw as the problem addressed by CSR—re-embedding the economic subsystem.\(^{247}\)

This re-embedding will require ecological jurisprudence,\(^{248}\) ecological economics\(^{249}\) and political theory,\(^{250}\) which in turn will have to lead to law reform. In terms of corporate law Greenfield has been argued that reform needs a different footing.\(^{251}\) How can these systems be reconnected? At the core of the problem has been a failure of regulation in terms of regulating the systems which support human life on the planet. Accordingly, the core of any solution must be built around the creation of a regulatory system with its three parts: first, processes of norm generation, a consensus on objectives and then a decision about techniques. These are followed by an evaluation process will be built in so that those generating the norms can inquire whether the techniques have been successful in achieving the objectives. Second, components, to organise management of the processes just identified with institutional infrastructure. And finally, a regulatory system needs to be appropriately energised to motivate the desired behaviour.

\(^{245}\) Ostrom.


\(^{249}\) Miriam Kenna & Volker Heinemann, Green Economics: setting the scene. Aims, context, and philosophical underpinning of the distinctive new solutions offered by Green Economics, 1 Int. J. Green Economics (2006).

\(^{250}\) Alperovitz.

\(^{251}\) Greenfield.
Answers with respect to all aspects of this new regulatory system are forthcoming from all quarters, although challenged by elite interests. In terms of the processes, these are well underway. Even more mainstream thinkers such as Stiglitz see the need to integrate social needs and environmental challenges of global warming into globalisation. Green economics, for example, is described in exactly these terms: “Green Economics seeks to reconnect the values and costs of transactions with the natural world and with social structures. It seeks to enhance the local economy; supports bio-regional developments, democracy and access for all; and seeks global governance through new institutions designed for this purpose.”

Ecological jurisprudence is a jurisprudence not based on ideology of liberal philosophy; rather, “ecological jurisprudence aims to bring considerations of justice to the foreground ... ultimately grounded in empirical analysis rather than mere ideology.” In other words, conditions of the ecology more widely considered may be considered by the courts. Production could occur within more democratically organised enterprises as cooperative structures would suggest, and perhaps be extended beyond even those directly involved in production. Essentially, what would then occur would be a clearly defined boundary for economic activity. That boundary would be defined both in social and ecological terms, and not simply economic. Interestingly, law has already done so to some extent. Law and economics scholars note inalienable rights—rights which should not be commoditised. Extending the ambit of inalienable rights beyond certain individual rights, critically, would require a re-ordering of normative priorities. The priorities could not be set as a private matter to avoid the democratic deficit of CSR. Rather, the normative ordering process would need to be inclusive. Following principles of sustainability, preservation of the ecology would be the first principle, as a public right, and would so be prioritised ahead of private rights and ahead of economics.

Drawing further from the discussion of the LIO and the corporation, in terms of objectives, consensus may be reached, as Brandeis earlier suggested, that organisations not be permitted to become to large. In essence, a business that is “too big to fail” is too big to be private, for one of the important lessons from the latest financial crisis is that public funds will be expended to rescue private LIO’s which are too big to fail. Too big is also a political determination—too big might be too big in terms of political power. The old saying, “power corrupts and absolute power

254 KENNETH & HEINEMANN.
255 Although focused on domestic violence, the article’s principles are widely applicable MARK FONDACARO, Toward an Ecological Jurisprudence Rooted in Concepts of Justice and Empirical Research, 69 UMKC L. Rev (2000-2001).
256 The limitations on judicial consideration of non-law sources was limited by the doctrine of “judicial notice” perhaps first extended by the Brandeis Brief.
258 HERMAN AND DALY & JOHN COBB JR., For The Common Good: Redirecting the Economy Toward Community, the Environment, and a Sustainable Future (Beacon Press. 1989).
260 PALAZZO & SCHERER.
corrupts absolutely”, suggests not only that individuals cannot be trusted with too much power, but that organisations too need to be restrained from excessive size, and hence garnering excessive power. Finally, too big may refer to ecological footprint. LIO with excessive ecological footprints could be determined excessively detrimental to the ecology and so terminated as either a particular business or even an industry. Both of the insights concerning inalienability and limiting the size of organisations could be legislated realising Luhmann’s “immunisation” function of law. That is, by embedding these as legal norms, such a reform could immunise society against their recurrence in the future.

As to the second aspect of regulatory systems, the components we may again, draw from CSR ideas. The regulatory infrastructure would be less embedded in the political system and more embedded in community. It would include more coordinating mechanisms and organisations to help all actors collaborate—high level political actors from the UN on down to local community members, to producers of all sorts. Rule making would be done by those close to the location of operations collaboratively the input from and support of experts and higher authorities so that appropriate adaptation to local conditions could be made. Substantive rights in the environment could be more broadly distributed.

In terms of procedure governing decision making processes a broader, collective would be involved to allow prevention to be primary—an executive action. This approach would largely displace the current adjudicative legal processes involving post facto ad hoc compensation. Further in terms of executive functions, it would require monitoring of some sort, possibly in line with public interest group new regulatory methods. This new structure and process could draw from the CSR discussions on participation in decision making. It would require modification of existing corporate law doctrines if the new production were to be housed in the legal corporation.

Clearly and in line with the new thinking about regulation, there is a considerable role to be played by innovative development of institutions. What would be an appropriate institutional form, however, is not clear. Although institutions like the UN have initiated programs like the Global Compact and International Standards Organisation’s ISO 26000, the success of these programs is somewhat

---

263 Luhmann looks at the immunisation function as an internal protective function but sees law as having this potential to immunise the social system LUHMANN, Law as a social system., 475
264 See for example GULBRANDSEN.
265 Such rights need not be limited to property rights as advocated by economists following GARRETT HARDIN, Tragedy of the commons, 162 Science (1968).. A basic criticism of Hardin and other property rights advocates is that what motivates spoiling of the commons in the first instance is the introduction of the profit motive. Without such, people tend to care for collective resources.
270 The process by which the ISO 26000 was developed was a concern among participants HALINA WARD, The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy, 12 Theoretical Inquireis into Law (2011).
disappointing.\textsuperscript{271} While the extent to which these two instances can be used to identify ineffective approaches is limited, it is clear that both have missed an opportunity by failing to engage in national law, the home of legal corporations and nation states as places where LIO’s operate. Institutions may be more effective where national bodies are engaged,\textsuperscript{272} or if more innovative regulatory thinking were to be applied.

In terms of and motivations, bringing together the analysis of the two regulatory systems, certainly additional options are opened up. Both public and private resources could be combined not only to constrain the producer organisations, but also to facilitate their contribution to the community more broadly.\textsuperscript{272} Such contributions could include certain types of services, from day care, to hosting visitors, distributing employment more equitably, to supporting educational and other forms of community development. Public law could be modified to prefer such types of organisations through tax laws, and other benefits which could more effectively support such organisations. Public law could further be designed to facilitate both prior prevention as well as broader participation in litigation where the ecology is harmed. In other words, both substantive and procedural law could be reformed to achieve such ends. These reforms would help achieve Ostrom’s principle of dispute resolution being cheap and accessible. While certainly, none of these ideas is new alone, and for the most part, appear to be a long way from the present order, the paper provides a new way of understanding the problem, organising a solution and, given the history of change, there is reason for optimism.\textsuperscript{274}

11. Conclusion

The problem, in a nutshell, is that the economic subsystem has undermined the viability of the political, social, legal and ecological systems through conceiving itself as tasked with wealth creation. In so conceiving itself, it has forced the retreat of the state, manipulated culture, and re-shaped thinking about humanity. Part of what has become evident is that negative externalities of LIO’s are often seen as a matter of corporate activity. The solution from this perspective is the revision and reform of corporate law.

The regulation of LIO, however, is clearly a highly complex matter. Public efforts at regulation through the legal subsystem clearly leave much to be desired. The failure of the legal subsystem to adequately address the LIO’s externalities and indeed its facilitation of those externalities by its creation and characterisation of the


\textsuperscript{273} In this context, several works show ways forward and promise BURGER, et al;JJ KIRKTON & M TREBILCOCK, Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance (Ashgate 2004).

\textsuperscript{274} At least at first GERSTLE & FRASER.
corporation as a private law matter have led to the social outcry calling for more, or perhaps different, control of the corporate form.

By the same token, CSR as private regulation is problematic. CSR is problematic not only because it lacks any coherent norm generating and sorting processes, or institutional infrastructure, but also because it is unclear about fundamental issues such as wealth creation, appropriate control over production and distribution of goods and services, or the priority to be given to the ecology necessary for human life across the generations.

Taking the foregoing analysis and putting it into a systems perspective, gives unique insight into the problem and the peculiar role of the legal corporation. The economic and legal subsystems share a boundary along the border of corporate law. Being so located at the boundary of the public legal and private economic subsystems allows this lego-economic actor particular powers to interact with the social system as a whole and facilitates the economic subsystem’s encroachment on neighbouring systems.

The issue as diagnosed is a systems issue as well as a matter of public institutions. Such issues call for public solutions, a public regulatory response. Given the power imbalance and the highly variable environment in which such a regulatory response would occur—i.e. the specific industry and specific LIO’s with their particular social and environmental footprints, problems and contributions, a broad public law solution is unlikely to achieve the rebalancing. It is unlikely that it can be or should be done without input from both LIO and other interested local parties—too often non-industry participants are left out of the discussion. In summary, some governmentally coordinated regulatory response is called for. The nature and design of such regulation, however, is a matter for another paper.

The task at hand, dealing with the three issues of social costs, concentrations and the role of law (including the corporation), can be cast as the issue of the regulation of the LIO housed in a legal corporation. The LIO organised in the corporate form can be described as a product of the one subsystem, the legal subsystem and the dominate participant of the other, economic subsystem. As such it is subject to two subsystems each with its own norms—a private person in the one, pursuing profits without restraint in the other—and these two normative priorities and perspectives make it particularly difficult to regulate the corporate LIO effectively. The regulatory systems compete to impose their lenses as exclusive means for regulating the LIO housed in the legal corporation.

Further, each of these public and private regulatory efforts own agenda driven by the norms of the subsystem it serves. Law on the one hand pursues regulation in a way that is coherent with the legal subsystem and consistent, attending to both the doctrines and principles, including its liberal political philosophy, which it has developed over the centuries. It so operates largely as Luhmann would suggest—i.e. as a self-referential system, and as a complaint driven process through which liberal individuals pursue their specific grievances on an ad hoc basis.

The economic subsystem, on the other hand, as a burgeoning and colonising subsystem has shifted from a focus on production to wealth creation. The economic subsystem has coopted both legal and political subsystems to serve itself. It has failed to operate as Luhmann’s self-regulating subsystem, attending to performance, function and it has failed to demonstrate the third feature of systems—the self-reflective or self-referential. In the case at hand, the changes to the social system identified as the first and second issues addressed by CSR—social costs, and wealth
inequalities—have led to an inability for the social system to operate as it should, to sustain human life in the long run.\textsuperscript{275}

Any reform seeking to address these issues will rely critically on re-norming and consequent reconceptualising the economic subsystem. The economic subsystem's function needs to be shifted from wealth generation based on unlimited growth to provisioning human needs, include the needs of subsequent generations, and work within the limited ecological capacity of the planet. In terms of the economic subsystem's performance, such performance can no longer be measured against the previous year's growth, a performance that can only be achieved by more commoditising goods and services in neighbouring subsystems. Rather, performance must be measured against the economic subsystem's ability to sustain other social systems. Steps in this direction, however, halting and mistaken such as the Index of Sustainable Economic Welfare\textsuperscript{276} among others\textsuperscript{277} have already been taken.

To achieve any such reform is ultimately and intimately an institutional matter. Institutions such as both the legal corporation and the LIO are contested. Further, the institutional systemic public law and private initiatives such as CSR have a great role to play. Reaching a consensus on any reform agenda is difficult. Even consensus on what would seem incontrovertible to some, the fundamental principle that human life looked at in the longer term must be the starting point for all regulation, public or private, is not simple. Yet as distant as these things may seem, as least as touching the LIO, this first step, a consensus does not appear as far removed from the normative core of CSR as it once was.


**E. MERRICK DODD**, *For Whom are Corporate Managers Trustees?*, 45 Harvard Law Review (1932).

**THORSTEIN VEBLEN**, The Higher Learning in America: A Memorandum on the Conduct of Universities by Businessmen (Hill and Wang, 1957 [1918]).

**THORSTEIN (NEW YORK VEBLEN, MENTOR, P. 182,)**, The Theory of Business Enterprise (1958 [1904]).


\textsuperscript{275} WALTER F BABER & ROBERT V. BARTLETT, Global democracy and sustainable jurisprudence: deliberative environmental law (Massachusetts Institute of Technology. 2009).

\textsuperscript{276} DALY & COBB JR.,

\textsuperscript{277} See, discussion in PORRITT., and the deeper problem identified in PAUL FELDMAN, *Yes, Jonathon Porritt – capitalism is the problem*, A World to Win(nd), at http://www.aworldtowin.net/reviews/Porritt.html and solutions ALPEROVITZ..
LAWRENCE MITCHELL, Corporate Irresponsibility: America's Newest Export (Yale University Press 2001).  
DAVID HARVEY, A Brief History of Neoliberalism (Oxford University Press 2005).  
Factory Act 1833 (3 & 4 Will. IV) c103  
Mines and Collieries Act 1842 (c. 99)  
Chimney Sweepers and Chimneys Regulation Act 1840  
AG HOPKINS, Globalisation In World History (Random House 2002).  

JEFF SEWARD, Inequality and Actually Existing Democracy: A New Framework of Analysis (Western Political Science Association  2012).


SHARON BEDER, Global Spin: The Corporate Assault on Environmentalism  (Green Books. 1997).


NOAM CHOMSKY, Profit over People: Neoliberalism and Global Order  (Seven Stories Press. 1999).


N. LUHMAN, Funktion der Religion  (Suhrkamp. 1977).


DAVID C. KORTEN, When Corporations Rule the World  (Kumarian Press. 1995).

D HAWKINS, Corporate social responsibility: balancing tomorrow’s sustainability and today’s profitability  (Palgrave 2006).
The Enclosure Act 1773 (13 Geo.3 c.81)
CHRISTOPHER FRANK, Master and servant law: Chartists, trade unions, radical lawyers and the magistracy in England, 1840-1865  (Ashgate Publishing. 2010).
STORY, Commentaries on the conflict of laws, foreign and domestic: in regard to contracts, rights and remedies  (Hilliard, Gray and Co 2nd 1841 ed. 1834).
KERNAGHAN WEBB, Voluntary Codes: Private Governance, the Public Interest and Innovation. (Carleton Research Unit for Innovation, Science and Environment, Carleton University 2004).


DAVID CROWther & NICHOLAS CAPALDI, *Introduction: an agenda for research*, in The Ashgate research companion to corporate social responsibility (David CROWther & Nicholas Capaldi eds., 2008).


DAVID SCHWEICKART, After Capitalism (Rowman and Littlefield. 2002).


G TEUBNER, Global law without a state (Dartmouth Publishing Group 1997).


HERMAN AND DALY & JOHN COBB JR., For The Common Good: Redirecting the Economy Toward Community, the Environment, and a Sustainable Future (Beacon Press. 1989).


GARRETT HARDIN, Tragedy of the commons, 162 Science (1968).


WALTER F BABER & ROBERT V. BARTLETT, Global democracy and sustainable jurisprudence: deliberative environmental law (Massachusetts Institute of Technology. 2009).

PAUL FELDMAN, Yes, Jonathon Porritt – capitalism is the problem, A World to Win(nd), at http://www.aworldtowin.net/reviews/Porritt.html.