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Steps towards a CSR binding paradigm

A review of Locke's book *The Promise and Limits of Private Power* (2013)

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Abstract

Purpose – The purpose of this paper is to pursue the dialogue on the global firms' regulation vis-à-vis human rights and labor standards in developing countries.

Design/methodology/approach – Locke's book *The Promise and Limits of Private Power* is analyzed and discussed with respect to more recent global regulation literature and mechanisms.

Findings – Locke advocates that private voluntary regulation has to be combined with local laws in developing countries to fully enforce labor standards and workers' rights. In light of recent changes, the interesting model proposed by Locke shows some weaknesses.

Originality/value – To enforce labor standards and workers' rights in developing countries, the author argue that governments in developed countries need to be seen as major players in multinational corporations (MNCs) regulations. But above all, the economic model needs to be questioned.

Keywords – Globalization, Corporate social responsibility, Private regulation, Public regulation, Global supply chain

Paper type – Viewpoint

The globalization process has allowed for the development of so-called “global” firms (also called multinational or transnational firms) and has shifted the “focus of manufacturing from developed to developing countries” (Vogel, 2010, pp. 72-73). Thus, global firms control and coordinate different activities in a multitude of countries. These phenomena have undermined the capacity of governments to make global firms legally accountable, and have led to multiple abuses from global firms, as they operate in a less binding environment.

Workplace issues in developing countries are one of the unwanted results of our occidental lifestyle and consumption model. Neoliberal economic theories (e.g. Friedman; Alchian and Demetz, etc.), which have transformed shareholders into implicit owners of companies and the company executives into shareholders' agents, underlie this consumption model. This ideology

justifies that “business is conducted in the exclusive interest of the shareholders” (Vernac, 2016, p. 76) and that the main purpose of companies is to “maximize their return on capital employed” (Segrestin and Hatchuel, 2012, p. 55). It has led to the search for savings on production costs, and thus to massive production site relocations to developing countries that are not always able to enforce their own laws, and finally to social dumping.

We will discuss the regulation model proposed by Locke. Our starting point is his book “The Promise and the Limits of Private Power. Promoting Labor Standards in a Global Economy” (Locke, 2013). It illustrates the limits of private voluntary regulation in global supply chains and proposes an alternative public/private regulation system. We choose to draw on Locke’s book because of recent regulatory developments (particularly the French Corporate Duty of Vigilance Law) that can give us a glimpse of new ways to regulate multinational corporations (MNCs) through corporate social responsibility (CSR).

The book is not about the reasons for today’s global supply chain problems; it is about the consequences – workplace issues in developing countries – of the global organization of production that has been implemented to meet consumer demand, and how to address them as best we can.

In order to improve workplace conditions in developing countries, several international and national organizations (*i.e.* global firms, governmental or public bodies, industry associations, trade unions, NGOs, ...), have built “social norms” (Celka, 2015, p. 136). For instance, public bodies have initiated non-binding texts (*e.g.* OECD, 1976; Global Compact, 1999; UN Guiding Principles, 2011; ...). In addition, following a growing number of scandals involving global firms and their human rights’ “concerns”, MNCs started, in the 1990s, to develop their own Codes of Conduct in order to overcome these workplace issues, and especially to prove to their consumers that they “care”.

Given the growing awareness to better control global firms and the growing number of regulatory mechanisms (hard and soft, but mostly soft), Locke asks the following question: why are there still difficulties in ensuring labor standards and workers’ rights in global value chains? And what regulation system do we need to overcome them?

We will first summarize Locke’s criticisms of private regulation initiatives and outline the regulation system he proposes (1). Then, we will comment on his choices and the book’s shortcomings, in the light of recent changes in regulations and studies about the need to regulate global firms (2).

1. Locke’s point of view: the need for a combination of private voluntary and developing countries’ regulation

In his book, Locke describes and analyses the limitations of private voluntary regulation (he deals with codes of conduct and capacity building). Private initiatives have emerged to fill a regulatory void, to address a weak system of global justice, as well as to remedy the limited ability (or willingness) of many national governments to enforce labor laws and workplace standards in their factories (because of their often weak labor laws, or because production centers are out of their jurisdiction). But primarily, they have emerged under the pressure of NGOs following numerous scandals involving global firms (Locke, 2013, pp. 10-11). As a

result, self-regulation has emerged as the dominant approach that global firms and labor rights NGOs “alike embrace to promote labor standards in global supply chains” (Locke, 2013, p. 11).

But despite private voluntary regulation, workplace issues are still a reality. The first contribution of Locke’s book is to show that private mechanisms have severe limitations; and that, although both traditional compliance model (monitoring and auditing schemes) and capacity-building initiatives have allowed (unstable) improvements, they have reached a limit.

Locke’s case studies also reveal that private regulation can succeed when “layered on and interacting with public (state) regulation” (Locke, 2013, p. 13) and when the firms are engaged in collaborative relationships. Therefore, if these conditions are met, private regulation will “tap into and align the interests and incentives of private firms while also generating positive results for workers” (Locke, 2013, p. 17) (*Figure 1*).

Unfortunately, collaborative arrangement “are rare within the supply chains”, and where they do exist, they remain unstable (Locke, 2013, p. 18).

The second contribution of the book is to identify global firms’ upstream policies and practices (*e.g.* buffer inventories of intermediate components, postponement of final assembly until signaled by pull-based ordering systems) as the root causes of workplace issues. The techniques implemented by global firms and their lead suppliers to meet the consumer demand in a “timely manner”, have created “all sorts of labor problems downstream for factories and their workers” (Locke, 2013, p. 127). In doing so, Locke shows that we were “looking at the wrong place” and underlines the need to look beyond the factory level (*Figure 2*).

Since private voluntary regulation by itself has an (limited) effect on the factory level and not on the MNCs upstream practices, something else is needed to tackle workplace issues. This is where the third contribution of the book lies: Locke proposes a mix of novel forms of private (soft) and public (hard) regulation to enforce labor standards and workers’ rights in global supply chains (Locke, 2013, p. 2). As both private and public regulation suffered from limitations, their “efforts need to work with and build off one another” (Locke, 2013, p. 176). Thus, he advocates for self-regulation by global firms, completed and supported by developing countries’ regulations.

2. Was Locke looking in the wrong place: which government are we talking about?

Locke’s book has been reviewed many times and four main observations can be identified. First, regarding the root causes of the workplace issues, Boström (2015) and Fichter (2015) stated, as we stated in our introduction, that we need to look even further than global firms’ practices by questioning the market itself and the way brands shape, even create, it. Second, concerning the regulation’s players, Locke leaves aside unions (Compa, 2013; Fichter, 2015) and small buyers (Boström, 2015). The role Locke assigns to developing country governments is also discussed: are they ready to enforce their own laws (Regini, 2014)? Third, the structural conditions of the mixed regulation are questioned (Regini, 2014). Finally, regarding the global supply chain to regulate, Gereffi (2014) and Barrientos (2014) assert that Locke’s view does not recognize sufficiently the “dynamic shift” (Gereffi, 2014) that is taking place in global supply chains and in regulatory modes.

Figure 1. Conditions for private voluntary initiatives success

Source: Adapted from Locke (2013, p. 17)

Figure 2. Workplace issues' main causes

Source: Adapted from Locke (2013, p. 156)

Our review will concur with the observations that have been made respecting the regulation key players and the ones concerning the market. One of the first statements in the book is about the role of the state. Locke argues that his book is an argument “about the limitation of [. . .] private initiatives and the need to bring the state (public regulation) back into the picture” (2013, p. 2). We agree with Locke on the point that government regulation is needed to enforce labor standards and workers’ rights in global supply chains. But which government are we talking about?

In our opinion, “bring the state back into the picture” means a need for a hardening of CSR (still layered with softer regulation) and leads us to the (old) debate between voluntary and mandatory CSR. Voluntary CSR has long been questioned concerning its effectiveness in improving corporate practices and seems, as Locke also acknowledges, finally “unable to address more systemic unsustainabilities in the global economy” (Gjølberg, 2011, p. 1). As self-regulation’s “mixed results” (Locke, 2013) are increasingly being recognized, a turn towards the “legalization of corporate social responsibility” (Berger-Walliser and Scott, 2018, p. 168) becomes clearer.

Like many others (Gjølberg, 2011; Saurwein, 2011; Osuji, 2015; Cominetti and Seele, 2016, ...), we acknowledge that the regulation cannot only be hard or soft. It evolves on a continuum from voluntarism (self-regulation) to prescriptive (state) regulation. In an interesting article, Cominetti and Seele (2016) disclose the stages on this continuum, which are characterized by different degrees of obligations (Figure 3).

Going back to Locke’s quote (“bring the state back into the picture”), he calls for an evolution from “soft soft” laws (since he only considers codes of conduct and capacity building) towards a mix of these latter and hard hard laws (developing country governments’ regulation). But in his “mix of novel forms of private and public regulation”, Locke does not take the governments of developed countries into account, since he proposes a solution solely based on self-regulation

(which according to him does not work efficiently) and on developing country governments' regulation (that are not capable of fully enforcing their own laws). Thus, the model he proposes seems paradoxical: how can a mix of two defective systems lead to a system that solves human rights and workplace issues efficiently? For some years now, we have known that developed country governments can play a significant role in enforcing labor standards and workers' rights in global supply chains (e.g. the US Dodd Frank Act (2010), the California Transparency in Supply Chain Act (2010), the EU Non-Financial Reporting Directive (2014), the UK Modern Slavery Act (2015), the Dutch Child Labour Due Diligence Law (2017), ...). We will focus on the French Corporate Duty of Vigilance Law (2017) to emphasize the developed country governments' role in global supply chains regulation.

The first article of the law sets an obligation of vigilance on companies with at least 5000 employees (in the headquarters and subsidiaries) while having their headquarters in France, and on companies with at least 10000 employees in France with their headquarters elsewhere. Companies that are subject to this law must implement a "vigilance plan" that includes:

[...] reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls [...], as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship (Duty of Vigilance Law).

Figure 3. From soft soft law to hard hard law

Source: Adapted from Cominetti and Seele (2016)

This is an important shift of the legal representation of the company (before this law, parent companies could not be held responsible for the actions of their subsidiaries abroad) and a prospect of an enlargement of the boundaries of the firm regarding wage labor (Favereau, 2015). The previous version of the law provided that non-compliant companies could incur a civil fine of up to €10 million. The French Constitutional Council, despite recognizing the "obvious public interest goal pursued by lawmakers", canceled this provision (23/03/2017) on the ground that it lacked legal certainty. Article 2 allows for the victims of a non-complying company to seek compensation for negligence by engaging the civil liability of the company. However, the burden of proof remains on the injured party who will have to prove a link between the noncompliance and the damage suffered (claimants can be represented by NGOs). In other words, victims have to prove that the violation arose from the activity of the subsidiary and from a headquarters' decision. Given the opacity of decision-making in firms, the liability of the firm is hard to prove.

However, this law is seen as a major step towards the respect for human rights by global firms in developing countries; as it is one of the first introducing the stick that was missing for a long time. Yet, while praising state regulation, we also acknowledge that it has to be layered in a complex system composed of different kinds of regulation from soft soft to hard hard laws to allow more flexibility and rapidity to adapt to global firms and business practices. Thus, appropriate governance strategy for business human rights issues needs to draw from both soft

and hard law initiatives (Choudhury, 2018), and to include a wider variety of actors than just MNCs, suppliers, workers and governments of developing countries.

Even if CSR is still far away from being considered mandatory (Cominetti and Seele, 2016; Knudsen and Moon, 2017), it is slowly shifting. Although, the risk of mandatory CSR imposed by Western countries is to go one step further in the logic of imperialism. As Khan and Lund-Thomsen (2011) clearly demonstrated, CSR can easily and rapidly turn into economic and cultural imperialism. When human rights and workplace issues in developing countries started to become obvious, MNCs and Western institutions tried to “fix” the problems caused by the Western economic and consumption models. Even now, there are few papers on the real causality of the issues developing countries are facing. To Blowfield and Finas (2005, p. 510), this is due to the lack of CSR ideational and historical dimensions in research, which lead to an absence of structural understanding and to an “inability or unwillingness to consider causality”. Thus, Western countries continue to try to enforce their own standards in countries with different culture, traditions, issues and levels of industrial development than ours, without taking their voices into account. Can we therefore fear the emergence of a legal imperialism where Western states supplant developing countries justice to “fix” the damage caused by Western companies instead of preventing this damage before it happens? Are we looking in the wrong place again by continuing to tackle the consequences rather than the real causes of these issues, *i.e.* the neoliberalism backbone, namely, the minimization of production costs in order to create “value”?

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