Articles

Persuasive Authority Beyond the State: A Theoretical Analysis of Transnational Corporate Social Responsibility Norms as Legal Reasons Within Positive Legal Systems

By Michael Torrance[*]

A. Introduction

The practice of law has been challenged by the promulgation of transnational norms associated with "corporate social responsibility" ("CSR"), arising beyond the State, with little or no connection to traditional sources of positive law.[1] These phenomena, which we will refer to as "transnational CSR norms," are increasingly important guides to behaviour for corporate actors, despite the fact that adherence to such norms is not "required" by positive legal systems. Perhaps for this reason, transnational CSR norms are typically poorly understood and possibly underutilized in the practice of law. The purpose of this paper will be to determine, by recourse to legal theory, whether, and if so how, transnational CSR norms may be related to positive legal systems, and therefore to the practice of law. In so doing, we will seek to develop a theoretical understanding of the role transnational CSR norms can, do, and ought to play within processes of legal reasoning, particularly from the theoretical starting points offered by analytical/ positivist, and discursive theories of law.

Transnational CSR norms compose a set of evolving standards (sometimes referred to as "soft law," ethical, or "para-legal" expectations) affecting corporate actors.[2] The suggestion that transnational CSR norms possess any "obligatory" character in the nature of law arouses much controversy in the legal profession.[3] This is particularly due to the "voluntary" nature of the commitments giving rise to such norms, by the corporations that

[*] Michael Torrance is a lawyer for Norton Rose Group whose practice includes advice on corporate governance and global business practices in relation to social and environmental risks, corporate responsibility ,and sustainability. He can be contacted at michael.torrance@nortonrose.com.

[1] Including but not limited to international standards of environmental performance, human rights, health and safety, employment/labour relations, and community and aboriginal relations, created and implemented by private actors without the direct involvement of the State. This definition will be elaborated upon below.

[2] Remi Clavet, *Governance, International Law & Corporate Social Responsibility*, *in* INTERNATIONAL INSTITUTE FOR LABOUR STUDIES 1 (2008).

[3] *Id.*

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

adhere to them. It remains a contentious question whether transnational CSR norms could ever be related to legal obligation, particularly since they are primarily composed of voluntary rules that are not promulgated by the State. The very thought of relating transnational CSR norms to the practice of law, therefore, forces lawyers and legal scholars to venture out towards the very limits of legal theory as it has traditionally been understood.[4] This is particularly the case in relation to positivist conceptions of law, which emphasize the social sources of law and the relationship of law to legal institutions associated with the State.

The pervasiveness of transnational CSR norms, however, and their evident role in guiding and constraining corporate behaviour, creates something of a dissonance between this view of positive legal theory and practice. If it is supposed (as Austinian positivists might) that legal systems comprehensively and exclusively govern social behaviour and that all legally relevant norms must have the coercive backing of the State to be considered legally relevant, the pervasive adherence to transnational CSR norms which do not purport to be backed by coercive State sanctions is hard to comprehend. Reconciliation of this phenomenon with such positivist understandings of law forces a broader definition of legal relevance than many lawyers may wish to accept.

In facing this challenge, legal theorists have been forced to revisit the concept of law altogether—what it means and the role it serves in social order. The conclusion for some has been to detach the concept of "law" from that of the coercive State altogether. As one author has concluded:

> Law as a whole is about more than just coercion. Regardless of whether it is hard or soft and whether or not it carries a sanction, a rule of law is primarily a tool designed to give overall direction to individual conduct within a given group. It proposes a sequence for the future occurrence and performance of human activities, and sets out a factual framework for judging whether events comply with this. In formulating how things should be, it reduces the scope of what is possible, stabilizes the actors' expectations and thus perpetuates the social order.[5]

From this perspective, the most salient question in determining legal relevance is whether norms are actually obeyed in practice. If one accepts this as a starting premise, then it

[4] *Id.*

[5] Isabelle Duplessis, *Soft International Labour Law: The Preferred Method of Regulation in a Decentralized Society*, *in* GOVERNANCE, INTERNATIONAL LAW & CORPORATE SOCIAL RESPONSIBILITY 7, 12 (2008).

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

becomes clear that any legal theory must contend with the empirical reality of extant, and practically effective, normative phenomena like transnational CSR norms if they are to remain relevant.[6]

The question becomes whether positive legal theory has the capacity to meet this challenge. While positive legal theory has constructed very rich theoretical frameworks for understanding law within the State, little attention has been given to understanding the legal nature of transnational normative systems as part of legal systems.[7] This is despite the fact that transnational CSR norms appear to possess a "peremptory, content-independent force, regardless of their authorization by a particular State," that is strongly suggestive of a legal character.[8] To account for these phenomena, positive theories of law are being challenged to incorporate into their theoretical purview such non-State, transnational normative systems that may overlap and interact with legal systems, and the actors that seek to adhere to them.[9]

It has been increasingly recognized that transnational CSR norms and the frameworks they compose share many of the same systemic and structural characteristics of State-based positive law. Transnational CSR norms are used by individuals and organizations to guide corporate behaviour and the behaviour of other actors (including but not limited to States) in relation to corporations. They are also used as standards against which corporate behaviour will be evaluated and measured by customers, investors, and other stakeholders. There may even be, in some circumstances, significant consequences for failure to adhere to transnational CSR norms within State legal systems. Nevertheless, transnational CSR norms also possess characteristics that diverge from positive law in significant ways. Perhaps most significantly, transnational CSR norms do not derive from the legal authority of the State, nor are their sources traceable to State institutions such as legislatures or courts. These divergences may lead some positivist theoreticians or legal practitioners to conclude that transnational CSR norms do not, or even cannot, give rise to genuine legal obligation within such systems. If that were the case, then it could be properly concluded that transnational CSR norms form no part of the content of legal obligations, and constitute a rather unimportant set of phenomena for the practice of law. However, if such conclusions are not correct, then it may be that those lawyers and scholars who ignore transnational CSR norms are missing out on an important legal phenomenon for the practice of law within positive legal systems.

---

[6] *Id.* at 27.

[7] KEITH CULVER & MICHAEL GIUDICE, LEGALITY'S BORDERS xvi (2010).

[8] *Id.* at xx.

[9] *Id.* at xxiv.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

The purpose of this paper is to understand, from a theoretical perspective, how transnational CSR norms can and ought to be related to positive legal systems. The approach will be to examine in detail the relationship between positive legal systems and transnational CSR norms. In so doing, a theoretical foundation will be laid to build a bridge between the empirical reality of transnational norms, and positive understandings of law and legal systems associated with the State.

I. Question to be Answered and Methodology

In considering the foregoing, contemporary thought on the nature of transnational CSR norms as processes of social control beyond the State will be analyzed. It will be highlighted how, despite the absence of clear association between transnational normative phenomena and the legal institutions of the State, many theorists of transnational CSR norms still apply concepts traditionally associated with positive law to explain transnational CSR norms. For example, the efficacy of transnational CSR norms is often described in terms of "authority," which is a concept that is used as a method to describe the obligation and obedience that arises within legal systems. Rather than being sourced in State institutions however, the "authority" of transnational CSR norms is often attributed as a trait or characteristic possessed by the norms, standards and/or rules themselves, either in descriptive, epistemic, or rational-voluntaristic ways, and used to explain why such norms gain "obedience" or adherence from a particular audience. Authority is also used to explain why such rules and norms are treated as "obligations" in ways reminiscent (or even identical to) law and legal obligation.

Theories of transnational CSR norms also demonstrate "systemic" characteristics, in that they set out objectively ascertainable standards of conduct that are used to evaluate and justify behaviour and give rise to consequential normative effects. Such systemic qualities are suggestive of the social source of transnational CSR norms, albeit a source that exists outside the State. Moreover, there are also empirical examples of how transnational CSR norms have been and can be incorporated into legal systems, directly or indirectly. These classifications of the "hooks" for the incorporation of transnational CSR norms into positive legal systems reinforce the conclusion that there exists at least the potential for a relationship between such norms and positive law.

In light of these characteristics, transnational CSR norms will be related to positive legal systems by recourse to two jurisprudential theories of law: (1) positive analytical theory expressed by Joseph Raz; and (2) discursive legal theory as expressed by Chaim Perelman, Friedrich Kratochwil and Theodor Viehweg. Razian positivism has been chosen as a highly developed positive theory of law offering a comprehensive account of positive State legal systems. It is a theory of law that emphasizes the need for identifying social sources of law to define the parameters of legal systems. It also emphasizes the importance of distinguishing law from subjective value judgments, and places prominence on the role of legal institutions in the creation and ministration of law. In light of these characteristics, it

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

will be examined how the Razian positivist conception of legal systems can and ought to address normative systems arising outside of the State, within its conception of positive law. In particular, how Razian positivist theory contemplates the possible "adoption" of transnational CSR norms into the legal systems of States. Once adopted, such norms may become incorporated into processes of legal reasoning that guide authoritative decision making, and therefore operate in a highly similar (if not identical) manner to legal norms, although they will remain distinguishable from positive law in the Razian account.

With this conceptualization offered by Raz, the question will become how such adoption or incorporation of external norms into positive legal systems might take place. It will be seen that Raz's theory of positive law does not provide a clear set of tools to understand this process from a theoretical perspective. The question for our theoretical inquiry will become how legal practitioners and theorists should understand the role of transnational CSR norms within the legal reasoning process that occurs, particularly, through the norm application process. To do this, recourse will be had to the ancient and practically oriented discursive theory of law, revived by theorist such as Chaim Perelman, Friedrich Kratochwil and Theodor Viehweg. Discursive theory will be seen to provide a theoretical framework for understanding the ways in which norms can be used in processes of legal reasoning and decision making within legal systems, as premises used in argumentation. Discursive theories resemble positivism in many respects, including the emphasis these theories place on searching for objective and distinguishing features of law versus purely moral or arbitrary judgments. However, discursive theories of law also readily accept that external norms in the nature of transnational CSR norms can be equated with legal reasons to the extent that they are useful within a legal discourse. Avoiding any clear delineation between "law" and "non-law" within such processes of legal reasoning, discursive theories instead focus on how norms may be deployed within legal argument. Within discursive theories, all salient norms are seen to serve as "seats of argument" to guide and constrain legal reasoning and legal decision making processes. The question is not so much whether a norm is "law" in assessing its relevance to a legal system, but rather whether a particular norm provides a persuasive or justifying reason that can support a legal argument. Identifying salient norms involves recognition of how these qualities of persuasiveness may come to be possessed by norms to make them salient for a legal discourse, regardless of their origin within or external to the legal system itself, or the apparatus of the State.

The foregoing theories will be applied to the case of transnational CSR norms to show that the "authoritative" and "systemic" qualities of transnational CSR norms identified by transnational theorists can give transnational CSR norms a persuasive and justifying character that makes them utilizable within a legal discourse. It will be argued that, where these characteristics can be demonstrated to exist, transnational CSR norms can be, and in fact ought to be, utilized within legal reasoning to define the contours of legal obligation. When used in this way by a norm applying institution, a norm will have a clear legal relevance, and come to be applied in the same way as law, to define the scope of legal obligation.

In light of these conclusions, it will be argued that future theorists should not be concerned solely with "whether" transnational CSR norms and related phenomena may be utilizable within positive legal systems. Instead, the focus should be on identifying the circumstances in which transnational CSR norms could be utilizable within processes of legal reasoning, by examining how such a relationship can or ought to take place, and where in fact it does. Recognition of the relevance of transnational CSR norms within positive legal theory in this way will help to bridge the theoretical/practical divide we have identified and provide a more complete understanding of how new and increasingly important phenomena of transnational CSR norms can or ought to be used within a legal discourse, as a tool to define the contours of legal obligation.

B. The Challenge of Transnational Normative Phenomena to the Positivist Conception of Law and Legal System

Joseph Raz argues that legal systems are unique normative systems since they claim, via the activities of a broad range of norm-applying institutions, to govern comprehensively, supremely and openly the social life of their subjects.[10] Razian positivism conceives of legal systems as basically systems of "reasons for action," which are "legal reasons" to the extent that they are reasons of a particular legal system. Reasons are "legal reasons" where (1) they are applied and recognized by a system of courts, and (2) courts are bound to apply them in accordance with their own practices and customs. Law is therefore defined as a system of reasons recognized and enforced by authoritative law-applying institutions.[11]

Within Razian positivism, it is assumed that all legal statements are statements of a particular legal system within a certain country or State jurisdiction.[12] The identity of a legal system is therefore bound up with that of the State.[13] A law is legally valid if and only if it is valid because it belongs to a legal system in force in a certain country, or is enforceable within that system, meaning that it is "systemically valid."[14] All legal statements must be statements of different particular legal systems and must be legally and systemically valid to be included as "law" within that system.[15] As such, Raz explains

[10] JOSEPH RAZ, PRACTICAL REASON AND NORMS 150-154 (1999); Culver & Giudice, *supra* note 7, at xxx.

[11] JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 212 (1970) [hereinafter RAZ, CONCEPT].

[12] JOSEPH RAZ, THE AUTHORITY OF LAW 63, 153 (1979) [hereinafter RAZ, AUTHORITY].

[13] *Id.* at 99.

[14] *Id.* at 153.

[15] *Id.* at 63.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

the nature of law by explaining the legal systems of States, which he identifies as positive legal systems.[16]

Transnational normative theories challenge a State centric conception of normative obligation by identifying and describing systems of social control that arise beyond the State. Transnational theories have emerged precisely to describe privately promulgated standards, such as transnational CSR norms, that have developed between private actors in response to an inability (real or perceived) of domestic State legal systems to regulate comprehensively areas of social action that could benefit from normative ordering and social control.[17] The development of such transnational normative systems amongst private actors, often with minimal or little involvement of States, is associated with the limitations of a State centric definition of domestic and international law that is perceived to be "incapable" of delineating fully the parameters of social conduct (including the social conduct of corporations) in relation to other social actors.[18]

The resemblance of transnational normative frameworks to positive law has been referred to as "striking."[19] This character, and the pervasiveness of transnational norms in guiding the conduct of corporate actors and their stakeholders, has come to be seen by many as conferring upon them a *prima facie* legal character that ought to be included within any comprehensive theoretical account of law, even positive ones.[20] These phenomena have been analogized to a sort of *lex mercatoria*, being used to solve various "coordination problems" of transnational business that otherwise would remain untouched due to a lack of convincing mechanisms in State law.[21] In this way, the emergence of "informal norms," "soft law," or systems of "private governance" embodied in transnational CSR norms beyond the State cannot easily be ignored from a legal perspective.[22]

---

[16] *Id.* at 148.

[17] Errol Meidinger, *Multi-Interest Self Governance through Global Product Certification Programmes*, *in* RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS (Olaf Dilling et al. eds., 2008).

[18] Tony Porter & Karston Ronit, *Self-Regulation as Policy Process: The Multiple and Criss-Crossing Stages of Private Rule-Making*, 39 POL'Y SCI. 41–72 (2006).

[19] Olaf Dilling, Martin Herberg & Gerd Winter, *Private Accountability in a Globalising World*, *in* RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 4 (Olaf Dilling et al. eds., 2008) [hereinafter Dilling et al., *Private Accountability*].

[20] Culver & Giudice, *supra* note 7.

[21] MICHAEL KERR, RICHARD JANDA & CHIP PITTS, CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS (2009); Dilling et al., *Private Accountability*, *supra* note 19, at 3.

[22] Dilling et al., *Private Accountability*, *supra* note 19, at 2.

Unlike top-down legislated rule making, the shared standards and rules that compose transnational normative systems can emerge in a horizontal fashion, amongst and between the entities that adhere to them.[23] Despite the non-hierarchical nature of such systems, transnational norms of this sort nevertheless operate as a "tight net of norm control" without an overarching executive authority from which such norms emerge or by which they are enforced.[24] Transnational CSR norms may be produced by the very act of doing business in society, by corporations that operate under the constant and often highly critical scrutiny of civil society, where allegations of misconduct can result in harm to business objectives.[25] The relevance of transnational CSR norms is not directly related to their association with "legal" requirements set by positive law of the State. Instead, transnational CSR norms are part of a broader process of social ordering, tied to social construction of "legitimacy" which allows corporate actors to achieve business objectives by navigating social expectations.[26]

Corporate actors identify and work within the constraints of transnational CSR norms to the extent that they seek to acquire "legitimacy" and where the parameters of legitimate action are defined by such norms.[27] The pursuit of legitimacy through adherence to transnational CSR norms derives from recognition that the processes of communication and deliberation that create transnational CSR norms serve to shape the parameters of acceptable conduct necessary for corporate legitimacy.[28] To the extent that the expectations of the salient legitimating "social group" or "collective audience" of corporate stakeholders is not congruent with existing domestic or international legal expectations, these alternative processes of norm creation have evolved to facilitate transnational corporate "legitimation."[29]

In the global governance process, global markets and the normative expectations that arise from them have become part of the "normative arena" in which social expectations are defined and honed into practicable standards of conduct.[30] The "normative arena" is

[23] *Id.* at 5.

[24] *Id.*

[25] Clavet, *supra* note 2.

[26] *Private Accountability*, *supra* note 19.

[27] *Id.*

[28] GUIDO PALAZZO & ANDREAS GEORG SCHERER, *Corporate Legitimacy as Deliberation: A Communicative Framework*, 66 J. BUS. ETHICS 71 (2006).

[29] Porter & Ronit, *supra* note 18.

[30] Julia Black, *The Development of the Global Markets as Rule-Makers: Engagement and Legitimacy*, *in* Law and Financial Markets Review 218 (2008) [hereinafter Black, *Development*].

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

defined as a space within which markets and market actors formulate rules and in which there is a "symbiotic relationship" between the public sector and private actors in setting and implementing standards of conduct.[31] This standard setting process may occur through processes like direct stakeholder engagement and dialogue and related efforts to convince others (be they State based institutions or grassroots movements) that certain norms should be adopted over others.[32] Corporate actors seek out and develop such systems in order to identify the parameters of legitimacy, which may not be wholly contained within national legislation, particularly when business is conducted across national borders and within divergent legal and regulatory contexts. These non-State systems may themselves be evaluated for their own "legitimacy" by considering whether they adequately meet democratic, constitutional, functional or values based criteria of acceptability in the processes of norm creation they apply.[33]

Such normative systems are shaped by what has been notably characterized as a competition for "regulatory share" amongst engaged actors, including but not limited to corporations.[34] Competition for "regulatory share" is driven by at least two factors: (1) freedom of movement; and (2) information.[35] The capacity of transnational actors, or capital, to simply "exit" a jurisdiction, or to move between jurisdictions, means that such actors are no longer geographically or jurisdictionally bound. By implication, there is no innate requirement to accept without question norms promulgated by State institutions. Moreover, information regarding existing regulatory regimes, or even stakeholder interests, can create pressures to export norms, revise existing norms, or create entirely new ones. The creation of norms is oriented towards "convincing solutions" that may find maximum recognition by all relevant groups and stakeholders.[36]

These efforts all operate notwithstanding the normative regime imposed by State actors. Such processes of transnational norm production require the subject of normative control (i.e., the corporation) to participate in defining the parameters by which they will be socially "controlled" beyond the State. In so doing, corporate actors are no longer able to rely simply on norm identification through manifest authoritative sources, such as State based legal institutions.[37] Legitimacy is created through the production of norms and

[31] *Id.* at 218.

[32] PALAZZO & SCHERER, *supra* note 28.

[33] Black, *Development*, *supra* note 30, at 225.

[34] Julia Black, *Legitimacy and the Competition for Regulatory Share*, LSE Law, Society and Economy Working Thesis no. 6/2009, 2 [hereinafter *Legitimacy*].

[35] *Id.* at 19.

[36] Dilling et al., *Private Accountability*, *supra* note 19, at 5.

[37] *Id.* at 6.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

standards that can be used to guide actions, at the level of the actors themselves.[38] Obtaining legitimacy within society is seen to necessitate participation in alternative processes of norm generation in light of the empirical reality of a "normative order" existing beyond the manifest authority of the State and the positive legal systems contained therein.

In light of these forces, comprehending the full set of norms applicable to a corporation in a given circumstance is seen by theoreticians of transnational CSR norms to require comprehension of the complete social context in which the company exists. This context is discoverable by examining the contours of the "normative arena" in which the actor exerts itself, which is determined by identifying what the company does and why. This can allow the corporation to identify the entirety of the social systems in which it is embedded and in which norms exist or may be created and which in turn will guide and constrain corporate behaviour in the pursuit of corporate legitimacy.[39]

In transnational norm theory, understanding the normative environment that must be navigated by the private actor requires a "poly-centric" analysis, not necessarily centered in the State.[40] From this perspective, it is accepted that norm and rule creation may happen outside of the State and so too might other governance or regulatory functions often attributed to State based legal systems, such as monitoring and enforcement. The State may remain a player in this de-centered conception of governance. However, there may also be a dispersal of capacities and resources relevant to the exercise of power amongst a wide range of State, non-State and transnational actors.[41] The pressures for compliance with transnational CSR norms can derive from the economic and social pressures of markets and communities that are brought to bear on corporations through the market. As a consequence, even where compliance with transnational CSR norms is not "legally required" within a State based legal system, it may nevertheless be "required" for other reasons.

The concept of CSR and the transnational CSR norms related to it, represent market driven sets of obligations that have emerged from the normative arena of the global market place. Such expectations derive from social demands expressed through market relationships or amongst corporate stakeholders and not necessarily from rules or expectations promulgated by State-centric or positive legal institutions. Social

[38] *Id.*

[39] PEER ZUMBANSEN, THE EVOLUTION OF THE CORPORATION: ORGANIZATION, FINANCE, KNOWLEDGE AND CORPORATE SOCIAL RESPONSIBILITY, 5 CLPE Research Thesis 1, no. 6/2009.

[40] *Id.*

[41] Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, *in* THE POLITICS OF REGULATION 145 (Jacint Jordana & David Levi-Faur eds., 2003) [hereinafter Scott, *Regulation*].

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

expectations of market actors regarding standards of corporate conduct in respect of such things as the environment, health and safety, employment and labour relations, human rights, or relationships with local communities have led corporate actors to develop standards and engage in "self-regulation" across multinational operations and industries.[42] Internal norms and rules established through such self-governance processes may be made public by announcing some kind of self-commitment, notwithstanding the fact that they are not obviously required by State centric legal systems. Often, compliance is guaranteed only by internal monitoring and control mechanisms, or by pressures brought to bear by stakeholders to implement and adhere to self-commitments, or generally accepted transnational CSR norms. Thus, a kind of "inner law" of corporations and their stakeholders and business partners emerges that is linked by the concept of CSR but with very limited involvement of the State in defining or enforcing such frameworks.[43]

Such self-commitments to comply with corporate responsibility expectations may appear to be voluntary from the perspective of State legal requirements. But here, appearances can be deceiving. Corporate responsibility expectations often do not practically operate as merely "aspirational" constraints on behaviour. In practice, they may be used to inform everything from contractual obligations, to shareholder relations, and interactions with other stakeholders, including but not limited to employees and local communities.[44] The maintenance of a "social license to operate," which can be defined as a practical ability to operate within a particular market, may necessitate that a corporation is constrained to follow certain normative practices and inhibited from engaging in others, whether or not such norms are contained within the legal requirements of the State. In these examples, corporations may act in a way consistent with "corporate responsibility" in order to receive or maintain the approval of the community, which for the corporate actor is as real and vital a consideration as positive law.[45]

In light of these phenomena and their innately transnational nature, reliance on a State centric conception of social obligation has been abandoned by many theorists as "neither descriptively accurate nor normatively desirable."[46] Instead, their analysis shifts away from State based legal systems and towards the "wider range of norms and mechanisms

[42] KERR, JANDA & PITTS, *supra* note 21; Dilling et al., *Private Accountability*, *supra* note 19.

[43] Dilling et al., *Private Accountability*, *supra* note 19, at 3.

[44] Colin Scott, *Reflexive Governance, Meta-Regulation and Corporate Social Responsibility: the "Heineken Effect," in* PERSPECTIVES ON CORPORATE SOCIAL RESPONSIBILITY 182 (Nina Boeger et al. eds., 2008) [hereinafter Scott, *Reflexive Governance*]; KERR, JANDA & PITTS, *supra* note 21.

[45] *Reflexive Governance*, *supra* note 44, at 181; Christine E. Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility*, *in* THE NEW CORPORATE ACCOUNTABILITY AND THE LAW (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., forthcoming).

[46] PEER ZUMBANSEN, *Transnational Law*, *in* ENCYCLOPEDIA OF COMPARATIVE LAW 738–54 (Jan Smits ed., 2006).

through which control is asserted or achieved."[47] Such normative expectations are not detached inherently from other social systems and in fact may come to be "embedded" within other legal, competitive and community structures that guide and control actors within a society. Transnational theories seek to consider each of these many norm-producing institutions and actors and their application, in an attempt to "transcend" definitional limitations over what is in reality an "untamable" process of social ordering.[48]

Such analyses proceed from the premise that there is little benefit to compartmentalizing or ignoring altogether identifiable rules and norms that are actually used to guide behaviour, simply because they do not derive from positive legal systems of States. The driver for such considerations is the empirical development of well-ordered economic and social relations in environments where there is little or no State activity. In response to this empirical reality, a broadened understanding of concepts such as "governance" has been developed to include non-State forms of normative ordering, in a basic attempt to "grapple with the problem of control" where control is sought or obtained beyond State based law and regulation.[49]

C. Relating Transnational CSR Norms to Positive Legal Systems

I. The Efficacy and Authoritative Nature of Transnational CSR Norms

In light of the foregoing characteristics of transnational CSR norms, the question becomes how such clearly important, but evidently non-State, transnational normative phenomena can be understood in theory as related to positive legal systems.

There are three basic elements of any positive legal system: (1) a threshold of "efficacy"; (2) "institutionalization" of the law within a legal system; and, (3) the existence of social facts that represent "sources" of law.[50] "Efficacy" means that a legal system is not the law in force in a certain community unless it is generally adhered to and is accepted or internalized by at least certain sections of the population. Normative effectiveness is also indicative of the importance of a particular norm within a society.[51] As such, it is necessarily the case that efficacy must be possessed by at least some of the legal reasons that compose a legal system. Thus, while an effective norm is not necessarily part of a legal system, the characteristic of efficacy is something associated with at least some legal

[47] *Id.*

[48] *Id.*

[49] Scott, *Regulation*, *supra* note 41.

[50] RAZ, AUTHORITY, *supra* note 12, at 42.

[51] *Id.* at 43.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

norms within any legal system. This strongly suggests the potential salience of effective transnational CSR norms within any positive legal systems they touch.

Transnational CSR norms may impose real (or at least effectively perceived) obligations on the private actors that adhere to them. As we have discussed, adherence to transnational CSR norms may be necessary for corporate actors to obtain certain benefits, or avoid negative consequences, such as in relation to a "social license to operate." In transnational normative theory, the efficacious nature of transnational CSR norms has most often been described in terms of the concept of "authority." Normative frameworks of control outside of the State have been characterized as emerging due to a "transition" of "authority" from the public to the private realm.[52] The implication is that private actors and the norms and rules they create amongst one another to govern their private affairs have acquired powers formerly associated with the authority of the State, namely the capacity to gain "obedience without question" from their norm-subjects. Such obedience has been explained in numerous ways, but essentially derives from the conditions of economic power relations and social influence that result in the formulation of transnational CSR norms.

"Authority"—in the sense employed within transnational normative theory—can be understood as the causal factor behind patterns of normative adherence, both to transnational CSR norms and law itself. It is definable as an "effect" of certain norms that falls somewhere between the effect of "persuasion" and the effect of "coercion" in gaining adherence of norm-subjects.[53] Persuasion is a process through which one gains adherence of wills through acts of discourse. Force, on the other hand, bends wills through acts or threats of violence.[54] Authority in the sense of a legal norm, is related to but distinct from both concepts, and is not present when either manifests itself. It has been said that such authority is related to coercion and persuasion in "symmetrical" ways. Both exist as capacities or potentialities implicit within the authority of a legal norm, but once actualized they are, at least temporarily, its negation.[55]

In this sense, authority is not so much an "entity" as an "effect," namely the effect of establishing the parameters of what is judged "right" in a particular circumstance. It represents a capacity to produce "obedience without question" in the norm-subjects to

[52] Miles Kahler & David A. Lake, *Governance in a Global Economy: Political Authority in Transition*, 37 Pol. Sci. & Pol. 409–14 (2004).

[53] HANNAH ARENDT, *What is Authority?*, *in* THE PORTABLE HANNAH ARENDT (2000); BRUCE LINCOLN, AUTHORITY: CONSTRUCTION AND CORROSION (1994).

[54] LINCOLN, *supra* note 53, at 4.

[55] *Id.* at 6.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

which they apply.[56] In this sense, laws, or transnational CSR norms arising beyond the State, can be said to possess "authority" wherever they are actually followed. Particularly in the case of transnational CSR norms, like other transnational norms, adherence may be gained where highly consequential, though non-governmental, organizations like standard setters exercise a type of "epistemic authority" as technical experts in their field.[57] These entities adjust the "ground rules" inside the system or market in which they participate, and in turn shape the behaviour of individuals and organizations operating within them.[58] The "authoritative" expertise of these norm generators becomes embedded in the rules and norms themselves, which in turn become institutionalized through the constraints they impose on their norm-subjects, including even public policy makers.[59] Such epistemological authorities do not often invite public dialogue, debate, or democratic deliberation. They do, however, exercise more than simply expert judgment in the provision of advice, and may also act as an evaluator of conduct and therefore play the role of a judge or adjudicator applying the norms they have created.[60] In this way, these experts are able to constrain behaviours and exert significant pressure on actors within their systems.[61] The epistemic conception of authority entails a relationship between a "superior" (the "expert") who establishes orders and rules for "subordinates" that are the norm-subjects to such orders and rules.[62] If the relationship of authority is "strong," this is because the superior is seen as suitable and legitimate by subordinates, thereby making it appropriate that the expert is attributed "authority" to render normative creations that ought to be followed.[63]

Epistemic authority may be granted by the State, giving a connection between the activity and the "authoritative centre" represented by the State and those experts that are tasked with generating norms to be followed.[64] Alternatively there may be a complete lack of central control by a State and no "lead interpreter" of the system in place to steer or coordinate the activities of participants. Instead, the epistemic authority arising within

[56] *Id.* at 1, 11.

[57] TIMOTHY J. SINCLAIR, THE NEW MASTERS OF CAPITAL: AMERICAN BOND RATING AGENCIES AND THE POLITICS OF CREDITWORTHINESS 63 (2005).

[58] *Id.* at 65.

[59] *Id.* at 85.

[60] *Id.* at 66.

[61] *Id.*

[62] KRISTINA TAMM HALLSTROM, ORGANIZING INTERNATIONAL STANDARDIZATION: ISO AND THE IASC IN QUEST OF AUTHORITY 34 (2004).

[63] *Id.*

[64] *Id.* at 35.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

systems of global governance may organically orient "towards the resolution of the problem which it defines and also by which it is defined."[65] With no such interconnection with State authority, authority in the epistemic sense is not being used to explain the legally binding actions of governments, but rather the nature of rule following behaviour of norm adherents, where such norms are set by epistemic authorities.[66] Where epistemological authority is the source of norm-adherence, the focus is not on who has the formal authority to articulate norms or the coercive power to enforce them (capacities traditionally found in the state) but rather on which "statements of authority" tend to be treated as binding in actual practice and by whom.[67] Statements of authority may be, themselves, open to contest.[68] Within this conception, authority is defined in purely objective or behaviouristic terms, denoted by the actual act of following, or obedience to, rules.[69]

Where no State compulsion exists to obey transnational CSR norms, their authority may also been seen to derive from "rational-voluntaristic" acceptance and consequent adherence to such norms. This form of authority is represented by the probability that specific orders or commands are followed by a certain group of people, contingent on an act of the "will" to obey that is part of every genuine relationship of authority.[70] The "rational-voluntaristic" type of authority embodies norm adherence that is an outgrowth of freely exercised reason, in which fundamentally equal individuals reach collective decisions through rational deliberations that are open to all.[71]

This conception of authority is analogous to the notion of epistemological authority in the sense that it stresses the importance of using rational arguments vis-à-vis those who follow the norms or rules in question.[72] Acceptance of a rule setter or norm generator's suitability for establishing rules is motivated on rational grounds by those who will be subject to them. Such norms serve as rationalizing tools for individuals and society as a whole. This rationality is utilized by those claiming the authority to establish rules and that seek a relationship of authority with other actors.[73] Rational-voluntaristic authority is,

[65] Scott, *Regulation*, *supra* note 41.

[66] SINCLAIR, *supra* note 57, at 67.

[67] Paul Schiff Berman, *Global Legal Pluralism*, 80 S. Cal. L. Rev. 1155, 1178 (2007).

[68] Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 Yale J. Int'l L. 301, 327 (2007).

[69] HALLSTROM, *supra* note 62.

[70] MAXIMILLAN WEBER, THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (A. R. Anderson & Talcott Parsons trans., 1947).

[71] HALLSTROM, *supra* note 62, at 37.

[72] *Id.*

[73] *Id.*

therefore, not derived from coercion or domination, but of freely exercised reason, in which fundamentally equal individuals reach collective decisions through rational deliberations. It does not rule out self-interested action, but it contextualizes self-interest by recognizing the importance of collective interests as essential to the successful pursuit of self-interest.[74] On this understanding, compliance is achieved because it "makes sense" or because it is "rational" to abide by the rules, standards and codes of ethics of the groups to which those who obey belong.[75]

The foregoing theories each provide explanations for why transnational CSR norms gain effective adherence from their norm-subjects. Such adherence could be characterized as "authority," or alternatively as a characteristic of "efficacy," insofar as transnational CSR norms are actually followed in practice. While this characteristic alone does not establish the legal relevance of transnational CSR norms within positive legal systems, it strongly suggests that transnational normative systems may exhibit characteristics that are similar to the foundational and threshold characteristics of positive legal systems.

That being the case, legal norms within the Razian conception of positive law must also have an "institutional" character. This means that all legal norms must be part of a determinate "legal system" which in turn must be defined in relation to the legal systems of States.[76] From a positivist perspective then, a norm cannot be associated with a legal system on the basis of "efficacy" alone without an institutional relationship to a legal system of a State. The question becomes whether transnational CSR norms, possessive of "authority" or the character of "efficacy" we have described, could become part of an institutionalized legal system, despite their origins and use outside of the State. Only if that were possible would the institutional character necessary for any norm to be identified as part of a legal system be met. The next step in our analysis will therefore be to consider the institutionalized nature of law within positive legal systems, and whether or how efficacious transnational CSR norms could obtain an institutionalized character and therefore meet another of the traits necessary for associating transnational CSR norms within a positive legal system.

II. Institutionalization of Legal Norms in Positive Legal Systems

In Razian positivism, three types of institutions are identified as being part of most State legal systems: (1) norm-creating institutions such as courts, or legislatures; (2) norm-applying institutions such as courts, tribunals or the police, and (3) norm-enforcing

[74] JOHN BOLI AND GEORGE M. THOMAS, CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875, 273 (1999).

[75] *Id.* at 279.

[76] RAZ, AUTHORITY, *supra* note 12, at 63, 153.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

institutions. Raz argues that norm-creating and norm-enforcing institutions are not a necessary feature of a positivist legal system. However, the existence of certain norm-applying institutions is a necessary feature of a legal system. A "norm-applying" or "adjudicative institution" is charged with regulating disputes arising out of the application of the norms of the system. Legal systems, therefore, contain only those standards which are connected in certain ways with the operation of adjudicative institutions of the legal system.[77]

The method by which norms are created is not, within the Razian positivist account, determinative of the existence of legal systems or the laws and legal reasons that compose them. When the actions of law-creating and law-applying organs conflict, the actions of the law-applying organs are those that affect the considerations of the law's subjects. As such, it is the norm applying institution that has final authority to declare what is the law in a positive legal system. If the courts consistently refuse to act on a law, then that law is not part of the legal system the courts operate, despite the fact that it was lawfully enacted and was never repealed. If the courts consistently interpret a statute in a way deviating from its original meaning, their reading of it, not its original sense, becomes the law. For these reasons, the recognition of law as such is not contingent on the identification of law-creating institutions, as much as it is dependent on law-applying institutions.[78] Again, this reiterates that, in the Razian positivist account, the salience of normative phenomena is contingent upon how they are utilized by norm-applying institutions within a legal system.

Norm enforcing organs are concerned with the physical implementation of norms. These institutions, manifested in police forces or other law enforcement, are not "key" to identifying legal systems according to Razian positivism. This is because the process of "enforcement" need not be performed within a legal system for a legal system to exist. Norm enforcement could be performed outside of the legal system, which could, for example, mean that once a judgment is given its execution could simply be left to the parties to the dispute.[79] Mechanisms of norm-enforcement are, therefore, not necessary to the identity of positive legal systems.

As noted, the only institution that is really needed for a legal system to be identified as such is a "norm-applying" institution that can make an authoritative decision, which could authorize even the use of force to achieve the purpose of that decision. By corollary, the focus of any inquiry identifying the salience of norms within legal systems should not focus on how norms are enforced or created, but instead on how they are applied. Recognition

[77] *Id.*

[78] *Id.* at 88.

[79] *Id.* at 107.

of any law or legal reason is logically related to the practice of the law-applying institutions within a legal system.[80]

There are limits to such an account of positive legal system however. To suggest that a law is part of a legal system only if it is acted on by law-applying institutions does not mean to suggest that such institutions serve to "create" the laws that they apply. On the contrary, law-applying institutions may be, and in most occasions are, merely recognizing and enforcing laws previously created by legislation, precedent, or custom.[81] Legal systems are not systems of absolute discretion, and as such, norm-applying institutions may not act independently. Instead legal systems consist of laws that the courts are bound to apply and cannot disregard regardless of their own views of the merits of such laws.[82] A rule that the courts have complete liberty to disregard or change is not binding on them and is therefore not truly a part of the legal system. For there to be a law in effect, the norm-applier cannot have the absolute capacity to change the norm whenever they consider that, on the balance of reasons, it would be better to do so.[83]

There exists an obligation on law-applying institutions and their officials to recognize and apply all and only those laws satisfying certain criteria of validity spelled out in the laws that compose the legal system.[84] Courts have a duty to apply the laws of the legal system when they are applicable to a particular legal problem. The courts' discretion to decide unregulated disputes may be absolute or guided by "ultimate laws of discretion," which impose duties on courts in exercising their discretion. Such laws serve to limit the courts' freedom of choice, but do not necessarily deprive them of it.[85] Discretion may still be used in order to decide (partially) unregulated disputes to which laws do not provide a clear answer.

Decisions of norm-applying institutions derive from deliberations based upon the evaluation of reasons for various alternatives. Courts write down the reasons that, in their opinion, justify their decisions. It is by examining the courts' opinions that one finds the laws on which they act. Within a legal system, norm-applying institutions must provide advance guidance to individuals and not operate merely on the execution of arbitrarily rendered decisions.[86] Such guidance comes from laws, which the courts are bound to

[80] *Id.*

[81] *Id.* at 89.

[82] *Id.* at 113.

[83] *Id.* at 114.

[84] *Id.* at 93.

[85] *Id.* at 97.

[86] *Id.* at 112.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

apply in settling disputes which provide an indication to individuals as to their rights and duties in litigation before the courts.[87] Laws themselves are normative and guide the actions of the courts as much as they do ordinary people who are subject to them.[88]

Therefore, the "law" applicable within a given legal system contains norms guiding both the behaviour of individual subjects of law as well as the institutions tasked with evaluating and judging behaviour of the law's subjects. The evaluation process that constrains norm-applying institutions is based on the very same norms that guide the behaviour of the subjects of law.[89] The "test" of identifying the norms that belong to the legal system is therefore synonymous with the tests to identify what norms the courts ought to apply when judging and evaluating behaviour.[90]

The application of law by norm-applying institutions allows for the authoritative settlement of disputes within a legal system. This feature of positive legal systems distinguishes law and law-applying institutions from other methods of social control, which do not have legal implications. Norm-applying institutions within legal systems, unlike other systems of social control, have the power to make authoritative determinations of legal situations. As such, their decisions are binding on those affected by their decisions, even if such decisions are "mistaken" in the sense that the law has been misapplied or the result is not "morally" correct.[91] This is because norm-applying institutions within positive legal systems have the power to make final and absolutely binding determinations of legal situations.[92] Such rulings can be called "authoritative" rulings, because they create obligations to obey regardless of their merit.[93]

Authoritative rulings provide the demarcation between rules that are legally binding and those that are not. Raz argues that a "social authority" will issue rulings, which are binding regardless of any other justification. As such, these rulings bind members of the society to which they apply, simply because they have been singled out by the purported legal authority and regardless of whether or not they are justifiable standards on other (in particular moral) grounds.[94] Raz accepts, however, that we may act on other reasons and

[87] *Id.*

[88] *Id.* at 89.

[89] *Id.* at 112.

[90] *Id.*

[91] *Id.* at 108.

[92] *Id.* at 110.

[93] *Id.*

[94] *Id.* at 51.

still be in conformance with authoritative reasons if it so happens that they result in the same actions as would be required by the authoritative directive.[95] However, once law is applied, it resembles an "order" and creates obligations of adherence without question on those to whom it applies.[96]

Where law is applied by a legal authority it becomes an "applied legal statement."[97] Like an order, an applied legal statement is not simply a reason to be weighed in the balance of reasons for certain action; instead, it is a reason to act regardless of whether there are other conflicting reasons to act in different ways.[98] Such reasons are "protected reasons for action" meaning that they are reasons for action that exclude all other reasons against it.[99] Such reasons "preempt" the weighing and deliberation of so-called "background reasons" by subjects of the law. Protected reasons have the capacity to replace the addressee's judgment and other background reasons, and must be followed by the subject without formulating a judgment on the merits.[100]

Law, in its authoritative application, therefore excludes consideration by the law's subject of all other reasons which are themselves not legally recognized. Law claims to defeat other weighty reasons, and claims absolute weight for itself.[101] Razian positivism distinguishes authoritative reasons from simply "weighty" reasons that are considered in a balance of reasons and do not exclude those other reasons from consideration (what he calls "first order reasons").[102] A norm-applying authority issues rulings, which are binding regardless of any other justification and therefore have the capacity to create protected and exclusionary reasons for action.

Marking a rule as "legally binding" is done by identifying it as an "authoritative ruling." This process of "marking off" rules as legally binding is undertaken in the issuance of authoritative rulings. Such a process is indicative of the existence of an institution or organization claiming authority over members of the society that is holding them bound to conform to certain standards, simply because they were singled out by that purported authority as binding, and regardless of whether or not they are justifiable standards on

[95] *Id.* at 144.

[96] *Id.* at 62.

[97] *Id.*

[98] *Id.* at 14.

[99] *Id.* at 17.

[100] *Id.* at 24.

[101] *Id.*

[102] *Id.* at 22.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

other grounds.[103] Such an institution is referred to as a "norm-applying institution" and resides at the centre of any positive legal system.

Applying the foregoing to the case of transnational CSR norms which may or may not come to be applied within a positive legal system, it becomes clear that efficacy on its own is not a sufficient trait for transnational CSR norms to be considered part of a positive legal system. In fact, this trait of transnational CSR norms could be problematic to the extent that an efficacious transnational norm conflicts with legally binding norms which purport to supplant all other "background reasons" that may be used as reasons for action. In the event of such a conflict, adherence to a transnational norm in the nature of a "background reason" that is in conflict with a "protected reason" of law, could result in violation of law. Alternatively however, if transnational CSR norms as "background reasons" were not in conflict with legal reasons, it would be permissible for them to be followed so long as no conflict emerged, and compliance with transnational CSR norms did not interfere with the actor's ability to comply with the law.

This begs the question, however, whether transnational CSR norms are merely "background reasons" or whether they could ever be applied as legal reasons from the perspective of a positive legal system. For a transnational CSR norm to be relevant to a positive legal system in this way, it would need to have an institutional nexus with the positive legal system to which it relates, particularly in the form of a nexus to a norm-applying institution. The relevance and salience of transnational CSR norms within legal systems will therefore depend upon whether and how a transnational CSR norm could be applied by norm-applying institutions in processes of legal reasoning, in order to render authoritative decisions in respect of legal problems. If that were the case, then transnational CSR norms would not be mere "background reasons," but instead would have potential bearing upon the norm-application process that gives rise to protected legal reasons, and therefore defines legal obligations within a positive legal system.

The next section will consider how, from this positivist conception of legal system, externally sourced norms such as transnational CSR norms might come to be so used by norm-applying institutions, thereby giving them the institutionalized quality necessary for any norm to be related to a positivist conception of law.

III. "Social Sources" of Transnational CSR Norms and the Openness of Positive Legal Systems to External Norms

In Razian positivism, the normative character of laws is expressed through "rules" and the interpretation of such rules.[104] According to Raz, rules allow for "agreement in the face of

[103] *Id.* at 51.

[104] *Id.* at 204.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

disagreement" including agreement on the decision procedure for settling legal disputes within a society, in spite of disagreements about the outcomes that should flow from it or about the underlying (particularly moral) justification for such rules.[105] A basic underlying function of the law is to provide publicly ascertainable standards by which members of society are bound, such that they cannot excuse non-conformity by challenging the justification of the standard that has been set for their behaviour.[106] Statements of legal standards include rights, permissions, duties and powers, and as we have noted, are explained in terms of "norms" or "reasons."[107]

A defining characteristic of all positive legal reasons is that they must have a "source" which can be used to identify them as a positive law. Laws are normally the product of authoritative acts, which constitute the social source of law.[108] These may include the enactments of legislatures, or the decisions of courts where courts are empowered to create law. The identification of a source of law provides a "validity condition" that can be used in its identification. Sources of law are "facts" by which a law is determined to be valid within a legal system and by which its contents may be identified.[109] Within Razian positivism, this necessity of a "social source" for the identification of legal reasons is called the "social thesis." Raz's "social thesis" attempts to separate law from its evaluation in moral terms and therefore allow for law to be investigated and described in value neutral ways.[110] Law has a source if its contents and existence can be determined without using moral arguments, but instead by referring to the social facts, which create the law.[111]

Transnational CSR norms establish standards and rules of conduct, which define and constrain rights, provide permissions for actions, impose duties and confer powers, particularly of corporate actors in relation to societal stakeholders. Transnational CSR norms often emanate from "moral" types of assessments regarding what behaviour of transnational actors is morally or ethically acceptable. However, when operating within a system of normative control, transnational CSR norms possess an objective and ascertainable existence as standards of conduct used to guide and constrain behaviour or which can be used to evaluate behaviour. As such, even if the impetus for transnational CSR norms is a "moral" or "ethical" one, once codified into a system of transnational

[105] *Id.* at 219.

[106] *Id.* at 52.

[107] *Id.* at 63.

[108] *Id.* at 147.

[109] *Id.* at 48.

[110] *Id.* at 42.

[111] *Id.* at 48.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

normative control, it could be readily argued that transnational CSR norms obtain an objective existence that means they are not synonymous with moral arguments, nor wholly dependent upon such arguments for their identification or justification. This would make such norms derivative of a "social source" and therefore possessive of another characteristic typically associated with positive legal reasons.

For example, where transnational CSR norms emerge from epistemic authority, they will be accepted and adhered to because of the expertise of the expert that has set down the norms. Alternatively, where transnational CSR norms are derived from consensus driven processes, such norms will be adhered to because they reflect such a consensus, perhaps for rational-voluntaristic reasons. In either case, transnational CSR norms are used because of the social source from which they have emerged, and not because of the moral evaluations of the entities that apply them.

The social sourcing of transnational CSR norms is also indicated by their manifestation in "systems" of normative control. Abstraction of the concept of "control" shows that such "systems" are composed of three essential elements:[112]

(1) Establishment of a set of rules, standards, goals, or values against which perceptions of what is happening within the environment to be controlled are compared;
(2) mechanism of monitoring or feedback;
(3) which in turn trigger "actions" which attempt to align the controlled variables, as they are perceived by the monitoring component, with the goal component.[113]

Systems of transnational CSR norms aimed at controlling or constraining social behaviour therefore share three essential characteristics: (1) they provide constraints (i.e., rules of conduct) (2) against which social action can be evaluated (3) and which may give rise to social consequences. These component functions of control may be split between different organizations and involve a mix of state, market, and community based rule making and evaluative processes.[114] They may be performed by a single organization (State or non-State) or may be dispersed amongst market actors, civil society, non-state regulators, and international and national state-based actors, who are interrelated in many different and varied ways.[115] Specially trained actors may take an auditing or monitoring role, leading to in-depth inquiries and the search for violations of, or compliance with,

[112] Scott, *Reflexive Governance*, *supra* note 44; Scott, *Regulation*, *supra* note 41.

[113] Scott, *Reflexive Governance*, *supra* note 44; Scott, *Regulation*, *supra* note 41.

[114] Scott, *Reflexive Governance*, *supra* note 44; Scott, *Regulation*, *supra* note 41;.

[115] Dilling et al., *Private Accountability*, *supra* note 19, at 4.

transnational CSR norms. In order to enforce compliance, private actors may possess numerous sanctioning mechanisms, from measures in staff management, through the cancellation of business dealings, to the withdrawal of certificates or quality marks, or even the appeal to court like institutions such as private arbitration or ombudspersons. Third party verification may also be relied upon to certify compliant practices of corporate actors.[116]

Other theorists have noted the similarities between legal systems and types of systems that lead to the creation and effectuation of transnational norms, such as certification programs like those of the International Finance Corporation (IFC),[117] International Standards Organization (ISO),[118] and the Forest Stewardship Council (FSC).[119] Whereas legal systems have legislative, adjudicative and enforcement elements that set rules, make evaluative judgments and use punishments and rewards to gain compliance, transnational normative and standards systems like those of the IFC, ISO and FSC set standards for performance, provide for evaluation of compliance, and enforcement through management and auditing systems which in turn may confer benefits for compliance and which may give rise to sanctions for non-compliance.[120] Such systems therefore have most of the same basic organizational elements of legal systems, even if they lack a source in the commands of sovereigns with sovereign imposed penalties for failure to do so.[121] In this respect at least, transnational normative systems bear significant resemblance to State legal and regulatory systems on their face.[122] These systemic characteristics of transnational CSR normative systems do not automatically confer upon them the "institutional" character necessary for such norms to be considered part of a positive legal system. However, they do provide evidence of the existence of a "social source" for transnational CSR norms, which allows for their identification without the necessity of applying moral conditions or qualifications.

It is quite clear, however, that whatever the "sources" of transnational CSR norms, they are not inherently tied to the institutions of positive law. The defining characteristic of transnational CSR norms is often the very fact that they are not sourced from State

---

[116] *Id.* at 5.

[117] *IFC Sustainability – Environmental and Social Standards*, INTERNATIONAL FINANCE CORPORATION, http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards (last visited 17 Aug. 2011)

[118] INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, http://www.iso.org/iso/home.htm (last visited 17 Aug. 2011).

[119] FOREST STEWARDSHIP COUNCIL, http://www.fsc.org/ (last visited 17 Aug. 2011).

[120] Errol E. Meidinger, *Environmental Certification Programs and U.S. Environmental Law: Closer than You May Think*, 31 ENVT'L L. REP. 10,162, 10,165, 10,167 (2001) [hereinafter Meidinger, *Environmental*].

[121] *Id.* at 10,166.

[122] *Id.*

institutions, inherently. It is true that transnational theories of normative control may operate in a highly related and intertwined manner with State institutions. Governmental regulators or legislators may enroll or be enrolled by non-State regulators in the performance of the State's own regulatory functions. Governmental regulation can, as in the case of meta-regulation, also act as a "backstop" or enforcer of non-state regulation, including transnational CSR norms.[123] Nevertheless, it remains the case that the social sources of transnational CSR norms are not synonymous with the social sources typically associated with State based positive legal systems (i.e., legislatures or courts). This does not preclude the inclusion of transnational CSR norms into State based legal systems in positivist legal theory. On the contrary, it is a contention of Razian positivism that not every legally valid rule originates as part of the legal system according to which it is valid. Customs, private international law, voluntary associations etc., and conceivably transnational CSR norms of the type under consideration in this paper, may be adopted and applied within a legal system according to Raz.[124] The legal validity of any norm is not established by showing that a norm originates from within the State, or a State based legal institution, but by showing that the norm conforms to tests of validity laid down by some other rules of the legal system in which it is applied. Such validity tests are called "rules of recognition."[125] External norms acquire "systemic validity" within a legal system when they are recognized by a rule of recognition.

A legally valid reason is a "legally binding" one where it has the normative effects of legal validity and also possesses systemic validity.[126] In this respect, external norms and rules that are recognized by a positive legal system may have the effect of defining the scope of legal obligation, despite their origin or social source. This possibility is due to the "open" character of legal systems.[127] Nevertheless, Raz maintains a distinction between external norms that are recognized by a legal system and those norms that arise from the legal system itself. This is done (according to Raz) in order to not "obscure" the distinction between norms recognized as part of the law, and norms that, although not part of the law, are recognized and enforced because it is the function of the law to support various social groupings outside of the legal system.[128] In order to maintain this distinction, Raz concludes that not all the norms that the courts ought to apply are part of the law, as he so defines it.[129] The fact that a norm is identified as one the courts ought to apply is,

[123] *See* sources cited *supra* note 45.

[124] RAZ, AUTHORITY, *supra* note 12, at 149.

[125] *Id.* at 150.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 101.

[129] *Id.*

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

therefore, no indication whether or not it is part of the system, and therefore truly a "law."[130] This finding gives rise to an important debate about whether adopted external norms could or should ever be considered "law" within the legal system they are applied.

We can conclude from this that positive legal systems are conceived as "open systems" which may give binding force to norms that do not belong to them.[131] This may occur by upholding and enforcing contracts, agreements, rules, and customs of individuals and associations; and by enforcing the laws of other countries and legal systems through "conflict of laws" rules. While such norms are not "part of the legal system which gives them sanction" they are recognized and made binding by norms that require the courts to act on and enforce these norms.[132] Raz concludes that external norms may be "adopted" by a positive legal system if: (1) the external norms belong to another normative system practiced by its norm-subjects and which are recognized where the system intends to respect the way that the community regulates its activities, regardless of whether the same regulation would have been otherwise adopted, or (2) they are norms which were made by or with the consent of their norm-subjects by the use of powers conferred on them by the system in order to enable such individuals to arrange their own affairs as they desire.

There is no innate reason to believe these are the only ways incorporation could occur. Transnational CSR norms, as we have discussed, may belong to normative systems of control that exist and operate at the transnational level. They also have empirical effects on the behaviour of their norm-subjects, which compose corporations and other actors that adhere to transnational CSR norms and who are evaluated in relation to them. Transnational CSR norms have also become infused within systems of self-regulation, either within corporations, across industries, or between market actors. Often, though not always, transnational CSR norms are made with the consent of the parties to which they apply. Even where consent is not directly obtained, it may be implied by the fact that the corporation is active within a certain market and wishes to gain the necessary "social license to operate" therein. The "normative arenas" from which transnational CSR norms emerge will often seek to include the subjects of the norms themselves, and thereby obtain at least tacit consent from their norm-subjects.

Transnational CSR norms are also often adopted as governing frameworks between corporations and their stakeholders and even incorporated into contractual relations, or used to evaluate the acceptability of ongoing contractual relationships. In light of these characteristics, there can be little doubt that transnational CSR norms are the types of

[130] *Id.*

[131] *Id.* at 119.

[132] *Id.*

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

external norms that Razian positivism contemplates could be "adopted" within legal systems – that is so long as the legal system adopts them because it intends to respect the way such communities regulate themselves and/or such norms have been created with a power conferred upon the transnational norm creator by the legal system in which it is adopted. These final caveats on the adoption of external norms into positive legal systems essentially mean that external norms will only be adopted where the legal system into which they are adopted recognizes and approves of their use in the regulation of social relations. As such, in the Razian account, transnational CSR norms may be adopted into a positive legal system if the legal system intends to respect the way transnational actors regulate themselves, or where the creators of transnational CSR norms have been conferred that power by the legal system itself.

IV. Incorporation of Transnational CSR Norms into Positive Legal Systems

Mechanisms by which transnational CSR norms may come to be part of a positive legal system have been recognized and classified by scholars considering the interrelationship between transnational CSR norms and positive legal systems. While this research has been more taxonomic than theoretical in nature, it provides a useful practical starting point for our theoretical examination of this topic. In essence, as will be developed below, it has been found that incorporation of transnational CSR norms can and does arise directly (through express reference in legislation and regulation, or through endorsement by States), as well as indirectly (through the adoption of external norms into legally enforceable contractual agreements, or judicial processes applying "open textured" legal tests such as "due diligence" or "standard of care").

1. Legislative Incorporation of Transnational CSR Norms

Legislative or regulatory requirements mandating that corporations operating within a legal jurisdiction be in compliance with specific transnational CSR norms is a direct form of incorporation into positive legal systems. While rare, such direct adoption of transnational CSR norms has been recognized in several jurisdictions.[133] Such legislative practices are driven by the same objectives that lead to the incorporation of any external, privately developed, standards into legislation. As the Standards Council of Canada has identified, such adoption may make sense for legislative decision makers: (1) where the norms have been developed by balanced committees of all relevant interests and by consensus; (2) where the norms have undergone public review and review by a standards organization prior to publication; (3) the norms are maintained and reviewed with appropriate regularity incorporating new developments; (4) that the norms are commensurable with commercial practices so that they may be readily implemented; (5) the norms address the

[133] Meidinger, *Environmental*, *supra* note 120, at 10,167.

public interest including consideration of such things as economic advancement, sustainability, and health, safety and welfare of stakeholders.[134]

While express adoption of transnational CSR norms has been infrequent, there is an inherent attractiveness to any ready-made standards that can be used to govern certain private activities.[135] An example of such incorporation in the case of transnational CSR norms arises in the field of health and safety regulation, where voluntary standards have been converted into regulatory requirements in many jurisdictions for decades.[136] Such standards often originate from their implementation across industries and corporate organizations as "best practices," despite local legal requirements. Industry best practices may then become the basis for legislation and regulation, where States become involved in the governance of industrial health & safety and seek ready-made standards to define the regime.

Another impetus for the adoption of transnational CSR norms into legislated instruments may arise from international legal obligations. The 1994 Technical Barriers to Trade Agreement, for example, requires member states to base their domestic "technical regulations" (including environmental and other CSR related fields) on existing voluntary standards and transnational CSR norms developed by international standardization bodies unless the standards would be "an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."[137] On such requirements, regulations deviating from this requirement could be challengeable as trade barriers. This requirement emerges from the pursuit of cross-jurisdictional consistency in regulation for the promotion of trade, and from agreements between States to minimize regulation introduced to impede foreign businesses, that deviates from internationally accepted standards.

Aside from international law requirements, the general objective of cross-jurisdictional consistency can enhance the attractiveness of transnational CSR norms as templates for

---

[134] Standards Council of Canada, *Key Considerations in the Development and Use of Standards in Legislative Instruments: Understanding the Partnership of the Regulatory and Voluntary Standards Systems* 3 § 3.3 (2006); *see* Stepan Wood & Lynn Johannson, *Six Principles for Integrating Non-Governmental Environmental Standards into Smart Regulation*, 46 OSGOODE HALL L.J. 345, 364 (2008).

[135] Wood & Johannson, *supra* note 134, at 371.

[136] Meidinger, *Environmental*, *supra* note 120, at 10,170.

[137] *Technical Barriers to Trade*, WTO LEGAL TEXTS (1994), http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited 17 Aug. 2011); Stepan Wood, *Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law, and Private Authority in Canada*, *in* NEW PERSPECTIVES ON THE PUBLIC-PRIVATE DIVIDE 131 (Law Commission of Canada ed., 2003).

legal and regulatory codes promulgated by the State.[138] There have been empirical examples of domestic legislation that has been enacted requiring regulatory bodies to use technical standards like transnational CSR norms developed by voluntary consensus bodies to the extent possible in developing regulations.[139] Even where such standards are not incorporated directly by reference, laws and regulations can be modeled on transnational norms and therefore require by law standards of conduct that are similar or identical to those set by transnational normative systems.[140]

2. Endorsement of Transnational CSR Norms

Aside from direct incorporation into legally binding instruments of the State, State governments may encourage adherence to transnational CSR norms by endorsing them, tacitly or expressly. Alternatively, there is also a possible negative impetus for adherence with transnational CSR norms, fed by a desire to avoid legislative or regulatory intervention into an otherwise unregulated sphere of private activity.[141] Government forbearance from entering into the regulation of certain actors and activity may be seen to represent a tacit approval by legal authorities of the standards being used privately to govern behaviour.[142] Actors wishing to remain unregulated may adhere to accepted standards of conduct to ensure that the government continues to refrain from regulating that area of social behaviour.

More express forms of endorsement are also possible and evident. A recent example of this form of endorsement is provided by the Government of Canada's Extractive Sector CSR Counsellor ("the CSR Counsellor"). The CSR Counsellor was appointed by Order in Council[143] and reports directly to the Minister of International Trade. The mandate of the CSR Counsellor relates exclusively to the activities of Canadian extractive sector companies operating abroad. The CSR Counsellor's mandate is to review the corporate social responsibility practices of Canadian extractive sector companies operating outside Canada and advise stakeholders on the implementation of endorsed CSR performance guidelines.

[138] Meidinger, *Environmental*, *supra* note 120, at 10,169.

[139] Such as the United States National Technology Transfer and Advancement Act of 1995, 15 U.S.C. § 3701 (1996) (requiring the agencies it governs to utilize voluntary standards unless doing so would be "inconsistent with law or otherwise impractical"); *see* Meidinger, *Environmental*, *supra* note 120, at 10,170.

[140] Meidinger, *Environmental*, *supra* note 120, at 10,170.

[141] *Id.* at 10,166.

[142] *Id.* at 10,175; Wood, *supra* note 137, at 133.

[143] Terms and conditions governing the appointment of a special adviser to the Minister of International Trade, to be known as the Extractive Sector Corporate Social Responsibility Counsellor, who may be appointed by the Governor in Council under the Public Service Employment Act, P.C. 2009–0422 ¶ 127.1(1)(c) (2009).

The process is entirely voluntary, and no review will take place without the consent of the parties. However, where complaints are reviewed, the CSR Counsellor will apply the endorsed transnational CSR norms, which include the International Finance Corporation Performance Standards on Social & Environmental Sustainability[144] (for extractive projects with potential adverse social or environmental impacts); the Voluntary Principles on Security and Human Rights[145] (for projects involving private or public security forces); and the Global Reporting Initiative (GRI)[146] (for CSR reporting by the extractive sector to enhance transparency and encourage market-based rewards for good CSR performance).[147] These transnational CSR standards will be applied by the CSR Counsellor as the appropriate standard of conduct against which the complaints will be assessed, meaning that they have been expressly endorsed as an appropriate standard of conduct for Canadian extractive sector corporations operating internationally.[148]

Endorsement of this sort does not make the endorsed standards "laws" *per se*, but create conditions that encourage internalization of such standards by corporate actors in any event. In this way, the endorsed transnational CSR norms can become the benchmark against which performance is assessed, by government and by other social actors that use the State's endorsement as a guide to selecting evaluative standards.

3. Contractual Incorporation

Transnational CSR norms may also become incorporated into the terms and conditions of contractual relationships.[149] A corporation may agree to adhere to transnational CSR norms in agreements with regulators, commercial suppliers, or as part of membership in an association. Such voluntary undertakings may be converted into a legally binding requirement when a party to such an agreement seeks judicial enforcement of the agreement.[150]

---

[144] *IFC Sustainability—Environmental and Social Standards*, INTERNATIONAL FINANCE CORPORATION, http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards (last visited 17 Aug. 2011).

[145] VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, http://www.voluntaryprinciples.org/principles/index.php (last visited 17 Aug. 2011).

[146] *Reporting Framework*, GLOBAL REPORTING INITIATIVE, http://www.globalreporting.org/ReportingFramework/ (last visited 17 Aug. 2011).

[147] *CSR Counsellor Mandate*, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA (21 Apr. 2011), http://www.international.gc.ca/csr_counsellor-conseiller_rse/mandate-mandat.aspx?menu_id=57&menu=L.

[148] *Id.*

[149] Meidinger, *Environmental*, *supra* note 120, at 10,168.

[150] Wood, *supra* note 137, at 52.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

4. Incorporation Through Norm-Applying Institutions

Aside from direct legislative incorporation or endorsement, utilization within judicial and regulatory processes is another mechanism by which transnational CSR norms may come to be incorporated into legal systems.

For example, transnational CSR norms that are viewed as "best practices" within a certain industry may influence the availability of permits or licenses for corporations, or affect regulatory approvals or sanctions. Regulatory offences providing for "strict liability," for example in the health and safety or environmental context, may also require corporations to establish "due diligence" if they are to avoid sanction once the factual elements of the offence have been established. Alternatively, tort claims may necessitate the demonstration of "reasonable care" in relation to persons affected by corporate conduct. Standards of care and diligence can be tied to best practices embodied by transnational CSR norms, even if there are no specific statutory, regulatory or case law authorities that explicitly refer to such norms.[151] In the application of such legal concepts, liability is often contingent upon a party demonstrating that it has met the "standard of care" expected in the circumstances.[152] Adherence to best practices embodied in transnational CSR norms may provide the best evidence of the appropriate standard of care, and therefore become part of the legal standard applied by courts. Such standards thereby form the benchmarks against which conduct is evaluated, and as such become tacitly (if not expressly) part of the legal standard of conduct expected of a corporate actor.[153]

Corporate directors may even be held to open-textured legal standards of care, skill and loyalty that can require effective implementation of transnational CSR norms where such norms provide a generally accepted set of standards to guide decision making.[154] Section 302 of the United States *Sarbanes-Oxley Act*,[155] for example, requires the chief executive officer and chief financial officer of public corporations to certify in financial reports all statements of material fact regarding the financial condition and operational results of the corporation. Internal controls must also be created to ensure corporate officers know material information in a timely manner. Fulfillment of these duties could encourage (or in

[151] Meidinger, *Environmental*, *supra* note 120, at 10,171.

[152] *Id.* at 10,172.

[153] Kernaghan Webb & Andrew Morrison, *The Law and Voluntary Codes: Examining the 'Tangled Web,' in* VOLUNTARY CODES: PRIVATE GOVERNANCE, THE PUBLIC INTEREST AND INNOVATION 125 (Kernaghan Webb ed., 2004); Wood, *supra* note 137, at 135.

[154] Meidinger, *Environmental*, *supra* note 120, at 10,171.

[155] 107 P.L. 204, 116 Stat. 745, 15 U.S.C.S. § 7201 (2010).

some circumstances possibly necessitate) the adoption and implementation of generally accepted practices embodied by transnational CSR norms.[156]

Adoption of transnational CSR norms into State legal systems may involve the State playing the role of "meta-regulator" of self-regulation or standard setting processes beyond the State.[157] Meta-regulation by States does not focus on prescribing standards for legal compliance, but may involve the use of legal mechanisms to ensure compliance with normative expectations that derive from outside of the State, including through the "normative arena" of competitive markets and relations with stakeholders.[158] Meta-regulation may mean that there are officially recognized reasons for acting that arise from sources other than the State, or that there are reasons to act in the absence of any specific legal requirement, but which are adopted into and enforced by State legal systems.[159]

Wherever this occurs, it will not be realistically possible for companies to take a "free ride" by ignoring best practices embodied in transnational CSR norms. To do so would create real legal risks in the event corporate conduct were to be challenged, where such practices operate as the standard of conduct expected of similarly-situated corporate actors, unless adherence to a different and equally acceptable standard of conduct could be demonstrated.[160] Transnational CSR norms can also, in this way, influence the exercise of discretion or implementation of policy objectives by legal and regulatory bodies, wherever transnational CSR norms are used to justify corporate conduct.

V. The Legal "Hooks" for Transnational CSR Norms in Positive Legal Theory

In each of the foregoing ways, transnational CSR norms can become incorporated, implicitly or explicitly, in the standards of conduct required by corporate actors to comply with their legal obligations. These mechanisms represent the "hooks" by which transnational CSR norms have been recognized as coming to form part of positive legal systems.

Despite the empirical recognition of this inter-relationship, there still remains a fundamental gap in our theoretical understanding of why, and how, such incorporation may occur. The next sections will consider the theory behind the incorporation of transnational CSR norms into positive legal systems. Of particular interest will be those

[156] Webb & Morrison, *supra* note 153, at 147.

[157] Parker, *supra* note 45.

[158] *Id.* at 178.

[159] *Id.* at 182.

[160] *Id.* at 139.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

more indirect forms of incorporation discussed above. These include through the application of legal standards of care, or open-textured concepts such as "due diligence," as well as in informal policy or regulatory processes. In these ways, transnational CSR norms are used to "plug the gaps" in the so-called "hard law" by legal institutions in practice, even as an interpretive guide for the application of law to particular facts.[161] Each of these "hooks" present mechanisms by which transnational CSR norms may come to be incorporated into positive legal systems, regardless of whether their use is expressly required by traditional legal authorities. The goal must be to understand, from a theoretical perspective, why this can occur, despite the non-State origin and seemingly "non-binding" character of such transnational CSR norms, within a positivist conception of law and legal system.

As we have seen in some of the indirect "hooks" for incorporating transnational CSR norms into positive legal systems such as "open-textured" legal concepts, external norms may be used within processes of legal reasoning where they are not in conflict with legally binding rules and where legally binding reasons are inadequate, or too indeterminate on their own to solve a particular legal problem. External norms can come to be utilized in these scenarios where they are persuasive and practically useful to the solution of such problems. In such circumstances, external norms such as transnational CSR norms could be sought out and utilized by norm-applying institutions in order to apply the law, to settle "unsettled" questions, or to bridge "legal gaps" in the positive law. According to Razian positivism, the law on a question is settled when legally binding sources provide its solution.[162] If a legal question is not answered by standards deriving from legal sources, then it lacks a legal answer and the law on the question is "unsettled."[163] When no decision is "required" by law there is said to exist a "legal gap." A gap in the law means that there exists no specific legal obligation, although there may be secondary or partial answers only, such as that "the law is unsettled" or that "the law requires nothing."[164] However, where a decision is required, a gap in the law cannot be allowed to stand. It must be filled by some process of legal reasoning, possibly utilizing norms and standards not deriving from the system itself. Such external norms may be adopted to inform legal reasoning in circumstances where a decision must be made, and the judicial decision maker is entitled (or required) to use such norms to inform their decision making process.

Within processes of legal reasoning (as used in norm-application) there may be standards courts are "bound" to follow which take precedence over other standards which, while not binding, norm-appliers may be entitled to follow to inform their reasoning. As we have

[161] Duplessis, *supra* note 5, at 27.

[162] RAZ, AUTHORITY, *supra* note 12, at 49.

[163] *Id.* at 50.

[164] *Id.* at 70, 71.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

seen, however, it is often also the case that legal obligations will be defined by open-textured standards of conduct such as "due diligence" or "reasonableness" which do not present a readily ascertainable "solution" to legal problems without the indirect application of other facts, norms or standards that are not directly part of the legal requirements. These types of open-textured legal standards will often necessitate reference to external standards of conduct or reasonable expectations that were not promulgated by the State. Such norms could be varied in their nature or source, and could include professional norms, social rules, customs, usages, contractual obligations, intra-organizational or inter-organizational agreements, or arbitration awards.[165] Such standards of conduct are open to interpretations that are not provided by State institutions, but instead depend on the exercise of judgment by the norm applying institutions themselves.[166] Open-textured legal requirements may therefore create incentives that compel subjects of law to seek out and develop normative systems through which they can demonstrate diligence or which will set the parameters of "reasonable" conduct in relation to legal standards.[167] In this way, the intersection of transnational CSR norms and legal requirements becomes evident, regardless of whether a norm-applier is "bound" to follow transnational CSR norms by the requirements of a positive legal system, such norms are useful to "fill the gaps" in processes of legal reasoning.

Despite such potential legal relevance, Raz's account of positive legal system "excludes" from the scope of a legal system norms that norm-appliers are entitled to follow from binding norms, which they are obliged to follow. It is this distinction, in fact, that Raz uses to define the limits of positive law.[168] Raz accepts that there may be norms and rules (and other such facts) that exist outside of the legal system which lack the character of "systemic validity," but which may nevertheless be utilizable in the norm-applying process, and therefore of significant importance for legal analysis, and in defining the scope of legal obligation. In their application, external norms may become part of authoritative rulings and in this respect give rise to legal obligation and duties, while not forming part of the legal system in which they are applied. This means that external norms cannot be truly considered "law" in Raz's account, at least until they are applied by norm-applying institutions, despite the fact that they may be necessary to define the scope of legal obligation prior to such application. Despite this, Razian positivism accepts that all legal systems are "open systems" which adopt and apply norms external to the system, regardless of whether such norms are "binding" on the norm-appliers that utilize them.[169]

---

[165] Gunther Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 LAW & SOC'Y REV. 763, 768 (1997).

[166] Parker, *supra* note 45; Scott, *Reflexive Governance*, *supra* note 44, at 176.

[167] Parker, *supra* note 45; Scott, *Reflexive Governance*, *supra* note 44, at 176.

[168] RAZ, AUTHORITY, *supra* note 12, at 115.

[169] *Id.* at 120.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

Such norms may be recognized as a result of binding rules for their recognition within a positive legal system, or they may be utilizable as norms that norm-appliers are "entitled to follow" even if they are not binding on them. In either case, however, it is clear that external norms used within the norm-applying process will become part of the scope and content of legal obligations within a positive legal system, through their application by a norm-applying institution. This may be true whether or not such external norms are considered to be "law" *per se* as defined in the Razian positivist account.

From this analysis, we can conclude that the open nature of positive legal systems allows for the adoption and use of external norms, including transnational CSR norms, within processes of norm-application. Having identified the possibility that transnational CSR norms could be adopted into positive legal systems in this way, we are led to consider the normative effect of transnational CSR norms that are so adopted and utilized within processes of legal reasoning. Razian positivism suggests that the incorporation of external norms (conceivably including transnational CSR norms) can be integral to understanding the scope and content of a legal system, wherever binding norms within the system do not or cannot provide a complete answer to the problem of the scope of a legal system.[170] However, few analytical tools are provided to explain how such norms can or ought to be used within processes of legal reasoning. This creates a certain indeterminacy at the borders of the Razian conception of positive legal systems that must be resolved if we are to comprehend how transnational CSR norms relate to law and legal obligation. The challenge becomes developing a method of understanding how such "borderline cases" can be understood within a positive conception of legal system, so that any indeterminacy can be minimized to the extent possible.[171]

The possible necessity of referring to external norms to understand the scope of a legal system, without a clear understanding of their normative effects, creates significant challenges for the legal practitioner. In particular, there exists a temporal problem of understanding the complete parameters of legal expectation and obligation prior to the norm-applying event that establishes the systemic validity of external norms, and giving rise to their use in authoritative "applied legal statements" which generate protected reasons for action. Subjects of law that are relying upon the guidance provided by law to identify acceptable legal "reasons for action" may not be able to wait for authoritative decision making to take place before they act. This means that, practically speaking, actors seeking to comply with law and to identify legal obligation prior to its application, will need to engage in a consideration of which laws, and also which external norms (if any), will be utilized within any future norm-applying process that might affect the actor in question.

[170] *Id.* at 97.

[171] CULVER & GIUDICE, *supra* note 7, at 61.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

While Raz suggests certain conditions of recognition of external norms that may be applied within a legal system, there is no clear indication of whether or in what circumstances norm-applying institutions will be compelled to adopt external norms, including transnational CSR norms. In this respect, the normative effects and potential for application of external norms such as transnational CSR norms is not clearly explained in Raz's account of positive legal systems. As will be discussed in the next section, without understanding more than the theories offered by Raz's positivist account then, a subject of law will be unable to discern the full scope of legal obligation that applies in a given circumstance, where such norms are essential in comprehending legal obligation.

VI. Limitations of the Razian Positivist Account of the Adoption of Transnational CSR Norms into State Legal Systems

In Razian positivism, the "marking off" of legal reasons as "binding" occurs with the issuance of final decisions of authoritative norm-applying institutions.[172] The directives emanating from such norm-appliers provide protected and exclusive reasons for action for the subjects of law. Thus it is that authoritative norm-applying institutions possess the capacity to identify, conclusively, what the law is and how it will be applied within a positive legal system. In considering how transnational CSR norms may be relevant to positive legal systems, we have examined how transnational CSR norms may come to be applied by norm-applying institutions. In this analysis, we have seen that certain characteristics of transnational CSR norms suggest they can be practically "efficacious" in relation to their norm-subjects and create normative effects on the social actors that use and adhere to them. Transnational CSR norms can also be socially sourced to the extent that they are utilized within "systems" of normative control that confer a "rules" based character distinct from underlying moral justifications. What transnational CSR norms may lack however is derivation from the institutions of the State. Despite this, we have discovered that Razian positivism contemplates the adoption of external norms such as transnational CSR norms under certain conditions of recognition specified by rules of the system into which they are adopted. Where such adoption occurs as part of a norm-application process, understanding the complete scope of the legal system and indeed the parameters of legal obligation necessitate the ascertainment of both salient legally binding reasons and the relevant external norms that will be used in an authoritative norm-application process.

A positive legal system will not always provide clear recognition rules or tests for the circumstances of inclusion of external (including transnational) norms within norm-application processes. There can be rules of recognition within legal systems that permit the utilization of an external (transnational) norm, even if it does not require it, to inform the legal reasoning of norm-applying institutions, including in the application of "open-

[172] RAZ, AUTHORITY, *supra* note 12, at 51.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

textured" legal concepts. A legal practitioner would therefore be mistaken as to the exact parameters and scope of legal obligation if they were to assume that the absence of an express requirement to recognize and apply transnational CSR norms meant that transnational CSR norms lacked relevance to a legal discourse. But such uncertainty as to the possible role played by external norms in defining legal obligation creates innate risks to its ascertainment, where transnational CSR norms may be relevant to, though not expressly incorporated into, positive law.

Closer examination reveals that these risks are inherent in any effort to determine precisely how law will be conclusively applied to a given legal problem. Prior to conclusive application by a norm-applying institution, the law can be identified only by recourse to the qualities of legal validity, which in turn depends upon systemic validity of a particular norm. Where legal (and therefore systemic) validity exists, a law can be identified as "legally binding." However, the manner in which legally binding laws will be applied to particular facts is not conclusively ascertainable until application occurs. In Raz's theory of positive law, there are two kinds of legal propositions, (1) what is *prima facie* the case; (2) what is conclusively the case. Even a statute, while considered by Raz to be a "pure legal statement," still operates as a *prima facie* law until it is applied to a particular factual scenario.[173] In this respect, when one attempts to discern how legally binding laws will be applied to a given circumstance, it is not possible to determine what is "conclusively the case" before actual application by a norm-applying authority occurs. It is only once application occurs that a *prima facie* law becomes an "applied law" and takes on the characteristics of an authoritative statement providing protected and exclusive reasons for action. This concept is what Raz calls the "*prima facie* solution."[174] It is based on the idea that the nature of applied law offering protected reasons for action is not discoverable unless and until a law has been applied by an authoritative norm-applying institution.

The *prima facie* solution makes the conclusive discoverability of all "applied law" contingent on the act of norm-application by a norm-applying institution. Any assessment of legal obligation that takes place prior to such application will need to be based upon an assessment of *prima facie* law, along with salient facts and external norms, in the determination of a particular legal problem. This effort to ascertain legal obligation prior to norm-application becomes more complicated when the process of norm-application involves the possible adoption of external norms. In such circumstances, only ascertainment of *prima facie* laws, salient facts, *and* the applicable external norms that will be adopted in the norm-application process will enable a subject of law to fully comprehend the scope of legal obligation that they face, prior to norm-application by an authoritative norm-applying institution.

[173] *Id.* at 62, 80.

[174] *Id.* at 59.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

As we have discussed, Raz's positivist account of legal system "excludes" from its scope those external norms that may be adopted into it, while acknowledging that such a delimitation means that a "complete answer" to the problem of the scope of a legal system may not be possible in the positivist account.[175] This does not resolve, and in fact enhances, the temporal problem that must be grappled with in order to ascertain the scope of legal obligation within positive legal systems. If laws and other salient norms are to be used to guide and inform the behaviour of law's subjects, the normative effect of laws and salient norms must, presumably, occur prior to conclusive application by a norm applying institution. The pre-applied state of such norms is, for all practical purposes, the state in which most subjects of law must identify the scope of legal obligation if law is to be used as an effective guide for behaviour. Prior to norm-application then, it is not self-evident which *prima facie* laws and external norms will be applied, and in what way, to create an "applied legal statement" which in turn creates "protected and exclusionary" reasons for action within a positive legal system. If "excluded" norms are also necessary to identify such legal reasons, then the law's subject must be attuned to norms that are excluded from, but relevant to, the legal system that they act within. As such, it will be inadequate for the law's subject to look only to the legal system itself for the full panoply of norms that may be applied to define the full scope of legal obligation.

In light of the foregoing, it is difficult to avoid the conclusion that the subject of law, seeking to ascertain legal obligation, must engage in some assessment of how *prima facie* laws and external norms might be used within a norm-application process that gives rise to legally binding protected reasons for action. More particularly, in the case of external norms such as transnational CSR norms, it is most important for the law's subject to consider what *prima facie* relevant external norms might be selected and applied within an authoritative adjudication process in order to solve legal problems. The actor who must be guided by legal reasons in order to be in compliance with legal expectation must engage in such an *a priori* process of analysis to select which reasons for action should be incorporated into their own decision making prior to an actual authoritative norm-application process. This search for salient reasons must extend beyond the legal system to include those external norms that may be adopted within an authoritative process of legal reasoning.

If we focus on how this discernment process takes place in relation to external norms, particularly in relation to transnational CSR norms of the sort under examination, we must examine the circumstances that might lead a norm applier to seek out and apply particular external norms to make conclusive determinations of legal situations. It is clear that norm-applying institutions will be constrained by the legally binding and systemically valid laws that guide and constrain their decision-making authority and discretionary powers. In the case of external norms, Raz concludes that they may be "adopted" by a system as legally

[175] *Id.* at 97.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

valid under certain circumstances. As well, external norms may be used in the norm-application process where their use is permitted, though not explicitly required, in order to inform the legal reasoning process. In either of these circumstances, external norms will be adopted to inform legal reasoning because they are informative of the social expectations applicable to the subjects of law, where such considerations are permissible by the legal system that adopts them. Nevertheless, Raz's theory of adoption has been criticized as failing to provide a complete explanation of how to determine the boundaries between those norms that are part of the system as "law" and those that are adopted from other normative systems and applied by norm-applying institutions but which are excluded from the definition of "law" *per se*.[176] The Razian approach implies a certain "hierarchy" between those norms that are generated within the institutions of the State and those that emerge from non-State institutions or processes.[177] Such a hierarchical conception may not recognize the practical reality that many non-State norms (including transnational CSR norms) often compete with and may even trump official State laws in practice.[178] To surmount such an implication, and for positive theory to contend with the empirical phenomena of transnational CSR norms, it would seem necessary to focus on how such norms arising outside of the State may come to be recognized as possessing legally significant characteristics, particularly where such norms effectively govern areas of social life that norms promulgated by the State do not, or cannot.

In light of the foregoing, we are drawn towards the conclusion that where transnational CSR norms exist and operate as reasons for action that are capable of being identified independently of their underlying moral justification, then the legality of such norms ought to be recognized.[179] That is to say, such norms possess a legal significance that puts them among the potentially salient external reasons that could inform the norm-application process, and indeed the scope and parameters of legal obligation itself. Accepting this, the real question then is not how to delineate "law" from "non-law," but rather how to develop an analytical theory of law that can identify the core features of legality and legal relevance in the case of transnational norms.[180] Inevitably, recognizing the legality of transnational CSR norms within State legal systems requires understanding of how an institutional nexus is created leading to recognition and/or adoption of such norms within a legal system. This recognition may be made easier if we accept that the nature of the norms themselves will not change simply because of their recognition within a positive legal system. The features of transnational CSR norms that make them worthy of

[176] CULVER & GIUDICE, *supra* note 7, at 64.

[177] *Id.* at 65.

[178] Teubner, *supra* note 165.

[179] Similar conclusions were drawn in CULVER & GIUDICE, *supra* note 7, at 115.

[180] *Id.* at 146.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

recognition, and therefore which make them *prima facie* legal in nature, will not depend on the fact of their application by a legal institution, but rather on why they may come to be applied by such an institution at some future point in time.

Razian positivism does not provide a complete account of the process by which norm application comes to adopt external norms to define the scope of a legal system. To overcome this limitation, in the next section we will have recourse to another theoretical conception of law offered by discursive theorists. The goal will be to expand upon Raz's understanding of the "openness" of legal systems and the possible adoption of external norms, with an examination of how internal and external norms interact within processes of legal reasoning used in norm-application aimed at authoritative decision making. This will be done with an aim to identifying the traits that transnational CSR norms must possess to identify them as "legal" and utilizable within processes of legal reasoning, particularly in relation to the norm-applying institutions of positive legal systems.

D. Recourse to a Discursive Examination of the Norm Application Process

Discursive theorists explain what we might call "norm-application" as a process of argumentation directed at the settlement of social disputes. In this endeavour, discursive theorists draw upon the "topical" theory of rhetoric first espoused by Aristotle. "Topics" is a problem-solution oriented form of logic involving the finding of reasons for or against acting.[181] Within discursive theories of argumentation, so-called "*topoi*" or "*loci*" or "commonplaces" are used to describe standpoints of arguments which serve as certain general propositions to which proofs can be made.[182] These commonplaces serve to locate the issues of a debate within a substantive set of common understandings that provide for the crucial connections within the structure of the argument.[183] "Seats of argument" in the form of premises employed in a logical process of argumentation are used to obtain assent to choices based on a series of practical judgments. Once accepted and shared by the parties to argumentation, these premises serve to displace other considerations which could provide grounds for competing evaluations.[184]

As in Razian positivism, discursive theories of law and legal discourse identify norm-application and the capacity to make final and binding authoritative decisions as the foremost objective and purpose of legal systems. While not conceived of in identical ways to the positivist characterization of "norm-applying institutions," discursive legal theorists

[181] THEODOR VIEHWEG, TOPICS AND LAW 19 (Peter Lang ed., W. Cole Durham, Jr. trans., 5th ed. 1993).

[182] *Id.* at 24.

[183] FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 219 (1989).

[184] *Id.* at 38.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

agree in essence with the analytical positivist approach that the parameters of law and legal obligation are best discerned by reference to the way in which it is applied to solve legal problems. As in Razian positivism, discursive theorists accept that norm-application is necessary for there to be an identifiable body of norms that can be considered "law." A primary difference between Razian positivism and discursive theories of law is in the treatment of norms used in processes of legal reasoning. Whereas Raz draws clear delineation between those legally valid reasons possessing systemic validity and those "excluded" norms that may nevertheless be informative of the scope of a legal system, discursive theorists view such attempts to be of little or no practical relevance. Discursive theorists challenge the appropriateness of automatically excluding from the scope of "law" such things as "international law," "soft law," or other such norms that may be relevant to legal reasoning, even if they may lack some of the systemic qualities of "municipal legal systems" described by positive legal theory.[185] Discursive theorists reject the idea that there can be a useful demarcation between legal reasons that are "laws" and legal reasons that are subsumed within legal systems but which remain distinct from true "law."[186] In the absence of practical relevance, such distinctions are abandoned. Instead, discursive theorists are content to conclude that the boundaries of law are simply indeterminable, and that legal reasoning includes a variety of persuasive norms, which may arise from within or outside of a particular legal system.[187]

Legally relevant norms are, for the discursive theorist, not limited to those that share a particular characteristic, such as, for example, an attached sanction, or attachment to a legal system. The question of legal validity of a norm cannot be completely reduced to a cognitive question of how one is to recognize the relationship between a legal norm and the system in which they are applied.[188] Instead, the relevance of norms to processes of legal reasoning and norm application derives from the way in which they are, or can be, used within such processes. This aspect of discursive theory is useful to consider for our purposes because it suggests an approach to the discernment of norms that may be useful within legal argumentation, and therefore informative of legal obligations within positive legal systems, through the norm-application process. From the discursive perspective, the persuasiveness of legal reasons used in legal arguments cannot be rooted only in the validation procedure internal to the legal system or the norm itself, or in the "unproblematic" correspondence of rules emanating from a legal system.[189] Discursive theorists recognize, as we have, that validity claims are, by their nature, unsettled prior to

[185] *Id.* at 42.

[186] *Id.* at 247.

[187] *Id.*

[188] *Id.* at 186.

[189] *Id.* at 33.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

the application of particular norms, even by recourse to internal logical criteria.[190] Prior to conclusive application of all salient norms in a process of norm-application, there will be no logical devices by which we can anticipate the conclusive result of "applied law" unequivocally. At best, the outcome of norm application will only be discernible by attempting to replicate the process of argumentation that will be used within the norm-application process itself. It is because arguments of a legal nature cannot be settled by self-evident and internally coherent rules that they must be settled by authoritative decisions that result from norm-application employing legal reasoning and argumentation.[191] Decision making through argumentation emerges as the procedure by which solutions to legal problems are discovered. Norm-application will not be reducible to the simple application of rules emanating from a system in a self-evident way in order to solve legal problems.[192] It will instead require consideration of how salient norms might come to be used in order to solve certain legal problems, using all of the rhetorical tools at our disposal to identify the persuasiveness of a particular norm in a particular situation or circumstance.

The discursive recognition of the temporal dilemma of identifying the scope and content of legal obligation prior to its conclusive application, and their identification of argumentation logic to the solving of legal problems, has led to the development of a useful descriptive analysis of how norms are practically identified and used within processes of legal reasoning. Through this understanding, discursive theory may provide us with the theoretical tools to discern how transnational CSR norms are identified and utilized by norm-applying institutions within a positive legal system, particularly where their use is not prescribed by legally binding norms within such systems.

I. The Normative Context of Legal Reasoning

We have discussed how transnational CSR norms have come to be understood as arising from and operating within a larger normative context that affects social actors, which may transcend the express requirements of a positive legal system. Our analysis of the relationship between transnational CSR norms and positive legal systems has, essentially, been an attempt to reconcile this broader normative context with the Razian understanding of positive legal systems. In so doing, we have examined the method by which broader societal norms "external" to a positive legal system may become part of such legal systems and therefore play a important role in defining their scope, as well as the content of legal obligation in relation to a particular legal problem.

[190] *Id.* at 34.

[191] *Id.* at 34.

[192] *Id.* at 33.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

The salience of transnational CSR norms, as we have discovered, derives in part from their capacity for efficacy, defined by the effect of adherence that they gain from their norm-subjects. Transnational CSR norms may be used within systems of social control as constraints or rules of conduct against which social action can be evaluated, and which may give rise to social consequences. Their salience also derives, in part, because the social consequences attached to transnational CSR norms are quite significant for their norm-subjects, namely corporations and their social stakeholders. The capacity for efficacy that transnational CSR norms possess suggested to us at the outset a possible linkage between them and positive legal systems. Nevertheless, as we have also discovered in our examination of Razian positivism, the mere identification of efficacy does not provide a complete account of legal relevance. Instead what is needed is an institutional linkage to a norm applying institution within a legal system.

While discursive theorists deny that legally relevant norms are discernible on the basis of systemic validity alone (an assertion not likely to be contested by Razian positivism in light of the open nature of legal systems), norms applicable to processes of legal reasoning are viewed as possessing unique characteristics that make them distinguishable from non-legal norms. That being the case, there is nevertheless a recognized commonality in the origin and purpose of "legal reasons" and other efficacious though "non-legal" norms (which we might call "external" in the positivist sense), which could become relevant and utilizable within a legal discourse. Discursive theorists start from a sociological premise that wherever social actors engage with each other for long periods of time, common norms and binding standards of behaviour emerge to define the parameters of social conduct. In the case of transnational theory, this has been attributed to the fact that social actors generally prefer relatively clear and calculable standards and guidelines of behaviour, even if it means that such standards must be developed by the actors themselves, rather than by governmental authorities.[193] For the discursive legal theorist, the concept of law, like any other normative order, derives from the norm-governance of the most rudimentary elements of social behaviour.[194]

The most basic of social behaviours is what may be termed "action" which represents the behaviour of a singular actor understood from the perspective of the "first party." Actions must be understood by attempting to reconstruct a subjective interpretation of the "motive" of the actor, which in turn provides a "sufficient reason" for the actors' conduct.[195] In this respect, motives are always viewed to exist prior to action and can be considered its antecedent condition.[196] "Social action" is a subcategory of meaningful

[193] A similar sociological premise was adopted in Dilling et al., *Private Accountability*, *supra* note 19, at 1.

[194] KRATOCHWIL, *supra* note 183, at 24.

[195] *Id.* at 24.

[196] *Id.* at 25.

action within a society and considers the way in which an individual actors' conduct is meaningfully oriented toward that of others, as understood in the "second party" such as in a process of bargaining, or in the third party as in the process of adjudication.[197]

Meaningful "social" action can be placed within a context of objectively shared understandings within a society that are subjectively held by the social actors themselves. Identification of such shared understandings allows the observer of social interactions to identify the goals and motivations for which "social action" is undertaken.[198] The "second-party" context of social action may be characterized by "strategic" or "bargaining" types of behaviour between social actors. "Bargaining" includes the possible application of coercive means, an unregulated process in which norms may not come into play. Bargaining interactions may also, however, include argumentation between the parties using language in the form of promises or threats (as opposed to actual actions) designed to obtain a coerced result.[199]

Bargaining types of interaction necessitate a certain interdependence of decision making and possibly the existence of common interests or shared motives between social actors. Where this interdependence is defined by norms, then social interactions of this nature may become "norm-governed." In this situation, norms serve to transform potential conflicts between social actors into problems that can be addressed by recourse to argumentation. The use of argumentation within a system of norm governance implies that one has renounced resorting to force alone, and that value is attached to gaining the adherence of one's interlocutor by means of reasoned persuasion.[200] It also presumes that the parties to argumentation do not regard the other party as an object, but rather as an actor capable of exercising free judgment and applying shared norms to develop acceptable solutions to a problem. In this respect, recourse to argument assumes the establishment of a "community of minds" which, while it lasts, excludes the use of violence or coercion. Where there is only the semblance of argumentative debate, either because the speaker imposes on his audience the obligation to listen to him or because the audience is content to make a show of hearing what he has to say, argumentation may simply be a delusion. In such circumstances, the agreement reached may well be a disguised form of coercion.[201]

---

[197] *Id.* at 24.

[198] *Id.* at 24.

[199] *Id.* at 181; CHAIM PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 8 (1969).

[200] PERELMAN & OLBRECHTS-TYTECA, *supra* note 199, at 55.

[201] *Id.* at 55.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

Within a comprehensive State legal system, coercion is centered in the institutions of the State. As such, the only legitimate means of dispute resolution becomes the processes of argumentation channeled through the legal or political systems of that State. With or without the State however, the role of norms comes to the fore when the actors' goals collide and a solution is sought through non-coercive means. Norms and rules are used to deliberately bound the conflict and achieve agreement on a method to resolve grievances or disputes, which employs such norms and rules through processes of argumentation.[202] Where norms and rules form the principles of action governing an area of social behaviour, those principles eliminate something of the arbitrary from the conduct of the actors that apply them. Their behaviour becomes regulated, and is no longer entirely dependent upon their subjective whims, or their relative power.[203] In applying such norms and rules to the resolution of disputes, outcomes will only be obtainable based upon argument and persuasion, rather than coercion based upon relative power.[204] Within this process, norms provide "standard" solutions, which the parties can utilize if they so desire. They may also limit or constrain the ways in which the parties are able to pursue their respective self-interests.[205] Norms become "implicit third parties" that may be identified and sought out to justify the positions of the social actor in relation to other social actors and serve as a system of norm-control without the need for concrete individuals to serve as third parties to apply norms.[206]

Shared norms may also be applied through explicit third party norm-appliers such as mediators, arbitrators or judges, as in positive legal systems or transnational normative systems of social control. Where a "third party" norm-applier is involved, the parties to a norm-application process must grant to each other equal standing to argue "the merits" of their case.[207]

This form of norm application is integral to the positivist understanding of legal system. Within positive legal systems, all legal argumentation aims at gaining the adherence of minds (most importantly of the norm-applier) and therefore assumes the existence of an "intellectual contact," between the parties to a dispute, and the legal authority empowered to adjudicate and decide the outcome.[208] The problem becomes knowing

[202] KRATOCHWIL, *supra* note 183, at 181.

[203] CHAIM PERELMAN, JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING 77 (1980).

[204] KRATOCHWIL, *supra* note 183, at 181.

[205] *Id.*

[206] *Id.* at 36, 181.

[207] *Id.* at 36.

[208] PERELMAN, *supra* note 203.

who is qualified or competent to criticize and to judge, and what elements of reasoning will be applied by the ultimate decision maker within the adjudicative process.[209] The question for a party to a legal process is not what the institutions of the State "command" of its subjects, but rather how legal reasoning will be applied to the determination of social conflicts. The norms utilized in the norm application process of a legal system are not synonymous with commands. Instead, the norms that will be applied in a given circumstance must be ascertainable in advance of their application and exist as "standing orders." In this respect, rules of this nature are best elucidated in logical form as "if-then" statements, indicating the circumstances and range of the rule's application to particular situations. Legal norms apply universally to those they govern and are not directed at a particular individual at a particular time. Even when the rules themselves empower someone to issue commands, the command and the rule are distinguishable from one another.[210] Understanding how protected reasons for action are created therefore necessitates an understanding of how legal reasons are understood and applied to legal problems, not by identifying freestanding protected reasons that command certain actions in their own right.

Both positive laws and transnational CSR norms have the capacity for use in this way within processes of argumentation directed at the resolution of conflict by means other than coercion. It is in this way that both law and transnational CSR norms may come to be used in a norm application process.

II. The Process of Norm-Application in Discursive Theory

Norm-application is understood in discursive theory as a method by which practical social problems are solved.[211] Norm-application is a form of practical reasoning that addresses the problem of "praxis"—involving an effort to gain adherence to one alternative among many in a situation where no logically compelling solution is possible, but a choice cannot be avoided.[212]

The necessity for action that drives norm-application within a legal system, or transnational system of normative control, requires that the binding force of a decision be recognized at a certain point in time, if the practical application of a norm is to occur.[213]

---

[209] VIEHWEG, *supra* note 181, at 65.

[210] KRATOCHWIL, *supra* note 183, at 53.

[211] VIEHWEG, *supra* note 181, at 102–07.

[212] PERELMAN, *supra* note 203, at 160; *Wordnet*, PRINCETON, http://wordnetweb.princeton.edu/perl/webwn?s=praxis (last visited 17 Aug. 2011).

[213] PERELMAN & OLBRECHTS-TYTECA, *supra* note 200, at 58.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

The praxis of positive legal systems occurs in the act of norm-application and the rendering of an authoritative decision. Discursive theorists also assert that every norm-applying endeavour requires a process of argumentation, whereby norms are applied to settle disputes definitively.[214] The role of a qualified and authoritative decision maker is to make authorized decisions that ought not to be challenged, or if they may be challenged then a final tribunal must be empowered to ultimately settle conflict. In the absence of such dispositions, the settlement of social conflict does not fall into the realm of law, but is rather a series of political questions, that may be determined by relative coercive capacities and the use of force.[215]

Within a positive legal system then, argumentation will be unavoidable whenever a legal proposition is questioned by one of the parties to a legal dispute or where there can be no agreement on the scope or interpretation of a particular legal concept, or on its value in relation to a legal problem under consideration. The goal of all argumentation is to create or increase the adherence of minds (most particularly of the norm-applying audience) to the arguments presented for their assent. An efficacious argument is one that succeeds in increasing the intensity of adherence among those who hear it. The objective of the actor advancing an argument is to gain, through adherence of the mind, an intended action (or an abstention from action), or at least to create in the audience a willingness to act in a certain way.[216] To "reason" with the norm-applying audience is not merely to verify and to demonstrate, but also to deliberate, to criticize, and to justify, to give reasons for and against; in other words, to argue.[217]

The role of the lawyer or advocate in such processes is to identify and apply persuasive reasons within processes of argumentation directed at the norm-applying audience. In fulfilling this role, the lawyer must find, through a premise seeking procedure, the arguments applicable to a particular legal problem and to rhetorically apply such premises towards the deliberations of authoritative decision makers. All reasons within such a discourse capable of persuading authoritative decision making are salient to a legal discourse and therefore ought to be included within a good argument. The advocate does not address the judicial decision maker as a legal historian, stating what previous authorities have said, but as a jurist attempting to convince the judge that there is reason to interpret the law and apply it in a certain way.[218] After hearing the contestants' pros and cons, a norm-applier will present the reasons that determine his or her decision. The

[214] KRATOCHWIL, *supra* note 183, at 32; PERELMAN & OLBRECHTS-TYTECA, *supra* note 199, at 310.

[215] PERELMAN, *supra* note 203, at 122.

[216] PERELMAN & OLBRECHTS-TYTECA, *supra* note 199, at 45.

[217] *Id.* at 61.

[218] PERELMAN, *supra* note 203, at 130.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

norm-applier will then communicate their reasons for the final decision so that they may be accepted by the parties to the litigation, by public opinion and by higher judicial tribunals.[219]

Thus, in any norm-application process, a search for premises must be undertaken by both advocates and decision makers. In this search, recourse must be had to norms arising from within and from outside of the legal system in which argument takes place – to the extent that such norms may be persuasive within a legal discourse. The purpose of that search is to comprehend the entirety of norms that are likely to have bearing upon the authoritative deliberations of the norm-applier. Only by considering the entire normative context of such deliberations can an actor possibly attempt to discern the likely application of norms to actions and thereby understand the full extent of legal obligation.

III. Identification of Legally Relevant Norms in Norm-Application

As we have seen with Razian positivism, discursive theorists identify legal (or legally relevant) norms on the basis of their linkage to norm-applying institutions of legal systems. Razian positivism necessitates identification of systemic validity as a condition precedent to such a linkage. Discursive theory overcomes the temporal problem associated with the identification of systemic validity by recognizing as relevant all norms that are likely to be used within processes of legal reasoning, whether or not such norms possess, or may ever come to possess, systemic validity. This trait of discursive theory is particularly useful where, as we have seen, transnational or other external norms may be relevant for norm-application processes prior to the conclusive determination of their systemic validity.

The question becomes how salient norms can be identified for their application within processes of legal reasoning? Clearly, there must be limits to the norms that will be salient to a particular norm-application process within a legal system. In the context of a positive legal system, only legally relevant norms will be relevant to the norm-applying institutions of the system and not all norms will be considered legally relevant norms. In considering the demarcation criterion between legal and other types of norms, the discursives adopt a pragmatic, rather than semantic view. Salient norms are identified by their use in arriving at a decision within an authoritative process of legal reasoning. Legal reasoning is concerned with the choice of alternative competing major premises, in an act of argumentation, directed at the resolution of legal disputes.[220] The unifying character of law consists in how legal norms and rules are actually used in decision making processes.[221] Legal norms are used in the resolution of legal problems and applied to a

[219] *Id.* at 122.

[220] KRATOCHWIL, *supra* note 183, at 213.

[221] *Id.* at 205.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

given legal controversy in order either to mediate or settle the matters at issue authoritatively.[222] Identification of legal reasons informs what can be expected from an individual in certain circumstances, by identifying what legal reasons would inform a norm applier tasked with reviewing the actions of the individual at some future point in time.[223] Legal reasons are therefore defined by their character as "persuasive reasons" within such legal decision making processes.[224]

As part of their persuasive capacity, norms may also be relevant to provide justification for conduct. Justification of the sort provided in both legal advocacy and reasoned decision making is aimed at the statement of positive reasons in favor of a choice or a decision over other possible choices. Justification involves the refutation of specific criticism against a certain choice of reasons or affirmation that a certain proposition is above criticism or at least less open to less criticism than other alternatives.[225] This, for example, coincides with the types of reasons used to establish "due diligence" or "reasonableness," and therefore to justify conduct that is being scrutinized in relation to an open-textured legal standard of this sort. As such, any premises that permit justification in a given legal discourse will be salient to that discourse, and therefore constitute a legal reason.

Legal argumentation of this sort is, fundamentally, a premise seeking procedure, deploying a logic that takes such premises and applies them.[226] The initial finding of the relevant premises from which one deliberates is therefore of decisive importance to any process of legal argumentation.[227] The process of finding premises must be subjected to close scrutiny since these will provide appropriate starting points for the determination of a legal problem with which the norm-applier is confronted.[228] This necessitates a consideration of what is considered "persuasive" in a given legal context. In a process of legal reasoning, a norm-applier will be required to rely upon the logical starting points and seats of argument provided by "commonplaces" and salient legal norms of the law. They may also adopt other normative premises to fill gaps in the law, or to guide their discretion.

Judicial decisions are "path dependent" and not made on the basis of random choices. Norm-application within a legal system therefore entails the application of certain binding

[222] *Id.* at 35.

[223] *Id.* at 213.

[224] *Id.* at 36.

[225] PERELMAN & OLBRECHTS-TYTECA, *supra* note 199, at 62.

[226] Viehweg, *supra* note 181, at 27; *id.* at 38.

[227] PERELMAN & OLBRECHTS-TYTECA, *supra* note 199, at 37–38.

[228] VIEHWEG, *supra* note 181, at 41.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

norms or rules, while weaving legal and common sense arguments into a single decision. The application of binding laws to the resolution of certain factual disputes is necessary so that the ultimate decision is in conformity to the law that is in effect.[229] Judicial decision makers are not simply "passive beings" pronouncing the law.[230] According to the requirements of most, if not all legal systems, a judgment not only has to contain at a minimum the "decision" reached but has also to provide reasons in support of the particular choice made by the judges.[231] Authoritative decisions backed by certain reasons invoke shared norms to increase the persuasive power of the award as well as the adherence of the parties and bystanders to the settlement.[232] The reasoning of the judicial decision maker is, therefore, closely rule bound.[233] The reasons of the adjudicator are used to "back" a decision and the decision maker's characterization of the case. It is through this process that the use of law as backings or groundings for decisions becomes visible.[234] The best legal arguments are those that the judicial decision maker uses in his or her own deliberations.[235]

One of the characteristics of law is that it provides procedures and binding norms, which require conformity in order to arrive at a valid decision.[236] However, when laws must be applied which are not of themselves self-evidently applicable, and where they are not to be arbitrarily imposed, then decisions regarding their application must be made on the basis of legal reasoning involving processes of argumentation.[237] Rhetoric and argumentation arises in the sphere of adjudication where there is a need to "evaluate, interpret or to judge" rather than simply accede to the self-evident applicability of certain laws.[238]

As we have identified in our examination of positive legal systems, the practical obligations of the judge to decide disputes may require them to fill "gaps" in the legal instruments

[229] KRATOCHWIL, *supra* note 183, at 205, 208.

[230] PERELMAN, *supra* note 203, at 120.

[231] Kratochwil, *supra* note 183, at 212.

[232] *Id.* at 183.

[233] PERELMAN, *supra* note 203, at 128, 129.

[234] KRATOCHWIL, *supra* note 183, at 228.

[235] PERELMAN, *supra* note 203, at 122.

[236] *Id.*

[237] *Id.* at 120.

[238] *Id.*

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

available, and to choose one or another interpretation of a relevant legal text.[239] It is in this process that argumentation with legally relevant norms that may lack a binding character comes into play in the legal process. There will rarely, if ever, be an adjudicative scenario where a clear text and single applicable rule will fully provide a judge with the legal solution that he is obliged to give. Instead, only recourse to argumentation utilizing all relevant norms in order to inform practical judgments will provide a norm-applier with adequate reasons sufficient to justify a legal decision, or to provide a subject of law with an adequate guide to legal obligation.[240]

The purpose of legal argumentation is to provide the norm-applying decision maker with the means or the intellectual instruments for the achievement of his task—to solve the legal dispute at hand.[241] Acceptance of a legal argument is not gained by demonstrative "proof" provided by uncontestable legal premises found entirely in binding laws, but rather by the cumulative effect of several, otherwise inconclusive, premises, which include binding laws and other salient and persuasive norms that can be used to guide the norm-application process. Legal reasoning thus necessitates the "weighing and balancing" of norms that may not have immediately evident binding effect, but which may provide an anchor for argument, or provide justifying and/or persuasive reasons to be used by the norm-applying institution.[242] In this respect, the process of premise seeking is not analogous to a "treasure hunt," whereby self-evident "laws" are found and applied to solve a legal problem.[243] Legal reasoning is rather a discursive or dialectical process whereby one actor seeks to induce or to increase the adherence of the mind of the judicial decision maker to the legal arguments presented for assent.[244] In arriving at a particular decision, a norm applier will consider a variety of practical judgments, which may be logically independent of legally binding norms. Nevertheless, a good decision will be one in which a rational assent can be gained through the giving of persuasive reasons as to why the practical judgments made, rather than other practical judgments which would also have been possible, were appropriate in the circumstances.

Otherwise non-binding external norms can serve as "persuasive" and/or "justifying" reasons, in the nature of legal reasons, which provide anchors to the practical judgments made by norm-appliers in the determination of legal problems, and the provision of reasons for such determinations. For this reason, such norms, including "soft law,"

[239] *Id.* at 123.

[240] *Id.* at 132.

[241] *Id.* at 139.

[242] KRATOCHWIL, *supra* note 183, at 210.

[243] *Id.* at 209.

[244] PERELMAN & OLBRECHTS-TYTECA, *supra* note 199, at 4.

voluntary or non-binding codes of conduct for transnational actors, custom, and other forms of transnational CSR norms (each of which lack inherent coercive enforcement mechanisms or systemic validity within positive legal systems) which represent "quasi-authoritative" statements of norms and rules can and ought to be considered as relevant to legal discourse.[245] Transnational CSR norms may serve, in spite of their softness, as an important source of evidence in cases in which courts have to "fill gaps" in existing law. They are also useful as legitimizing norms that could be adduced for the creative development of law. As we have noted, legal standards such as "reasonableness" or "foreseeability" have such an open texture that they may necessitate the importation of norms and reasons that inherently arise outside of the legal system in which they are applied.

The use of such norms in these ways within positive legal systems can result in them "hardening" into legal obligations. Where norms and rules are subsequently incorporated into official legal regimes, they may "cross the magical boundary" of systemic validity to become "hard law." This process, while difficult to grasp in legal theory, is often a process that is, for practical purposes, a "non-event" with no functional importance other than a semantic one for the parties involved, with no discernible impact on the norms themselves.[246]

As we have discussed, systematized transnational CSR norms: (1) provide constraints (i.e., rules of conduct) (2) against which social action can be evaluated (3) and which may give rise to social consequences. These systemic characteristics of transnational CSR norms provide evidence of their objective existence, and potential for use as "rules of action." Legally relevant norms can be understood by the degree of influence that they may have upon authoritative decision making by norm-applying institutions in processes of legal reasoning.[247] Any more rigorous attempt to demarcate between legal and other norms may not be possible since it is incompatible with the inherently argumentative process of arriving at a decision through legal reasoning.[248] However, we can conclude that transnational CSR norms may possess legal relevance insofar as they provide persuasive reasons to anchor legal reasoning and provide justifying reasons to refute specific criticism against a certain choice of reasons. Such a trait will affirm their legal relevance within a norm-application process of a positive legal system.

---

[245] KRATOCHWIL, *supra* note 183, at 204.

[246] Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 Yale J. Int'l. L. 393, 415 (2007).

[247] KRATOCHWIL, *supra* note 183, at 193.

[248] *Id.* at 186.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

IV. Conclusions Regarding Discursive Understanding of Norm Application

As we have seen in our consideration of discursive theory, legal reasoning can be understood as a form of argumentation that involves the investigation of ways in which adherence or disavowal of a particular position can be obtained.[249] Rhetorical processes of argumentation used in legal reasoning are concerned with the selection and presentation of relevant facts and reasons in the process of deliberation.[250] Argument is aimed at persuading or convincing those whom it addresses that a choice, decision or attitude is preferable to other possible choices, decisions and attitudes.[251]

In light of this rhetorical nature of norm-application, the actual content and scope of law and legal reasoning cannot be taken as "a given," or as something that can be selected and applied as though it were self-evident. Instead the identification of legal reasons is something that the advocate has a role in building through a process of argumentation directed at legal decision maker, or norm-applying institution.[252] Legal arguments deal with the finding and interpretation of applicable norms and procedures and with the presentation of relevant facts and their evaluations to influence the norm-application process. Legal arguments also deal with the question of what norms and arguments ought to be excluded from consideration in legal reasoning.[253]

It is in this process of premise seeking and legal reasoning that transnational CSR norms may come to be applied within a norm-application process in a positive legal system, regardless of their inherent systemic validity or binding nature within such a system. We have seen that positive legal systems are open systems, which will utilize external norms, possibly including transnational CSR norms, in the norm-application processes that result in conclusive determination of legal problems. External norms will be possibly adopted into a positive legal system if legally binding rules require their adoption, or where norm appliers are "entitled" to adopt them, and not precluded from doing so by legally binding norms. The tests for recognition of transnational CSR norms may be clear, for example where governmental regulation acts as a "backstop" or enforcer of transnational CSR norms through meta-regulation.[254] Their applicability may be less clear where they are used in relation to legal obligations that set open-textured standards of conduct such as "due diligence" or "reasonableness" and which do not present a readily ascertainable

[249] *Id.* at 40.

[250] *Id.* at 40.

[251] KRATOCHWIL, *supra* note 183, at 40; PERELMAN, *supra* note 203, at 129.

[252] VIEHWEG, *supra* note 181, at 41.

[253] *Id.*

[254] Scott, *supra* note 41; Scott, *Reflexive Governance*, *supra* note 44.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

"solution" to legal problems without the application of other facts or standards that are not part of the legal requirement. These types of legal standards may necessitate reference to external standards of conduct or reasonable expectations that were not promulgated by the State. To the extent that transnational CSR norms can be used in these or other ways, their legal relevance will be established. This can occur wherever norm-applying institutions are permitted, or required, to use transnational CSR norms as persuasive and justifying reasons to guide their legal reasoning.

Where there is no express prescription regarding the use of external norms, the task of the norm-subject in identifying their legal obligations prior to norm-application is complicated and uncertain. In fact, it will not be possible to identify with certainty which external norms (if any) may be incorporated and applied by a norm-applying institution by identifying their source within the legal system. Systemic validity will also not be an indication of legal relevance, since no external norm will possess systemic validity unless and until they are conclusively applied by a norm-applying institution. However, where conclusive application occurs, an institutional nexus between a transnational norm and a positive legal system will be established, which in turn will confer systemic validity and legal relevance to the applied transnational norm. This is regardless of the fact that the use of transnational CSR norms was neither prescribed by law, nor viewed as legally binding prior to their application by a norm-applying institution. Prior to application, this systemic validity will be impossible to identify simply based upon the relationship between the transnational norm and the positive legal system. As such, the subject of law will need to consider the process of legal reasoning that will be utilized by the norm-applying institution, to ascertain whether a transnational norm could or ought to be used as a persuasive or justifying reason within deliberations of the norm-applier.

The question within our analysis becomes how and when transnational CSR norms might be selected and applied by a norm-applying institution within a positive legal system. To answer this question we undertook an examination of discursive theory, from which we discerned that norms lacking inherent systemic validity may be legally relevant where they provide persuasive and justifying reasons to anchor legal reasoning. This may occur where norms are persuasive because they are consistent with shared understandings recognized by the salient audience, or where such norms and reasons can justify behaviour by refuting specific criticisms against a certain choice of reasons or by affirming that a certain proposition is open to less criticism than other alternatives. The final part of our analysis will involve a specific consideration of the traits possessed by transnational CSR norms that may give rise to their persuasive and justifying character for use within the norm-application processes of positive legal systems, regardless of their inherent systemic validity or "binding" quality.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

E. Transnational CSR Norms as Legal Reasons—Persuasive Authority Beyond the State

Where transnational CSR norms demonstrate potential as persuasive and justifying reasons, they will be theoretically utilizable as premises within a legal discourse aimed at norm-applying institutions within a positive legal system. In such circumstances, transnational CSR norms ought to be considered legally relevant even before they are actually applied by a norm-applying institution and therefore conferred systemic validity within a positive legal system.

It is not the goal of this paper is to provide an exhaustive account of the characteristics of transnational CSR norms that may grant them the characteristics of persuasive and justifying reasons within a legal discourse. However, we have already identified many of the traits of transnational CSR norms that make them potentially salient for use by norm-applying institutions within a positive legal system. Transnational CSR norms have been recognized as composing a sort of *lex mercatoria,* used to solve various "coordination problems" of transnational business that otherwise would remain untouched due to a lack of convincing mechanisms in State law.[255] Their emergence as "informal norms," "soft law," or systems of "private governance" beyond the State is indicative of their practical usability in social ordering at the transnational level.

While it is true that transnational CSR norms often emanate from "moral" types of assessments regarding what behaviour of transnational actors is morally or ethically acceptable, we have identified that this moral character is not necessary for their recognition once transnational CSR norms are used within a system of social control. Systems of transnational CSR norms aimed at controlling or constraining social behaviour appear to share three essential characteristics that make them more like rules for action than simply "values": (1) they provide constraints or rules of conduct; (2) against which social action can be evaluated; (3) and which may give rise to social consequences. These component functions of control may be split between different organizations and involve a mix of state, market, and community based rule making and evaluative processes.[256] "Systematization" of this sort is useful for identifying transnational CSR norms that are ready for use and recognition within positive legal systems. When operating within a system of normative control like this, transnational CSR norms possess an objective and ascertainable existence as standards of conduct used to guide and constrain behaviour or which can be used to evaluate behaviour. As such, even if the impetus for transnational CSR norms is a "moral" one, once codified into a system of transnational normative control, transnational CSR norms obtain an objective existence that make them independent of moral arguments for their identification. Where such systems are in place,

[255] *Private Accountability*, *supra* note 19; KERR, JANDA & PITTS, *supra* note 21.

[256] Scott, *Reflexive Governance*, *supra* note 44; Scott, *Regulation*, *supra* note 41.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

it could readily be concluded that a "social source" exists that makes transnational CSR norms useful within positive legal systems.

Identification of the "legality" of transnational CSR norms will, as we have discussed, depend on their emanation from an identifiable social source, with an existence that is not dependent upon moral justifications alone. Once such a systemic and "socially sourced" quality is found, other traits that could identify a transnational norm as utilizable for this purpose includes their efficacy, and the general adherence that they obtain from their norm-subjects. The expertise that was involved in their creation may be such a factor. As well, consensual or rational-voluntary adherence may be indicative of the fact that the parties that use them have accepted such norms as proper standards of conduct. While such traits, or claimed traits, could be subject to challenge by those contesting their use in the norm-application process, if established, they would be indicative of a set of efficacious norms that would facilitate a process of legal reasoning or decision making that cannot be entirely defined by norms arising from within a positive legal system.

Of course, the identification of these "authoritative" of "efficacious" qualities to transnational CSR norms does not mean that they *must* be applied without question within processes of legal reasoning. As discursive theorists point out, even norms and rules infused with claims of authority can be challenged through argumentation, including by challenging the value of the authoritative opinion, the basis of authority, or by pointing out conflict between claimed authorities.[257] By consequence, there will be no single characteristic of a transnational norm that gives them an obligatory or "deontic" character. The role of the norm-applying institution will be to consider the conditions under which transnational CSR norms that appear to gain general adherence from their norm-subjects should be recognized and applied in the resolution of a legal problem within a positive legal system.

As we have seen, transnational CSR norms form part of a broader process of social ordering, tied to social construction of "legitimacy" at the transnational level, which allows corporate actors to achieve business objectives by navigating social expectations. Corporate actors seek out and develop such systems in order to identify the parameters of legitimacy, which may not be wholly contained within national legislation, particularly when business is conducted across national borders and within divergent legal and regulatory contexts. This has meant that transnational CSR norms often posses a character of "efficacy" which means that they are generally accepted, internalized and adhered to by at least certain sections of the population.[258] Adherence to transnational CSR norms may be considered necessary for corporate actors to obtain certain benefits, or avoid negative consequences, such as in relation to a "social license to operate." In transnational

[257] PERELMAN & OLBRECHTS-TYTECA, *supra* note 199, at 309.

[258] RAZ, AUTHORITY, *supra* note 12, at 43.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

normative theory, the efficacious nature of transnational CSR norms has most often been described in terms of the concept of "authority." While the efficacy or "authoritative" nature of transnational CSR norms does not require that the legal authorities of positive legal systems apply such norms within the norm-application process, it may provide a persuasive and justifying reason to do so. This will particularly be the case where the positive legal system endorses such transnational CSR norms, and/or where the system seeks to promote self-regulation by those that voluntarily adhere to them. The "authoritative" qualities of transnational CSR norms in relation to their norm-subjects will enhance their persuasive and justifying character.[259] The concept of "authority" captures the capacities or potentialities of persuasion, as well as coercive consequences, that are implicit within effective transnational CSR norms.[260] The "authority" of transnational CSR norms will be evidenced by their ability to delineate the parameters of what is judged "right" in a particular circumstance and their capacity to produce "obedience without question" in the norm-subjects to which they apply.[261]

As we have discussed, the authoritative capacity of transnational CSR norms may be based upon the expertise from which they have been developed.[262] The expertise of these norm generators becomes embedded in the rules and norms themselves, which in turn become institutionalized through the constraints they impose on their norm-subjects, including even public policy makers.[263] In this way, these experts are able to constrain behaviours and exert significant pressure on actors within their systems.[264] The epistemic authority of transnational CSR norms may also be conferred by States.[265] Alternatively, there may also be a complete lack of centralized State control over such processes. Whatever the case, the effectiveness of transnational CSR norms at steering and coordinating the activities of their norm-subjects, even without the official oversight of the State, will be illustrative of their authority. Where authority exists, transnational CSR norms will serve as useful tools for norm-appliers tasked with the problem of praxis, which must solve legal problems involving corporate conduct. Transnational CSR norms present a ready set of standards for evaluating behaviour, whether or not their "authority" was originally conferred by the State, or simply emerged from expertise or coordination between social actors themselves.

---

[259] LINCOLN, *supra* note 53.

[260] *Id.* at 6.

[261] *Id.*

[262] SINCLAIR, *supra* note 57, at 63.

[263] *Id.* at 66.

[264] *Id.*

[265] HALLSTROM, *supra* note 62, at 35.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

There may also be an element of consent or agreement that underpins transnational CSR norms which makes them persuasive and justifying within a legal discourse. Transnational CSR norms are often derived from consensus driven processes, including through direct stakeholder engagement and dialogue. These efforts involve deliberation about which norms should be adopted over others, and as such, may reflect underlying social agreement regarding the norms that should be applied to a particular social conflict.[266] The norms and standards that are produced through these processes are used to guide actions at the level of the actors themselves, and be accepted by those actors as legitimate.[267] Moreover, to the extent that the legitimacy of transnational CSR norms is in question, then they may be reviewable on this basis, to determine whether they adequately meet democratic, constitutional, functional criteria of acceptability for use in a positive legal system.[268] These traits may suggest that the authority of transnational CSR norms is based upon "rational-voluntaristic" acceptance and adherence to transnational CSR norms by their norm subjects. Where transnational CSR norms are generally adhered to across an industry, for example, they may serve as "rationalizing tools" for individuals and society as a whole, and be of great benefit to the legal reasoning of norm-applying institutions of a positive legal system. Where rational acceptance of transnational CSR norms has been obtained, or is evidenced by generalized adherence, then it can be reasonably concluded that such adherence is an act of freely exercised reason.[269] In this respect, the use of transnational CSR norms by norm-applying institutions of positive legal systems to resolve disputes involving their norm subjects is analogous to the use of contractual terms to resolve disputes between contracting parties.

In some circumstances, transnational CSR norms are even part of what may be termed an "inner law" of multinational corporations, composed of parameters of conduct such entities have set for themselves in relation to society.[270] Internal norms and rules established through such self-governance processes may be made public by announcing self-commitments, and form part of contractual relationships between social actors. In this way, transnational CSR norms may exist as a "normative order" that is already embedded within positive legal systems, particularly where legal recourse exists for corporate stakeholders to enforce such commitments through legal means.[271]

---

[266] PALAZZO & SCHERER, *supra* note 28.

[267] *Id.*

[268] Black, *supra* note 30, at 225.

[269] WEBER, *supra* note 70.

[270] Dilling et al., *Private Accountability*, *supra* note 19.

[271] ZUMBANSEN, *supra* note 39.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

For each of these reasons, it can be concluded that there is a clear potential for transnational CSR norms to be used as persuasive and justifying reasons by norm-applying institutions within positive legal systems. Such systems are "open" to the use of external norms, including transnational CSR norms. Transnational CSR norms exhibiting the foregoing traits serve as ready standards of conduct to close legal gaps, or resolve unsettled legal problems and serve as anchors to legal reasoning. They may also serve to guide the exercise of discretion, or otherwise as part of legal argumentation in a situation of praxis, where a decision must be made but no particular alternative is obviously correct. Where transnational CSR norms are used in this way, and applied by a norm-applying institution, they may gain systemic validity, and become truly "legal" norms. Where potential for such application exists, transnational CSR norms will possess a *prima facie* legal character, that make them readily utilizable within processes of legal argumentation.

F. Conclusions

I. Summary of Findings

Transnational CSR norms have emerged as important guides to corporate behaviour in relation to society. Transnational normative theories challenge State centric conceptions of normative obligation by identifying and describing systems of social control that arise beyond the State. They do this by describing privately promulgated standards such as transnational CSR norms that have developed empirically in response to an inability (real or perceived) of domestic State legal systems to regulate comprehensively areas of social action that could benefit from normative ordering and social control. The development of such transnational normative systems amongst private actors, often with minimal or little involvement of States, is associated with the limitations of a State centric definition of domestic and international law that is perceived to be "incapable" of delineating fully the parameters of social conduct (including the social conduct of corporations) in relation to other social actors.

The resemblance of transnational CSR norms to positive law has been referred to as "striking." They can compose a sort of *lex mercatoria* used to solve various "coordination problems" of transnational business that otherwise would remain untouched by State laws. The authority of such norms, real or perceived, has resulted in the emergence of "informal" or "soft law" beyond the State, which cannot be easily ignored from a legal perspective.

That being the case, it is clear that the relevance of transnational CSR norms as guides to the conduct of corporate actors does not derive from their association with "legal" requirements set by the positive law of States. Instead, transnational CSR norms are part of a broader process of social ordering, tied to social constructions of "legitimacy" which allows corporate actors to achieve their business objectives by navigating social expectations. Corporate actors identify and work within the constraints offered by

transnational CSR norms where the parameters of legitimate action are defined by transnational CSR norms.

Despite the lack of a clear nexus between transnational CSR norms and the institutions of State based positive legal systems, our analysis has demonstrated that there can be little doubt of the potential salience of transnational CSR norms within positive legal systems. They serve as ready standards of conduct that can provide persuasive and justifying reasons within a legal discourse.

In the temporal period prior to norm-application, where an actor operating within a positive legal system must attempt to ascertain their legal obligations, or craft legal arguments, it will be clearly inadequate, and possibly misleading, for that actor to rely only upon those norms emanating from the norm creating institutions of a positive legal system. Razian positivism clearly elucidates how all positive legal systems are open systems. This means that external norms, including quite possibly transnational CSR norms, may come to be used within positive legal systems to define the scope of such systems and the parameters of legal obligation. This basic trait of positive legal systems makes transnational CSR norms relatable to legal obligation within positive systems of law.

For such a relation to occur, however, there must exist an institutional nexus between the transnational norm and the positive legal system itself. That nexus will arise where the transnational norm is actually applied in making conclusive determinations of legal situations, by the norm applying institution of the positive legal system. The question of the legal relevance of transnational CSR norms then, will depend upon their relevance to processes of norm application within such systems. If transnational CSR norms are applied by a norm-applying institution, they will acquire systemic validity. This act will confirm their legal salience. The open nature of positive legal systems means that such an application is entirely possible, and in many circumstances likely, to occur

Prior to application by a norm applying institution, however, a subject of law will need to give consideration to both legally binding norms (inherently possessive of systemic validity), and those external norms that may be used within the norm application process, to fully ascertain their legal obligations. In light of the fact that conclusive ascertainment of the norms used to define legal obligation cannot be identified until application occurs, the subject of law must consider all salient norms and reasons that could be used to guide the deliberations of norm-applying institutions. Such norms will include binding laws, but may also include transnational CSR norms or other external norms, which are not easily identifiable as being systemically valid within the positive legal system prior to their application by a norm-applying institution.

The question becomes how transnational CSR norms can be identified as legally relevant, prior to a conclusive norm application process. In our consideration of discursive theory, we have identified that any process of norm-application that is not arbitrary will involve a

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press

process of argumentation or legal reasoning. Norm-application processes will be bounded and constrained by the legally binding laws that guide and constrain the exercise of authority and the deliberations of norm-applying institutions. However, the open nature of legal systems will mean that salient norms will likely include more than just those norms that derive from within the legal system itself. According to discursive theory, there will be a necessary interplay between norms emanating from outside of the legal system and those that derive from within it, wherever norm-application occurs in a situation of "praxis," in which a decision must be made, and where no self-evident solutions present themselves. Comprehending the full extent of this interplay is therefore necessary to understand the full scope of obligation within the system.

Discursive theorists convincingly argue that the use of systemic validity as a boundary distinguishing law from non-law will not be practically useful in the identification of salient premises for legal argumentation. Instead, all salient norms, rules or standards, are recognized by their capacity to be used as persuasive premises within a legal discourse. While law must be oriented by its relationship to a positive legal system, it is not necessarily sourced from within it. The search for applicable legal reasons will therefore not be exhausted by a search for laws that emerge from the norm-creating institutions of a positive legal system. On the contrary, comprehension of legal obligation will require an examination of both legally binding laws, and other external norms, which may gain the quality of systemic validity to the extent that they are applied by a norm-applying institution.

Within positive legal systems, the normative frameworks offered by transnational CSR norms will be informative of the content of legal obligation to the extent that they are persuasive within the deliberations of norm-applying institutions, or provide justifying reasons that influence the norm-application process. While such norms may or may not acquire the status of "law" within a positive legal system, they may well be used to define the parameters of legal obligation. This conclusion is consistent with the theory of positive legal systems offered by Raz as well as transnational theories of norms.

The question in our analysis became how and when transnational CSR norms might be selected and applied by a norm-applying institution within a positive legal system. Where transnational CSR norms demonstrate potential as persuasive and justifying reasons, they will be utilizable as premises within a legal discourse aimed at norm-applying institutions. In such circumstances, transnational CSR norms ought to be considered legally relevant even before they are actually applied by a norm-applying institution and therefore conferred systemic validity within a positive legal system. Among the salient traits of legally relevant transnational CSR norms is their incorporation within a "system" of social control. Systems of transnational normative control are typically composed of: (1) a set of objectively ascertainable norms, rules, or standards of behaviour, that can be used to guide the behaviour of an actor that seeks to comply with law; (2) utilized in the evaluation of behaviour through some process of adjudication; (3) which in turn gives rise to

conclusive and consequential determinations. The existence of such systems is indicative of a "social source" that makes transnational CSR norms distinguishable from simply moral or value judgments.

Transnational CSR norms may also be legally relevant due to a character of "efficacy," which means that they are generally accepted, internalized and adhered to by certain sections of the population. Adherence to transnational CSR norms may be considered necessary for corporate actors to obtain certain benefits, or avoid negative consequences, such as in relation to a "social license to operate." In transnational normative theory, the efficacious nature of transnational CSR norms has most often been described in terms of the concept of "authority." The "authority" of transnational CSR norms is often attributed as a trait or characteristic possessed by the norms, standards and/or rules themselves, either in descriptive, epistemic, or rational-voluntaristic ways, and used to explain why such rules and norms gain "obedience" or adherence from a particular audience. While the efficacy or "authoritative" nature of transnational CSR norms does not "require" that the legal authorities of positive legal systems apply them in the norm-application process, this characteristic may provide a persuasive and justifying reason to do so, even although such assertions will be rebuttable to the extent that the persuasive and justifying character of transnational CSR norms can be refuted.

Where such traits manifest themselves in transnational CSR norms, however, we have concluded that their legal relevance will be established. Such transnational CSR norms will exist as utilizable legal reasons within positive legal systems that possess a potential systemic validity, which makes them appropriate for consideration when determining the proper scope of a positive legal system, and the extent of legal obligation related to it. They will also be relevant and useful for processes of legal reasoning and argumentation directed at norm-applying institutions, and for the deliberations of law-abiding actors and norm-applying institutions themselves. On these bases, any suggestion that transnational CSR norms are not relevant to the practice of law within a positive legal system is clearly refutable. Such transnational CSR norms will possess a *prima facie* legal character that makes them readily utilizable within processes of legal argumentation, and very salient for legal practitioners and theorists alike.

II. Need for Further Research

We have begun to define positive legal systems in a way that allows for the inclusion of transnational CSR norms, which involve non-traditional systems of rules that empirically gain adherence from their norm-subjects. Such systems are clearly relatable to positive legal systems and may become part of positive law through norm-application processes. This finding allows us to consider how and when transnational CSR norms can or ought to be related or incorporated into positive legal systems and processes of legal reasoning. Such discernment will aid the legal theorist and lawyer practitioner, as advisor or advocate, to comprehend the full scope of a positive legal system, and the range of salient reasons

that should inform and guide our understanding of legal obligation, inclusive of transnational CSR norms.

While we have discussed some of the ways in which such recognition and application may occur, the next steps for legal researchers will be to further refine how and under what conditions transnational CSR norms may be utilizable and relevant to define the parameters of legal obligation within a positive legal system. Beyond prescribed requirements to apply transnational CSR norms, or open textured legal concepts such as "due diligence" or "standard of care" or the concept of "reasonableness" which necessitate the consideration of more detailed standards external to the rule to guide deliberations, there may be other circumstances where the application of transnational CSR norms within positive legal systems will be appropriate or useful. A question for future research will be to further categorize and identify the exact methods by which transnational CSR norms can become persuasive and justifying reasons within a particular legal system.

Another issue is how to identify and select transnational CSR norms as guides to behaviour, particularly where multiple sets of norms exist to choose from. Corporate actors will need to select and define the normative arena in which they operate. To do so, they will have to consider both the norm-applying institutions and stakeholders with which they interact, as well as the possible normative standards of behaviour available to them. In choosing which transnational CSR norms to use as guides to behaviour, one question will be whether and to what extent "consensus" is necessary for a transnational CSR norm to be utilizable? How broad or deep should such a consensus be before a transnational CSR norm can be said to possess authority? Such questions may affect the legitimacy of a given norm. They may also affect the potential for a given transnational CSR norm to serve as a persuasive or justifying reason within a legal system.

Relatedly, it will be important to examine how recognition rules for transnational CSR norms may vary from jurisdiction to jurisdiction. While many transnational CSR norms claim to possess a universal character, jurisdiction or culturally specific expectations would seem relevant in determining whether such norms will be persuasive in a particular circumstance. Relativity, in terms of culture and legal system, will challenge corporate actors when identifying which standards to select as guides to behaviour, and which to utilize in processes of legal reasoning.

Another question is whether corporate actors themselves could develop transnational CSR norms through direct engagement with their stakeholders? If that were the case, then there could be identifiable legal benefits to stakeholder engagement whereby rules of conduct are developed in consultation with stakeholders. Such processes could allow corporations to define their own legal obligations through direct consultation with those affected by corporate conduct. This could create both an incentive towards stakeholder engagement, and also refine consensus building processes to the particular circumstances

of a corporate organization. In a similar vein, it would be useful to further develop when or how legal systems ought to recognize consultative efforts, as meta-regulators of such self-regulatory and consensus building efforts. It will be necessary to define what is meant by "consensus" and "legitimacy," since such concepts are often inter-linked with the utility of transnational CSR norms. Of relevance will be the identification of those actors whose participation is necessary to achieve "consensus" and/or confer "legitimacy" on useable norms.

Elaborating upon these scenarios and developing clearer tests for recognition of transnational CSR norms within positive legal systems will help lawyers and legal scholars to better understand the potential and actual interrelationship between transnational CSR norms and legal systems. The foregoing theoretical analysis provides a basic framework and starting point for such considerations, but only begins to shed light on these types of practical problems.

https://doi.org/10.1017/S2071832200017466 Published online by Cambridge University Press