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A Meta-regulation Approach of Corporate Regulation: A  
Strategy to Include ‘Social Responsibility’ at the Core of  
Corporate Self-regulation in Weak Economies

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# **A Meta-regulation Approach of Corporate Regulation: A Strategy to Include 'Social Responsibility' at the Core of Corporate Self-regulation in Weak Economies**

**Mia Mahmudur Rahim<sup>1</sup>**

**ABSTRACT:** *The force of legal regulation that might influence business enterprises to be socially responsible is a contentious issue. It is hard to determine what role the regulation should play in making businesses accountable for their actions, especially in the post-regulatory world. Under these circumstances, meta-regulation is a comparatively new regulatory approach. It attempts to link social values to economic incentives and disincentives, and it indirectly influences corporate governance to include stakeholders, other than stockholders and public agencies to assist corporate self-regulation. By considering these concepts as vital, this article conceptualises this approach. It argues that this approach is a viable way to create a socially responsible corporate self-regulation from the perspective of a weak economy. It is an analysis that is essential and thus becomes the aim of this article.*

## **Keywords**

Meta-regulation, corporate regulation, business enterprises, weak economies, social values, corporate self-regulation

## **Introduction**

How and to what extent does legal regulation matter in developing social responsibility in corporate enterprises is a long debated and never resolved question. In the corporate regulation landscape, while some regulatory reformers have argued that the prescriptive regulatory approach has failed to facilitate, reward, or encourage corporate enterprises to go beyond their profit centric behaviour, others have stated that relying only on corporate self-regulation is not viable in order to incorporate social values in corporate behaviour in the absence of non-legal drivers in the society. In this dilemma, meta-regulation is comparatively a new regulatory approach that encourages business enterprises to transcend their social responsibilities. It is based on a fusion of responsive and reflexive mode of regulation to converge the patterns of private ordering and state control in contemporary corporate regulation.

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Meta-regulatory approach in corporate regulation attempts to link social values to economic incentives and disincentives, and it indirectly mandates and monitors organisations' self-regulated responsibility (Gilad 2010,486). It is suitable to "alleviate regulators' limited access to information and expertise, enlist corporate commitment, enhance firms' self-regulatory capacity, and overcome the inherent limitations of prescriptive rules" (Gilad).

Peter Grabosky first observed the notion of meta-regulation and the concept has gradually been expounded upon, most notably by John Braithwaite and Christine Parker (Grabosky 1995; Braithwaite 2003; Parker 2007). They developed the meta-regulation approach as a more effective and responsive way to link sociological conditions to corporate regulations than to command and control regulations; they have located the development of meta-regulation at the intersection of state regulations and self-regulation.

Parker places the concept of meta-regulation 'into a broader literature in which governance is seen as increasingly about "collaborations", "partnerships", "webs" or "networks" in which the state, state-promulgated law, and especially hierarchical command-and-control regulation, is not necessarily the dominant, and certainly not the only important, mechanism of regulation' (Parker 2007,210). She emphasises the plurality of legal governance methods while conceptualising the meta-regulatory approach and points out that the legal regulation of business is a generally ineffective way to hold corporations socially responsible for their actions. She makes a distinction between accountability and responsibility, arguing that legal regulation of businesses merely holds them accountable for conduct that fails to meet legal standards, as distinct from instilling them with a sense of social responsibility. To hold business enterprises socially responsible for their behaviour, Parker believes that a legal approach should go 'beyond accountability' to ask whether and how much they care about their responsibilities where 'responsibility internalises standards by building them into the self-conceptions, motivations, and habits of individuals and into the organisation's premises and routines' (Selznick 2002,29,102 in Parker 2007,210).

In *The Open Corporation*, she draws together a wealth of empirical and theoretical regulatory scholarship to argue that other than relying only on the laws and directions from the government, development of social responsibility in corporate enterprises should depend more on corporate self-regulation. She further argues that corporate self-regulation to this end could be prompted, fostered, and made accountable, for the efficient and effective achievement of policy goals, through a combination of law (formal government regulation or meta-regulation), internal corporate self-management and input from external stakeholders (Parker 2002,292). In this context, she has limited the role of legal regulation to ensure corporate openness or permeability to stakeholder views (ibid., 293).

In her model of meta-regulation, the establishment of permeable self-regulation is depicted in three phases, the commitment to respond; the acquisition of specialised skills and knowledge; and the institutionalisation of purpose (Parker 2002,31). She argues that to develop social responsibility in corporate self-regulation, a corporate enterprise with a self-regulation system has to be positioned at one of these three phases, or regulation has to have the capacity to move an enterprise through these phases.

The aim of the first phase is to prompt management commitment and for an enterprise to become accountable. According to her, at this stage, law has a role to ensure that appropriate provisions in corporate laws could set the normative goals for corporate self-regulation. At this point, however, she opines that other than insisting the regulatee to hold a particular value to reach a policy goal, laws should not interfere in the internalisation of the value of compliance management system within enterprises. Rather, she contends that private ordering should bring the values required by the law into effect.<sup>2</sup> In this setting, the prompting of the commitment to respond to the legal requirement starts due to the force of legal sanction, and thereafter it could be carried forward by the self-regulation system. Hence, her model of meta-regulation for developing accountability in corporate enterprise starts using a combination of regulatory approaches where the effect of these approaches depend upon each other. Here, the private ordering or self-regulation is neither voluntary nor totally dependent on prescriptive laws; rather it is a necessary part of the web of regulation in respect of any particular policy goal.

The main aspect of the second phase is related to the ability of enterprises to raise their capacity to facilitate the internalisation process in a self-regulation system. At this stage, enterprises depend upon their own strengths, leaders, innovations, and on the scope of generalisation of these innovations across the industry.

In the third phase, enterprises develop their own strength and strategies to reach the goal. At this stage, they could use, according to Parker, a 'double-loop learning' – evaluating the compliance management program and learning from results. Here, the role of law is to promote the evaluation of performance against benchmarks, and to insist the enterprises to disclose their evaluations to stakeholders so that the corporate constituents could be in a better position to decide on an enterprise's performance, and the regulators could assess regulatory impact for any changes into regulatory strategies.

The processes mentioned in all these phases together set corporate self-regulation into a 'triple loop' – regulators set the substantive goal of a process; corporate enterprise (as a regulatee) undertakes self-regulated programs according to its own strength, necessity, and market standards to reach the goal;

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<sup>2</sup> Jill Murray nicely summarises this view, 'Law does not work by automatic fiat, but requires some kind of internalization to ensure its effectiveness', for details see Murray (2004).

and the performance of self-regulation is evaluated by the stakeholders who have the ability to create impact on an enterprise's internal strategies, or on regulatory strategies (Parker 2002,277). In all these processes, the role of laws and regulators is to help enterprises connect their 'internal capacity for corporate self-regulation with internal commitment to self-regulate' (Parker 2002, 246) and to facilitate 'the potential for other institutions of civil society to hold' (ibid) corporate self-regulation accountable.

Utilising Philip Selznick's conceptualisation of 'corporate conscience', Parker argues that for meta-regulation to work at holding business enterprises accountable for social responsibilities, the meta-regulation should:

- (1) aim at clear values or policy goals for which businesses can take responsibility, as distinct from allowing businesses merely to comply with output rules;
- (2) aim to ensure that these values are embedded into the practices and structures of businesses; and
- (3) recognise that a business must still be able to pursue its main goals and it should be given space to work out for itself how best to meet these goals within the responsibility framework (Parker 2007,215).

When the above-mentioned three factors are present, the regulation can be seen as operating to make businesses socially responsible, that is, the regulatory approach is indirectly insisting that corporate enterprises hold social responsibilities at the core of their self-regulation (Parker 2007,217).

Although the way I conceptualise meta-regulation is based on Parker's formulation of meta-regulation, my version of this approach differs from hers. The differences are mostly due to the fact that she has framed this regulatory approach with regard to business enterprises in general, and has not categorised the enterprises in any way, whereas my approach is specifically related to the corporate self-regulation in weak economies. This focus on the corporate self-regulation of weak economies has led me to consider the formulation of this regulation and its implementation differently. While Parker places less emphasis than I do on the role of the state as regulator, and minimises the role of government as an external influence in regard to corporate self-regulation (Parker 2007, 210), the political power of the state and the role of government are vital components of my approach.<sup>3</sup> I argue that meta-regulation is a fusion of responsive and reflexive mode of regulation that attempts to link social values to economic incentives and disincentives, and it indirectly insists that corporate

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<sup>3</sup> For details of such approach in meta-regulation, see generally Heyesa and Rickman (1999) and Grabosky (1995,542).

governance achieve public policy goals through self-regulation. It could help regulators to create a more socially responsible corporate culture, as business enterprises of weak economies would then be in a stronger position to persuade their management to fully embrace the ethos of social values in their core strategies.

In this article, I emphasise on the development of social responsibility in corporate self-regulation but not on the argument of the market, or voluntary, regulation over government regulation. Here, I draw upon regulatory scholarship that rejects the dichotomisation of regulation and deregulation, and conceptualises a pragmatic view of the power that corporate enterprises wield, the need for enterprises to internalise public policy goals, and the limitations of traditional prescriptive regulation to achieve this internalisation and, consequentially, change the corporate culture.

In the second part of this paper, I conceptualise 'meta-regulation', and the third part consists of assessments of some meta-regulatory strategies to incorporate social policy goals in self-regulated corporate responsibility of weak economies in general. Finally, I conclude that a meta-regulatory approach in corporate regulation is a potential strategy that can be successfully deployed to develop a socially responsible corporate culture for business enterprises, so that they will be able to acquire sustainable social values in their self-regulation.

### **Conceptualising meta-regulation**

The definition of regulation is unclear, as it covers broad areas of state control over social and economic activities, including various forms of unintentional and non-state actions (Baldwin et al. 1998, 4).<sup>4</sup> Nonetheless, it is widely accepted that regulation refers to anything that controls or influences the activities in which society is an important aspect (Selznick 1985).<sup>5</sup> Such control or influence is purported to prevent undesirable behaviour, actions and activities, or to enable and encourage desirable ones.<sup>6</sup> To this end, it may include policies, norms, market principles, institutional/international principles, or covenants, designed to affect social and economic behaviour and activities.<sup>7</sup> According to this, all law is regulatory in nature (Parashar, 2008).

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<sup>4</sup>For a detailed study on regulation, see generally Julia Black (2002); Parker (2008).

<sup>5</sup> Keith Hawkins and Bridget Hutter divide the landscape of regulation into two major parts: the economic regulation and social regulation. They define economic regulation as regulation of financial markets, price and profits, and the social regulation as laws protecting the environment, consumer, social values, and employees. For details, see Hawkins and Hutter (1993); Hutter (1997, 7).

<sup>6</sup> Robert Baldwin and Martin Cave consider regulation as a tool of the government to intervene in the economy and in the rules of private ordering systems to influence the behavior of business. For details, see Baldwin and Cave (1999, 2, 63); Pacific (2001, 1).

<sup>7</sup> Anthony I Ogus sees regulation as 'fundamentally a politico-economic concept and, as such, can best be understood by reference to different systems of economic organisation and the legal forms which maintain them.' For details, see Ogus (1994,1); Yeager (1993, 24).

The aim of regulation varies with differing objectives of regulators in different contexts. One of the predominant aims of creating regulation is to make the behaviour of regulatees consistent with market principles, and widely valued social norms, by emphasising greater efficiency and flexibility in internal management. In the regulatory landscape, the manner in which regulatory strategies could improve compliance at the generic level, without being intrusive in usual business practice, is an ever-growing issue (Baldwin and Cave 1999; Ayres and Braithwaite 1995; Shleifer 2005). In this backdrop, regulatory strategies are increasingly used to improve compliance with environmental standards (Hawkins 1984; Gunningham et al. 1998; Hutter 1997), the implementation of occupational health and safety guidelines (Hopkins 1995; Gunningham and Johnstone 1999; Shapiro and Rabinowitz 2000), the involvement of stakeholder engagement and equal opportunity (Nanton 1995; McKay 2001; Smith 2006), ethical standards (Crane and Matten 2007) and fair competition (Parker 1999) in business and society. In this setting, meta-regulation is comparatively a new regulatory approach where different modes of regulations could regulate one another. This regulatory approach attempts to link social values to economic incentives and disincentives, and it indirectly influences corporate governance to incorporate corporate social responsibility (CSR) principles through self-regulation.

The development of meta-regulation can be traced back to the precepts of modern law that evolves, according to the 'Renew Deal' scholars<sup>8</sup> (Lobel 2004,89), through three legal paradigms. The first paradigm was a system that merely facilitated private ordering; the second one was a regulatory model; and the third, a progression from a regulatory model towards a governance approach (Lobel).

In the first paradigm, though formal laws were prominent, economic actors considered the rules to be a 'thin regulatory framework for freedom of contract and property security' (Lobel). At this stage, private parties were free to carry out their own transactions within a framework of a minimal set of rules. This paradigm shifted towards the development of substantive laws within which the 'thick' regulatory state was formed. Of particular importance in this paradigm was the view held by the centralised authority that social subsystems were incapable of self-administration; and it was, therefore, deemed necessary to intervene in diverse areas through goal-oriented legal policies. However, this regulatory model often failed to ensure compliance because it was either under-effective or over-effective, or it distorted other social values. As Parker notes, enforcement of this type of law often failed to improve compliance due to an insufficient deterrent effect (Parker 2006,591), Specifically, the laws that aimed to deter business

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<sup>8</sup> Amongst the regulatory reformers, there is a growing trend of stepping outside of a litigation and rule enforcement regulatory focus to explore alternative conception of law and law making scholarship. Orley Lobel has attempted to draw together such scholarship under an umbrella that she labeled the 'Renew Deal'. For details on 'Renew Deal' see Lobel (2004). Many scholars who are active in a wide variety of field are considered as Renew Deal Scholars. For example, some of these scholars are Sturm (2001), Karkkainen (2003), Freeman (1997).



offences were limited in their effectiveness because it was difficult to detect the type of offence committed by businesses, and it was difficult to enforce adequate punishment. When the issue of insufficient deterrence is not successfully addressed, the objective of the law is usually frustrated as regulatees fail to act in accordance with it (Braithwaite 2002,108). The third regulatory transformation in the legal paradigm is based on reconstitutive legal strategies that aim to 'restructure subsystems rather than simply prescribe substantive orders' (Stewart 1986, 90; Teubner 1986, 299). Martin Jänicke and Helmut Weidner (1997,310-312) studied the evolution of environmental laws and regulations in 13 countries and found that most countries originally adopted formal, market-based laws; secondly, they adopted direct control through substantive laws; and thirdly, they adopted 'reflexive' laws that facilitate coordination between public and private actors.

The notion of reflexive law and the autopoietic system of law owes a debt to the scholarly works of Gunther Teubner (Teubner 1982; Teubner and Generalizations 1985,149; Teubner 1988). Reflexive law relates to the shaping of internal procedures in semi-autonomous social systems and the regulation of interaction between social sub-systems (Parker 2008,358). It does not try to set substantive values in organisations, nor dictate the desirable outcome of social processes, but rather focuses on the process itself in order to catalyse coordination between plural social groups (Teubner and Generalizations 1985,167; Parker 2008,359; Búrca and Scott 2006). Autopoiesis is the self-reproduction of a system out of its own components (Teubner 1988; Teubner and Febbrajo 1992; Veld 1991). It is 'the functional differentiation of society into cognitively closed, normatively open self referential systems' (Black 2002,6; Kooiman 1993). In describing the implications for law as an autopoietic system, Graf-Peter Calliess argues that the 'core operations of the legal system ... ,e.g., adjudicating, legislating, contracting, and the like, must be linked with each other in a way, that the mere existence of one such act provokes others, making reference to the first and thereby literally producing each other' (Calliess 2001; Rose and Miller 2010,173). An instance of such an interlinkage of legal acts is the 'interrelation between statute and judgment, where the binding act of law making produces the court decision, which at the same time by means of interpretation in the hermeneutic circle produces and reproduces the norm' (Calliess 2001).

Teubner emphasises the importance of breaking the taboo of circularity in legal thinking (Teubner 1982; Teubner and Febbrajo 1992; Teubner 1988, 1987). '[P]ointing to the false dilemma between centralised regulation and deregulatory devolution', Orley Lobel argues that there is a growing consensus on the necessity of innovative approaches of law, and law making, to incorporate social policy goals with self-regulated corporate responsibility (Lobel 2004). Renew deal scholars argue for more governance approach in legal regulation as 'a myriad of policy initiatives in different fields are employing new regulatory approaches in legal

practice that reflect this theoretical vision' (Lobel 2004,343). Susan Sturm has summarised the common elements of this type of regulatory governance. She mentions:

Public agencies encourage local institutions to solve problems by examining their own practices in relation to common metrics and by comparing themselves to their most successful peers. Problem solving operates through direct involvement of affected and responsible individuals. Information about performance drives this process. Its production and disclosure enable problems to be identified, performance to be compared, pressure for change to mount, and the rules themselves to be revised. Public bodies coordinate, encourage, and hold accountable these participatory, data-driven problem solving processes (Sturm 2006,247).

In accordance with this growing consensus, a state-promulgated authoritative regulatory mode has become less prominent, while deregulation has gradually fostered the scholarship of pluralism in regulation. Indeed, it has been argued that state-promulgated laws, civil regulation, and the market coexist in a range of interdependent configurations (Levi-Faur 2006,521). The decentralisation of legal power, the pluralisation of public actors, state sanctions, and incentives, are now important factors in framing corporate regulations and incorporating social values into corporate governance. Corporate societies have responded to these changes; they are initiating new strategies that transcend their traditional governance focus to touch on corporate ethics, accountability disclosure and reporting (Coglianese et al. 2004,5; Georges and Glen 1988,27). Under these circumstances, scholarly evidence and regulatory best practice suggests that regulators should generally use a mix of regulatory modes, or strategies, to improve the implementation of social responsibility in business enterprises, rather than relying on any single strategy (May 2005; Winter and May 2001; Hutter 2006,14; Gunningham, Grabosky and Sinclair 1998; Sparrow 2000; Nagarajan 2008,6).<sup>9</sup>

Meta-regulation is a fusion of different regulatory modes in which the *internal* "corporate conscience" could be *externally* regulated (Parker 2007,237). According to Parker, different social organisations and stakeholders, together with the government, should formulate this regulatory approach. Among these regulators, however, she puts minimal emphasis on the role of government in regulating corporate behaviour. She argues that law-makers and regulators may not be best placed to implement social responsibility in corporate regulations (Parker 2007,217) and that the people who are directly involved in particular situations should play a meaningful role in the development of the regulations of those situations (Parker).

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<sup>9</sup>For a big picture of changing regulatory scholarship, see Harlow (2005).

I believe, however, that the state has a vital role to play, and it should use its political power to establish values that inform meta-regulating laws. In the context of weak economies like Bangladesh, without the backing of the state and without strong economic incentives or legal sanctions, business enterprises may not be interested in incorporating the ethos of social responsibility into their regulations. In her approach to meta-regulation, Parker replaces the impact of political and governmental sanctions with the impact of plural actors in corporate governance, and the enabling environment of strong economies. In these economies (and in some developing economies) consumer activism (Bruyn 1999,30), voluntary industry codes, and the importance of reputation, are all factors that motivate corporate behaviour (Hutter 2006,8; Cable and Benson 1993). As a result, state promulgated laws and regulations do not need to play a significant role in shaping corporate behaviour in these economies (Bruyn 1999,36).

States need to play an essential role in formulating regulations in most weak economies. However, most of these economies do not have an environment that enables different actors to affect corporate governance, and their corporate laws have not yet delineated stakeholders' rights, limits, and abilities, in regard to influencing corporate governance (Braithwaite 2006,886). The laws of Bangladesh, for instance, do not have any bearing on how business enterprises should accommodate different stakeholders other than the government and stockholders (Ward 2004). One of the reasons for this is that the groups<sup>10</sup> working on corporate regulation issues in weak economies lack the knowledge, and the ability, to effectively disseminate information and public credibility. Due to the high degree of poverty, illiteracy, and ignorance, non-state actors in the civil sphere of weak economies are lagging behind in corporate issues. Therefore, while these types of actors in strong economies are able to monitor the operation of businesses, and are even able to impose sanctions against particular corporate behaviour (Hutter 2006,13; Bruyn 1999,25-30), equivalent actors in weak economies are not in a position to garner public support for such actions. For example, in Bangladesh, the number and influence of non-governmental organisations (NGOs) that engage with the corporate sector is low, despite the fact that this country is home to the largest NGO in the world, and one of its NGOs won the Nobel Prize for its immense impact on the socio-economic life of the people of Bangladesh.<sup>11</sup> Recently, when workers

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<sup>10</sup>Non-state actors would be divided into two major spheres; the economic sphere and the civil sphere. The economic sphere includes, for instance, markets and a broad range of profit motivated organizations and activities embracing finance, industry, etc. The civil sphere includes non-governmental organisations, charities, trusts, foundations, advocacy groups, groups of professionals, etc. For this research, non-state actors are generally meant the non-state actors of the civil sphere. For details of non-state actors, see Hutter and O'Mahony (2004) and Anheier (2004).

<sup>11</sup> Bangladesh Rural Advancement Committee (BRAC) is the largest NGO in the world with over 7 million microfinance group members, 37,500 non-formal primary schools, and more than 70,000 health volunteers. BRAC is the largest NGO by number of staff employing over 120,000 people and it reaches to over 110 million people in Asia and Africa. For details, visit [http://en.wikipedia.org/wiki/BRAC\\_%28NGO%29](http://en.wikipedia.org/wiki/BRAC_%28NGO%29); Grameen Bank was awarded the Nobel Peace Prize in

from the ready-made garments (RMG) industry demonstrated in its capital city for an increase in their minimum wage, very few NGOs were involved, either for or against the cause. The impact of these NGOs on the RMG factory owners was negligible; their lack of public support, credibility, and organisational skills, meant that they were not even able to bring the issue to the forefront of public attention. Ultimately, the government had to step in and a statutory body, the Minimum Wage Board, solved the issue with the government facilitating the settlement.

It is worth repeating that where the corporations of strong and developing economies are taking consumer demands and stakeholder requirements into account in developing their standards, corporations in most of the weak economies are not sufficiently accountable to the societies in which they operate (Warhurst 2005; Swanson 1999; Moon, Crane and Matten 2005). Though the business enterprises, which are suppliers to global buyers, try to satisfy the buyers' conditions to which they have agreed, complying with these conditions alone does not effectively contribute to the development of a socially responsible corporate culture. Most of these suppliers have confined their efforts to adopting their buyers' denoted CSR-related practices only in the furtherance of their own self-interest; these principles and practices are rarely incorporated into the general corporate culture. Indeed, they usually comply with CSR standards only so long as they are under pressure from their buyers to do so (Baden, Harwood and Woodward 2009; Lim and Phillips 2008).

In these circumstances, social responsibility is not developing sustainably into the corporate culture in weak economies. For instance, an investigation revealed that most of the RMG factories near the capital city of Bangladesh are not using their effluent plants regularly; they set up these plants as it is a requirement to get supply orders from the renowned buyers/brands. They use these plants only when the buying and governmental agencies are supposed to inspect them. This investigation was on the environmental pollution caused by the export oriented manufacturing enterprises in three villages. Kumkumari, Khagan and Basaet, three villages approximately 35km away from Dhaka and beside a river named Turag, have 30 export oriented manufacturing factories of which almost all have effluent plants (Sarkar 2011; Muniruzzaman 2011). Sometimes these factories are penalised by inspection teams and pay fines for not using their effluent plants regularly. Even though the pollution in these villages is mounting, thousands of tons of toxic liquid is being washed out into the agricultural fields and flowing into the Turag every day. Now the water in Turag has only 0.4-0.5 mg/liter liquid oxygen and is losing its usual flow; the villagers are being exposed to a risky environment (Sarker 2011).

Regulating these business enterprises from a weak economy perspective is hard, particularly when it is found that the buyers'/brands' agencies are not really

vigilant regarding the pollution caused by the supplying manufacturers. The governmental agencies are highly corrupt and do not have the required expertise to assess industrial pollution, and a large portion of the media is either owned, or patronised by the owners of polluting industries. In this situation, corporate regulation needs to have a combination of various strategies- it should channel external pressure including the pressure from local groups on the corporate enterprises; it should provide scope to stakeholders to assess enterprises' CSR programs; it should be linked with incentive schemes for the champion and legal sanctions including physical punishments for the laggard, and so on (King and Lenox 2000,3). For developing such regulation, political consensus and state's role is necessary to determine the extent of corporate and stakeholders' rights and liabilities through laws, and to set the public policy goal for the industry. In this type of corporate regulation framework in weak economies, the role of the state is to settle the policy goal of any regulation for the industry, and to act as a facilitator in implementing regulatory goals. Here, my point (on the dependence of regulation on a combination of different forces instead of regulatory dependence) is mostly on the private ordering, and that market based rationale is due to the need to address the weak civil society and media engagement in corporate regulation and prevalence of corruption in weak economies in general.

High rate of corruption in corporate regulation in weak economies is an important factor that needs to be addressed in any regulatory reform. As corruption is lesser in strong economies, and they have vigilant media, civil society groups, and sophisticated anti corruption agencies, corporate regulation in these economies does not need to emphasise anti corruption strategies. As the role of these actors is inadequate in most of the weak economies, addressing corruption in corporate regulation is important. Hence, I emphasise on the role of state, private sector, and local civil society engagement. in regulation where the state should provide sanction to coercive measures and provide an effective court system. Private sectors should innovate systems to create a benchmark for each other, and civil society groups and media should monitor and address the performance of public and private sectors. Laws or legal policies could hold these factors and could provide sanction to these actors. All these factors in such a regulatory setting would then create meta-regulatory effects, and the states' role would insist upon private parties to develop systems to avoid coercion, and the role of civil society groups would put pressure on the state and private ordering for development in regulatory strategies.

Against this backdrop, regulatory reform for developing social responsibility in corporate self-regulation in weak economy demands different strategies than those used in strong economies. Consequently, it would be short-sighted to rely on the initiative of corporate enterprises to develop the normative basis for a socially responsible corporate regulation and, at the same time, relying only on the corporate self-regulation and public agencies to develop a socially

responsible corporate culture in weak economies (Ward 2007; Radaelli 2007) (The later part of this article describes some strategies for developing meta-regulatory approach in corporate regulation with the aim of incorporating social responsibilities in corporate self-regulation from a weak economy's perspective). Particularly, small and medium-sized enterprises (SMEs) of weak economies would only incorporate social responsibility values at the core of their self-regulation if they were adequately motivated, incentivised, and simultaneously put under legal obligation to do so (Berik and Meulen 2006,23). Since the SMEs of weak economies have neither the required knowledge of incorporating social responsibility issues at the core of corporate regulation, nor the information and expertise to systematically develop a socially responsible corporate culture, the governments of these economies need to create an environment that enables SMEs to take social, environmental, and ethical responsibility issues at the core of their self-regulation (Hutter 2006,13; Brunsson and Jacobsson 2000,172). That is, unlike strong economies, weak economies need to use political power to facilitate meta-regulatory approach in corporate regulation to create this environment (Jordana and Levi-Faur 2004).

Another reason for emphasising the role of government more than Parker does is the diverse nature of business enterprises in different economies. While most transnational corporations and buyers are based in strong economies, the business enterprises of weak economies are typically small and medium-sized, and tend to act as suppliers to global buyers. Their business management strategies are, therefore, different to strategies deployed by the businesses of strong economies. In particular, the corporate psychology, organisational patterns, and motivational factors of small and medium sized enterprises differ from those of large business enterprises (McAdam and Reid 2001).<sup>12</sup> Meta-regulatory laws that were designed to suit businesses of strong economies may therefore prove unsuitable for the business enterprises of weak economies.

### **Meta-regulation: A fusion of responsive and reflexive regulatory mode**

My conception of meta-regulation has much in common with the notions of reflexive and responsive modes in regulation. While these types of regulatory modes are theoretically distinct, they are ideally interdependent (Parker 2008,356). I contend that meta-regulation represents a fusion of the ideas of responsive and reflexive regulation; it is a pluralised form of regulation that embraces the normative criteria of responsive and reflexive law theories. In this concept, the state sets the general goals and plays some roles in facilitating and enforcing their achievements and, at the same time, it promotes and relies upon the regulated actors to self-identify problems and develop solutions in conjunction

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<sup>12</sup>For a detailed discussion, see Carrier (2002).

with stakeholders (Smith 2006,693). Lest this becomes too polemic, I will briefly discuss these modes and the fusion.

In its normative sense, the concept of reflexive mode of regulation is about the mechanism through which the regulatory system could relate with other sub systems by promoting a multi level approach of governance depending on decentralised forms of deliberation (Smismans 2004). This mode assists regulatory intervention to underpin an autonomous process of adjustment, representation and participation. It does not intervene by imposing particular distributive outcomes. It has also a positive, or descriptive, notion that seeks to devolve, or confer, rule making power to self-regulatory processes (Barnard et al. 2005).

The regulations with this mode could be termed as reflexive regulation. Most of the EU directives like the EU Working Time Directive fall within the purview of this type of regulation. Likewise, the laws and policies with this mode are commonly known as reflexive laws or policies. For instance, the laws that allow collective bargaining by trade unions to make qualified exceptions on limits of working time, or similar standards, in labour governance could be called as reflexive labour laws (Barnard et al. 2003; Deakin 1999). Law with this mode ‘tries to “regulate” not only through “performance” but also through influencing centres of “reflexion” within other social subsystems’ (Rogowski and Wilthagen 1994,7). In his seminal article, Substantive and Reflexive Elements in Modern Law, Gunther Teubner summarises the dimensions of reflexive mode in laws as follows (Teubner 1982,257):

Justification	Controlling self-regulation, the coordination of recursively determined forms of social cooperation
External Function	Structuring and restructuring systems for internal discourse and external coordination
Internal Structure	Procedure orientation, relationally oriented institutional structures and decision processes

Reflexive mode in regulation can proceed depending on self-regulation of regulatees within the regulated system (Rogowski and Wilthagen 1994,7). It catalyses the processes of social cooperation, emphasising that people should be granted the opportunity to match specific values to specific problems.<sup>13</sup> An important feature of this type of law is that ‘it involves not simply an attempt to delegate rule making authority to self-regulatory mechanisms such as collective bargaining, but also [represents] an effort to use legal norms, procedures and

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<sup>13</sup>The Oxford English Dictionary Online defines ‘reflexive’ as ‘applied to that which turns back upon, or takes account of, itself or a person’s self, esp. methods that take into consideration the effect of the personality or presence of the researcher on the investigation’, Reflexive in [www.oxfordreference.com](http://www.oxfordreference.com); For a discussion on the philosophical basis of reflexive law, see Callies (2001).

sanctions to “frame” or “steer” the process of self-regulation’ (Teubner 1982; Teubner and Generalizations 1985; Schutter 2004). Unlike general laws and regulations, the main aim of this law is not the establishment of specific rights and duties (Gaines 2002). These types of laws and regulations do not define the goals to be realised by the welfare state. Rather, they emphasise procedures, and appropriate decisions are assumed to be made on the basis of procedures indicating who should take part in making a particular decision; hopefully resulting in decisions being made by stakeholders whose interests will be directly affected (Fiorino 1999; Barratt and Korac-Kakabadse 2002). In reflexive law, self-regulation may be combined with due consideration of the interests of the collective, and decisions may be made solely on the basis of arguments and not upon economic or political power (Black 1996).

Briefly, there are two core features of reflexive mode in regulation: (1) it catalyses the process of networking among stakeholders; and (2) it allows the stakeholders to choose which legal values apply to their problems (Parker 2008,356). Because reflexive law catalyses the process of self-regulation by which stakeholders can coordinate themselves (Black 1996), it has a ‘special potential to provoke other subsystems to engage in processes of networking with each other’ (Parker 2008,357). However, the output of this networking is conceivably problematic. Christine Parker doubts its potential success as it is difficult to connect and coordinate many subsystems with many different processes (Teubner 1982,254; Parker 2008,358). Laws with specific social values that are adopted by the state, however, may have a chance of coordinating different subsystems of society in order to attain a common social goal.

Responsive regulation embraces broad substantive values and focuses on ways to promulgate these values within the practices of a range of self-regulating or semiautonomous groups (Nonet, Selznick and Kagan 2001). Ian Ayres and John Braithwaite have made responsive regulation popular. Building on the argument that ‘[g]ood policy analysis is not about choosing between the free market and government regulation [n]or is it simply deciding what law should proscribe’ (Ayres and Braithwaite 1995,3), they have pointed out this regulatory approach suitable to ‘promote private market governance through enlightened [but not absolute] delegations of regulatory functions’ (Ayres and Braithwaite). To them the ‘notion of responsiveness is the idea that escalating forms of government intervention will reinforce and help constitute less intrusive and delegated forms of market regulation’ (Ayres and Braithwaite). Based on this notion, they finally argue that any external intervention in self-regulation should depend on the extent to which the regulatee has already internalised the underlying values or aims of the law (Ayres and Braithwaite 1995,231; V Braithwaite 2007,3; Braithwaite V, Murphy and Reinhart 2007,137,153).

One predominant assumption in this approach is that most of the regulatees are rational and will therefore be influenced to do the right thing if they are



properly assisted with education, incentives, and put under pressure of persuasion and deterrence. It also recognises that the regulatees are 'motivationally complex'; more particularly, it recognises that motivating the 'individual and corporate repute, dignity, self-image, and the desire to be responsible citizens' is hard as these are intrinsic within the very core of one's perception. Pointing to this particular issue, the core of the enforcement mechanism of this regulatory approach is the presence of an enforcement agency with a 'big stick' (Braithwaite 1985). Hence, in responsive regulation, there must be a regulatory agency that has enforcement power, that is, power to provide incentives as well as investigate and punish for non-compliance. This agency should also have a range of possible sanctions so that the sanction can be varied according to the diverse range of non-compliance. At this point, this regulatory approach depends on the political affiliations that help to preserve its integrity in a diverse society.

Responsive regulation allows regulatees to plan their implementation strategies in a culturally appropriate manner. Likewise, regulators are also granted an opportunity to modify its goals and principles; plural actors and institutions are given latitude to learn and correct themselves (Parker 2008,357). Ian Ayres and John Braithwaite describe the operation of this type of law. They state that regulators could intervene if it is found that regulatees have failed to design effective self-regulation. Similarly, regulatees can avoid punitive regulation or harsh enforcement if they respond to the core aims of this type of law in their self-regulation (Ayres and Braithwaite 1992,19-35 in Parker 2008,357). Responsive law could thus be seen to facilitate the reflexive process by promoting the demonstration of particular values in the conduct of regulatees. Robert Baldwin and Julia Black discuss five ways to make responsive laws 'really responsive', other than focusing on the regulatee's compliance. They contend that responsive law should be responsive to,

- (1) the operational and cognitive framework of regulatees;
- (2) the broader context of the regulatory regime;
- (3) different precepts of regulatory strategies;
- (4) the state's own performance; and
- (5) changes in each of these elements (Baldwin and Black 2008,59).

Considering these elements, responsive regulation embraces substantive public interest-oriented goals backed by widely accepted social values that either are related to the values of the regulatees or can be associated with their values. In this broader sense, responsive law has two main objectives, namely, promoting broad substantive values and insisting on the incorporation of its values into the strategies of different actors (Nonet, Selznick and Kagan 2001; Ayres and Braithwaite 1995).

This type of regulation also has flaws. In particular, its aim to place its values at the core of the implementation strategies of different regulatees may not be possible. This approach is extremely challenging for regulators; it is a very big call to expect them to know all about the regulatees and their ever-changing attitudes (Nagarajan 2008,11). The assumption is that political deliberation is capable of channeling its values with integrity. However, politics alone may not be able to determine the substantive values of independent actors. Alternatively, it could destroy an organisation's process for implementing its values without substituting it with a superior or equally worthy process. Using political deliberation as an automatic driver to push different mechanisms to conceive substantive values as the basis of its strategies could also expose flaws in this theory of law. Teubner accordingly argues that law should not focus on setting substantive duties (Teubner and Generalizations 1985,167).

The basis of a meta-regulatory approach consists of the two normative features of reflexive and responsive law theories. This approach has two core features. First, that it consists of substantive and procedural values derived from a plurality of regulation originating in the state, and it indirectly insists that participants incorporate these values in their regulations. This feature is consistent with definitions of responsive law. Secondly, it involves a process through which its substantive values are applied to the behaviour of the participants who agree on them, and this process can be revised as the values are applied. This feature has a uniquely reflexive legal quality.

Like responsive law, meta-regulatory law requires the regulatees (who have accepted the option to do, or not to do, something) to align themselves with the core values of the law. Meta-regulatory law does not directly impose values on regulatees, or force them to abandon their current values, nor does it emphasise the values of any particular law. This type of approach informs business enterprises of the rationales of society (or any sub-section of society), or of incentives, or legal sanctions that might colour the development of their business strategies (Ericson, Doyle and Barry 2003). For instance, where the meta-regulation law is designed for corporate regulation, it would be appropriate to inform regulatees (SMEs, for instance) of the market-based rationale. This indirect method could be implemented in different ways, such as by requiring information, declaring incentives, or describing situations that could incur disincentives. (These issues could be defined as 'objects' of meta-regulation.) The objective is to integrate the market rationale, incentives, and disincentives with business strategies. For instance, requiring business enterprises to disclose their social responsibility performance could create a situation that enables stakeholders to sanction the way enterprises act. If the information provided in the performance disclosure is judged to be favorable, in accordance with the standards that the particular stakeholder group expects business enterprises to follow, the consequences may be positive –public perception of the enterprises' reputation might improve, for

example, or investment in the enterprises might increase, or it might gain a greater market share. Negative judgments, on the other hand, may lead to a damaged reputation, reduced investment, or lesser market share. To modern business enterprises, such losses may matter more than the imposition of a fine for breaching formal law (Buhmann 2006,196).

Though meta-regulation is not as process-oriented as reflexive law is, it does indirectly bind regulatees to adopt certain processes in order that they might avail themselves of incentives or avoid sanctions. Reflexive law, however, 'seeks to structure bargaining relations so as to equalise bargaining power, and it attempts to subject contracting parties to mechanisms of "public responsibility" that are designed to ensure that bargaining processes will take account of various externalities' (Teubner 1982,256). Accordingly, meta-regulation allows regulatees to design their own internal strategies, which should take their stakeholders into account. The aim is to provide regulatees with the power to adopt the most competitive business strategies, giving them the best chance to compete effectively.

For example, the US Federal Sentencing Guidelines insist that enterprises maintain an effective compliance system. According to these guidelines, enterprises that have effective compliance systems may be granted a reduced penalty for any breach of law.<sup>14</sup> The guidelines also state that the absence of a compliance system could lead to an enterprise being placed on probation until it implements such a system. These meta-regulatory approaches have significant effects on how corporations assess acceptable practices. For instance, because several US agencies (such as the Department of Defense and the Department of Health and Human Services) consider the performance of compliance mechanisms when deciding whether to initiate civil or criminal proceedings, their regulated enterprises maintain effective compliance systems that follow the standards of compliance outlined in the Federal Sentencing Guidelines. Section 86C of the Australian *Trade Practices Act 1974* (Cth) allows the courts to issue corporate probation orders in relation to competition and consumer protection offenses (Parker 2002,248; Parker and Nielson 2006).<sup>15</sup> As a result, business enterprises adopt various different strategies to avoid being charged with these offenses, since the punishment of corporate probation could be extremely damaging to them.<sup>16</sup> Here, the important point is the presence of the source of meta-regulating effects in legislation. In the above-mentioned instances, the importance of the presence of compliance program given in the legislations is one of the sources of developing meta-regulating activities in the internal regulations of corporations.

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<sup>14</sup> See Murphy (2001). For details, see Centre for Corporate Accountability, *Response to the Government's Draft Bill on Corporate Manslaughter*, available at <http://www.corporateaccountability.org/manslaughter/reformprops>; see generally Hall (2004).

<sup>15</sup>For general discussion on this Act, see Vermeesch et al. (1998).

<sup>16</sup>For a detailed discussion, see Hill (2003) and Gainsford (2004).

## **Meta-regulation strategies to develop corporate social responsibility in weak economies**

In meta-regulation, legal provisions, guidelines, and policies, could be used to create meta-regulation effects in corporate self-regulation. Laws requiring businesses to report on their social and environmental impact and ethical performance, for instance, might be perceived as meta-regulatory. To fulfill such legal reporting requirements, corporate management might create regulations regarding the collection of information. Management may use the information thus collected to adopt strategies for managing any risk that it has identified during the information collection process. The report could also enable the business's stakeholders to exert pressure on the management to implement systems to manage risk, thereby helping to protect the corporate enterprise's reputation and enhance its performance (Smith 2006). Other common meta-regulatory strategies include determining corporate liability, damages, or penalties, in civil or criminal law by reference to whether a business has implemented an appropriate compliance system (Krawiec 2005,14-21). These strategies can also operate to encourage businesses to ensure they have internal risk-management processes in place. An example of the effect of such a meta-regulatory strategy can be seen in the way businesses have responded to occupational health and safety laws in the past; in this example, tort laws effectively operated as meta-regulatory law (Scott 2004,145; Parker 2007,218).<sup>17</sup> Laws that take into account a business's compliance system to determine its liabilities, or penalties, in relation to vicarious liability for sexual harassment and discrimination, for example, or unequal employment opportunity, also have a meta-regulatory effect (Parker 2002,449-51; Smith 2006).

Likewise, there could be non-legal strategies to create a meta-regulatory approach in corporate regulation. Meta-regulatory strategies could be embodied into the corporate Codes of Conduct, or in the Best Practice Principles, or in the Business Guidelines. These non-legal instruments could have provisions, for instance, for fast-tracking in granting of permissions, scheduling inspections less frequently, offering tax breaks or public recognition to reward businesses that demonstrate commitment to specific social values in their internal regulations. For getting such incentives, business enterprises would then develop suitable systems within their structure to demonstrate their social commitment. The later part of this article describes some of these meta-regulatory strategies.

Using a meta-regulation approach to attempt to develop a socially responsible corporate culture is a relatively new idea and so provides limited analysis. Nonetheless, this regulatory approach is not confined solely to corporate regulations; Bronwen Morgan contends that, for example, a meta-regulatory

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<sup>17</sup> For the recent development of this legal approach in the health sectors in UK and Canada, see McDonald (2010).

approach has the ability to manage the tension between the 'social' and 'economic' goals of regulatory politics (Morgan 2003,490; Habermas 1989). Fiona Haines and David Gurney consider a meta-regulatory approach consistent with market principles as it emphasises greater efficiency and flexibility; they considered this approach as relatively unobtrusive in day-to-day business practice and they regard it as effective in terms of problem solving (Haines and Gurney 2003). John Braithwaite has applied this approach even to develop access to justice (Braithwaite 2003).

Indeed, how best to create meta-regulating effect in corporate regulation is a vital issue in meta-regulation. To get the maximum benefit from meta-regulatory approach that helps implementing social responsibilities in business enterprises, regulators/policy framers have to select relevant incentives, disincentives, sanctions, coercion, or other issues, that are related to corporate social responsibilities. Incentives (the same incentive could be turned as disincentive depending on its acceptance or avoidance by the specific business enterprise), coercion, certain privileges, etc., are the 'strategy' through which the concept of meta-regulation is realised in business enterprises. For instance, developing an independent and efficient 'media' that reflects the social, ethical, and environmental performance of business enterprises would be considered as a strategy to set off meta-regulation. Providing better education and raising awareness about consumer rights would be another instance of such strategies. The following discussion is on few meta-regulatory strategies with an aim to provide a general idea on how meta-regulatory strategies could be used to incorporate social, environmental and ethical values at the core of corporate self-regulation in weak economies in general.

#### *Legal rights to bounty hunter*

Narrating the rights and liabilities of bounty hunters in legislations would help business enterprises to be more competent in implementing social and environmental issues in corporate regulations, and would also help governmental agencies to assess corporate performance.

In simple terms, bounty hunters are different individuals, or professional bodies, who are experts in assessing secondary materials to bring out the exact picture of any performance. In the corporate context, for instance, private auditors who are able to bring new tax shelters to light through assessing corporate tax profiles could be considered bounty hunters. The incentive for the acts of bounty hunters is that they get a share of the gain they have indicated for the authoritative bodies to collect (Stratton 2002; Sims 2002; Canellos and Kleinbard 2002,2). For instance, where the tax return data of the business enterprises of a particular industry is available in a useful form, private auditors get the chance to assess that data and bring out an argument that the tax authority is entitled to a greater return

from a particular enterprise. In this situation, the tax authority usually provides a certain amount of the excess return to the auditor as an incentive for detecting more anomalies or faults in the financial performance of business enterprises.

Facilitating the functions of bounty hunters in the domains of regulation is an old idea (Crumplar 1975 in Braithwaite 2006,894) that can be traced back to the *qui tam* writ in the English state during the fourteenth and fifteenth centuries (Braithwaite). "A writ of *qui tam* is a writ whereby a private individual who assists a prosecution can receive all or part of any penalty imposed".<sup>18</sup> The objective of this idea is to increase vigilance in society so that law enforcement authorities will get more information. Incorporation of the rights and liabilities of bounty hunters in legislations is an indirect way to make a more law-abiding corporate society. With these objectives, this meta-regulatory strategy has been incorporated in many strong economies. For example, England and Wales incorporated this idea into *Common Informers Act 1951*, and in the US, its *False Claim Act* has given it a more principled footing (Braithwaite 2006,895). These legislations have detailed the incentive of the informer for initiating judicial action against an offender as well as the penalties for abusing the right of private prosecution (Sims 2002,735-7; Fisse and Braithwaite 1983).

#### *Legal protection to whistleblower*

The whistleblower is a variation of the bounty hunter. Like the idea of a bounty hunter, the objective of this idea is to put business activities into a very vigilant environment as well as to facilitate the development of an ethical base for business policies. Anybody could be a whistleblower in an organisation. In particular, senior managers of business enterprises could be the best whistleblowers, as they know the pros and cons of business strategies and transactions, and are in a better position to open up any fraud, or unethical transaction, that goes against the law and social values. An aggrieved member of an organisation could also be a whistleblower. He/She could blow the whistle by reporting his/her grievance that is related with fraud or dishonesty at the organisational level. Whistleblowers may raise an issue to a prescribed body within the organisation, or to other people within the accused organisation. They may also raise their allegation to regulators, law-enforcement agencies, the media, or groups concerned with the issue at hand (Latimar 2003,23-29; Lindquist 2003,78).

Like bounty hunters, the role of whistleblowers needs to be secured by suitable legislation to use this role as a meta-regulatory strategy. Whistleblowers should be secured in their position in any organisation, or business enterprise, in

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<sup>18</sup> *Qui tam* is the abbreviation of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning "[he] who sues in this matter for the king as [well as] for himself." A more literal translation would be "who as much for our lord the king as for he himself in this action pursues" or "follows." For details, see Wikipedia at <[en.wikipedia.org/wiki/Qui\\_tam](http://en.wikipedia.org/wiki/Qui_tam)> 19 February 2011

weak economies and should also be incentivised. In the US, if a suit initiated by the information given by a whistleblower becomes successful, a whistleblower usually gets 15 to 25 per cent of any settlement or judgment attributed to fraud or unethical transactions, or policies, identified by the whistleblower (Braithwaite 2006,895). Various legislations of different countries have also incorporated this notion and detailed the protection of whistleblowers, such as the *Public Interest Disclosure Act 1998* in the UK, the *Sarbanes-Oxley Act 2002*, and the *False Claims Act* (revised in 1986) of the US. Australia has protected whistleblowers by incorporating provisions into the *Australian Corporations Act 2001 (Cth)* in 2004 (Pascoe and Welsh 2011).

The leniency provisions in legislations, which empower the regulator to waive penalties on whistleblowers, have been effectively used by different organisations to boost their policy implementation strategies. ACCC's Immunity Policy for Cartel Conduct and Immunity Policy Interpretation Guidelines provide immunity from litigation and penalty for those who assist with cartel investigation.<sup>19</sup> However, the immunity under this policy and guidelines is strictly conditional and is subject to a number of conditions. Competition Commission of India has waived the penalty of whistleblower even to the extent of 100 per cent.<sup>20</sup> Likewise, different organisations related with corporate regulation in weak economies could use this meta-regulatory strategy. The *Company Act 1994* and the *Penal Code 1908* of Bangladesh, for instance, could have provisions ensuring immunities and protection to whistleblowers, which would encourage individuals and corporations to assist law enforcing agencies with necessary information against corporate fraud, mistrust and non-compliance.

#### *Sanction to self-inspection and self-audit*

Given the limited resources of most weak economies, and the limited reach of many conventional regulatory strategies, there is the need for a variety of alternative strategies, involving voluntary compliance, self-assessment, and the use of third parties as surrogate regulators. These issues could be included into regulations so that they could be practiced in a wider context. Self-inspection and self-audit could be two potential issues to this end as these are less comprehensive and ambitious.

Governmental agencies could prepare necessary provisions that would enable enterprises to self-audit, and illustrate how social responsibility issues could be identified and controlled. In this way, enterprises could be encouraged to take greater internal responsibility for risk management. 'By publicising in advance key audit criteria, which the inspectorate also uses in random audits,

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<sup>19</sup> This policy and guideline is available at Commission, A. C. C. 'ACCC immunity policy for cartel conduct.' Canberra, Australian Competition and Consumer Commission.

<sup>20</sup> For details visit <http://www.cci.gov.in/> at 17 May 2011

workplace compliance may be facilitated even without inspections'<sup>21</sup>, Minnesota has embodied this provision into their legislation. The *Environmental Improvement Act 1995* of Minnesota encourages business enterprises to self-inspect and report the results to the governmental agencies. For the printing industries of Minnesota where most of the member enterprises are relatively small in size, a separate corporation, PIM Environmental Service Corporation, has been created to provide auditing services to this industry. The governmental agency provides the format of their probable audit to the auditor at the firm level and the firm auditor provides a complete evaluation of all companies' environmental, safety and health systems and passes the report to the Printing Industry of Minnesota Inc. (PIM). PIM then sends it to PIM Environmental Service Corporation for correction of any problem related with compliance issues. Sector specific business enterprises like the ready-made garments producing enterprises in Bangladesh could develop this kind of arrangement and the legislation related with the auditing provisions of this country could acknowledge the standard of this self-arranged auditing service. There could be an agreement between the coalition of self-audited business enterprises and the auditing authority of the government whereby an enterprise which audits and corrects itself promptly will 'have this fact taken into account when regulators decide whether to initiate any enforcement action, whether an enforcement action should be civil or criminal in nature, and what penalties to impose' (Gunningham and Sinclair 1997,9). To make this arrangement an attractive one, there could also be a provision of a potent 'enforcement stick' for non-participants in conjunction with self-audit incentives. However, this provision should depend upon the extent and strength of business enterprises. In other words, this provision should not be imposed for all enterprises, but could be optional as well as be linked with direct incentives. The choice for self-auditing and inspecting should not be 'between compliance and non-compliance but between low-cost, low-stress, collaborative route to compliance on the one hand, and fines, liability, and public notoriety on the other' (Administration 1997,134). This arrangement could be a pertinent example of the importance of establishing the correct balance between enforcement and assistance in corporate meta-regulation (Administration).

### *Mitigation of penalties*

Legal provisions must facilitate the justice delivery system so that this system can take the existence of genuine responsibility in business enterprises, as a source of mitigation of penalties would be a meta-regulatory strategy to incorporate social values in corporate self-regulation. From an enforcement point of view, business

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<sup>21</sup> Occupational health and safety, Queensland Department of Employment, Vocational Education, Training and Industrial Relations Submission No. 79 to the Industry Commission, 30 September 1994 in Gunningham and Sinclair (1997,8)



enterprises are particularly interested in remedies and defenses. They can use their 'responsibility system' to serve a "preventive function in relation to strict liability offences and inferential function in relation to other types of conduct in that the existence or lack thereof may assist a court to assess the purpose" (Francis and Armstrong 2003,386) behind their conduct. Accordingly, there could be legal provisions in the major corporate legislations in weak economies to facilitate the court to take the existence of 'genuine' responsibility as a source of mitigation of penalties.

The determination of the criteria of corporate social responsibility is an important issue in the implementation of this meta-regulatory approach in weak economies. Though the determination of 'genuine responsibility' is contextual and mostly depends upon the court that knows the circumstance well, there could be some assertion in this regard. For instance, genuine corporate responsibility should be based on an effective ethics policy, an aspirational operating strategy, and a good record of accomplishment. In the *ACCC v Australian Safeway Stores Pty Ltd.* (1996), it was indicated by the court that the compliance program upon which there could be mitigation of penalties should be (a) substantial and actively implemented, and (b) with a success record of accomplishment (Dee 1999). The Australian Standard on Compliance Programs<sup>22</sup> has fixed some salient features of a genuine compliance program in business enterprises. Amongst those features, a 'top-driven' approach and the appointment of senior managerial staff are important.

The mitigation of penalties is gradually being used in different sectors as a strategy to push business enterprises to develop their own internal responsibility systems. Some institutions are using this strategy to decide their organisational actions against their members (Jones 1992 in Francis and Armstrong 2003,376). The insertion of this strategy in the corporate regulation would force business enterprises to develop standards of self-regulation continuously. The incentives of this strategy in weak economies would be high, it could help businesses save money, time, and reputation; minimise the risk of getting severe punitive actions from the authorities; and help regulators force business enterprises to have socially and environmentally responsible programs without providing any direct legislation. The incentives of using this strategy would also be high for governmental agencies as with this strategy, governments can save money, and give power to police, and audit business enterprises frequently. For this meta-regulatory strategy to work in a weak economy, corporate laws might need to acknowledge this strategy and preserve the right of the court to use the good record of compliance program in business enterprises as one of the determining factors of punishment grading.

#### *Legal provisions to stakeholder engagement*

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<sup>22</sup> AS 3606 of 1998

The provisions/initiatives that could relate stakeholders with corporate strategies are considered one of the best strategies to ensure that business enterprises have the required systems to fulfill their social responsibilities.<sup>23</sup> Effective stakeholder engagement in corporate governance can minimise the role of policing by governmental agencies, and the use of coercive modes in corporate regulation.

The foundation of the stakeholder-based meta-regulatory strategy is a combination of a few socio-economic precepts; business operations need to be legitimate to ensure their free flow where stakeholders are the most suitable source of gaining legitimacy of business operations in society. Moreover, since stakeholders are also the consumers, their collective initiatives have the ability to affect the business performance of an enterprise. This notion is important to corporate regulation in the market-based economic framework. Neil Gunningham mentions in a study that examined community engagement in corporate regulation that stakeholder engagement, negative media attention, and increased likelihood of obtaining certificates from standardisation authorities are the major stimuli for the improved social performance of business enterprises (Gunningham 2002,58). Vietnam has incorporated this approach by creating the Vietnam Business Council (VBC). This council is a consultative and deliberative forum comprised of representatives from business, government, and civil society to coordinate community-corporate collaboration for social development (Gutiérrez and Jones 2004). It is committed to addressing issues related to the development of economic and social business policies or laws. It seeks corporation and community collaboration for social development, which is a means of widening the application of social values for the community at large (Gonzalez 2004). It also seeks to improve the process for obtaining input from both government and business in the reform process. This council was created under the leadership of four key organisations, namely, the Vietnam Chamber of Commerce and Industries, the Prime Minister Research Commission, the Central Institute of Economic Management, and the Association of Small Enterprises in Hanoi.

The stakeholder pressure is more effective to insist medium-sized enterprises for socially responsible behaviour than the small-sized enterprises because the latter, in most cases, perceive themselves as being 'beneath the radar' of community or environmental activist, and usually face less significant threats from stakeholder groups. On the contrary, medium-sized to big enterprises seriously consider their social relationship, as they believe that the violation of

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<sup>23</sup> There are many definitions of stakeholders. According to Freeman, a stakeholder is a group or individual that can affect or be affected by the implementation of the organisation's objectives. Mitchell et al. includes only those as stakeholders who are prominent and legitimate. Clarkson defines stakeholders into two groups, primary stakeholders are those who are more related with an organisation and the second group of stakeholders are those who are not directly related with a particular organisation but are indirectly related with companies' performance. For details, see Freeman (1984), Mitchell, Agle and Wood (1997) and Clarkson (1995).

their 'social license' could result in serious economic damage. For instance, without maintaining a reasonable relationship with the local stakeholders/society, they might be in an undesirable situation to obtain necessary approvals for plant expansion or technological change. This relationship matters to them, as it is also the avenue of maintaining better relationships with business constituencies.

Based on the strength of the stakeholder role in society, weak economies could use stakeholders to police as well as to shape business activities in addition to using the traditional modes of regulations. Their laws and regulations could pave the way for a tacit bargain between the stakeholders and the business society; that is, if the business enterprises commit to reaching the expected performance through their own plans, the stakeholders will hold off interference in corporate plans. Here, the role of meta-regulatory strategy is to provide legal sanctions for stakeholder interference in corporate strategies that touches the lives of stakeholders. With this legal footing, stakeholders typically help business enterprises reach the most viable strategy for all.

There are other strategies suitable to create meta-regulating effects in corporate regulation. Amongst these, while some are appropriate for corporate regulation in general, others are suitable for big enterprises' regulation or specifically for SMEs regulation. The above-mentioned strategies are chosen considering the business enterprises of weak economies. The crux of using these strategies is that they are able to generate a considerable gain or loss to the business enterprises. The provisions that ensure the first tracking of licenses or permits, reduced fees, technical assistance, public recognition, penalty discount under certain conditions, reduced burdens from routine inspections, greater flexibility in self regulation, etc., are based on economic rationales. These strategies are able to insist that business enterprises go beyond legal liabilities; they are designed in such a way that they are economically able to offset the cost for going beyond compliance (Gunningham 2002,53).

A meta-regulatory strategy is most effective when it is used in combination with other strategies, and not in a stand-alone approach. Therefore, the best outcomes of using these strategies could be dependent upon the affordability of different actors, and the level of concert of different regulations, regulators and regulatees. At this point, Parker identifies four key components necessary for the successful implementation of meta-regulatory strategies:

- (1) The enterprises engaging in meta-regulatory strategies should adopt practices and processes that lead to the pursuit of beyond-compliance goals and include outcome-based requirements.
- (2) There should be independent verification of the functioning of the corporate management system by a third party, and the result, or the summary of the results, should be available to other stakeholders.

- (3) From the corporate part, there should be an ongoing dialogue regarding the outcome of any meta-regulatory strategy to ensure the credibility and legitimacy of the corporate process and to enable third party input and oversight.
- (4) These strategies should be tied with the possibility of regulatory intervention as a safety net which only 'kicks-in' when triggered by the failure of the less intrusive process on the part of corporate management.

The element of 'informational regulation' could be an effective meta-regulatory strategy. It 'provides to affected stakeholders information on the operations of regulated entities, usually with the exception that such stakeholders will then exert pressure on those entities to comply with regulations in a manner which serves the interests of stakeholders' (Gunningham 2002,55). However, this strategy has not been described in this article, as it does not seem suitable as a meta-regulatory strategy in weak economies. The reason for this is simple: most business enterprises in weak economies do not have the expertise to generate quantitative reports and, simultaneously, most corporate stakeholders in these economies do not have the abilities to assess either the reports with quantitative analysis or to delve into the qualitative, but hazy information, contained in corporate reports (Gunningham 2002,57). Nonetheless, the types and level of efficiency of the strategies that generates meta-regulation varies with the variation in circumstances and objectives. For instance, in a weak economy where civil society groups are less organised and media is weak, legal sanction, or coercion, or actions against corruptions, could be a necessary meta-regulatory strategy (Rahim 2011). On the other hand, for the development of meta-regulation in strong economies, giving incentives to media groups would be a more suitable strategy than coercion or sanction.

## **Conclusion**

State-centered conception of regulation is not sufficient in the pluralised society. Simultaneously, the decent **red understanding** (red understanding?) of regulation that simply has an add-on to allow for corporate self-regulation is not quite capable of incorporating social values and ethics in corporate behaviour in the absence of non-legal drivers in the society. Due to this gap, the recent interest of scholars and practitioners in exploring the synthesis of corporate self-regulation, and the values of social responsibility, may have effects on the traditional form of corporate regulation. They suggest that regulators should generally use a mix of

regulatory modes to improve the implementation of social, environmental, and ethical values in business enterprises, rather than any single mode. To this end, this article conceptualises meta-regulation from the perspective of a weak economy.

Meta-regulation is the fusion of responsive and reflexive modes of regulation and takes into account both regulators and regulatees, and uses different strategies with sequential effects. It has significant implications for our understanding of regulation, requiring us to delve into the analyses of the patterns of private ordering and state control in contemporary corporate regulation. This article also offers some meta-regulatory strategies that can indirectly relate social values with economic incentives or disincentives, and influence corporate governance to add the issues of social responsibility into corporate self-regulation. These types of meta-regulatory strategies could be successfully deployed to develop a socially responsible corporate culture for business enterprises in weak economies in general, so that these enterprises in these economies will be able to acquire social, environmental, and ethical values in their self-regulated responsibility.

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